**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. SC11-946**

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**WILLIAM TURNER,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

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# INITIAL BRIEF OF APPELLANT


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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Turner's successive motion for post-conviction relief. The motion was brought pursuant to rules 3.850 and 3.851 of the Florida Rules of Criminal Procedure.

The following abbreviations will be used 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;

"PCR" -- record on appeal from initial denial of post-conviction relief;

"PCR2" -- record on appeal from denial of successive motion for post-conviction relief.

## INTRODUCTION

In Porter v. McCollum, 558 U.S. --, 130 S. Ct. 447 (2009), the United States Supreme Court ruled that this court's Strickland[1] analysis in Porter v. State, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." 130 S. Ct. at 455. The Court so ruled despite the requirement in the Anti-Terrorism Effective Death Penalty Act (AEDPA) that federal courts accord deference to state courts' application of federal constitutional law.

Likewise, AEDPA provides that federal habeas relief from a

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

state court judgment does not lie merely because a federal court disagrees with a state court's application of federal constitutional law. Rather, habeas relief is permissible only where the state court's application of federal constitutional law is clearly and unreasonably wrong. The Supreme Court in Porter held that this court's application of Strickland warranted habeas relief even under the strict standards of the AEDPA.

The facts and circumstances here are uniquely and remarkably similar to those found by the Supreme Court to require habeas relief in Porter. Precisely as in Porter, where trial counsel's failure to present evidence of Porter's Korean War service required federal habeas relief, trial counsel for Turner failed to present evidence to the jury of Turner's combat service in Vietnam. At Turner's penalty phase, his military service was glossed over and the evidence so scant that the prosecutor was able to argue that Turner's claims of Vietnam War combat duty to court-appointed mental health experts were not to be believed and demonstrated a general "lack of credibility." R 1107.

After Turner's jury returned its advisory recommendation of a death sentence, by the barest seven-to-five vote, trial counsel presented evidence of Turner's Vietnam service to the trial judge in the Phase III sentencing portion of the trial.

The trial judge, again as in Porter, found that Turner's combat military service was of "no significance." R 307.

This court would be hard-pressed to find another case as squarely on point with Porter as Turner's. Due to the unique similarities between Porter and Turner's case, discussed in far more depth and detail later in this brief, it is incumbent upon this court to assess whether its unreasonable application of Strickland in Turner's case warrants the same relief as that required in Porter.

This court has previously addressed whether a Supreme Court finding that this court misapplied Supreme Court precedent must be given retroactive effect. 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), where a jury was not instructed that it could and should consider nonstatutory mitigating circumstances when returning an advisory verdict in a capital penalty phase proceeding.[2] Likewise, in Espinosa v. Florida, 505 U.S. 1079 (1992), the Supreme Court summarily reversed a decision in which this court held that Maynard v. Cartwright, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a

[2] AEDPA was not in effect at the time of the decision in Hitchcock, so there was no requirement that the Supreme Court determine that this court's decision was clearly or unreasonably wrong. The Court's review in Hitchcock was de novo.

Florida capital penalty phase proceedings was merely advisory.[3]

Following the decisions in Hitchcock and Espinosa, this court was called upon to address whether certain individuals whose death sentences had likewise been affirmed by this court under the same misapprehension of federal law could 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 the denial by this court of the proper application of federal constitutional law should permit such individuals to present their claims anew 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 James because "it would not be fair to deprive him of the Espinosa ruling").

Turner, whose ineffective-assistance-of-counsel claims were heard and decided by this court before Porter was rendered,

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[3] The decision by the United States Supreme Court in Espinosa was in the course of direct review of this court's decision affirming a death sentence on direct appeal. The Supreme Court's decision was therefore not subject to the procedural provisions of federal habeas review, and the Supreme Court thus reviewed this court's decision de novo.

seeks in this appeal only the same consideration that Porter received. Turner seeks here to have his ineffectiveness claims reheard and reevaluated using the applicable Strickland standard, i.e., the standard that the Supreme Court applied in Porter's case to find that a resentencing was warranted.[4]

## STATEMENT OF THE CASE

On July 18, 1984, Turner was indicted on two counts of first-degree murder for the deaths of his estranged wife (Count I) and her roommate (Count II). R 11. Turner entered pleas of not guilty. Turner was convicted of first-degree murder on both counts on August 16, 1985. R 190-191. Following a capital penalty phase proceeding, the jury recommended a death sentence on Count I by a vote of seven-to-five, and a life sentence on Count II by a vote of seven-to-five. R 212-213. On November 1, 1985, the trial court sentenced Turner to death on Count I and to life in prison on Count II. R 1451.

On direct appeal, the case was remanded twice for evidentiary hearings concerning Turner's absence from critical stages of his trial. After the remands, Turner's convictions

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

and sentences were affirmed by this court on July 7, 1988. Rehearing was denied on September 22, 1988. Turner v. State, 530 So. 2d 45 (Fla. 1988) (McDonald and Barkett, JJ., concur as to guilt but dissent as to penalty). The United States Supreme Court denied certiorari on February 21, 1989, Turner v. Florida, 489 U.S. 1040 (1989) (table), making any motion pursuant to the then-existing version of rule 3.850 of the Florida Rules of Criminal Procedure due on February 21, 1991, under the two-year provision in the rule at that time.

On March 29, 1990, nearly 11 months before his rule 3.850 motion was due under the rule's former two-year time limitation, Florida Governor Bob Martinez signed a death warrant scheduling Turner's execution for May 30, 1990. The Florida Office of Capital Collateral Representative moved for a stay of execution for Turner asserting that they were unable to represent Turner and that outside counsel had to be recruited to handle his case. On April 26, 1990, this court granted a stay of execution until private counsel could be located for Turner. On May 25, 1990, the Tallahassee law firm of Ausley McMullen informed the court that it would represent Turner pro bono, and the court ordered that Turner's rule 3.850 motion be filed by September 25, 1990. That date was extended by the court to October 15, 1990, and Turner's rule 3.850 motion to vacate was filed in the circuit court for Duval County on that date, less than five months after

counsel had been appointed.

With less than five months in which to prepare Turner's post-conviction motion (i.e., to read and become familiar with his prior trial and appellate proceedings; to investigate the case anew, both as to guilt phase and penalty phase issues; to research all applicable law; to file an original "state habeas petition" in this court; and to file a comprehensive post-conviction motion in the circuit court that would determine whether Turner would live or be put to death), pro bono counsel filed a voluminous motion on Turner's behalf.

The motion was supported by some 78 appendix exhibits that included affidavits from over 45 individuals who knew Turner (lawyers, medical professionals, jail personnel, friends, ministers, co-workers, neighbors, hitherto undiscovered eyewitnesses to the crimes, fellow Vietnam War combat veterans, and others) who were readily available to testify at his trial and penalty phase – but who were never sought or contacted by Turner's trial counsel. A mere 20 days after these voluminous materials were filed, the trial judge summarily denied the motion without granting so much as a court appearance. The denial of relief was affirmed by this court. Turner v. State, 614 So. 2d 1075 (Fla. 1992). Such cursory treatment by the trial court is, of course, no longer permitted after this court's decision in Huff v. State, 622 So. 2d 982, 983 (Fla.

1993) (requiring opportunity to make oral argument in support of post-conviction claims and for entitlement to an evidentiary hearing.)

Contemporaneous with the filing of his rule 3.850 motion in this court, Turner filed an original habeas corpus petition in this court contending, inter alia, that the Florida courts failed at trial and on direct appeal to give proper and due consideration to mitigating evidence presented at his trial penalty phase. In his habeas petition, Turner alleged that the trial court and this court failed to properly consider his mitigating evidence at trial and on direct appeal based on this court's holdings in Campbell v. State, 571 So. 2d 415 (Fla. 1990), revised & superseded on denial of rehearing, 571 So. 2d 415 (Fla. 1990), and Nibert v. State, 574 So. 2d 1059 (Fla. 1990). That petition was denied by this court on December 24, 1992. Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992).

Turner filed his first and only petition for federal habeas corpus relief on or about July 16, 1993. On August 31, 2001, the district court entered an order dismissing claims V(A) and (B) (in part) and IX; and striking Claim XI (instructing that the request for evidentiary hearing be made by separate motion). The court ordered supplemental briefing on the remaining claims. On June 26, 2002, the court denied the petition in its entirety but "without prejudice to Petitioner's right to raise a claim

pursuant to Atkins v. Virginia[5] in a separate petition in this Court, after exhausting such a claim in the state courts." Order at 291. Turner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. That court affirmed. Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003). Turner's petition for a writ of certiorari to the United States Supreme Court was denied on May 3, 2004. Turner v. Crosby, 541 U.S. 2104 (2004) (table).

During the pendency of Turner's federal habeas corpus appeal, and after issuance by the United States Supreme Court of its opinion in Atkins, Turner filed a rule 3.850 motion in circuit court grounded on Atkins. On May 6, 2003, the circuit court denied the motion without prejudice to refile at the conclusion of then-pending federal habeas corpus proceedings. On August 18, 2006, Turner refiled a rule 3.850 motion based on the Atkins decision. The circuit court denied relief on September 14, 2009. This court affirmed the denial of relief on September

[5] 536 U.S. 304 (2002) (holding that Eighth and Fourteenth Amendments prohibit execution of mentally retarded persons).

28, 2010. Turner v. State, 2010 WL 3802538 (Fla. Sept. 28, 2010).

## STATEMENT OF THE FACTS

The underlying facts of the crime in this case are set forth in two prior opinions of this court. See Turner v. State, 530 So. 2d 45 (1988) (McDonald and Barkett, JJ., concur as to guilt but dissent as to penalty); Turner v. State, 614 So. 2d 1075 (Fla. 1992).

TRIAL PRESENTATION

Thirteen months after trial counsel were appointed to this case, Turner went to trial and was convicted of first-degree murder in the deaths of his estranged wife, Shirley, and her roommate, Joyce Brown. One week after the guilt verdicts were rendered, the penalty phase was conducted. At the commencement of the penalty phase, trial counsel informed the court that they "needed additional time within which to prepare" for the penalty phase, for "obtaining various documents," "locating witnesses," and for other basic and necessary trial functions. Counsel told the court that at that time that they could "present only what we have been able to obtain in the last five days." R 1177-78 (emphasis added). Counsel admitted they had not "had time and would not be able to . . . investigate all the circumstances and matters in [Turner's] background" necessary for an adequate presentation of mitigating evidence. R. 1179.

Counsel thus proceeded to the penalty phase, by their own admission, grievously unprepared. Although they had barely scratched the surface of what was available, counsel presented six witnesses on behalf Turner's life: his father, a brother, a coworker, a work supervisor, a school records custodian, and a psychiatrist. The hasty and ill-prepared case was weak and unimpressive, as evidenced by the trial court's order sentencing Turner to death.

Significantly, at the post-jury verdict sentencing phase before the trial court, trial counsel did present evidence of Turner's service in Vietnam. The evidence was obtained and presented, however, after the jury had returned its sentencing recommendation of death, by a seven-to-five vote. The proof of his Vietnam service was therefore unknown to the jury that voted for Turner's death by a one-vote margin.

In its capital sentencing order, the trial court found that counsel had failed to prove that Turner met the criteria for the two statutory mental mitigating factors.[6] As to any nonstatutory mitigation offered or argued at Turner's penalty phase, the court concluded that Turner's military service was of "no significance"; that allegations that he was a "good family man and father" were "not proven"; and that his diligence as an employee was of "little significance." R 307. In the only

trial court finding approximating nonstatutory mitigation, the court found that Turner had "in the past demonstrated concern for others and unselfishness," but considered "the weight" of this factor to be "only slight." Id.

Post-conviction counsel were appointed to Turner's case in April 1990. Less than five months later, Turner filed a rule 3.850 motion and appendix that proffered a wealth of mitigating evidence never sought by or known to his trial lawyers. This readily available evidence probably would have tipped the delicate seven-to-five jury vote in favor of Turner's life. This material was thoroughly pled in Turner's rule 3.850 motion and was documented in the appendix thereto, Apps. 1-78.[7]

The appendix submitted with Turner's rule 3.850 motion contained volumes of crucial mitigating evidence concerning Turner's life (e.g., his "Baker Act" files and Vietnam War combat records) and sworn statements from dozens of witnesses who were readily identified and located during the five months afforded to post-conviction counsel in which to prepare the motion.

All of these witness could, and would, have described to Turner's jury in compelling and understandable terms the tragic

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[6] See §§ 921.141(6)(b), (6)(f), Fla. Stat.

[7] References to exhibits that were submitted in the original rule 3.850 appendix are denoted in that motion as "App.___," followed by the tab number in that appendix.

road that led to the deaths of Shirley Turner and Joyce Brown. These witnesses were available to describe and detail Turner's difficult childhood and abnormal home life. They were available to testify to his learning disabilities and indicia of mental problems throughout his schooling. They were available to attest to the significance of his having a brother with severe mental retardation (an IQ of 35), and a sister who died in childhood of a brain tumor. They would have spoken about his valiant and traumatic Vietnam War combat experiences, his 14 years of loving and devoted marriage and proud responsible fatherhood, and his many years of exemplary and even heroic citizenship. The jury would have heard about Turner's three dramatic life-saving rescues of endangered citizens as a state transportation worker – only one of which was known to the jury that voted to take Turner's life.

Turner’s entire life up until the dissolution of his family and his ensuing nervous breakdown was both remarkable and sympathetic. Turner is and was a man with significant mental limitations, who struggled to surmount his impairments, become a good citizen, and escape the mental horrors forever imprinted upon him during his service to the United States in the Vietnam War. Equally important, there were witnesses available who had contact with Turner around the time of the offense who could have enlightened the jury as to his very disturbed state of mind

during that key period. Friends and family who were close to him before his explosion were available to describe what led up directly to the tragedy, but they were never sought or used by trial counsel in this critical aspect of Turner's defense. Apps. 23-28, 30, 45.

Other proffered crucial witnesses, similarly undiscovered by trial counsel, actually saw the offense firsthand. These key individuals were available to describe Turner's obviously deranged state of mind at the time. App. 5-12. There were still other important witnesses who saw and interacted with Turner shortly after the offense who could have testified to his utter disorientation and genuine amnesia of the event, and his extreme remorse upon coming to comprehend months later what he had done. App. 4, 32, 33.

Any one of these over 45 witnesses could have made a difference in the outcome of the penalty proceeding. Had counsel performed the requisite investigation, preparation, and presentation at the penalty phase of Turner's trial, a plethora of mitigating circumstances would have been proven and Turner would not have been sentenced to death. This material, presented to the Florida courts in prior 3.850 proceedings and summarily rejected, includes mitigating evidence of severe mental illness at the time of the offense and undiscovered eyewitnesses to the actual offense.

In affirming Turner's death sentence, this court placed great emphasis on its determination that Turner was not "in an uncontrollable frenzy" at the time of the offense. The court relied entirely on the "testimony of [two] witnesses that Turner temporarily ceased the attack and hid when a policeman drove by, resuming the attack thereafter." Turner v. State, 530 So. 2d 45, 51 (Fla. 1987); see also trial court's sentencing order, R 306 (rejecting "substantially impaired capacity" statutory mitigating factor (6)(f), in part, because "the defendant stopped his attack on Joyce Brown when a police car passed on the street and resumed the attack after the passing").

However, had counsel investigated the crime scene, they would have learned, and the jury and courts would have known, that these two all-important witnesses were wholly unreliable. One of these two witnesses upon whose credibility Turner's life hinged, James Andrews, was a chronic alcoholic "well known in the community" as someone who "can't be trusted or believed." App. 14. See also App. 13 (Affidavit of Andrews himself: "I was kind of high when I was interviewed by the police after the incident. I had the shakes . . . One time I made a fork move with the power of my mind."); and App. 74.

The only other witness on this crucial point was Irene Hall, the 14-year-old daughter of victim Joyce Brown, a witness of questionable reliability given the traumatic and hysterical

circumstances in which her observations were made. She testified – uncorroborated by anyone else – that Turner ran behind a house when the patrol car passed and then returned and resumed stabbing. R. 594, 603.

Had counsel or a defense investigator properly performed their duty by merely investigating the crime scene and talking to residents of the neighbourhood, they would have found numerous individuals who witnessed the entire offense -- witnesses critical to Turner's defense. Seven such individuals were proffered to the state and federal post-conviction courts as having been available at Turner's trial, to describe his deranged combat-trance-like state at the time of this tragedy. All the new eyewitnesses asserted that Turner at no point showed any recognition or concern when the police cruiser rolled past him -- despite a hail of rocks and bricks and shouts from a crowd of onlookers. All the witnesses recalled the patrol car passing and related that Turner remained oblivious throughout. App. 5, 6 ("He was crazy, a mad man. He was out of control . . . out of his senses"); 7 ("in his own world . . . stone cold crazy"); 8 ("completely out of this world . . . totally crazy at the time"); 10 ("He appeared to be crazy . . . out of his mind."); 11 ("The guy was totally out of it. He was a lunatic.").

It is difficult to imagine any material more worthy of

post-conviction consideration than the testimony of seven previously undiscovered or sought eyewitnesses to the actual offense. These witnesses would have established, at a bare minimum, that Turner met the statutory mental mitigating factors of "extreme mental or emotional disturbance," and "impaired capacity to conform to the requirements of the law." See §§ 921.141(6)(b), (6)(f), Fla. Stat.

Dr. George Barnard.

Dr. George Barnard, a leading forensic psychiatrist, was appointed by the trial court to examine Turner and was a witness for the State at the guilt-innocence phase. In his affidavit that he filed in this case, Dr. Barnard stated explicitly that he could have been a crucial witness for Turner at the penalty phase, had counsel simply asked him the most simple and basic inquiry relevant to a psychiatrist's role in the capital sentencing process:

> I was not asked to render an opinion concerning whether Mr. Turner met the mental mitigating factors outlined in the Florida Statutes. Had I been asked . . . I would have testified that the mitigating factors in Section 921/141(6)(b) and (f) were applicable to his mental state at the time of the crime.

App. 3 (emphasis added).

The failure of counsel to make such a fundamental inquiry in a case centered on mental health issues was unreasonable.

Indeed, this error alone might have made the difference between a death sentence and a life sentence for Turner. There is clearly a "reasonable probability" that the outcome of this case would have been different, i.e., there exists "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Patrick McGuinness, Esq.

Only nine hours after the offense, Turner was visited in jail by assistant public defender Patrick McGuinness. McGuinness, who previously had "interviewed probably 140 to 150 persons charged with murder" found Turner to be

> [A] very, very sick individual . . . among the four or five most bizarre individuals I had encountered.
>
> . . . I was struck by the fact that he seemed genuinely puzzled about what was going on. He did not seem to believe me when I told him he was reportedly involved in the murders of his wife and Joyce Brown.
>
> . . . He did not seem to know what it was he was supposed to have done that resulted in his arrest. He said in his "wildest dreams" he would not hurt the mother of his children and his wife.
>
> As I stated in my deposition, I did not believe . . . he understood the nature and quality of the act he was charged with. Further, it was my opinion he was suffering from a mental disease or defect. I informed Mr. Turner's subsequent counsel, Hank Coxe, of my interaction with Mr. Turner and apprised him of the basic substance of this Affidavit.

App. 4 (emphasis added). These impressions of Turner's "very very sick" mental state in the immediate aftermath of the offenses, relayed in detail to trial counsel, were proffered in post-conviction as evidence that trial counsel should have used on Turner's behalf.

There were other readily available witnesses to attest to Turner's mental illness. Jail psychologist Olney McLarty, who referred Turner to the jail psychiatrist for medication for depression and severe mood swings, stated: "I would see him virtually every day in order to keep a close watch on his suicidal tendencies and to avert his slipping further away from reality." App. 32 (emphasis added). Attorney Robert Goodstein, who was representing victim Shirley Turner in her domestic case with Turner would have testified to Ms. Turner's efforts to Baker Act Turner "based on her belief that he was insane." App. 45.

All of this evidence was readily available to trial counsel, and the presentation of any of it probably would have changed the penalty phase outcome, given the narrow seven-to-five jury vote for death.

At the penalty phase, counsel introduced Turner's school records, which contained a reference to the fact that Turner had scored 72 on an IQ test. The only other reference to this

strongly mitigating circumstance came out during testimony from Dr. Miller, a forensic psychiatrist who was appointed to examine Turner for sanity and competency. Dr. Miller testified at the penalty phase that based on his mental status examination, he believed Turner was of "borderline intelligence." That was the entire extent of any discussion of Turner's intellectual deficits as a mitigating factor weighing against a death sentence. Counsel put on no further evidence of Turner's mental deficits, and made no effort whatsoever to explain the significance of his impairments to the jury or court. In closing argument, he did not even mention Turner's intellectual impairments.

In his post-conviction pleadings, Turner proffered readily available evidence of mental impairments, including school records and affidavits describing learning disabilities and intellectual limitations. His appendix proffered testimony that he "was not very bright and had a very difficult time trying to understand even simple things. . . . He had to have things repeatedly told to him before he could grasp them." He was the "worst student in the family" of six surviving children (not including his severely retarded brother who is incapable of speech or schooling, or his sister who died of a brain tumor at age 14). Consistent with borderline mental retardation, Turner was known throughout his schooling as "slow to learn." "He had

a hard time keeping up," "wasn't quite right," and "probably should have been retained," but instead he received "social promotions" to the next grade level. App. 19, 21, 34-36, 41, 42, 57, 58.

Further, it is highly significant that two of Turner's siblings were born with severely damaged brains. His brother, Michael, has an IQ of 35, and is totally unable to function in the most basic respects, such as speech. His sister, Deborah, died at the age of 14 of a brain tumor, after a lengthy illness. Although the jury heard testimony about Turner's disabled family members, and his dutiful love and care for them, no effort was made to demonstrate that Turner, too, was mentally impaired. Indeed, the jury and sentencing court had no appreciation of the significance of Turner's low mental functioning for other aspects of his life, including the conditions that led to his offense. Such information would have been heavily mitigating, probably even preclusive of a death sentence.

Heavy Vietnam War combat duty.

During closing argument at the guilt phase, the prosecuting attorney argued to the jury that Turner's claims of Vietnam War combat duty were not to be believed and demonstrated a general "lack of credibility" in his statements to the examining psychiatrists. R 1107. The prosecuting attorney was wrong.

Turner served the United States honorably during the

Vietnam War. He participated in intense infantry-based ground combat. He bore mental scars created by the horrors of war, and he was decorated for his combat service. He was part of a combat unit described as "Vietnam's Forgotten Heroes." App. 46 ("Vietnam's Forgotten Heroes: The-United States Air Force Security Police in Action," Combat Illustrated magazine).

However, Turner's service was more than forgotten – the simple fact that he served (an undisputed matter of record) was challenged at perhaps the most pivotal moment of his life. Turner was accused of "faking" service to his country to the very jurors charged with determining Turner's fate.

These jurors never had the benefit of viewing any records of his military service other than an honorable discharge form. The only testimony regarding his service was a brief comment made in connection with psychiatric testimony at the guilt-innocence phase of trial, and from Turner's father. Turner's trial counsel left the issue of his Vietnam War service entirely unclear.

Indeed, whether Turner even went to Vietnam was not clearly reflected in the record. During closing argument at the penalty phase, defense counsel alluded to Turner's military service, but never mentioned that he served in Vietnam or that he was a combat veteran.

Turner is indeed a combat veteran of the Vietnam War. The

failure of his attorneys to investigate his service, to substantiate his war experiences, and to present to the jury an accurate picture of his service was unreasonable and ineffective. The appendix proffered Turner's military records and documentary source evidence of Turner's actual combat mission in Vietnam. See App. 16, 17, 48, 49 (excerpts from Air Base Defense in the Republic of Vietnam 1961-1973, United States Air Force); App. 47 (History of 821st Combat Security Police Squadron, March - May 1968); App. 46 ("Vietnam's Forgotten Heroes: The United States Air Force Security Police in Action," Combat Illustrated magazine).

An account of Turner's Vietnam duty was presented in his petition at pp. I-30-35, supported by App. 16, 17, 46-53. The jury should have known the powerful story of his service in Vietnam. Turner served in a special unit created in response to the devastating Tet Offensive in January, 1968. App. 47. The unit, the 821st Combat Police Security Squadron, was deployed continuously to counter the threat of further offensives and to replace combat casualties due to wounds or fatigue. Id.

Included in appendix 16 was the Affidavit of Retired Master Sergeant Larry Foster, an instructor where Turner and the 821st were “highly trained in reconnaissance, ambush, and search-and-destroy.” Once in Vietnam, the air force bases housing the unit, including Phan Rang, where Turner was stationed, “were hit

by rocket attacks many times. . . which did a lot of destruction":

> There were many air force personnel injured and killed, some of whom were the security policemen. There were also ground attacks by the enemy.
>
> The ground attacks came from the villages that had sprung up around the bases. The people occupying these villages for the most part were innocent civilians and had no part in the attacks. The enemy used these villages to attack from because of the cover it gave, and because the enemy knew that Americans were opposed to killing innocent people. We had no choice but to return fire into these villages.
>
> . . . I remember many times looking out on the air strips and seeing a sight that I will never forget. What I saw were hundreds of silver coffins glistening in the Viet Nam sun. In these coffins were American soldiers. This had a sobering effect on everyone. The fear of dying became very real. Some of us were able to handle this but there were many more who anguished over the thought of dying. Some of the men began to drink in order to get by with everyday life and to be able to sleep at night, and to get through the night without having any nightmares.

Appendix 16; see also affidavit of Narciso Valdez, who trained with Turner and volunteered with him to go to Vietnam. App. 17 (describing unit as "first line of defense" for the air bases).

Turner served the United States with honor during a brutal war. This is "significant" mitigation evidence. Jackson v. Dugger, 931 F.2d 712, 717-18 (11th Cir. 1991). In Porter, the

Supreme Court condemned the failure of the Florida courts to accord proper mitigating weight to Porter's military service. In Porter, the trial court had found Porter's military service to be of "inconsequential proportions" and this court affirmed. 130 S. Ct. at 451.

This is precisely the same unconstitutional treatment that Turner received regarding his military service. The trial court found his service to be of "no significance[,]" and this court affirmed. R 307. As is known by any combat veteran (and as the United States Supreme Court held in Porter) honorable combat service to the United States during wartime is not an act of "no significance." Such service demands consideration. Had trial counsel presented the powerful evidence available regarding Turner's combat duty and not simply a photograph of Turner in uniform, this alone might have tipped the balance with the narrowly divided jury.

Exemplary citizenship.

Turner consistently demonstrated exemplary citizenship and was, in every sense of the word, a good Samaritan. Although the jury and sentencing court were aware of his courageous rescue of a woman being kidnapped and raped (R.1217-25), they did not know that this act was typical of William Turner and that such deeds were part of a lifelong pattern of extraordinary conduct:

On three separate occasions I witnesses Bill

> Turner perform acts of true heroism. One event, when he interrupted an abduction and rape, I testified about at Bill's trial. The other two times Bill prevented people from committing suicide [while we were working on bridges for DOT]. The first time, we saw a man standing on the bridge, ready to jump. Bill ran up and physically stopped him from jumping. The second time, I thought the guy was joking but fortunately Bill took him seriously. Bill talked to that person and kept him occupied until the police arrived.

Affidavit of Mark Ballard, App. 23.

It is noteworthy that Ballard testified at Turner's penalty phase, but did not testify about the above experiences because counsel simply "didn't ask me any other questions about Bill." Id. Had counsel interviewed his witness conscientiously, he would have presented evidence of two other life-saving acts performed by Turner, and the trial court could not have concluded, as it did, that the mitigating weight of such evidence was "only slight." It certainly would not be slight to the individuals whose lives Turner saved. See also App. 27 (affidavit of Paul Pappas, former Secretary of the Florida Department of Transportation, that Bill Turner "was a dedicated employee who held public service in the highest and the best sense of the word. Turner made me very proud, and made his co-workers proud to be a part of that department.").

In addition to Turner's three courageous rescues of complete strangers, Turner also demonstrated exemplary

citizenship by providing valuable assistance to the state in its murder prosecution in State v. Leroy Reed, Case No. 82-1906-CF, in the circuit court in Duval County. Turner's cooperation and testimony were crucial to the state's case. See Brief of Appellee (State of Florida) in Reed v. State, App. 72. This, too, was overlooked by trial counsel in their scant background investigation of their capital client's life.

Skipper evidence.[8]

Trial counsel should also have presented readily available evidence of Turner's exemplary prison conduct and his high potential for rehabilitation. According to jail personnel, Turner

> was basically a very good, decent, likable person. He was very cooperative, and, unlike many inmates, was not vulgar or abusive toward the nursing staff and encouraged other inmates to be less offensive toward the staff.

Affidavit of Olney McLarty, jail psychologist and counselor, App 32. Jail nurse Jacquelyn Tyson concurred: "I recall that Mr. Turner was under a great deal of stress yet he tried to be cooperative and seemed to be a good-hearted person." App. 33. See also testimony of courtroom personnel in 1986 remand proceedings on direct appeal. (Trial bailiff Bobby J. Jackson testified, "Mr. Turner was a perfect gentleman the whole time."

[8] Skipper v. South Carolina, 476 U.S. 1 (1986).

Supp. RT. 34. Bailiff Jerry Blood testified that "Mr. Turner acted like a gentleman throughout the trial." Supp. RT. 50.). Potential for rehabilitation and good custodial conduct are mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1 (1986).

Other mitigating evidence was proffered in Turner's state and federal post-conviction pleadings, and supported by his appendix, including: his difficult and terribly abnormal childhood and early adulthood (App. 18, 20, 21, 40); his deeply-held religious convictions (App. 19, 20, 32, 36, 37, 38, 41); his profound remorse for his actions (App. 32, 33, 38); his drug and alcohol problems that began in Vietnam (App. 17, 36, 39); his history and his parents' histories of hypertension, high blood pressure, diabetes and stress-related physical problems (App. 34, 35, 65, 66). See petition at I-24-26, 39-44. All of this mitigating evidence was readily available to Turner's trial counsel for presentation on behalf of Turner's life. Counsel's failure to discover and present such evidence was unreasonable, and was due solely to counsel's admitted failure to prepare for the penalty phase. Any of this evidence could have made a difference in the jury's seven-to-five vote for death.

Turner proffered an overwhelming amount of mitigating evidence that was completely overlooked by trial counsel. As summarized above, the proffered evidence included: numerous new

eyewitnesses to the offense itself; a trial psychiatrist with an enhanced and strongly mitigating assessment; lawyers and other professionals personally aware of Turner's severe mental illness and chronic "borderline intelligence"; jail staff, ministers, teachers, and fellow Vietnam veterans; testimony about several life-saving rescues performed by Turner; and scores of others who knew Turner – all with powerfully mitigating testimony that surely would have tipped the balance in this seven-to-five case.

Turner's voluminous proffer certainly made a prima facie case for attorney ineffectiveness sufficient to warrant an evidentiary hearing and, ultimately, sentencing relief.

It is also important to note that collateral counsel, as described in the introductory sections above, worked under enormously difficult time constraints. Newly-recruited post-conviction counsel had only a few months in which, among other responsibilities, to: (1) familiarize themselves with everything that had come before: pretrial, trial, penalty phase, and direct appeal proceedings, including two remand hearings on Turner's absences at critical stages; trial attorney files; police and state attorney files; (2) reinvestigate the case, identify witnesses to seek and interview, interview those witnesses, and take statements where needed; (3) obtain and review records concerning Turner's life, such as medical records, school records, military records, jail and prison records, etc.; (4)

prepare, research, and file a state habeas petition in this court containing post-conviction issues not susceptible to a rule 3.850 motion, pursuant to Article V of the Florida Constitution and rule 9.030(a)(3) of the Florida Rules of Appellate Procedure; and (5) prepare his rule 3.850 motion for post-conviction relief. All of the post-conviction mitigation evidence presented to the trial court and referenced above was assembled in less than five months.

By contrast, trial counsel had well over a full year from the time of their appointment until trial in which to prepare a case in mitigation. On the first day of the penalty phase, counsel informed the trial court that they were not ready to put on a penalty phase case. Counsel told the court that if the defense were required to proceed at that time, counsel could "present only what we have been able to obtain in the last five days." R 1177-78. Turner's lawyers implored the court for a continuance because they had not "had time and would not be able to . . . investigate all the circumstances and matters in [Turner's] background." The weighty mitigating evidence proffered in post-conviction weighed against these less-than-overwhelming aggravators would probably have tipped the jury towards a life sentence. A reasonable probability is one sufficient to undermine confidence in the outcome. Here, that confidence is clearly undermined.

In finding Turner's allegations meritless on their face, the circuit court and this court made factual determinations that were clearly in violation of Strickland and Porter. The inadequacy of trial counsel's penalty phase presentation is manifest in the trial court's sentencing order finding little or no mitigation. The trial court expressly found that counsel had failed to prove that Turner met the criteria for the two statutory mental mitigating factors; that Turner's military service was of "no significance"; that assertions that he was a "good family man and father" were "not proven;" and that his diligence as an employee was of "little significance." R 307.

In the only trial court finding approximating nonstatutory mitigation, the court found that Turner had "in the past demonstrated concern for others and unselfishness," but the court considered "the weight" of this factor to be "only slight." Id. That this one sentence comprised the only mitigation found in Turner's case speaks volumes about the inadequacy of trial counsel's performance on behalf of Turner's life. The sentencing order itself is proof of counsel's ineffectiveness.

When Turner sought post-conviction relief, the trial court summarily dismissed his rule 3.850 motion and 78-item appendix twenty days after they were filed. The court's order, six pages of which were devoted to summarizing the post-conviction claims

and a short discussion of applicable legal standards, contained only one paragraph addressing Turner's claim of ineffective assistance at the penalty phase. The court's entire "findings" on this claim were:

> The next 100 pages of Defendant's motion contains alleged mitigation testimony and evidence that counsel allegedly should have presented. These claims are without merit. See the court's sentencing order regarding non-statutory factors, including Defendant served his country honorably; Defendant was a good family man and father; Defendant was a diligent and conscientious employee; and Defendant has in the past demonstrated concern for others and unselfishness. Additionally, See defense counsel's memo in mitigation directed to the court on October 3, 1985 in which defense counsel raises the following non-statutory mitigating factors: employment, family, military history, and Defendant's sense of right and wrong close in time to the offenses. School records and citizen comments appeared in the Defendant's pre-sentence report.

Order on Defendant's Motion for Post Conviction Relief, November 6, 1990, p. 7. It is remarkable that the trial court's sole bases for denying Turner's claim of ineffective assistance at the penalty phase were (1) a citation to the court's original sentencing order, in which the court found there was virtually **no** nonstatutory mitigation proven, and (2) "a memo in mitigation" that was submitted to the court six weeks after the jury had voted for Turner's death.

Most disturbing, the trial court, in the passage above, misquoted its own sentencing order, creating the false

impression it had found mitigation at trial when, in fact, it had not. In the above excerpt, the court cited to its Sentence Order, and clearly implied it had found that "Defendant was a good family man and father." See Rule 3.850 Order. In actuality, the court expressly found that factor was "not proven" in its trial sentencing order. R 307.

Similarly, with regard to evidence of Turner's (1) military service and (2) diligence as a worker, cited above as proof of counsel's effectiveness, the court's sentencing order found these factors so weakly established as to have "no significance" and "little significance," respectively. In finding that trial counsel were effective at Turner's penalty phase, the trial court thus relied entirely on a (1) reference to its trial sentencing order – in which it found little or no nonstatutory mitigating evidence – and (2) a post-penalty phase memorandum submitted to the court after the jury had voted for death.

This court agreed with the trial court, and affirmed. Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992) (McDonald, J., concurs specially with opinion; Barkett, C.J., and Kogan, J., concur in result only). As discussed below, this court's rationale for affirming the dismissal of Turner's ineffective-assistance-of-counsel claims was erroneous.

The similarities between Turner's case and Porter are remarkable and striking. Many of the very same factors and

circumstances deemed to require relief for Porter are equally or more persuasive in Turner's case. For example:

* both are military combat veterans whose service to their country was found to be "insignificant" to the Florida courts;

* both were convicted of double homicides arising out of domestic disputes;

* both presented extensive evidence of mental illness that was ignored by the Florida courts;

* both presented some mitigating evidence at trial and proffered voluminous additional evidence during post-conviction that was rejected and ignored by the Florida courts.

## SUMMARY OF THE ARGUMENT

The circuit court erred as a matter of law in its misapplication of the decision of the United States Supreme Court in Porter v. McCollum, 558 U.S. --, 130 S. Ct. 447 (2009), to Turner's case. As a matter of law, Porter requires that Turner be accorded a new sentencing hearing because: the record affirmatively shows that compelling mitigation evidence was available to Turner's trial counsel, who failed to present it to the jury; the trial court, in sentencing Turner to death, ran afoul of Porter in failing to accord sufficient importance and significance to Turner's mitigation evidence; and it is beyond

serious dispute that Turner would have received a life sentence, rather than a death sentence, if the available mitigation evidence had been presented or been properly evaluated as the law and the Constitution require.

Moreover, Porter should be applied to Turner's case retroactively under the unique facts and circumstances of this case. The prior rejection of Turner's ineffective-assistance-of-counsel claim in violation of Porter was based on this court's improper misinterpretation and misapplication of Strickland v. Washington, 466 U.S. 668 (1984). And the Supreme Court's decision in Porter represented a fundamental rejection of this court's Strickland jurisprudence. As such, Porter constituted a "change in law" requiring its retroactive application to Turner's case.

## ARGUMENT

### A. STANDARD OF REVIEW

This appeal presents two issues with different standards of review. The first issue involves the application of Porter v. McCollum, 558 U.S. --, 130 S. Ct. 447 (2009), to the unique facts and circumstances of Turner's case. As to this issue, deference to the lower court's determination is accorded only to historical facts. All other facts must be considered by this court in relation to how Turner's jury would have viewed those facts.

The second issue requires a determination of whether Porter must be applied to Turner's case retroactively under the unique facts and circumstances of this case. This issue presents a question of mixed fact and law and must be reviewed de novo. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004).

### B. TURNER'S DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENT UNDER THE STRICKLAND ANALYSIS REQUIRED BY PORTER

Turner was deprived of the effective assistance of trial counsel at the penalty phase of his trial. His claims of attorney ineffectiveness were presented in a rule 3.850 motion and appendix filed in October 1990. This voluminous 3.850 motion, supported by a comprehensive appendix, was flatly denied a mere 20 days after being filed – without an evidentiary hearing, and without a court appearance of any kind. This court affirmed this summary denial of rule 3.850 relief. In affirming the denial of relief, this court did not conduct a de novo review of legal questions presented and instead employed a standard of review that was entirely deferential to the circuit court's erroneous legal conclusions, in violation of Porter v. McCollum, 558 U.S. --, 130 S. Ct. 447 (2009).

In Porter, the Supreme Court condemned this court's practice of misinterpreting and erroneously applying Strickland v. Washington in its consideration of ineffective-assistance-of-counsel claims. Many of the very same factors and circumstances

deemed to require relief for Porter are equally or more persuasive in Turner's case. Given the extraordinary similarity between Porter's claims and those presented by Turner – both rejected by this court under the very same faulty Strickland analysis – Porter mandates that this court revisit its previous denial of Turner's claims.

Porter, a restatement of the Sixth Amendment standards set forth in Strickland, constitutes a change in Florida law that renders Turner's Porter claim cognizable in collateral proceedings.[9] 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 James because "it would not be fair to deprive him of the Espinosa ruling.").

[9] Porter held that this court unreasonably applied clearly established federal law in rejecting Porter's ineffective-assistance-of-counsel claim in Porter v. State. Turner does not suggest that Porter announced new federal law. Indeed, Porter held that this court failed to properly understand, follow, and apply clearly established federal law. The Porter decision thus establishes new Florida law because it expressly rejected this court's practice of incorrectly analyzing ineffectiveness claims. Porter v. McCollum makes clear that this court's decision in Porter v. State (and in subsequent decisions citing it) was wrong. Accordingly, in Porter, the Supreme Court established new Florida law. This is identical to the rulings in Hitchcock v. Dugger and Espinosa v. Florida, in which the Supreme Court found that this court had failed to properly understand, follow, and apply federal constitutional law,

In Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989), receded from in part on other grounds, Coleman v. State, 64 So. 3d 1210 (Fla. 2011), this court held that claims based on Hitchcock v. Dugger, in which the Supreme Court held found that this court had incorrectly read and applied Lockett v. Ohio, could be raised in rule 3.850 motions. The same principles should govern this court's treatment of meritorious and valid claims based on the Supreme Court's holding in Porter. Turner thus raised this issue in the circuit court, but the court denied the motion.

This court should treat Turner's case – based on its uniquely similar facts and circumstances – as it treated factually meritorious claims brought after the Supreme Court's decisions in Hitchcock v. Dugger and Espinosa v. Florida. Porter is demonstrably new Florida law within the meaning of Witt v. State. Turner is thus entitled to have his previously presented ineffective-assistance-of-counsel claims decided on the basis of valid standards rather than standards found to be erroneous in Porter.

### C. THE UNIQUE FACTS IN TURNER'S CASE REQUIRE RELIEF PURSUANT TO THE UNITED STATES SUPREME COURT'S DECISION IN PORTER

It is important to point out at the outset that Turner is

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necessitating this court's revisiting its holding in a number of similarly-situated cases.

not contending here that all ineffective-assistance-of-counsel cases adversely decided by this court necessarily violate Porter or warrant sentencing relief. Quite to the contrary, he asserts only that the unique circumstances of his case mandate a reconsideration of his ineffective-assistance-of-counsel claim, in order to comport with Porter. Turner's case is uniquely similar to Porter's in several respects, and it is incumbent upon this court to look anew at his weighty claims of attorney ineffectiveness and the improper assessment of them thus far by Florida's courts.

In Porter, relief was granted due to the Florida courts' failure, as in this case, to properly apply Strickland. The 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 highly mitigating facts and voluminous documentation presented in Turner's Strickland claim. It did not perform "the probing, fact-specific inquiry" required by Strickland and succinctly described in Sears v. Upton, -- U.S. --, 130 S. Ct. 3259, 3266 (2010) ("we have consistently explained that the Strickland inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."). Porter makes clear that this court's treatment of Turner's mitigating evidence was

unconstitutional.

The mitigation evidence proffered by Turner in post-conviction was riveting and compelling and would have resulted in a life recommendation from the jury that voted seven-to-five for death had it been presented. Nevertheless, this court's ruling with respect to the prejudice prong of Strickland merely accepted the circuit court's conclusory language and faulty determinations. Neither the circuit court order nor this court's opinion considered the proffered evidence when finding that Turner was not prejudiced by trial counsel's deficient performance. The findings in this case are starkly in violation of Porter.

Turner's substantial claim of ineffective assistance of counsel has not been given serious consideration as required by Porter. Turner requests that this court perform the analysis required of his claim and properly examine and assess the weighty mitigation proffer heretofore disregarded and discounted – for this court to take a close look at the facts and the law as required by Porter.

The pertinent facts in support of this claim, both the mitigating evidence presented at Turner's trial and the mitigating evidence proffered in his rule 3.850 motion, are described in detail above. In synopsis, at Turner's penalty phase, only six witnesses testified: his father, a brother, a

coworker, a work supervisor, a school records custodian, and a psychiatrist. The direct examination testimony of these witnesses comprises a total of only 55 pages of trial transcript.

The penalty phase presentation was last-minute and slapdash – wholly inappropriate and ineffective given the gravity of the situation. Turner's counsel were self-admittedly unprepared for the penalty phase. Prior to commencing the proceeding that determined whether Turner would live or die, counsel informed the trial court that they "needed additional time within which to prepare" for the penalty phase, for "obtaining various documents," for "locating witnesses," and for other basic and necessary trial functions. Counsel told the court that at that time, they could "present only what we have been able to obtain in the last five days." R 1177-78. Counsel admitted they had not "had time and would not be able to" . . . "investigate all the circumstances and matters in [Turner's] background" necessary for an adequate presentation of mitigating evidence. R 1179.

Due in large measure to counsel's deficient penalty phase performance, the trial court found that counsel failed to prove that Turner met the criteria for the two statutory mental

mitigating factors.[10] As to any nonstatutory mitigation offered or argued at Turner's penalty phase, the court concluded that Turner's military service was of "no significance;" that allegations that he was a "good family man and father" were "not proven;" and that his diligence as an employee was of "little significance." R. 307.

It is important to emphasize that nonstatutory mitigation may include evidence of mental illness that is less than the "extreme emotional disturbance" and "significantly impaired capacity" required to establish the statutory mental health mitigating circumstances (b) and (f) in section 921.141(6) of the Florida Statutes. The Supreme Court made this point in Porter: "Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating." Porter, 130 S. Ct. at 455 (citing Hoskins v. State, 965 So. 2d 1, 17-18 (Fla. 2007)); see also Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) ("it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to 'extreme' emotional disturbances.").

The trial court here did precisely what this court found to be unconstitutional in Cheshire. The trial court addressed

[10] See §§ 921.141(6)(b), (6)(f), Fla. Stat.

mental mitigating factors in its Sentencing Order. With regard to statutory factor 921.141(6)(b), the court found:

> There is ample evidence to support the conclusion that the defendant was under the influence of mental or emotional disturbance. . . . The keyword in evaluating this mitigating circumstance is extreme. The assertion that the defendant was under the influence of extreme mental or emotional disturbance is specifically rejected as a mitigating circumstance.

R 306 (emphasis in original). The court gave the same analysis to factor (6)(f):

> While there is ample evidence to find that the defendant was impaired, the Court specifically rejects the contention that the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

R 307 (emphasis in original). Thus, while the trial found that there was "ample evidence" of mental mitigation short of the statutory adjective and adverb, the court "rejected" mental mitigation.

The trial court's failure to consider nonstatutory mitigating circumstances was, in the words of this court, "unconstitutional." Cheshire. Nevertheless, this court, which reviews the "entire record" in its direct appeal consideration, affirmed Turner's death sentence despite the constitutional violation upon which the sentence was based.

It is equally significant that the trial court's rejection of the "substantially impaired" statutory mitigator was largely

based on citation to trial testimony that “the defendant stopped his attack on Joyce Brown when a police car passed on the street and resumed the attack after the passing.” R 306-07.

In affirming Turner’s death sentence, this court relied explicitly on the above section of the trial court’s sentencing order in rejecting the “impaired capacity” mitigator on direct appeal.

As noted elsewhere in this brief, had counsel investigated effectively, the jury and courts would have known that James Andrews, the witness responsible for the critical testimony cited above was, by his own admission in his post-conviction affidavit, “kind of high” at the time he gave his statement police. App. 74. Had counsel investigated the circumstances of the offense, Turner’s sentencers and this court would have known, as presented in the post-conviction appendix, that Andrews was "well known in the community" as someone who "can't be trusted or believed." App. 14; see also App. 13.

As a result of counsels’ lack of preparation, their penalty phase presentation did not hold a candle to what counsel could and should have presented had they investigated and prepared adequately. Turner's rule 3.850 motion alleging his ineffective assistance contained voluminous documentation of a wealth of mitigating circumstances that were not presented by his attorneys at the penalty phase or were only presented in a

cursory or incomplete manner.

On October 15, 1990, Turner filed his 3.850 motion and voluminous 78-item appendix containing undiscovered and unused mitigating evidence. Less than three weeks later, the circuit court summarily denied relief without permitting so much as a court appearance.

In his rule 3.850 motion, Turner proffered a huge amount of mitigating evidence that was completely overlooked by trial counsel. As summarized above, the proffered evidence included: numerous new eyewitnesses to the offense itself; a psychiatrist who testified for the state at the guilt phase asserting that Turner met the statutory mental mitigating factors; lawyers and other professionals personally aware of Turner's severe mental illness around the time of the offense; evidence of poor academic and social functioning as a youth; testimony from jail staff, ministers, teachers, and fellow Vietnam veterans; testimony about life-saving rescues performed by Turner that were not presented at trial; and scores of others who knew Turner – all with powerfully mitigating testimony that would have tipped the balance in this seven-to-five case.

The post-conviction proffer also included compelling documentation of his precipitous mental breakdown (e.g., files of efforts to commit him under the "Baker Act" shortly before the offense) and his service to his country (Vietnam War combat

records), neither of which was known to his sharply-divided sentencing jury.

Key undiscovered witnesses were available who had contact with Turner around the time of the offense who could have enlightened the jury as to his severely disturbed state of mind during that key period. Friends and family who were close to him before his breakdown were available to describe what led up directly to the tragedy, but they were never sought or used by trial counsel in this critical aspect of Turner's defense. Apps. 23-28, 30, 45.

Other proffered crucial witnesses, similarly undiscovered by trial counsel, actually saw the offense firsthand. These key individuals were available to describe Turner's obviously deranged state of mind at the time. App. 5-12. There were still other important witnesses who saw and interacted with Turner shortly after the offense who could have testified to his utter disorientation and genuine amnesia of the event in the immediate aftermath, and his extreme remorse upon coming to comprehend months later what he had done. App. 4, 32, 33.

Any one of these over 45 witnesses could have made a difference in the outcome of the penalty proceeding. Cumulatively, there is little doubt that one juror would have changed his or her vote, creating a 6-6 verdict that would have

required the judge to sentence Turner to life.[11] In short, Turner would not have been sentenced to death had trial counsel performed the requisite investigation, preparation, and presentation at the penalty phase of Turner's trial.

Ironically, in its order denying post-conviction relief, the trial court did a 180-degree about-face of its findings in its original sentencing order:

> The next 100 pages of Defendant's motion contains [sic] alleged mitigation testimony and evidence that counsel allegedly should have presented. These claims are without merit. See the court's sentencing order regarding non-statutory factors, including Defendant served his country honorably; Defendant was a good family man and father; Defendant was a diligent and conscientious employee; and Defendant has in the past demonstrated concern for others and unselfishness. Additionally, See defense counsel's memo in mitigation directed to the court on October 3, 1985 [after the jury's death verdict] in which defense counsel raises the following non-statutory mitigating factors: employment, family, military history, and Defendant's sense of right and wrong close in time to the offenses. School records and citizen comments appeared in the Defendant's pre-sentence report.

Order on Defendant's Motion for Post Conviction Relief, November 6, 1990, p. 7 (emphasis added).

Despite this astounding flip-flop by the trial court in

[11] Under Florida law, a 6-6 vote is considered a life recommendation and jury recommendations must be given "great weight" by the sentencing judge. Tedder v. State, 322 So. 2d 908, 910 (1975). Jury overrides of life are virtually never

misrepresenting its trial level findings, this court uncritically affirmed the lower court's summary denial of post-conviction relief in Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992) (McDonald, J., concurs specially with opinion; Barkett, C.J., and Kogan, J., concur in result only). In its opinion affirming the denial of relief, this court did not even mention the word "prejudice," ignoring one of the two prongs required by Strickland for analyzing ineffective-assistance-of-counsel claims. The court extolled trial counsel's penalty phase presentation, suggesting that the matter was settled merely by counsel's seemingly adequate performance – without regard to the massive proffer of compelling mitigating evidence that trial counsel failed to discover and present the jury.

The court devoted a single paragraph in its opinion to its reasons for denying Turner's ineffective-assistance-of-counsel claim. The court provided three fatally flawed bases for its dismissal of Turner's ineffective-assistance-of-counsel claim: (1) the court recited the mitigating circumstances inexplicably found by the trial court to have been proven in its 3.850 denial (without acknowledging — perhaps without even realizing — that these very same circumstances were found by the trial court not to exist in its sentencing order; (2) again

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affirmed by this court and are upheld only when the jury's life recommendation is patently unreasonable.

echoing the trial court, this court specifically noted that trial counsel "argued in a presentence memorandum that there was sufficient evidence to constitute non-statutory mitigation;" and (3) the court found, in essence, that none of the proffered wealth of mitigation mattered because the trial court had "adequately informed the jurors that they could consider evidence presented at the guilt phase." Id.

The court's first rationale for affirming the trial court's denial of relief was clearly invalid to the extent it adopted the trial court's totally inconsistent descriptions of the mitigating evidence presented. In sentencing Turner to death, the trial court expressly found that no mitigating circumstances were proven. Then, in ruling that trial counsel were not ineffective, the trial court found in its 3.850 denial order that trial counsel had proven the very same circumstances the court had found not to exist in its sentencing order. This court's adoption of this convoluted treatment of trial counsel's performance was demonstrably unsupportable.

As to the court's second rationale, the court based its rejection of Turner's ineffectiveness claim, in part, on counsel's "presentence memorandum" to the judge. The court thus ignored the crucial importance of presenting mitigating evidence to the jury – not simply to the judge after the jury has already voted for death. "The function of the sentencing phase is to

provide the jury with all mitigating evidence concerning the convicted defendant and the crime so that it can render an individualized sentence." Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) (emphasis added). "By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence.'" Brownlee v. Haley, 306 F.3d 1043, 1074 (11th Cir. 2002) (alterations in original) (quoting Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991)). To invoke trial counsel's memorandum to the court as evidence of an effective penalty phase performance was untenable.

In its third reason for denying Turner's claim of attorney ineffectiveness, this court unreasonably relied on the fact that a jury instruction at the beginning and close of the penalty phase "informed the jurors that they could consider evidence presented at the guilt phase." This court essentially absolved trial counsel of their duty to make a substantial presentation at the penalty phase merely because the trial court had instructed the jury it could consider at the penalty phase all the evidence that had been presented in the guilt phase. Turner v. Dugger, 614 So. 2d at 1078-79 ("The trial court's jury instructions adequately informed the jurors that they could consider evidence presented in the guilt phase.")

The trial court's pat "consider-all-the-guilt-phase-evidence" instruction was obviously no substitute for an effective presentation at the penalty phase, and this court can not permit the instruction to pass for such a substitute. For one thing, the jurors heard the guilt phase evidence in a distinct and different context from a capital penalty phase. Expecting the jurors to recall unspecified evidence they had heard a week or two earlier, and to apply it for wholly different purposes, is not reasonable. See e.g., Brownlee, 306 F.3d at 1079-80 (if jury has not "heard all the powerful mitigating evidence that could have been presented," the result is "'unreliable,' and on this incomplete record, the imposition of a death sentence is 'fundamentally unfair.'") (citing Strickland).

Second, the trial court's instructions made no reference whatsoever to "mitigation." Thus, the generalized instruction did not come close to informing the jurors in any way about the consideration of mitigating evidence – the primary defense goal of a penalty phase presentation.

Third, by telling jurors they should consider everything they "heard" at the guilt phase, the instruction encompassed everything potentially aggravating as well. For this reason, the mere instruction in question obviously cannot be permitted to suffice as a substitute for a defense case at penalty phase.

Finally, if the instruction was truly all that important, to the extent it put everything mitigating from the guilt phase in play at the penalty phase, it was incumbent on trial defense counsel, at least, to point out what from the guilt phase evidence the jury could and should consider in mitigation. Effective counsel would have "explained the significance of all available evidence" to the jury. Williams v. Taylor, 529 U.S. 362, 399 (2002). Counsel here did not do so.

This court thus relied on a general and ambiguous jury instruction that did not even refer to "mitigation" as a basis for finding trial counsel's performance to be effective and for rejecting the plethora of mitigating evidence proffered in post-conviction. This broad instruction said nothing at all about "mitigation," and in no way can be deemed a substitute for the "meaningful individualized" capital sentencing proceeding that a penalty phase is supposed to be. See Lockett v. Ohio, 438 U.S. 586 (1978); Brownlee, 306 F.3d at 1070, 1075.

Here, too, this court misinterpreted and misapplied Strickland and committed clear Porter error.

It is impossible to assess counsel's trial performance in a vacuum, i.e., without regard to what counsel reasonably could have done. For obvious reasons, the sufficiency of counsel's penalty phase presentation must be considered in relation to what was available to present by way of mitigating evidence in a

given case. In Turner's case, as amply demonstrated, there was a massive amount of mitigating evidence that was available and not presented at trial. This court failed to compare trial counsel's actual presentation with the wealth of proffered material demonstrating what reasonable counsel could have done with the requisite investigation. Assessing the reasonableness of counsel's performance simply on the basis of what they did present at trial without considering what available evidence they did not present precludes a meaningful or reliable determination of whether counsel's penalty phase defense was reasonable or deficient.

Indeed, as the Supreme Court explained in Strickland, an assessment of counsel's performance requires a court "to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "[T]he Strickland inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below." Sears v. Upton, -- U.S. --, 130 S. Ct. 3259, 3266 (2010).

This is clearly not a case in which the readily available new mitigating evidence "'would barely have altered the sentencing profile presented' to the decision maker." Sears, 130 S. Ct. at 3266 (quoting Strickland, 466 U.S. at 700). Here, the sentencing jury did not know that Turner was a combat veteran of the Vietnam War. They did not know of all of the

people whose lives Turner had saved. They did not know that a state witness who provided the sole basis for this court's finding that Turner was "not in an uncontrollable frenzy," Turner, 530 So 2d at 51, was drunk at the time, claims he can "make a fork move with the power of [his] own mind[,]" and was described by his own mother as devoid of credibility.

They did not know that Turner was in a state of florid psychosis hours after the offense when a public defender visited him in jail and "he genuinely did not seem to know what he was supposed to have done that resulted in his arrest." They did not know that a jail psychologist observed Turner "slipping in and out of reality" during his pretrial incarceration. They did not see documentary evidence that his wife and her lawyer had attempted to have Turner involuntarily committed to a mental hospital shortly before offense.

The fact that trial counsel presented "some mitigation evidence," Sears, 130 S. Ct. at 3266, does not necessarily mean that counsel's failure to discover and present a plethora of compelling additional evidence was reasonable and therefore "effective" per Strickland. To the contrary, proper resolution of Turner's Sixth Amendment claim "will 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." Id. (emphasis added).

In making its determination, the court must "consider 'the totality of the available mitigating evidence – both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding.'" Porter, 130 S. Ct at 453 (quoting Williams v. Taylor, 529 U.S. 362, 397-398 (2000)).

Many of the very same factors and circumstances presented in post-conviction proceedings –- but neglected by trial counsel -- found to require relief for Porter are equally or more applicable in Turner's case. For example:

* both are military combat veterans whose service to their country was found to be "insignificant" (in Turner) or "inconsequential" (in Porter) to the Florida courts. "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." Porter, at 455. "[T]he jury might [also] find mitigating the intense stress and emotional toll that combat took." Id.;

* both were convicted of double homicides arising out of domestic disputes; both were sentenced to life on one count and death on the other count (although Porter's jury recommended death on both counts, unlike Turner's jury which recommended life on one count);

* both presented extensive evidence of mental illness that was ignored by the Florida courts; and

* both presented some mitigating evidence at trial and proffered voluminous additional evidence during post-conviction that was rejected and ignored by the Florida courts.

Turner's case cannot conscientiously be distinguished from Porter's. To allow Porter to live while permitting Turner to be executed would be both unconstitutional and grossly unjust.

### D. UNDER THE WITT RETROACTIVITY STANDARD, PORTER IS A DECISION FROM THE UNITED STATES SUPREME COURT THAT REQUIRES A RECONSIDERATION OF TURNER'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS

Turner was deprived of the effective assistance of trial counsel at the penalty phase of his trial, in violation of Porter v. McCollum, 558 U.S. --, 130 S. Ct. 447 (2009). Porter establishes that the previous denial of Turner's ineffective-assistance-of-counsel claim was based on this court's improper misinterpretation and misapplication of Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court's decision in Porter represents a fundamental rejection of this court's Strickland jurisprudence. As such, Porter constitutes a "change in law" as explained below, and renders Turner's Porter claim cognizable in post-conviction proceedings. See Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). A rule 3.851 motion is the appropriate vehicle for presenting Turner's claim premised upon a change in Florida law. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989), receded from in part on other grounds, Coleman v.

State, 64 So. 3d 1210 (Fla. 2011).

In Witt, this court determined that changes in the law could be raised retroactively in post-conviction proceedings under certain circumstances. The court held that the doctrine of "finality" can yield to a "more compelling objective . . . 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).

Because "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," id. at 928, this court declined to follow the United States Supreme Court's standards for retroactivity, which this court characterized as a "relatively unsatisfactory body of law." Id. at 926 (quotations omitted). The United States Supreme Court recently approved the notion that a state may

indeed give a decision by the Supreme Court broader retroactive application than the federal retroactive analysis requires. Danforth v. Minnesota, 552 U.S. 264 (2008).[12]

In Witt, this court emphasized that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." 387 So. 2d at 926. The Witt court recognized two "broad categories" of cases that qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." Id. at 929. The court identified under Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the

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

old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Id. at 926; see also Griffith v. Kentucky, 479 U.S. 314 (1987) (overruling Stovall and Linkletter in part).

This court held in Witt that a change in law can be raised in post-conviction proceedings 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. Several years after Witt, in reaction to the United States Supreme Court's decision criticizing Florida's improper consideration of mitigating evidence in Hitchcock v. Dugger, 481 U.S. 393 (1987), this court was repeatedly called upon to address the Witt standard and how to apply it to cases where it had committed the same violation of Lockett v. Ohio, 438 U.S. 586 (1978).

In Hitchcock, the Supreme Court granted certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit denying federal habeas relief to a death-sentenced petitioner in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the Supreme Court found that Hitchcock's unconstitutional death sentence resulted from this court's misreading of Lockett, in violation of the Eighth Amendment.

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clearly established federal law.

Shortly after the United States Supreme Court decision in Hitchcock, a Florida death-sentenced individual with a pending execution date argued to this court that he was entitled to the benefit of Hitchcock.[13] Applying its retroactivity doctrine set forth in Witt, this court agreed and ruled that Hitchcock constituted a change in law of fundamental significance that could properly be presented in a successor rule 3.850 motion. See also 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

[13] 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 called upon to resolve the effect of Hitchcock. On September 3, 1987, this court granted a resentencing in Riley, noting that Hitchcock constituted a clear rejection of the "mere presentation" standard that it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in Lockett. See Cooper v. State, 336 So. 2d 1133, 1139 (Fla. 1976) (holding that the jury's consideration of mitigating circumstances was confined to the factors enumerated in Florida's capital sentencing statute). On September 9, 1987, this court issued its opinions in Thompson and Downs ordering resentencing 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 there was harmless. And, on October 30, 1987, this court issued its opinion in Demps, and likewise

So. 2d 659, 660 (Fla. 1987); Demps v. Dugger, 514 So. 2d 1092 (Fla. 1987).

In 1978, the United States Supreme Court had held in Lockett v. Ohio that mitigating factors in a capital case cannot be limited so as to preclude capital sentencers from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. at 604. This court interpreted Lockett to require only that a capital defendant

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concluded that the Hitchcock error there was harmless.

have the opportunity *to* present any mitigation evidence. The court determined that Lockett did not require the jury to be instructed that it could 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. The Court held that this court had violated Lockett 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.

This court held that Hitchcock "represents a substantial change in the law" such that it was "constrained to readdress . . . Lockett claim[s] on [their] merits." Delap, 513 So. 2d at 660 (citing, inter alia, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)). In Downs, this court held that a post-conviction Hitchcock claim could be presented in a successor rule 3.850 motion because "Hitchcock rejected a prior line of cases issued by this Court." Downs, 514 So. 2d at 1071.

Clearly, this court read the opinion in Hitchcock to say that it had misread Lockett in a whole series of cases. This court's improper treatment of mitigating evidence in Hitchcock

was not an isolated or aberrant decision, but in fact reflected an erroneous construction of Lockett that had been applied continuously and consistently in virtually every case decided between this court's opinions in Cooper and Songer v. State, 365 So. 2d 696 (Fla. 1978), in which the Lockett issue was raised. In Thompson and Downs, this court acknowledged this pattern and recognized that fairness dictated that every capital litigant who had raised a meritorious Lockett issue but had lost due to the court's systemic error should be entitled to the same relief afforded to Hitchcock.

The same principles at issue in Delap and Downs are applicable here. Just as Hitchcock reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, Porter likewise reached the Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Precisely as in Hitchcock, where the Supreme Court found that this court's decision affirming the death sentence was contrary to or an unreasonable application of its precedent in Lockett, in Porter the Supreme Court found that this court's decision affirming the death sentence was contrary to or an unreasonable application of its precedent in Strickland.

This court's analysis in Downs is equally applicable to Porter and to the Supreme Court's subsequent decision further explaining Porter in Sears v. Upton, -- U.S. --, 130 S. Ct. 3529

(2010). Just as Hitchcock rejected this court's analysis of Lockett, Porter rejects this court's analysis of Strickland claims. Therefore, just as this court granted Hitchcock relief to certain capital litigants who had raised the same Lockett error as that found unconstitutional in Hitchcock, so too should this court grant relief to Turner, who raised the same Strickland issue as that found unconstitutional in Porter.

This court also applied the Witt retroactivity doctrine where the court was found by the United States Supreme Court to have misunderstood its holding in Maynard v. Cartwright, 486 U.S. 356 (1988). This court had held that Maynard, an Oklahoma case, was not applicable in Florida due to differences in the states' capital sentencing schemes. Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989). Subsequently, the United States Supreme Court determined that Maynard did apply in Florida and that the Florida standard jury instruction on the "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in Maynard. Espinosa v. Florida, 505 U.S. 1079 (1992).

Following the decision in Espinosa, this court found that the decision qualified under Witt as new Florida law that warranted the revisiting of 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 James because "it would not be fair to deprive him of the Espinosa ruling").

For precisely the same reasons that this court determined Hitchcock and Maynard constituted new law under Witt, the court should find that Porter is new law and reconsider Turner's previously denied ineffective-assistance-of-counsel claims under the proper and correct Strickland standard.

In Porter v. McCollum, the United States Supreme Court found this court's Strickland analysis, as enunciated 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 had explained:

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

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 post-conviction hearing. * * * [N]either the post-conviction 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.

130 S. Ct. at 454-55.

In its treatment of Porter's ineffective-assistance-of-counsel claim, this court failed to find prejudice due to a faulty analysis that summarily discounted mitigation evidence that was introduced at a post-conviction hearing, but was not presented at trial. See Porter, 130 S. Ct. at 451. The state court improperly "either did not consider or unreasonably discounted" that evidence. Id. at 454.

The analysis employed by this court in Porter v. State was not an aberration, but was in accord with a line of cases from this court, precisely as this court's Lockett analysis in Hitchcock was premised upon a comparable line of cases. This is apparent, for example, in this court's decision in Sochor v.

State, 883 So. 2d 766, 782-83 (Fla. 2004), where the court relied upon the language in its own Porter opinion to justify its rejection of the mitigating evidence presented by the Sochor's mental health expert at a post-conviction evidentiary hearing.

In Turner's case, as in Porter, this court erroneously deferred to the trial court's findings to justify its decision to improperly, in the language of Porter, "discount to irrelevance" pertinent mitigating evidence. Id. at 455. Porter makes clear that a reliable assessment of moral culpability in a capital penalty phase requires that the jury be informed of the defendant's full and complete life history and be apprised of his mental condition around the time of the offense. The failure of counsel to investigate and present such evidence is deficient and prejudicial, even where numerous witnesses had

been presented at trial.[14]

Here, as discussed in detail above, the 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 the prejudice analysis used in Turner's case to be in error, Turner's claim of ineffective assistance of counsel must be readdressed in the light of Porter.

In Sears v. Upton, the United States Supreme Court expounded on Porter, finding that a Georgia post-conviction 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 (emphasis added). The Supreme Court found that "although the court appears to have stated the proper prejudice standard, it did not correctly

[14] The United States Supreme Court noted in Kyles v. Whitley, 514 U.S. 419 (1995), that Brady and Strickland claims require an assessment of the potential impact upon a capital jury of the information or evidence the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it.

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 post-conviction 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 [state post-conviction] 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 (emphasis added; footnotes and internal citations omitted).

Sears, like 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 what occurred. According to Porter and Sears, this court should revisit its flawed analysis and Turner's ineffective-assistance-of-counsel claim should be reassessed with a full and probing prejudice analysis, attentive to the unique and highly mitigating facts and the Porter mandate that the failure to present a full picture can be deficient and prejudicial. In making such a reassessment, this court should "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [state post-conviction] proceeding." Sears, 130 S. Ct. at 3266-67 (emphasis added).

Sears teaches that post-conviction courts necessarily must speculate as to the effect on the jury of unpresented evidence in order to make a Strickland prejudice determination. This is true not only when little or no mitigation evidence was presented at trial but in all instances. Sears and Porter thus

require state courts to conduct a thorough fact-specific prejudice analysis. No prejudice analysis was done in Turner's case. His unconstitutional condemnation to death thus violates Porter and sentencing relief is therefore required.

## CONCLUSION

In light of the foregoing arguments, Turner requests that this court reverse the order denying his Porter motion and grant him a new penalty phase hearing.


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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this 29th day of August, 2011, to: Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050; and John I. Guy, Esq., Assistant State Attorney, counsel for appellee, at Duval County Courthouse, Jacksonville, Florida 32202.

_____
John R. Hamilton

## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that this petition complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
John R. Hamilton