IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-877

LOWER TRIBUNAL No. 87-2719-CF-A-W

ANTHONY JOHN PONTICELLI,

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. Ponticelli's 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;

"Supp. R. ____." – supplemental record on appeal;

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

"Supp. PC-R. ____." - supplemental record on appeal from denial of postconviction relief;

"2d Supp. PC-R. ____." - second supplemental record on appeal from the denial of Mr. Ponticelli's ineffective assistance of counsel at the penalty phase claim, following this Court's relinquishment of jurisdiction;

"PC-R2. ____." – record on appeal from the denial of relief of Mr. Ponticelli's successive postconviction motion;

"PC-R3. ____." - record on appeal from the denial of relief of Mr. Ponticelli's second successive postconviction motion

All other references will be self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

Mr. Ponticelli 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. Ponticelli, 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. Ponticelli's case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Ponticelli's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009).

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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 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 Supreme Court's ruling in *Porter v. McCollum* must be read.

Mr. Ponticelli's 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 understanding 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 Supreme Court finding that this Court had misapprehended and misapplied Supreme Court precedent. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the 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 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").

[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. Ponticelli, 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. Ponticelli 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. Ponticelli seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Ponticelli seeks the proper application of the *Strickland* standard. Mr. Ponticelli seeks to be treated equally and fairly.

STATEMENT OF THE CASE

Mr. Ponticelli was indicted on January 4, 1988, with two counts of first-degree murder and one count of armed robbery (R. 1375-6). Mr. Ponticelli pled not guilty (R. 1385).

Mr. Ponticelli's capital jury trial commenced on August 9, 1988. After the State rested, the trial court granted the defense's motion for judgment of acquittal as to the armed robbery count (R. 941). Guilty verdicts were returned on both counts of first degree murder on August 12, 1988. The penalty phase began on August 18, 1988. That same day, the jury recommended a death sentence by a vote of nine to three for each of the murders (R. 1371-2). A sentencing hearing was held on September 6, 1988, at which time Mr. Ponticelli was sentenced to death for the two counts of first degree murder (R. 1849-51).

On direct appeal, this Court affirmed Mr. Ponticelli's convictions and sentences. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991).

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). *Ponticelli v. Florida*, 506 U.S. 802 (1992).

This Court found Mr. Ponticelli's challenge procedurally barred. *Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993).

A motion to vacate sentence pursuant to Rule 3.850 was filed on April 11, 1995 (Supp. PC-R. 1-60).

A *Huff* hearing was held and the lower court entered an order granting a limited evidentiary hearing (PC-R. 321-401; Supp. PC-R. 1673-93).

On July 10, 2000, an evidentiary hearing commenced. Following the hearing, the lower court entered an order denying all relief on November 1, 2002 (Supp. PC-R. 1736-60).

Mr. Ponticelli appealed to this Court. Simultaneously, with his appeal, Mr. Ponticelli filed a petition for writ of habeas corpus. This Court denied all relief on August 31, 2006. *Ponticelli v. State*, 941 So. 2d 1073 (Fla. 2006).

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

While Mr. Ponticelli's case was on appeal before this Court, Mr. Ponticelli filed a successive Rule 3.851 motion, based on the United States Supreme Court's ruling in *Ring v. Arizona*. The circuit court denied relief, as did this Court. *See* Florida Supreme Court Case No. SC03-1655.

In May, 2007, Mr. Ponticelli filed a successive Rule 3.851 motion based on recently disclosed documents he obtained from the Office of the State Attorney and the Department of Corrections (PC-R2. 10-48).

In late 2007, Mr. Ponticelli instituted federal habeas corpus proceedings before the Federal District Court for the Middle District of Florida.

A state court evidentiary hearing was held before the circuit court on October 1, 2008, on Mr. Ponticelli's successive Rule 3.851 motion.

On March 16, 2009, the circuit court entered an order denying Mr. Ponticelli's amended successive Rule 3.851 motion (PC-R2. 879-889).

Mr. Ponticelli appealed to this Court (PC-R2. 949-50). On November 10, 2010, this Court entered an order affirming the circuit court's denial of relief. *See* Florida Supreme Court Case No. SC09-992.

Shortly before this Court had entered its order on Mr. Ponticelli's first successive Rule 3.851 motion, he filed a second successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009) (PC-R3. 1-34). On December 16, 2010, the State responded (PC-R3. 60-88). The circuit court held a case management conference on February 23, 2011. Thereafter, on April 1, 2011, the circuit court denied Mr. Ponticelli's motion. Mr. Ponticelli timely filed a notice of appeal.

In May, 2011, the federal district court denied Mr. Ponticelli's petition for writ of habeas corpus. Mr. Ponticelli is currently appealing three issues before the Eleventh Circuit Court of Appeals.

STATEMENT OF THE FACTS

A. THE TRIAL RECORD

Mr. Ponticelli was indicted for two counts of first-degree murder and one count of armed robbery on January 4, 1988 (R. 1375-6). On February 23, 1988, five and a half months before Mr. Ponticelli's capital trial, James Reich was appointed to represent Mr. Ponticelli (R. 1400-1).

On June 6, 1988, trial counsel file a Motion for Appointment of Expert Witnesses in which he stated:

1. Discovery depositions of three essential or extremely important witnesses for the State of Florida in this cause have disclosed that the Defendant, for approximately one month prior to November 27th, 1997 was, on a daily basis ingesting large amounts of Cocaine, both "Crack" and powder.

2. The evidence of such use and the apparent effect of the same upon Defendant has been disclosed by the following State witnesses:

a. Joseph Leonard: This witness testified ... that sometime in September or October, 1987, Defendant accompanied his parents to the State of New York and was there for approximately four to six weeks. After the Defendant returned from this visit this witness, for the first time, learned that the Defendant was using crack cocaine and Defendant's behavior and personality changed substantially.

* * *

3. Defendant is charged in this cause with two counts of First Degree Murder which requires proof by the State of Florida of premeditation by Defendant.

4. The undersigned believes that the Defendant, due to the drug use as set forth above, was, on November 27th, 1987 incapable of "premeditating" any act and was incapable of forming the intent necessary to constitute First Degree Murder.

5. A person who is an expert in the area of the effect of cocaine on mental processes is necessary to the reasonable defense outlined above in order to give Defendant the opportunity to effectively present said defense to the jury in this cause.

(R. 1408-9). The court granted the defense's request (R. 1411).

The following month, trial counsel filed a Motion for Psychiatric Examination requesting that the court appoint experts to determine whether Mr. Ponticelli was competent to proceed (R. 1413-5). The court appointed experts (R. 1416).

On July 25, a few weeks before trial, the defense filed a Notice of Intent to Rely on Insanity Defense (R. 1424-5).

A competency hearing was held on August 2, 1988 (R. 1176-1217). Dr. Mills testified that Mr. Ponticelli was not competent to stand trial because of Mr. Ponticelli's delusional thinking and the fact that "his associations were loose"; one thought was not tracking logically upon the other (R. 1183). Dr. Mills concluded that Mr. Ponticelli was suffering from a psychosis that prevented him from assisting his attorney (R. 1186).

While Dr. Poetter believed Mr. Ponticelli was competent he found that Mr. Ponticelli was in denial and that his denial was a way of coping with the stress of the trial (R. 1198). Dr. Poetter testified that "emotionally I doubt that [Mr. Ponticelli] really is aware that he could be sentenced to death" and thus, Mr. Ponticelli was mildly impaired (R. 1202). The fact that Mr. Ponticelli was not communicating with his trial counsel was based on his religious beliefs and his denial of his situation (R. 1203). Dr. Poetter testified that Mr. Ponticelli believed that he was helping himself by not saying anything and that every decision was affected by his thinking process (R. 1205).

Dr. Krop testified that he believed Mr. Ponticelli was competent to stand trial (R. 1211). Like Dr. Poetter, Dr. Krop believed that Mr. Ponticelli's denial of his situation was his way of coping (R. 1213). Dr. Krop stated that this coping mechanism was inappropriate because it did not allow him to assist his attorney (R. 1214). The court found that Mr. Ponticelli was competent (R. 1217).

On August 9, 1988, Mr. Ponticelli's capital trial commenced. During voir dire, the court and defense counsel told the jury that there may be a defense of insanity (R. 66). The State also raised the issue of cocaine or drug use (R. 104).

During trial counsel's opening statement he told the jury:

> In the process of this trial, you will discover that there are inconsistencies; that there are contradictions; that there are some outright lies; that the evidence against Tony Ponticelli is insufficient to constitute proof beyond and to the exclusion of every reasonable doubt that he, from a premeditated design, to effect the death of Nicholas and Ralph Grandinetti, shot them.
>
> I submit to you that the evidence will not demonstrate, and that the evidence will not show that the State has proven beyond a reasonable doubt the elements of those offenses.

(R. 292). However, trial counsel also went on to state:

> The evidence will show that approximately two weeks before the deaths of Nicholas and Ralph Grandinetti, beginning around that period of time, not only was Tony Ponticelli using cocaine that he got from the Grandinettis, he was using cocaine that he secured from another source in Oklawaha. The cocaine that he was getting from Oklawaha was in the form of what they call crack.
>
> On the night that Nicholas and Ralph Grandinetti were murdered, Tony Ponticelli was on what the Mental Health profession calls "a run". He was pulling a cocaine train, or it was pushing him, but in any event, had, at that time, been using cocaine to the extent that his mental processes, his physical condition was such that he was set up for a psychotic episode.
>
> You will hear what cocaine does to you. You will hear what a small amount of cocaine does to you. You will hear what a lot of cocaine does to you, and it's not pretty.
>
> . . . First of all, that the elements of first degree murder have not been proven; second of all, that there is a reasonable doubt as to whether or not Tony Ponticelli shot Nicholas and Ralph Grandinetti.
>
> The evidence is going to establish that there is reason to believe that there is at least, at the very least, a reasonable doubt as to the mental state, that is the insanity of Tony Ponticelli at the time that Nicholas and Ralph Grandinetti were killed.
>
> * * *
>
> [W]hile there is reasonable doubt as to who did the killings, . . . there is no reason not to believe that Tony Ponticelli, whatever he did that night, whatever role he played in the deaths of Nicholas and Ralph Grandinetti, that he was not legally sane . . .

(R. 293-5).

The evidence at trial included testimony that in the morning hours, on the Saturday following Thanksgiving, Ellzey Harrington saw a red car near his house (R. 305). Later that afternoon, Harrington approached the car and found two individuals, later identified as Nicholas and Ralph Grandinetti (R. 310).

After an investigator arrived from the Marion County Sheriff's Department, it was determined that Ralph Grandinetti was dead (R. 321). Nicholas Grandinetti was transported to the hospital for treatment (R. 351).

The following day an autopsy occurred of Ralph Grandinetti (R. 363). Dr. Sanderson, M.D., concluded that Ralph Grandinetti "died from the gunshot wound to the head" (R. 374).

Investigator Bruce Munster was assigned to investigate the offense as the lead detective. He spoke to Timothy Keesee because Keesee owned the car in which the Grandinetti's were found and also lived with them (R. 780). Keesee told him that Tony Ponticelli had been with the brothers on the night before the car was found (R. 782).

At trial Keesee testified he returned from a trip out of town on the Friday evening, following Thanksgiving, about 7:30 p.m. (R. 415-6). Keesee was accompanied by his brother, Roger, who was in the Navy at that time (R. 416). Tony Ponticelli, whom he knew from Mr. Ponticelli's coming to purchase cocaine from the Grandinetti's was present at the trailer along with Nicholas and Ralph (R. 416). Mr. Ponticelli had purchased large quantities of cocaine from the Grandinettis for the last few weeks, sometimes two or three times a day (R. 426-7).

Keesee told the jury: "They were discussing money that Tony had owed them for..." (R. 416). Mr. Ponticelli indicated that he would raise money by helping the brothers sell drugs (R. 417). Ralph "told [Tony] to make the calls" and handed Tony the phone (R. 417). Keesee remembered that Ralph was "pushy" and "insistent" with Mr. Ponticelli (R. 436-7); "It was apparent that Ralph wanted money" (R. 443). Keesee also observed that Mr. Ponticelli was nervous, but he told the jury that Mr. Ponticelli did not want to be taken home because he wanted to find a way to pay them that night (R. 419, 442).

Keesee admitted that there was cocaine at the trailer on that evening, however, he testified:

> Q: While you were there, you stated that there was some cocaine on the table.
> Did you, yourself, see anybody – any of the people partake of any of that cocaine?
>
> A: No.

(R. 420). Keesee and his brother left the trailer at approximately 8:30 p.m. (R. 420). When Keesee returned that evening the brothers were not there (R. 421).

Due to Keesee's information, Inv. Munster interviewed Mr. Ponticelli on Saturday evening and Mr. Ponticelli told him that he had been with the Grandinetti's earlier in the evening on Friday night but had left them at about 9:30 p.m. (R. 783).

Subsequently, Mr. Ponticelli made serval more statements to Inv. Munster (Supp. R. 15-8; 32-5; 42).

Inv. Munster then interviewed Joey Leonard about a firearm (R. 832). Leonard testified for the State at Mr. Ponticelli's trial. Leonard explained that he knew Mr. Ponticelli for a few years and in early November, 1987, Mr. Ponticelli paid for a tattoo for Leonard (R. 608). In exchange for the tattoo Leonard loaned Mr. Ponticelli a gun, a .22 (R. 608).

On the Friday after Thanksgiving, Mr. Ponticelli called Leonard and requested a ride at about 8:30 p.m. (R. 610-1). At the time, Mr. Ponticelli told Leonard that he was with Nicholas Grandinetti (R. 611). At approximately 9:30 p.m., Mr. Ponticelli stopped by Leonard's home and gave him the gun back and told him that he "did Nick" (R. 611). Bobby Meade was also present during the conversation (R. 613).

On Saturday, Leonard spoke to Mr. Ponticelli who told him that he: "did Nick, his brother" (R. 616). Mr. Ponticelli also explained that Nick and his brother were harassing Tony for money and were not going to let him leave their house unless he paid them $175 (R. 617). Mr. Ponticelli also told Leonard that the three of them were driving around trying to sell cocaine and he shot the Grandinettis (R. 619). Mr. Ponticelli did not know why he had shot the Grandinettis (R. 623).

Robert Meade also testified about the Friday following Thanksgiving. Meade recalled that Mr. Ponticelli arrived between 9:00 and 9:30 p.m. at Leonard's house (R. 574). Meade testified similarly to Leonard as he told the jury that Mr. Ponticelli gave Leonard the gun back and told them that he had killed Nick (R. 575). Mr. Ponticelli told them that the Grandinettis had "roughed him up" (R. 596).

The day that Inv. Munster interviewed Leonard and Meade, Nicholas Grandinetti died (R. 836). Dr. Maruniak performed the autopsy the following day. The cause of death was cardiac arrest due to the gunshot wounds (R. 398).

A few weeks after Mr. Ponticelli's arrest, Dennis Freeman contacted Inv. Munster and told him that he had information about the case (R. 846-7). Freeman later provided Inv. Munster with a map that Mr. Ponticelli had drawn which led to Dotson's house (850). Freeman provided the phone number of Ron Halsey (R. 851).

At trial Keith Dotson testified for the State. Dotson told the jury that he met Mr. Ponticelli on the Friday following Thanksgiving around 5:00 p.m. (R. 511-2). Dotson explained that his cousins and a friend were visiting and that they were going to watch movies if Mr. Ponticelli wanted to join them (R. 512).

Dotson testified that Mr. Ponticelli arrived at his house around 6:30 p.m., while they were watching Scar Face (R. 512-3). Mr. Ponticelli stayed for thirty minutes, but returned an hour or so later (R. 513-4). Dotson recalled that about an hour later, at 8:30 p.m., Mr. Ponticelli again returned and told him that he had "killed two guys" for money and cocaine (R. 517). Mr. Ponticelli also requested that he be allowed to wash his clothes (R. 517). Dotson did not see any money or cocaine (R. 517).

Dotson testified that Mr. Ponticelli was acting "freaked out" or "hyped up" (R. 520, 532). After they washed his clothes, they drove Mr. Ponticelli home (R. 521).

Dotson's cousin, Ed Brown, who was from West Virginia, was also present at Dotson's house over Thanksgiving weekend (R. 465). Brown testified that on the Friday following Thanksgiving, at 7:30 p.m., Mr. Ponticelli stopped by the Dotson house while they were watching Scar Face (R. 469-70). Brown testified:

> Q: During your stay in Florida anytime earlier that week, had you ever seen Mr. Ponticelli?
> A: No ma'am.

(R. 469). Mr. Ponticelli watched the movie for thirty minutes and then left (R. 473). Mr. Ponticelli returned after dark in a car and stated that he was going to kill two guys (R. 473-4). At that time, Brown also saw a gun (R. 474). Mr. Ponticelli also asked if they could give him a ride later that night (R. 474). Brown testified that Dotson got his shotgun and the group agreed not to answer the phone if it rang (R. 476).

Later that evening, Mr. Ponticelli returned and stated: "I did it, dudes." (R. 477). He washed his clothes (R. 478). Brown described Mr. Ponticelli for the jury and told them that he acted like he "shouldn't have done it" and that he was "really worried" (R. 480). "He was hyper, you know, he was all around the room – he would look in all the rooms and everything and just – he was acting real scared, you know, worried" (R. 481). They drove Mr. Ponticelli home (R. 482). Ed Brown denied using cocaine with Mr. Ponticelli (R. 508).

Likewise, Brian Burgess, Dotson's friend from West Virginia testified at Mr. Ponticelli's trial. Burgess testified that he never met Mr. Ponticelli prior to the Friday evening, after Thanksgiving (R. 535). Burgess testified that Mr. Ponticelli arrived between 6:00 and 7:00 p.m., while they watched movies (R. 536). Mr. Ponticelli left after about thirty minutes, but returned an hour or so later and told him that he was going to kill the two guys in the car (R. 536-7). Burgess also saw that Mr. Ponticelli possessed a gun (R. 538).

About 9:00 or 10:00 p.m., Mr. Ponticelli returned in a cab and told him that he shot two people in the back of the head (R. 540-1). Mr. Ponticelli told him that he needed money (R. 542).

Mr. Ponticelli walked around the house looking out the windows as his clothes were washed (R. 544). Burgess then drove Mr. Ponticelli home (R. 544).

Like the others, Warren Brown testified that he met Mr. Ponticelli on Friday evening (R. 557). Mr. Ponticelli stopped by around 7:00 p.m. and then again at 9:00 p.m. (R. 558). However, Warren Brown testified that after Mr. Ponticelli confessed to shooting two people, he requested that they provide him with an alibi for the evening (R. 561). Warren Brown also described Mr. Ponticelli as "nervous" (R. 565).

Ronald Halsey met Mr. Ponticelli through John Turner on the Sunday after Thanksgiving in 1987 (R. 640). Turner and Mr. Ponticelli stopped by Halsey's house and burned some clothes (R. 643-4). Mr. Ponticelli told Halsey:

> that he owed Nick some money for some cocaine, I believe it was a hundred dollars, and that Nick and Ralph roughed him up, threw him in the back of the car and they were driving somewhere, and they came to a stop and Tony took a gun. He shot the driver twice in the back of the head and then he shot the passenger twice in the back of the head.

(R. 645). Mr. Ponticelli also told him that he had spent the money he obtained on crack (R. 648).

Douglas Freeman testified that had been incarcerated in the same cell with Mr. Ponticelli in late 1987 (R. 716). According to Freeman, Mr. Ponticelli discussed his case with him (R. 720). Mr. Ponticelli told him that on the night of the crime, the Grandinetti's picked him up because he owed them money (R. 722). While they were at the trailer, Mr. Ponticelli considered committing the crime, but someone else was there (R. 741). He drove around with the Grandinettis to the Dotson house because he "was making them think that these particular people wanted to buy some cocaine" (R. 734). Mr. Ponticelli continued to drive around with the Grandinettis and he was in the back seat (R. 744). He shot both of the brothers in the back of the head (R. 744-5).

Mr. Ponticelli told Freeman that he abandoned the car and took the money and cocaine that the brothers had (R. 748). According to Freeman, Mr. Ponticelli told him that he killed the brothers in order to rob them of cocaine and money (R. 753).

Mr. Ponticelli also admitted that he had disposed of his clothes and given Inv. Munster false statements (R. 721, 726). Freeman stated:

> Q: Speaking about cocaine, did the defendant tell you whether or not, on the night of the murders, that he had used any cocaine?
> A: Yes, he did.
> Q: What did he tell you?
> A: . . . I specifically asked him had he been doing any drugs or drinking, heavily or whatever, that particular day, and he said no.

(R. 753). Freeman also testified that he was not receiving any benefits for his testimony (R. 714).

Freeman had been convicted of twenty-six felonies (R. 739). Additionally, Freeman had provided information to law enforcement many times since 1976 (R. 755).

During the defense case, Mr. Ponticelli's trial counsel presented the testimony of John Turner. Turner knew Mr. Ponticelli for about a year at the time of the crime (R. 947). When Mr. Ponticelli returned from New York in October, 1987, he spent much of his time with Turner (R. 948). Mr. Ponticelli and Turner used cocaine, including free basing, every day, from 8:00 or 9:00 a.m. until 3:00 or 4:00 a.m. (R. 948, 950, 953).

On cross examination, the State elicited testimony from Turner that he did not recall seeing or using cocaine with Mr. Ponticelli on the Friday following Thanksgiving (R. 961).

Defense counsel also attempted to present the testimony of Dr. Mark Branch, who was an expert in behavioral pharamcology (R. 973-4). Trial counsel wanted Dr. Branch to testify as to the effects of cocaine on the mind and body and to explain cocaine psychosis (R. 975-8).

The state objected to Dr. Branch's testimony and the court refused to allow the jury to hear the testimony because there was no evidence of cocaine use at the time of the offense (R. 993).

During the State's closing argument, the prosecutor stated:

> If you'll remember the testimony of the two young men from West Virginia, Ed Brown and Brian Burgess, they were both present at Keith Dotson's house in Silver Springs Shores on Friday night when the defendant returned for a second time to that residence.
>
> These fellows didn't know the defendant, and he told them at that time, "I'm going to kill a couple of guys."

(R. 1054). The prosecutor argued that the statements Mr. Ponticelli made demonstrated his state of mind and that insanity was not an issue in the case (R. 1055-6).

The prosecutor explained away Mr. Ponticelli's paranoid behavior on the night of the crime as "a rational fear of the consequences of his actions that evening." (R. 1063).

Trial counsel told the jury that, as to the four witnesses present at Dotson's house on Friday evening: "I don't believe they would come to Ocala, Florida, and sit in this chair and lie to y'all" (R. 1093). He also told the jury: "And there's no doubt in my mind, at least, that he said the things that those boys from West Virginia say he said." (R. 1101-2).

The jury found Mr. Ponticelli guilty of both counts of premeditated murder (R. 1152).

The penalty phase commenced on August 18, 1988. Trial counsel presented only the testimony of Dr. Mills. Dr. Mills explained the personality changes that occur when an individual uses intoxicants (R. 1321). Based on a hypothetical, Dr. Mills believed that Mr. Ponticelli was suffering from an extreme mental or emotional disturbance because of his repeated use of cocaine at the time of the crime (R. 1322, 1325). Dr. Mills also testified that Mr. Ponticelli's capacity to appreciate the criminality of his conduct was substantially impaired (R. 1325).

The State argued to the jury that the pecuniary gain aggravator applied. As to cold, calculated and premeditated, the State argued that the strongest evidence was from the "fellows from West Virginia" who testified as to Mr. Ponticelli's statements (R. 1342). The State also argued the heinous, atrocious and cruel aggravator as to the death of Nicholas Grandinetti (R. 1343).

As to mitigation, the State told the jury:

> Dr. Mills points to the defendant's actions, his paranoia, his hyperness, when he stopped by the house where the fellows from West Virginia were, and he felt that, yes, this was a result of his using cocaine.
>
> Remember that the defendant was telling these young men that he was planning to kill two people and he returned and told them, yes, he had, in fact, done this. I submit to you that that is not that abnormal a reaction and, sure, we know that the defendant used a lot of cocaine, but there was no evidence at all during the trial that he had used cocaine that day; none whatsoever. In fact, he told Dennis Freeman that he did not use cocaine that day.

(R. 1349-50).

The jury recommended death (R. 1372).

The trial court sentenced Mr. Ponticelli to death for the murder of Ralph Grandinetti, finding two aggravators: pecuniary gain and the crime was committed in a cold, calculated and premeditated manner (CCP)(R. 1167-8, 1172). Likewise the court sentenced Mr. Ponticelli to death for the murder of Nicholas Grandinetti, finding the same two aggravators and the crime was heinous, atrocious and cruel (HAC)(R. 1168, 1172).

In mitigation, the court considered that Mr. Ponticelli had no significant criminal history, but pointed out that the "convictions are not required to negate a mitigating factor" (R. 1170. The court also considered Mr. Ponticelli's age. The court did not find either mental health mitigator had been established (1171-2). In fact, the court stated: "there is absolutely no evidence that defendant used any alcohol or drugs on the day of the offense" (R. 1836).

B. THE DIRECT APPEAL

This Court affirmed Mr. Ponticelli's convictions and sentences. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991). The United States Supreme Court vacated the judgment and remanded for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). *Ponticelli v. Florida*, 506 U.S. 802 (1992).

On March 4, 1993, this Court held: "A review of the record reveals that the instruction given on [heinous, atrocious and cruel] was even less detailed than that found insufficient in Espinosa. However, the challenge to the sufficiency of the instruction is procedurally barred because there was no request for specific instructions or objection to the instructions given." *Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993).

C. THE POSTCONVICTION PROCEEDINGS

Mr. Ponticelli's evidentiary hearing commenced on July 10, 2000. The *Brady*, ineffective assistance of counsel at both the guilt and penalty phases, *Ake*, competency claims, among others, were somewhat intertwined and primarily focused on Mr. Ponticelli's history of drug use, drug use near the time of the crime and behavior following his incarceration along with the inconsistencies and evolution of many of the State's witnesses' testimony regarding premeditation.

1. The Days and Hours Preceding the Crime

Mr. Ponticelli presented testimony that several State witnesses lied at his trial: Timothy Keesee, the roommate of the Grandinettis, who had seen Mr. Ponticelli within hours of the crime, admitted that he lied at trial (PC-R. 532). Keesee explained the events that led to his false testimony: The day following the crime, Inv. Munster interviewed Keesee (PC-R. 506). Keesee told Inv. Munster that the reason he and his brother left the trailer was because they were uncomfortable because of the "cocaine usage" at the trailer (PC-R. 508). Specifically, Keesee told Inv. Munster that Mr. Ponticelli had done "one line" of coke in the forty minutes he was present at the trailer (PC-R. 508). Keesee also observed that on the table there were baggies, a razor blade and a piece of glass (PC-R. 509).

Keesee was interviewed by the prosecutor, Sarah Balius, who took notes when they spoke (PC-R. 513-4). Keesee recalled that he told the prosecutor that he witnessed Mr. Ponticelli use cocaine on the night of the crime (PC-R. 514).

During preparation for his testimony, the prosecutor asked him similar questions and when he changed his answers, she said, "Good" (PC-R. 537). Keesee "could tell by her response as she wrote, that it was helping her case." (PC-R. 537).

In explaining his contradictory deposition and trial testimony from his original statement to Inv. Munster, Keesee believed that it was helping his case, as well as the State's against Mr. Ponticelli (PC-R. 537).

Keesee also explained that when Inv. Munster searched his car he found needles and drug paraphernalia (PC-R. 515). Keesee interpreted the fact that he was not prosecuted to the fact that the State was going "light" on him because he was cooperating on other matters (PC-R. 515). Keesee was also trying to cooperate with the State so that they would release his car and property. Keesee had also been charged with possession of cocaine one month before he gave his deposition (PC-R. 515). Keesee pled to the charge and interpreted the fact that the State allowed him to plead as a favor (PC-R. 518).

Keesee also testified that he had previously seen Mr. Ponticelli use cocaine on eight to ten occasions over a two week period and characterized him as a "peeper", i.e., paranoid (PC-R. 510-11). Mr. Ponticelli would peak out the windows and Nicholas Grandinetti would attempt to calm him down (PC-R. 511). He also described that when Mr. Ponticelli used cocaine he became uneasy, fidgety and anxious (PC-R. 513).

On the night of the crime, contrary to his trial testimony, he described Mr. Ponticelli as: "nervous, sitting on the edge of his chair, anxious to leave. He mentioned a couple of times: 'I need to get going.'" (PC-R. 527).

Like Keesee, Brian Burgess and Edward Brown also admitted that they testified falsely at Mr. Ponticelli's capital trial (PC-R. 600, 652). Specifically, Burgess and Brown told the lower court that they met Mr. Ponticelli on Thanksgiving Day or the early morning hours of Friday and that they did not see Mr. Ponticelli three times on Friday evening, as they testified at trial (PC-R. 591, 652, 660).

On Thursday, Mr. Ponticelli came to Dotson's house, after dark, while the group watched movies (PC-R. 592). Burgess and Brown testified that the evening turned into a party with 20 to 25 people (PC-R. 593). Mr. Ponticelli was drinking beer and using cocaine (PC-R. 593, 653).

Later in the evening, Burgess, Ed Brown, Turner and Mr. Ponticelli left the party and traveled to a trailer to buy more cocaine (PC-R. 594, 654). When they returned to the party Mr. Ponticelli showed them how to cook the cocaine and make a homemade pipe to smoke it (PC-R. 655). The cocaine use began in the car ride back to the Dotson house and extended throughout the night (PC-R. 619, 657).

Burgess also described Mr. Ponticelli's behavior on Friday night; he testified that the first time he saw Mr. Ponticelli he acted nervous and "edgy-like" (PC-R. 607). When Mr. Ponticelli came back to the house later, he acted "really paranoid", i.e., "[j]ust real nervous, couldn't sit down, looking out the windows, looking out the doors, going from room to room, window to window, and had a knife in his hand the whole time." (PC-R. 607).

Burgess and Brown also admitted that they used cocaine with Mr. Ponticelli on Friday night (PC-R. 610, 672).

John Turner was Mr. Ponticelli's closest friend at the time of the crime. On December 21, 1987, Turner provided a statement to Inv. Munster in which he stated that Mr. Ponticelli told him that the Grandinetti brothers pursued him that night, located him, threatened him and used cocaine with him (PC-R. 958).

Turner remembered attending the party at the Dotson house on Thursday night which lasted until the morning hours of Friday (PC-R. 974, 977). Mr. Ponticelli free based cocaine and reacted the way he always did when he used cocaine (PC-R. 975, 980).

During his deposition, Turner informed trial counsel and the State that he had met the individuals from West Virginia before the night of the crime and that "Me and Tony took them over to Nick's house, and he got them some coke." (PC-R. 985). Turner told Inv. Munster about the cocaine party (PC-R. 986).

Turner also testified about he and Mr. Ponticelli's cocaine addiction in the weeks preceding the crime:

Q: How did you obtain the cocaine that you and Mr. Ponticelli used during that period of time?

A: A few different ways. We first had just powdered cocaine, and we would cook it up, freebase it. And after a while I guess our – I guess – I guess our bodies just didn't work anymore, and we were – we were just spilling and wasting more than we were cooking up. We would just drop it, and we were shaking.
Q: What do you mean when you say you're shaking?
A: Shaking, I mean, just –
Q: Like tremors?
A: Yes. Just shaking. Just trying to get the next hit.
Q: Was that anticipation of getting the hit or was it the cocaine that was messing up your physical function, do you know?
A: I think it was both. It was just the – it was the anticipation of – that's the whole thing about freebasing or crack cocaine is that you just – you can't wait to get to the next hit. That' all you're trying to do. You're just trying to get to the next hit, and that's all that matters.

* * *

Q: But were there times when [your dealer] would actually seek you out to sell you crack cocaine?
A: Many times he would knock on my window at 6:00 in the morning at my bedroom window and wake me up. You know?

"I've got what you need."

"I don't have no money."

"Well, that's okay. Here's a $20 rock on me. Come see me tomorrow."

He would know I'm not gonna leave it sit there. I'm gonna smoke it. As soon as I do, I'm gonna be at his house, and then it starts the process all day.
Q: Once you started on a day you didn't stop until you were exhausted?
A: Right. At that point we didn't even have to get started anymore, though. It was – our body was so – it was just waking up it was time to get started. You know? After – after a couple of months of doing that, you don't need that first hit anymore. You just crave it constantly.

(PC-R. 966-8).

Every time Mr. Ponticelli used cocaine at Turner's house he was "wigging" (PC-R. 969). Mr. Ponticelli would also react similarly when they used cocaine in the car (PC-R. 970).

Frank Porcillo testified at Mr. Ponticelli's evidentiary hearing. Porcillo was friends with Mr. Ponticelli in 1987 (PC-R. 556-7). Porcillo recalled that when he met Mr. Ponticelli, Mr. Ponticelli worked full-time and spent a lot of his time off working on his car (PC-R. 559-60). During this time, Porcillo described Mr. Ponticelli as laid back, non-violent and respectful (PC-R. 561).

Porcillo testified that in the fall of 1987, when Mr. Ponticelli returned from New York, Tony was using and smoking cocaine (PC-R. 562). According to Porcillo, Mr. Ponticelli's behavior changed when he used cocaine; was paranoid and not easy to be around (PC-R. 563-5). "If he did say something, it didn't make any sense", he rambled (PC-R. 565). Mr. Ponticelli was the cocaine user who would hide in the corner and act inappropriately to noises (PC-R. 565-6).

On the Friday following Thanksgiving, 1987, Porcillo saw Mr. Ponticelli at the convenience store just after dark and described him as acting "whacked" (PC-R. 568). There was also a red car in the parking lot (PC-R. 581). Porcillo believed that Mr. Ponticelli "was like going off the edge." (PC-R. 569). Mr. Ponticelli acted the same way he had acted when Mr. Porcillo had witnessed him use cocaine (PC-R. 574).

Robert Meade, who testified at trial, saw Mr. Ponticelli on Friday, in the late evening. He testified that Mr. Ponticelli acted like he was on cocaine, i.e., very irrational and crazy (PC-R. 932, 937). Meade had told Inv. Munster in a statement that Mr. Ponticelli was on crack the night of the crime (PC-R. 940). Meade had also met Nicholas Grandinetti earlier that night and Mr. Grandinetti told him that he was looking for Mr. Ponticelli, because he [Tony] owed him [Nick] money (PC-R. 945).

2. The Prosecution

Inv. Munster testified at Mr. Ponticelli's evidentiary hearing. Inv. Munster admitted that Keesee told him that there was cocaine being used at the Grandinetti trailer on the night of the crime (PC-R. 1032).

Inv. Munster's undisclosed notes also reflected that he was aware of the Thanksgiving cocaine party at the Dotson house and that Mr. Ponticelli bought cocaine from the Grandinetti's for Dotson and his friends from West Virginia (PC-R. 1050-1, 1054-5). Inv. Munster's notes reflect that witnesses changed their testimony from their initial statements, including Mr. Ponticelli's discussing his motives for the crime.

Sarah Williams, formerly Sarah Balius, prosecuted Mr. Ponticelli in 1987-1988 (PC-R. 1085). Ms. Williams agreed that if Mr. Ponticelli was "not on cocaine at the time [of the crime] it's hard to establish a cocaine psychosis defense (PC-R. 1101).

Ms. Williams' undisclosed notes from an interview with Keesee indicated that he had told her that on the night of the crime the individuals at the trailer were "doing cocaine" (PC-R. 1108). Ms. Williams conceded that her notes of the interview with Keesee were inconsistent with his deposition testimony wherein he testified that no one was using cocaine at the trailer (PC-R. 1114). In fact, her deposition notes are marked to indicate that she did in fact believe that Keesee had told Inv. Munster about the cocaine usage at the trailer on night of the crime (PC-R. 1117-8, Def. Ex. 8). Ms. Williams did not correct the false testimony (PC-R. 1120).

As to the information about the Thanksgiving night cocaine party, Ms. Williams agreed that if the information about the party were true it would have caused a serious problem for the prosecution at trial (PC-R. 1128).

Ms. Williams also testified about Dennis Freeman, the jailhouse informant. While Freeman testified at trial that he wasn't receiving any benefit for his testimony, Ms. Williams' notes reflected that she had told Freeman's attorney that she "would make no firm offer prior to [Mr. Ponticelli's trial] but assured him his cooperation would be remembered with favor before mitigating judge/Sturgis. Will make no formal deal on the record prior to trial" (PC-R. 1136-7, Def. Ex. 9). Ms. Williams did not believe that she was obligated to reveal her communications about her assurances that Freeman would receive "favors" for his cooperation under Brady (PC-R. 1138).

3. Mr. Ponticelli's Pre-Trial Incarceration

Mr. Ponticelli also presented witnesses with whom he was incarcerated at the jail while he was awaiting his trial. Kenneth Moody was incarcerated in the jail in the summer, 1988. He described Mr. Ponticelli as having long hair and a beard and being "buggy" (PC-R. 886). He explained that a "bug" was a jail term for individual who was not right (PC-R. 886). He testified that Mr. Ponticelli would "talk to god" and that he "thought god was going to save him or he didn't talk to nobody, didn't associate with nobody. He'd stand there and stare out the window and talk to god." (PC-R. 886). Everytime Moody saw Mr. Ponticelli he had a bible (PC-R. 887).

Moody also testified that Inv. Munster approached him about "snitching" on Mr. Ponticelli (PC-R. 888).

Likewise, Wilbur Bleckinger was incarcerated with Mr. Ponticelli (PC-R. 904). Bleckinger noticed that Mr. Ponticelli acted as if he was having a conversation with god; Mr. Ponticelli would speak out loud and then pause as if he were waiting for an answer (PC-R. 905-6). Mr. Ponticelli would also pace with his bible around the cell (PC-R. 907).

Jose Burgos knew Mr. Ponticelli from the area and was incarcerated with him in the jail (PC-R. 914). He testified that Mr. Ponticelli was in his own little world at the jail and he spent most of his time reading the bible (PC-R. 916). Burgos often observed Mr. Ponticelli walk around with a towel on his head, with the lights out in his room, praying (PC-R. 916). Mr. Ponticelli would also talk aloud to someone, but no other individual was present (PC-R. 916).

Prior to trial, Mr. Ponticelli corresponded with several friends and realtives. Wendy Falanga had had very little contact with Mr. Ponticelli in the two or three years prior to his arrest. However, Mr. Ponticelli wrote her from the jail, while awaiting trial (PC-R. 780). She described the lengthy letters she received as odd and containing a lot of scripture; "[a]nd every other sentence – after every sentence was a scripture, the sentences were fragmented. It was a thought here, and then the next sentence was a completely unrelated thought". (PC-R. 781).

Likewise, Mr. Ponticelli contacted Concetta O'Berry when he was incarcerated, pre-trial. He wrote her what sounded to her like a suicide note (PC-R. 842). He wrote that God had told him to write her the letter, but he never mentioned anything about his case or the fact that he was in jail (PC-R. 842-3). Ms. O'Berry was concerned about the letter and contacted Mr. Ponticelli's brother, it was only then that she learned that he was in jail (PC-R. 844).

Nancy Kelskey also had contact with Mr. Ponticelli while he was incarcerated before his trial (PC-R. 812). She testified that his letters were "overly religious" and erratic, i.e., jumping from one conversation to another (PC-R. 812). He wrote similar letters to Patricia Leonard (PC-R. 854).

4. Mr. Ponticelli's Background

As to Mr. Ponticelli's childhood and background several witnesses testified. Michael Barnes met Tony when he was a child of ten or so in New York (PC-R. 683). Barnes described Tony as a quiet child who followed the group and never said much (PC-R. 683). The other kids teased Tony because he was overweight and wore glasses (PC-R. 684).

While in junior high school, Barnes and Tony started to experiment with marijuana (PC-R. 685). When they reached high school they also started experimenting with other drugs, including black beauties, which were speed, mescaline, which was a psychedelic drug, hash and Valium (PC-R. 686-7). Later in high school, they began to use cocaine (PC-R. 687).

When Tony used cocaine his personality changed (PC-R. 688). Barnes explained:

A: Well, when he started smoking it, he just – he wasn't himself. He started like getting, I don't know, paranoid. Like we would be hanging out partying, walk down the road, and all of a sudden, you know, it was like he was losing it, and he would say, "Oh, Mike, there's someone over there in the woods."

"Anthony, what are you talking about?"

"Mike, I'm telling you there's someone in the woods."

I'd look over and there's nobody there. He was hallucinating, you know, really bugging out from it.

Q: And was there ever anybody in the woods?

A: No.

Q: And did this happen pretty regularly?

A: Almost every time we were doing it as, you know, we were doing it more and more.

(PC-R. 688-9).

After Tony stopped spending time with Wendy Falanga his cocaine use increased (PC-R. 691). This time Tony went from using two grams at a time to three and a half (PC-R. 691).

Barnes recalled that after Tony moved to Florida, he returned to New York for a wedding (PC-R. 693). Barnes accompanied Tony back to Florida and recounted that when they arrived back in Florida they met John Como at his parents' restaurant and started using cocaine (PC-R. 697). During the evening, after the restaurant was closed a young woman knocked on the door (PC-R. 697). Barnes and Como wanted to see what she needed, but Tony did not want them to open the door (PC-R. 697). After they assisted the young woman, they looked for Tony and found him in a cabinet with the door closed: "It looked like someone took a water hose and put it over his head; soaking wet with two knives in his hands swearing that there's somebody on the roof." (PC-R. 698). The following morning, Tony was gazing at the ceiling, not hearing a word Como said (PC-R. 737).

Joseph Orlando and Como, Tony's cousins, also spent time with Tony when they were young (PC-R. 710, 724). They, too, engaged in drug and alcohol use with Tony when they were teenagers (PC-R. 713). They used marijuana, hash, mescaline and cocaine (PC-R. 713, 726). Once, after using marijuana laced with angel dust, Tony had a bad reaction and blacked out (PC-R. 727).

Tony attended Orlando's wedding in September, 1987, in New York and extended his trip in order to spend some time with his cousin (PC-R. 716-7). While Tony was in New York, the two went on a cocaine binge and drank a lot of alcohol; Tony was using twenty-eight to thirty-six grams of cocaine over a four to five day period (PC-R. 719-20).

Orlando confirmed the accounts of Tony's behavior when he used cocaine, he got paranoid and anxious, more so than most people (PC-R. 721).

Wendy Falanga was yet another friend of Tony's from New York (PC-R. 770). Tony was the only friend that was allowed in Falanga's parents' house when they were teenagers (PC-R. 771). Later, Falanga also used drugs with Tony, including cocaine, Valium, meprobamate, alcohol and Ativan (PC-R. 772).

Concetta O'Berry testified that she knew Mr. Ponticelli as a child and Tony would visit her father who was ill (PC-R. 838). In high school, Mr. Ponticelli became distant (PC-R. 839). One night, he confided in her that he had a drug problem and "he wanted to get clean" (PC-R. 840).

Tony's sister-in-law, Rita Carr and his sister, Nancy Kelskey also testified. Kelskey told the lower court that her brother was born as a "blue baby." (PC-R. 805). Carr recalled that when Tony was a child he was quiet and happy (PC-R. 793). They both explained that Tony was adopted when he was seven and originally lived with the family as a foster child (PC-R. 793, 805). Several other foster children also lived with the Ponticelli's and all of the children got along (PC-R. 794, 805). Tony later confided in Carr that he felt separated from the family because he was adopted (PC-R. 799).

While Tony was in high school, Kelskey noticed a change in his personality – he was aloof and didn't care (PC-R. 810). She suspected he was using drugs (PC-R. 810).

Carr allowed Tony to live with them when he returned to New York in 1987, but Tony began to distance himself and stay out late (PC-R. 797). Finally, she asked him to leave because she believed he was using drugs (PC-R. 798).

Patricia Leonard met Tony in early 1987 through her brother, and they started dating (PC-R. 849). She told the court that Tony was very easy going (PC-R. 851). Robert Meade, Tony's friend reiterated Leonard's description (PC-R. 927). Tony did not use cocaine when he first moved to Florida (PC-R. 852). Tony was also very good to her son (PC-R. 858).

When Tony was in New York, he called Leonard and confided to her that he had started using cocaine, again (PC-R. 852).

Upon his return to Florida Tony's friends noticed a change in his personality – he was nervous, jittery and alienated himself (PC-R. 853, 928). His friends saw him using cocaine and crack (PC-R. 929). Meade described the effect of cocaine on Tony: "He would get very irrational and very unpredictable . . . and would make statements that really didn't mean anything" (PC-R. 930).

5. Mr. Ponticelli's Mental Health

At Mr. Ponticelli's evidentiary hearing, he presented a substantial amount of expert information about his mental health.

Dr. Michael Herkov, a psychologist, testified. Initially, Dr. Herkov testified that in his opinion Mr. Ponticelli was not competent to stand trial (PC-R. 1351). During his review of the materials, Dr. Herkov learned that Mr. Ponticelli refused to communicate with his trial attorney about the offense (PC-R. 1352). Dr. Herkov testified that the materials indicated that Mr. Ponitcelli's actions were based upon his religious beliefs (PC-R. 1352). However, Dr. Herkov found that Mr. Ponticelli's religious beliefs were based a "psychosis or a delusion, rather than simply a Christian of Judeo-Christian belief about trusting in God" (PC-R. 1353).

Dr. Herkov explained that a delusion is a fixed false belief that is not rational (PC-R. 1354). In Mr. Ponticelli's case his delusion included the idea that if he assisted in his defense he would be calling God a liar (PC-R. 1354). Another indication of Mr. Ponticelli's delusion was that he engaged in ideas of reference, which meant that everything that happened had significance for him (PC-R. 1354). Mr. Ponticelli "believed that God was going to manipulated the judge like a puppet, that he was going to be transported out of the courtroom. Very unusual beliefs and consistent with a delusional process" (PC-R. 1356).

Dr. Herkov also believed that Mr. Ponticelli was hallucinating when he was receiving answers from God and seeing Jesus' face in the moon (PC-R. 1361, 2380). He heard inmates speaking to him when they were not (PC-R. 1361).

Dr. Herkov concluded that Mr. Ponticelli was psychotic (PC-R. 1363). It was Mr. Ponticelli's psychosis that forced him to jump from one topic to the next in his conversations and letters (PC-R. 1364). Dr. Mills' notes of his interview with Mr. Ponticelli corroborated Dr. Herkov's findings because Dr. Mills stated: "It is essentially impossible to really record [the interview] because there are breaks and they don't make sense (PC-R. 1364).

Mr. Ponticelli displayed other symptoms of psychosis – increased goal directed activity and hypergraphia. These symptoms appeared in Mr. Ponticelli's preaching and attempts to convert everyone with whom he came into contact and in his letter writing (PC-R. 1365-6). Mr. Ponticelli also experienced a sense of euphoria "which is a hallmark sign of mania"; and he experienced increased energy, even though sleeping and fasting (PC-R. 1238-9).

Dr. Herkov concluded that given Mr. Ponticelli's religious delusion, he did not have the capacity to assist his trial attorney. Mr. Ponticelli's actions were "not based on a volitional, rational decision", but rather based on his religious delusion (PC-R. 1370).

Dr. Herkov also considered Mr. Ponticelli's state of mind at the time of the offense and found that Mr. Ponticelli was voluntarily intoxicated at the time of the offense (PC-R. 1373). Dr. Herkov found significant evidence to suggest that Mr. Ponticelli was intoxicated on cocaine at the time of the offense (PC-R. 1373). He noted the amount of cocaine use the night before the offense, his chronic cocaine use in the week preceding the offense, his lack of sleep and his use of cocaine within hours of the offense in forming his opinion (PC-R. 1373).

Dr. Herkov also believed that Mr. Ponticelli was suffering from an extreme mental or emotional disturbance at the time of the offense and that his ability to conform his behavior to the requirements of the law was substantially impaired at the time of the offense (PC-R. 1374).

Dr. Harry Krop evaluated Mr. Ponticelli shortly before trial to determine competency to proceed (PC-R. 1502). Dr. Krop believed that at the time of trial it was difficult to determine how much of Mr. Ponticelli's religiosity was typical or a delusional belief; he had concerns even at the time of trial (PC-R. 1506, 1530). However, because he found no information to suggest Mr. Ponticelli suffered from a mental illness at the time of trial, he concluded that Mr. Ponticelli's decision not to speak to his trial attorney was volitional (PC-R. 1507).

Dr. Krop was requested to re-evaluate Mr. Ponticelli in 1998, and was provided information for his evaluation. For the first time in his career, Dr. Krop changed his opinion as to competency from 1988 and testified that Mr. Ponticelli was not competent to stand trial in 1988 due to his delusional beliefs (PC-R. 1524, 1528, 1530). Dr. Krop based his opinion on the testimony he reviewed since the trial which corroborated Mr. Ponticelli's statements (PC-R. 1525). Specifically, Dr. Krop stated that Mr. Ponticelli did not have the capacity to communicate with his attorney, testify relevantly or challenge prosecution witnesses (PC-R. 1525).

Dr. Krop also indicated that even at the time of trial, as his report stated, he believed that at the time of the offense Mr. Ponticelli was intoxicated from his cocaine use and that his ability to conform his conduct to the requirements of the law may have been diminished (PC-R. 1535). Despite his opinions, Dr. Krop was not asked to testify at trial (PC-R. 1536).

As did Dr. Herkov, Dr. Krop testified that he found that both of the statutory mental mitigators applied to Mr. Ponticelli (PC-R. 1547-8).

At trial, Mr. Ponticelli's trial counsel attempted to introduce the testimony of Dr. Marc Branch during the guilt phase (PC-R. 1646). However, the State objected and the court did not allow the jury to hear Dr. Branch's testimony (PC-R. 1646). Dr. Branch's research specialized in the effects of drugs on behavior (PC-R. 1637). Dr. Branch testified that in 1988, he made several assumptions based on the

information that was presented to him by trial counsel. For example, he believed that Mr. Ponticelli's cocaine use was very heavy, but for a short period of time (PC-R. 1653). Following the trial, he learned that Mr. Ponticelli's cocaine use was much more longstanding and that he was in fact a poly-substance abuser (PC-R. 1653-4).

In 1988, Dr. Branch was aware that there was at least one account of Mr. Ponticelli engaging in peeping (PC-R. 1654-5). Dr. Branch later learned that Mr. Ponticelli often suffered from paranoid delusions while using cocaine, which he believed was a significant difference from what he knew at trial (PC-R. 1655). The behaviors he learned that Mr. Ponticelli engaged in while on cocaine were consistent with psychosis; Mr. Ponticelli experienced both hallucinations and delusions (PC-R. 1656).

Since the evidentiary hearing, Dr. Branch also learned that Mr. Ponticelli was in fact using cocaine on the day of the offense, even within hours of the offense (PC-R. 1662). He also learned that the day before the offense Mr. Ponticelli had very little sleep and very little to eat (PC-R. 1663).

In 1988, Dr. Branch was only able to say that it was possible that Mr. Ponticelli was psychotic at the time of the offense (PC-R. 1668). However, based on all of the information he learned following the offense he was reasonably certain that Mr. Ponticelli was psychotic at the time of the offense due to his ingestion of cocaine (PC-R. 1669).

Dr. Branch found that the statutory mental health mitigators applied to Mr. Ponticelli, due to his cocaine use near the time of the offense (PC-R. 1673). Dr. Branch was never asked to consider mitigation in 1988 (PC-R. 1674).

Dr. Barry Crown, a neuropsychologist, conducted neuropsychological testing on Mr. Ponticelli in 1995 (PC-R. 1214). Mr. Ponticelli's testing reflected deficiencies in his brain functioning (PC-R. 1218-9, 1220, 1221, 1226, 1230-1, 1232, 1233). Overall, Dr. Crown found that Mr. Ponticelli's brain functioning was significantly impaired and "that his deficits were particularly related to executive functions" (PC-R. 1234-5). Executive functioning is controlled by the frontal lobes of the brain, which are responsible for planning, organization, concentration, attention, memory and understanding the long-term consequences of immediate behavior (PC-R. 1215).

While the State's expert, Dr. Wayne Conger, disagreed with many of the conclusions of the other experts, he did concede that Mr. Ponticelli was a long time poly-substance abuser and cocaine addict at the time of the offense (PC-R. 2283). Dr. Conger also did not disagree with Dr. Crown that Mr. Ponticelli suffered from brain damage, he just did not believe that it was significant enough to explain Mr. Ponticelli's competency at the time of trial or state of mind at the time of the offense (PC-R. 2223).

6. Trial Counsel

James T. Reich was appointed to represent Mr. Ponticelli at his capital trial, on February 23, 1988 (PC-R. 1767, 1769). Mr. Ponticelli's was Mr. Reich's first capital trial (PC-R. 1767).

Mr. Reich believed that Mr. Ponticelli was not competent. In preparation for the case, Mr. Reich visited Mr. Ponticelli a few times at the jail, but in his first few visits he "did most of the talking. [He] didn't let [Mr. Ponticelli] talk at all." (PC-R. 1776).

After his first substantive meeting with his client, Mr. Reich immediately filed a motion to determine if Mr. Ponticelli was competent (PC-R. 1781). However, Mr. Reich did not review Mr. Ponticelli's jail records or speak to any inmates or correctional officers about Mr. Ponticelli (PC-R. 1863).

Throughout trial, Mr. Reich thought that there were indications that Mr. Ponticelli was incompetent but he did not bring the incidents to the court's attention (PC-R. 1788).

As to his theory of defense, Mr. Reich believed that his only possibility for an acquittal was to present an insanity defense based on cocaine psychosis or voluntary intoxication (PC-R. 1772, 1774). In his opening statement, Mr. Reich argued cocaine psychosis and in the alternative reasonable doubt (PC-R. 1304). Mr. Reich agreed that his theories of defense were inconsistent (PC-R. 1805).

Mr. Reich also recalled that the State attempted to "sanitize" the case in terms of drugs (PC-R. 1794). Specifically, the State moved to prevent the toxicology reports of the Grandinetti's from being introduced as well as Keesee's prior drug history (PC-R. 1798). As to the toxicology reports, the court overruled the objection, yet Mr. Reich never introduced the reports (PC-R. 1799). Mr. Reich also never introduced the evidence of drug paraphernalia which tested positive for cocaine (PC-R. 1821). However, the prosecutor's approach was to tell the jury that there was no evidence of cocaine use on the day of the offense and Mr. Ponticelli's bizarre behavior demonstrated his consciousness of guilt (PC-R. 1806-7).

As to the evidence presented in postconviction, Mr. Reich testified that Keesee's testimony that he had seen Mr. Ponticelli use cocaine shortly before the offense would have been relevant information that he would have used in his defense (PC-R. 1811). "With that testimony, Marc Branch . . . gets to get on the stand. I get my opinion from him. . . . I get my instruction. Plain and simple" (PC-R. 1811).

Mr. Reich was also never informed that Mr. Ponticelli told Freeman about a cocaine party on Thanksgiving night (PC-R. 1818). Had Mr. Reich known of the cocaine party he would have used that information in presenting his defense of insanity and/or voluntary intoxication and to impeach Dotson, the Browns and Burgess (PC-R. 1826-7). Mr. Reich believed the information would have allowed him to cast doubt on the testimony of the West Virginia group based on their ability to remember (PC-R. 1827).

Also, the testimony about cocaine use proved that Freeman was lying when he testified that Mr. Ponticelli told him that he did not use cocaine on the day of the offense (PC-R. 1828).

Trial counsel agreed that had he known about Mr. Ponticelli's longstanding reaction and behavior while using cocaine he would have presented it to the jury because it would have supported his theory of defense (PC-R. 1834). He would have also provided such information to his experts (PC-R. 1836).

D. THE POSTCONVICTION APPEAL

This Court found that Mr. Ponticelli could not establish the prejudice to prove his claim that his trial counsel was ineffective at the penalty phase, despite the fact that trial counsel's performance constituted deficient performance. *Ponticelli*, 941 So. 2d at 1096-7. And, that Mr. Ponticelli did not establish that his trial counsel was ineffective at the guilt phase. Id. at 1102-4.

E. THE SUCCESSIVE POSTCONVICTION PROCEEDINGS

In 2006, Mr. Ponticelli obtained documents that he had not received previously. One document was a letter from Inv. Munster to an individual at the Department of Corrections (PC-R2. 725-6). In the letter, Inv. Munster made clear that he "hope[d] the information provided in this letter will facilitate [Freeman] earning [] gain time." (Def. Ex. 3). Indeed, the body of the letter specified several "meritorious deeds" that Freeman performed in assisting law enforcement and the prosecution (Id.). The first reference of a "meritorious deed" was to Freeman's assistance on the Ponticelli case (Id.). Freeman also assisted law enforcement on several other cases and had "worked as an informant" (Id.).

Another document was a letter dated June 2, 1988, from an individual at DOC to Linda Freeman, Dennis Freeman's wife (PC-R2. 728-9). The letter indicates that Freeman's wife was told of promises made to her husband by the Office of the State Attorney to reduce his sentence that had not been fulfilled (Def. Ex. 5).

Additionally, Mr. Ponticelli obtained Freeman's trial attorney file.

At the evidentiary hearing, in explaining his prior representation of Freeman, Frederick Landt testified that there were two ways for an individual to get gain time – the first was simply if he was incarcerated and the second was for substantial assistance to authorities (PC-R2. 534). However, as to the first way, an individual who was incarcerated in county jail was not entitled to gain time (PC-R2. 534; See Def. Ex. 4).

Freeman's trial attorney file included letters that indicated that Freeman wanted the State to assist him in obtaining gain time, both regular gain time and that based on his "substantial assistance". At the time Freeman, was serving a seven (7) year sentence that began on

October 24, 1986.[5] Indeed, on March 30, 1988, Freeman's trial attorney notified the trial prosecutor in Mr. Ponticelli's case that he needed her assistance in order to have Freeman transported to DOC custody and classified so that Freeman could receive gain time based upon his "substantial assistance" (Def. Exs. 2, 4). Trial prosecutor, Sarah Ritterhoff-Williams, formerly Sarah Balius, testified that she recalled the issue that Freeman wanted gain time to be awarded to him (PC-R2. 489).

Following the communication with the trial prosecutor in Mr. Ponticelli's case, on April 19, 1988, Freeman's trial attorney wrote a letter to Assistant State Attorney Brad King that stated:

> Four to six weeks ago you and I conferred regarding Dennis Freeman's status. At that time you indicated that you could truthfully write a letter to the Department of Corrections on behalf of Dennis Freeman outlining at least fifteen acts of substantial assistance that Dennis has performed for your office and various police investigators. Each of these acts were of such significance that Dennis would be entitled to gain time in accordance with the entitlement to gain time outlined to you by the Department of Corrections.
>
> * * *
>
> This letter is a request that you follow through with this prior to your resignation being effected. ...

Def. Ex. 1. Mr. King, did not dispute the accuracy of the content of the letter (PC-R2. 472). Indeed, Mr. King admitted that he was aware that Freeman wanted gain time for his cooperation (PC-R2. 472).

In the following months, Freeman's trial attorney continued to seek assistance in obtaining gain time for Freeman. On May 19, 1988, Freeman's trial attorney wrote a letter to Inv. Munster, the lead investigator for the Marion County Sheriff's Office in the Ponticelli case, and requested that he assist him in gathering information so that Freeman could receive gain time (Def. Ex. 8; PC-R2. 406). And, on May 25, 1988, he attempted to call Inv. Munster to discuss Freeman's gain time (Def. Ex. 7; PC-R2. 404). On that same day, Inv. Munster penned a letter to the Department of Corrections requesting gain time on behalf of Freeman (Def. Ex. 3).

In addition to obtaining gain time to which Freeman would not normally be entitled due to his incarceration in the county jail, Freeman also sought "additional gain time based upon his substantial assistance to law enforcement authorities . . . (Def. Ex. 9; PC-R2. 408). Freeman was well aware of the efforts being made to obtain gain time and an early release from prison. *See* Def. Exs. 2, 8, 10.

[5]Freeman had been sentenced on eighteen felonies, however, the sentences were running concurrently (PC-R2. 766-7).

Freeman's DOC inmate record, to which the parties stipulated, evidences that he received a retroactive award of gain time dating back to November 11, 1986. He also received additional gain time after he was classified at DOC and the letters were written on his behalf. On the day of Freeman's deposition, July 1, 1988, Freeman received thirty-three days of meritorious gain time (PC-R2. 772)[6]. Indeed, Freeman received incentive gain time, administrative gain time, meritorious gain time[7] and provisional credits[8]. Mr. Freeman was released from the Marion County Jail on August 15, 1988, just a few days after testifying against Mr. Ponticelli (PC-R2. 768).

In addition to the Freeman information, Mr. Ponticelli also presented the testimony of Warren Brown. Brown confirmed that his brother's testimony at Mr. Ponticelli's evidentiary hearing was more accurate that the testimony at trial (PC-R2. 676). Specifically, though contradicting his trial testimony, Brown recalls meeting Mr. Ponticelli on Thanksgiving evening (PC-R2. 676). The evening turned into an impromptu party with twenty or more people. Warren Brown drank heavily that night and used cocaine (PC-R2. 677; 679-80). He saw Mr. Ponticelli use cocaine at the party. When he saw Mr. Ponticelli on Friday night, Brown had been drinking heavily again (PC-R2. 687). Before trial, the prosecutor told him and the others that she was not interested in their drug use, but just the facts of the case (PC-R2. 681). Based on the prosecutor's comments, Brown did not reveal anything about the cocaine party to the jury (Id.).

SUMMARY OF ARGUMENT

Mr. Ponticelli was deprived of the effective assistance of trial counsel at the guilt and penalty phases of his case, 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. Ponticelli's ineffective assistance of counsel claims was premised upon the Florida Supreme 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. Ponticelli's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

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

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[6] Under the statute, Freeman was not entitled to this type of gain time.

[7] His meritorious gain time was awarded after Inv. Munster's letter to DOC (PC-R2. 772).

[8] In July and August, 1988, shortly before and after testifying at Mr. Ponticelli's trial, Freeman received eighty (80) days of provisional gain time (PC-R2. 772).

A. INTRODUCTION

Mr. Ponticelli was deprived of the effective assistance of trial counsel at the guilt and penalty phase of his case. Mr. Ponticelli presented his ineffective assistance of counsel claims in Rule 3.851 motions. Following the evidentiary hearings, the circuit court erroneously denied Mr. Ponticelli's claims. When this Court heard Mr. Ponticelli's appeals of those decisions, it failed to conduct a *de novo* review of legal questions contained within the 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. Ponticelli's 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* was a repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein,[9] which renders Mr. Ponticelli'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").

Mr. Ponticelli 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. Ponticelli 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. PONTICELLI'S INEFFECTIVENESS CLAIMS

[9] 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. Ponticelli 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.

1. Retroactivity under *Witt*.

It is Mr. Ponticelli's 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. Ponticelli's claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law. Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Ponticelli's ineffective assistance of counsel claims, both at the guilt and penalty phases, 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 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.[10]

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

[10] 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.

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 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).[11]

[11]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.[12] 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

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

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

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.[13]

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 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

[13]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).

> 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. Ponticelli's 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. Ponticelli's 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. Ponticelli's case, this Court relied on *Sochor* to conduct its analysis of Mr. Ponticelli's claims.[14]

[14]For example, in finding that Mr. Ponticelli failed to establish that there was a reasonable probability that the result of the penalty phase proceeding would have been different if defense counsel had conducted a reasonable investigation into the lay witness testimony, this Court stated, "*See Sochor, 883 So. 2d at 774* (deferring to the trial court's factual finding that even if defense counsel had adequately investigated the penalty phase, he would not have been able to present evidence substantially different than that presented at the penalty phase)." *Ponticelli*, 941 So. 2d at 1097-98; *see also id.* at 1094 ("Applying the [Sochor] standard to the case at hand, we deny these claims"); *id.* at 1098 ("After weighing all the expert testimony, the trial court found Dr. Conger's testimony most credible, and we defer to the trial court's finding of fact when faced with conflicting expert testimony. *See Sochor*, 883 So. 2d at 783").

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.[15] 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.[16] 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.

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.

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[15] 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.

[16] 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).

In Mr. Ponticelli's case, as in *Porter*, this Court erroneously deferred to the trial court's findings to justify its decision to unreasonably "discount to irrelevance" pertinent exculpatory and mitigating evidence. *Id.* at 455. *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. Ponticelli's claims 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. Ponticelli's 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. PONTICELLI'S CASE

Porter error was committed in Mr. Ponticelli's case. Following the denial of Mr. Ponticelli's claims by the trial court, this Court affirmed the denial of relief. As to the guilt phase ineffective assistance, this Court erroneously deferred to the legal ruling that counsel's failure to investigate further and his resulting strategic decisions were reasonable. The reasonableness of counsel's decisions are questions of law as was recognized in *Porter v. McCollum*. Similarly, the determination that no prejudice resulted from trial counsel's failure to investigate and prepare for the penalty phase deferred to the circuit court's erroneous findings. This Court affirmed the circuit court's holding that prejudice was not shown on the basis that "After weighing all the expert testimony, the trial court found Dr. Conger's testimony most credible, and we defer to the trial court's finding of fact when faced with conflicting expert testimony." *Ponticelli*, 941 So. 2d at 1098.[17] 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

[17] In its September 9, 2004, order, the trial court denied this ineffectiveness claim. Regarding the lay witness testimony, the trial court found that Ponticelli "did not establish that he was prejudiced by counsel's failure to offer [this] testimony." The court recognized that much of this testimony was cumulative to that presented at trial since "counsel incorporated the witnesses from the guilt phase into consideration in the penalty phase." Furthermore, to the extent the testimony at the evidentiary hearing differed from testimony at trial, it would have had a negative effect on Ponticelli's case. As the trial court explained:

> Instead of being a young man who naively experimented with drugs for a short period of time, the lay witnesses presented at the evidentiary hearing portray the Defendant as a man who escaped the ill effects of drugs for a substantial period of time in Florida and then returned to a habit he knew was evil.

The trial court found that Ponticelli had not established that evidence available to counsel at the time of trial demonstrated Ponticelli had used cocaine at the time of the crime. Furthermore, regarding the mental health expert testimony, the trial court summarized the testimony presented at the evidentiary hearing and found Dr. Conger's testimony to be the most credible. These findings are supported by competent, substantial evidence; therefore, we affirm the trial court's denial of this claim. While we find that defense counsel's investigation into mitigating evidence was inadequate and constituted deficient performance, Ponticelli has not established that this deficiency prejudiced him.

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. Ponticelli by performing deficiently.

1. Deficient Performance.

In Mr. Ponticelli's case, trial counsel failed in his duty to conduct a reasonable investigation, including an investigation of guilt phase issues. Trial counsel had no strategic basis for failing to adequately represent Mr. Ponticelli regarding his competency to proceed and mental health issues in the guilt phase; to challenge state witnesses; and object to improper prosecutorial arguments. Trial counsel failed to adequately represent Mr. Ponticelli.

2. Prejudice.

a. guilt phase

Had trial counsel conducted an adequate investigation into Mr. Ponticelli's mental health he would have learned that Mr. Ponticelli was incompetent to proceed and had viable mental health defenses available to him.

Further, had trial counsel investigated and challenged the State's witnesses he could have demonstrated that the witnesses were not telling the truth on material facts and shown that Mr. Ponticelli did not commit first degree murder. Due to trial counsel's failure to adequately investigate and prepare, prejudice has been established.

b. penalty phase

The mitigation presented at Mr. Ponticelli's Rule 3.851 evidentiary hearing was qualitatively and quantitatively different from that presented at trial.

At trial, defense counsel presented scant testimony about Mr. Ponticelli's background, other than in the three weeks preceding the offense he was using cocaine on a daily basis. Trial counsel presented only the testimony of Dr. Mills, who explained the personality changes that occur when an individual uses intoxicants (R. 1321). Based on a hypothetical, Dr. Mills believed that Mr. Ponticelli was suffering from an extreme mental or emotional disturbance because of his repeated use of cocaine at the time of the crime (R. 1322, 1325).

However, in sentencing Mr. Ponticelli to death, the trial court did not find either mental health mitigator had been established (1171-2). In fact, the court stated: "there is absolutely no evidence that defendant used any alcohol or drugs on the day of the offense" (R. 1836).

Had trial counsel properly investigated and prepared, the jury would have heard that Tony Ponticelli's life began tragically when he was abandoned by his biological mother after a difficult birth, where he was a "blue baby" (PC-R. 805). Mr. Ponticelli was brought to the

Ponticelli home six months later along with several other foster children (PC-R. 793, 805). His childhood was unremarkable – he was quiet and happy and got along well with the other foster children (PC-R. 793). Eventually, the other foster children were placed with their natural parents and Tony remained with the Ponticelli's. He was adopted by the Ponticelli's when he was seven (PC-R. 793, 805). Later in his life, Mr. Ponticelli confided to his sister-in-law that he felt separated from the family because he was adopted and his adopted father seemed to have no time for him (PC-R. 799).

As Mr. Ponticelli approached his early teens he remained quiet and desperately tried to fit in with his peers (PC-R. 683). His desire to fit in contributed to the fact that he was a follower (PC-R. 683). Unfortunately, Mr. Ponticelli's desire to fit in was inhibited by his weight problem and the fact that he wore glasses which he was teased about (PC-R. 684).

Whether it was Mr. Ponticelli's desire to fit in with his friends or to escape the feelings that he didn't fit in with his family, he turned to drugs and alcohol at a young age; in junior high he experimented with marijuana and beer (PC-R. 685, 713, 726). In high school, Mr. Ponticelli's substance abuse continued and increased. He was using marijuana during school hours and also started experimenting with other drugs, including black beauties, mescaline, hash and Valium (PC-R. 686-87, 713, 726).

In high school, Mr. Ponticelli met Wendy Falanga, who was older than him; he developed a crush on her (PC-R. 772-73). Falanga convinced Mr. Ponticelli to begin using cocaine so that he could hang out with her (PC-R. 772-75). Mr. Ponticelli's use of cocaine progressed rapidly, probably because he was free-basing cocaine almost immediately after he started using it (PC-R. 691). His cocaine use caused him to neglect his school work; it even caused him to forego eating and sleeping because he was so strung out (PC-R. 810). In 1985 or 1986, Falanga got married and it "devastated Tony" (PC-R. 780). Following Falanga's marriage, his cocaine use increased (PC-R. 691).

When Mr. Ponticelli was not on drugs, he was sweet and respectful (PC-R. 777). His friends parents' liked him and he would spend time speaking to them (PC-R. 838). Additionally, Mr. Ponticelli helped his adoptive father with a cleaning business and was motivated to hold jobs in high school. But, when Mr. Ponticelli used cocaine his personality changed (PC-R. 688). As his friend, Michael Barnes explained, Mr. Ponticelli would get paranoid and start hallucinating (PC-R. 688-9).[18] Mr. Ponticelli also experienced mood swings: "He would go from being in the middle of a conversation to either getting really, really paranoid or breaking down and crying, and almost putting himself like in a fetal position and rocking" (PC-R. 778).

[18]Barnes' testimony about the change in Mr. Ponticelli's personality was corroborated by every witness who observed him use cocaine (PC-R. 510-11, 565, 721, 775-78, 930, 969-70).

In high school, Mr. Ponticelli confided in Concetta O'Berry that he had a drug problem; he was using cocaine every day and "he wanted to get clean" (PC-R. 840). With help, Mr. Ponticelli was able to graduate from high school. Shortly thereafter, his parents moved to Florida and Mr. Ponticelli went with them. The change of scenery and peer group appeared to help Mr. Ponticelli stop using cocaine. He held a job and spent time working on his car (PC-R. 559-60). He appeared to return to his easy going, relaxed self (PC-R. 851, 927). Further, while in Florida, Mr. Ponticelli began dating Patricia Leonard (PC-R. 849). Leonard testified that Tony was very good to her son (PC-R. 858).

In September, 1987, Mr. Ponticelli returned to New York to attend the wedding of his cousin, Joseph Orlando, and extended his trip in order to spend some time with his cousin and family (PC-R. 716-17). While Mr. Ponticelli was in New York, he started using cocaine; the two cousins went on a cocaine binge and also drank a lot of alcohol; Mr. Ponticelli was using twenty-eight to thirty-six grams over a four to five day period (PC-R. 719-20, 852). Mr. Ponticelli's reaction to cocaine had not changed – he got paranoid and anxious, more so than most people (PC-R. 721).

Mr. Ponticelli returned to Florida in late October with his friend Michael Barnes. The night they returned to Florida, Barnes and Mr. Ponticelli's cousin John Como used cocaine with Tony (PC-R. 697). Barnes and Como witnessed Mr. Ponticelli have a severe paranoid reaction to the drug, which they described as he was acting like a madman (PC-R. 733-34). Mr. Ponticelli ended up hiding in a cabinet, drenched in sweat with two knives in his hands swearing that there was somebody on the roof (PC-R. 698). In the three weeks preceding the offense, Mr. Ponticelli spent nearly every day with John Turner. Turner testified about he and Mr. Ponticelli's cocaine addiction in the weeks preceding the crime:

> Q: How did you obtain the cocaine that you and Mr. Ponticelli used during that period of time?
> A: A few different ways. We first had just powdered cocaine, and we would cook it up, freebase it. And after a while I guess our – I guess – I guess our bodies just didn't work anymore, and we were – we were just spilling and wasting more than we were cooking up. We would just drop it, and we were shaking.
> Q: What do you mean when you say you're shaking?
> A: Shaking, I mean, just –
> Q: Like tremors?
> A: Yes. Just shaking. Just trying to get the next hit.
> Q: Was that anticipation of getting the hit or was it the cocaine that was messing up your physical function, do you know?
> A: I think it was both. It was just the – it was the anticipation of – that's the whole thing about freebasing or crack cocaine is that you just – you can't wait to get to the next hit. Thats' all you're trying to do. You're just trying to get to the next hit, and that's all that matters.

(PC-R. 966-68).

Every time, which meant nearly everyday, Mr. Ponticelli used cocaine at Turner's house, he was "wigging" (PC-R. 969).

Mr. Ponticelli's cocaine use continued during the week of the homicides. On Thursday evening, Mr. Ponticelli attended a cocaine party at Keith Dotson's house (PC-R. 974, 977). The party lasted until the early morning hours of the following day (PC-R. 974, 977). When they returned to the party, after purchasing cocaine from the Grandinettis, Mr. Ponticelli showed Dotson, Brian Burgess and Ed Brown how to cook the cocaine and make a homemade pipe to smoke it (PC-R. 655). He free based cocaine that night and reacted the way he always did when he used cocaine (PC-R. 975, 980).

On the evening of the offense, the Grandinetti's sought out Mr. Ponticelli because he owed them money (PC-R. 945). Timothy Keesee saw Mr. Ponticelli within an hour or so of the offense at the Grandinetti trailer (PC-R. 532). Tony was "nervous, sitting on the edge of his chair, anxious to leave. He mentioned a couple of times: 'I need to get going.'" (PC-R. 527). Keesee was only at the trailer for about forty minutes, but in that time he witnessed Tony use cocaine and he saw cocaine on the table along with a razor blade and glass (PC-R. 509).

After Keesee saw Mr. Ponticelli at the trailer, Frank Porcillo, a friend of Tony's, ran into him at the convenience store, near the pay phone (PC-R. 568). Mr. Ponticelli approached Porcillo and acted like he "was like going off the edge." (PC-R. 569). Later in the evening, Robert Meade, who testified at trial, saw Mr. Ponticelli and believed that he was on cocaine because he was acting very irrational and crazy (PC-R. 932, 937).

In addition to the overwhelming amount of information trial counsel could have presented about Mr. Ponticelli's background, history and behavior even up to within hours of the offense, trial counsel could have also presented evidence of Mr. Ponticelli's mental make-up prior to and at the time of the offense. At Mr. Ponticelli's evidentiary hearing, he presented a substantial amount of expert information about his mental health.

Dr. Michael Herkov, a psychologist, testified that he found significant evidence to suggest that Mr. Ponticelli was intoxicated on cocaine at the time of the offense (PC-R. 1373). He noted the amount of cocaine use the night before the offense, his chronic cocaine use in the week preceding the offense, his lack of sleep and his use of cocaine within hours of the offense in forming his opinion (PC-R. 1373).[19] Dr. Herkov believed that Mr. Ponticelli was suffering from an extreme mental or emotional disturbance at the time of the offense and that his ability to conform his behavior to the requirements of the law was substantially impaired (PC-R. 1374). In forming these opinions, Keesee's testimony about the use of cocaine at the trailer was important to Dr. Herkov (PC-R. 1389). Dr. Herkov also testified that Mr. Ponticelli was under the influence of cocaine for the entire day or two before the offense due to the fact that cocaine has long lasting effects on brain receptor

[19]Dr. Herkov also found that Mr. Ponticelli was a severe cocaine addict (PC-R. 1387).

modifications (PC-R. 1396-97). In fact, Dr. Herkov opined that Mr. Ponticelli's neurotransmitters were altered and would have been altered even had he not used cocaine in eighteen hours prior to the offense (PC-R. 1445). Dr. Herkov also explained that: "[y]ou can have the feelings of paranoia that can go much longer than the high. People who are strung out on cocaine can show signs of paranoia for hours and sometimes even days, especially in these chronic abusers" (PC-R. 2396). Mr. Ponticelli's cocaine use could have affected his ability to plan and premeditate (PC-R. 1407).

In addition to Dr. Herkov, Dr. Harry Krop also indicated that at the time of trial, as his report stated, Mr. Ponticelli was intoxicated from his cocaine use at the time of the offense and his ability to conform his conduct to the requirements of the law may have been diminished (PC-R. 1535).[20]

During Mr. Ponticelli's trial, defense counsel attempted to introduce the testimony of Dr. Marc Branch during the guilt phase (PC-R. 1646). However, the State objected and the court did not allow the jury to hear Dr. Branch's testimony (PC-R. 1646). Dr. Branch testified at the postconviction evidentiary hearing that in 1988, he made several assumptions based on the information that was presented to him by trial counsel. For example, he believed that Mr. Ponticelli's cocaine use was very heavy, but for a short period of time (PC-R. 1653). Following the trial, he learned that Mr. Ponticelli's cocaine use was much more longstanding and that he was in fact a poly-substance abuser (PC-R. 1653-54).

In 1988, Dr. Branch was aware that there was at least one account of Mr. Ponticelli engaging in peeping (PC-R. 1654-55). Dr. Branch later learned that Mr. Ponticelli often suffered from paranoid delusions while using cocaine (PC-R. 1655). The behaviors he learned that Mr. Ponticelli engaged in while on cocaine were consistent with psychosis; Mr. Ponticelli experienced both hallucinations and delusions (PC-R. 1656).

In 1988, Dr. Branch was only able to say that it was possible that Mr. Ponticelli was psychotic at the time of the offense (PC-R. 1668). However, based on all of the information he learned following the offense he was reasonably certain that Mr. Ponticelli was psychotic at the time of the offense due to his ingestion of cocaine (PC-R. 1669). Dr. Branch found that the statutory mental health mitigators applied to Mr. Ponticelli, due to his cocaine use near the time of the offense (PC-R. 1673).

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[20]Dr. Krop had evaluated Mr. Ponticelli at the time of trial for competency. Dr. Krop testified at the evidentiary hearing that his report included mitigating information and had he been asked he would have testified to the existence of both statutory mental health mitigators: that Mr. Ponticelli suffered from an extreme mental or emotional disturbance at the time of the crimes and that his capacity to appreciate the criminality of his conduct was substantially impaired (PC-R. 1535).

Additionally, Dr. Barry Crown, a neuropsychologist, conducted testing on Mr. Ponticelli in 1995 (PC-R. 1214). Mr. Ponticelli's testing reflected deficiencies in his brain functioning (PC-R. 1218-19, 1220, 1221, 1226, 1230-31, 1232, 1233). Overall, Dr. Crown found that Mr. Ponticelli's brain functioning was significantly impaired and "that his deficits were particularly related to executive functions" (PC-R. 1234-35). Executive functioning is controlled by the frontal lobes of the brain, which are responsible for planning, organization, concentration, attention, memory and understanding the long-term consequences of immediate behavior (PC-R. 1215).

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Ponticelli had a vast amount of non-statutory mitigation as well statutory mental health mitigation.

3. Analysis under *Porter*.

This Court's ruling with respect to the prejudice prong merely accepts the circuit court's conclusory language and 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. Ponticelli was not prejudiced by trial counsel's deficient performance. The findings in this case are starkly in violation of *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. Ponticelli's substantial claims of due process violations and ineffective assistance of counsel have not been given serious consideration as required by *Porter*. Mr. Ponticelli 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. Ponticelli requests that this Court grant him a new trial and/or 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 Kenneth Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 6th day of September, 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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