IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-946

WILLIAM TURNER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Turner's case is, in all critical respects, indistinguishable from the case of *Porter v. McCollum*, 558 U.S. --, 130 S. Ct. 447 (2009), in which the United States Supreme Court held that Florida courts erroneously analyzed Porter's claim of ineffective assistance of trial counsel in denying him sentencing relief. Turner is entitled to the same relief that Porter was granted—and for the same reasons.

In its answer brief (hereinafter "AB"), the State offers a variety of reasons for this court to affirm the circuit court's summary denial of Turner's assertion of *Porter* error. Foremost among the State's arguments are: (1) Turner's trial counsel was not ineffective with regard to his penalty phase preparation and presentation because the jury was instructed to consider evidence from the guilt phase in its sentencing determination or because counsel submitted a post-verdict memorandum to the court with actual proof of Turner's Vietnam service (AB 2-3, 6-7, 28); (2) Turner has not demonstrated that trial counsel's performance was "deficient" per *Strickland's*[1] "first prong" (AB 15, 30-31); (3) *Porter* was merely an "application of *Strickland* to a particular case" and did not establish a "new constitutional right" (AB 18); and (4) Turner's motion was merely an attempt to "re-litigate" his previous claim of ineffective assistance (AB 13, 20-22).

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

In this brief, Turner will address each of the State's contentions in turn. As will be shown, under the unique and compelling facts in this case, sentencing relief is mandated by *Porter*. Each of the State's arguments is unavailing.

B. TRIAL COUNSEL'S FAILURE TO PRESENT CONCRETE, CREDIBLE, AND READILY AVAILABLE EVIDENCE OF TURNER'S VIETNAM COMBAT EXPERIENCE AT THE *PENALTY PHASE* WAS SUBSTANTIALLY THE SAME AS THE FAILURE OF PORTER'S COUNSEL, AND THAT FAILURE WAS NOT OFFSET BY SCANT REFERENCES TO TURNER'S MILITARY SERVICE IN THE *GUILT* PHASE OR BY A PRESENTENCING MEMORANDUM TO THE TRIAL COURT

The State contends that Turner's trial counsel was not deficient in his investigation and presentation of Turner's military service—and, in particular, of his combat service in the Vietnam War. In support of its contention, the State suggests that counsel's failure to present definitive proof of Turner's Vietnam service in the *penalty phase* was, in essence, "cured" by (1) the trial court's instruction that the jury could consider, in making its sentencing determination, any evidence adduced in the *guilt phase*, and (2) counsel's post-verdict submission to the trial court of a memorandum citing Turner's Vietnam service. AB 7.

1. Turner's Vietnam Combat Service

a. Counsel's Failure to Ascertain Turner's Service

Crucially, Turner's service in Vietnam was still a bit of a mystery when the jury retired for its penalty-phase deliberations. Turner's counsel did not even

mention Vietnam in his closing argument at the penalty phase. There are only two possible reasons: either counsel did not think that Turner's Vietnam service was important or counsel was lacking evidence of that key mitigating factor—a factor that the Supreme Court now says *must* be considered and accorded significant value.

The nature of Turner's military service was called into question by the prosecutor in his closing argument at the guilt phase of trial. The prosecutor strongly suggested that the testimony of mental health experts as to Turner's war experience might have been concocted by Turner to serve his own interests:

> Now, let's talk about the defendant's statements for just a moment. Again in considering and assessing that, does he have an interest in the outcome of the case? Sure does. What about *his motivation to exaggerate, hedge or fake?* . . . In other words, statements that are in the defendant's interest, that may or may not have been totally complete, totally accurate.
>
> The lack of accuracy or the *lack of credibility of the defendant's statements*, the state would submit, are strongly demonstrated by the statement that Coxe made to you in some discussions of hand-to-hand combat in voir dire and some cross-examination during trial. Well, Dr. Miller was told that he never had any hand-to-hand combat experience in Viet Nam, yet Dr. Stinson was told there was some combat situations. Well, he's telling different stories Why is that?

R 1106-07 (emphasis added).

In its answer brief, the State flip-flops on whether Turner served in combat. On the one hand, the State contends that counsel was not deficient in failing to

present evidence of Turner's actual combat duty. According to the State, combat duty was indeed introduced in the form of Turner's statements to mental health experts in the guilt phase. AB 2-4. But on the other hand, the State argues that Turner's case is distinguishable from *Porter* because Turner was *not* in "serious" or "major" combat. AB 12, 29.

Thus, the State now commits the very same violation that the Supreme Court condemned in *Porter*, trivializing Turner's war service and minimizing its importance. The State even affirmatively disparages Turner's war experience by contending that he came under sniper fire "only one time" (AB 15), that he was subjected to fire "one time" (AB 30 (emphasis in original)), and that he "was not in any major battle of Vietnam" (AB 29).

This sort of hair-splitting about the specific degree of combat that Turner endured is offensive to veterans and shows that the State simply does not grasp the overarching mandate of *Porter*—that military service and participation in a treacherous and traumatic war demands respect and serious consideration. Service in the Vietnam War was not simply about "major battles," and the State's argument makes a mockery not only of *Porter* but also of thousands of Americans who served in that conflict. The State's efforts to "diminish the evidence of [Turner's] service . . . reflects a failure to engage with what [Turner] actually went through in" Vietnam. *Porter*, 130 S. Ct. at 455.

In fact, Turner is indeed a veteran of Vietnam combat, despite what the State may say to the contrary. The history of his unit is described in detail in Appendices 46-51. Appendix 47 contains a "History of the 821st Combat Security Police Squadron"—Turner's unit—provided by the United States Air Force Historical Archives. The report sets out the official mission of Turner's unit, and describes its creation, the specific dates and locations of the intensive training undergone, and the unit's deployment to Vietnam. All of the dates and places in the report correspond precisely with Turner's military records. Appendix 53.

The 821st CSP was activated in March 1968 in response to the enemy's devastating Tet Offensive in January 1968:

> The Tet offensive of Jan 1968 revealed a significant security deficiency for protection of air bases within RVN. In-country emergencies necessitated the movement of security forces from one base to another to counter known and anticipated hostile threats. The deployment of security forces left bases without adequate protection. To fill the gaps, an independent quick reaction was requested by 7AF.

App. 47 at 7. The Air Force History describes the mission of the 821st CSP Squadron:

> Mission: To be prepared for immediate deployment in support of any base or operating location in the Republic of Vietnam which is directly engaged with the enemy or the intelligence threat indicates attack is imminent. The squadron will be prepared to deploy all or any portion of the unit within two hours from any location. Elements will be continuously deployed throughout the Republic of Vietnam to provide a

> more variable counter threat and to replace combat casualties due to wounds or fatigue.

Id. at 1.

Appendix 46 contains an article from *Combat Illustrated* magazine entitled "Vietnam's Forgotten Heroes: The United States Air Force Security Police in Action." The article likewise describes the special training and mission of Turner's unit, referring to it as "among the Vietnam War's little known heroes":

> For the first time in its history, the U.S. Air Force was operating from bases which were subject to rocket or mortar attack, sabotage and infiltration. Even though base assistance was theoretically available from the U.S. Army, U.S. Marines and the ARVN, when U.S. bases were attacked, the brunt of the fighting was borne again and again by a few U.S.A.F. Security Policemen spread painfully thin around the perimeter.

App. 46; *see also* Appendix 49, Roger P. Fox, "Air Base Defense in the Republic of Vietnam 1961-1973," Office of Air Force History (1979).

Thus, notwithstanding the State's efforts to devalue Turner's combat duty and cast it as "extremely limited" (AB 29), the official records and published accounts describe Turner's unit as deeply involved in combat. Turner and his squadron of heroes maintained a crucial line of defense, guarding and protecting the dangerous perimeters of U.S. air bases throughout Vietnam.

It cannot be denied that Turner "served honorably under extreme hardship and gruesome conditions." *Porter*, 130 S. Ct. at 455. Tragically, the jurors who deliberated Turner's fate knew none of this, due solely to trial counsel's failure to

obtain and present it. Had the jury known, there is certainly a "reasonable probability" that at least one more juror would have voted to spare Turner's life—and tipped the fragile 7-to-5 majority towards life in prison rather than death.

b. The Psychological Toll of Combat Duty

The State also seeks to minimize the psychological effects on Turner of his Vietnam combat experiences, asserting that his participation in the Vietnam War "did not leave him a 'traumatized, changed man' [and that he] did not struggle 'to regain normality upon his return from war.'" AB 29-30 (citation omitted in original). Here, again, the State's argument plainly reflects the failure of trial counsel to present evidence of the war's effects on Turner's psyche and spirit. Due solely to counsel's deficient omission, the jury was again unaware of important mitigating evidence.

Had Turner's counsel investigated effectively, he would have known and presented readily available evidence that Turner was indeed a "changed" man when he got home from Vietnam. In fact, "PTSD is not uncommon among veterans returning from combat." *Porter*, 130 S. Ct. at 450 n.4. Appendices 34-39 describe the changes that Turner's family members saw in him when he returned home after serving in the Vietnam War, and those family members describe how he had changed.

Turner's father, for example, reported:

> When he got home from the war, Thaddeus [Turner] told me a frightening story about being under heavy fire the very first night in Vietnam. They put him out on guard duty at the perimeter post where he was based. The base was attacked and they had o fight for their lives to protect the base. . . . He was noticeably skittish when he got home. *He was a different person in a lot of ways.* He was no longer the youthful twenty-year old who had left for the service. He had been through hell.

App. 34. Turner's mother gave a similar report:

> When Thaddeus got back from the service, he seemed different. We would be watching the news and Vietnam would come on and he would get all upset and worked up watching it. . . .You could tell the experience had been very upsetting for him but he could never talk about what it was like over there. He was jumpy. He would start when he heard a loud noise.

App. 35.

According to Turner's brother, "[w]hen [Turner] came home, he seemed different. He was quieter and more withdrawn. He was drinking more and he had started smoking marijuana." App. 36. His sister Fabian Turner noticed that he "did seem to be more somber and kind of distant." App. 37. And his sister Bernadette Jackson observed that "[w]hen he got home from Vietnam, he was a changed person—more withdrawn and quiet. He wouldn't talk about the things he had gone through over there but you could tell he'd been through a terrible ordeal." App. 38.

Turner confided more to his high school friend and brother-in-law, Robert Jackson:

> William used to talk to me about Vietnam. He told me he saw a lot of killing and bloodshed in Vietnam and still had nightmares about it. He would jump when he heard loud noises and you could tell his combat experiences had really taken their toll on his mind. He reminded me of my brother Alfred who also saw lot of heavy combat over there. Back at that time you could tell he still had a lot of anxiety related to his war experience.

App. 39.

Turner unquestionably experienced "the intense . . . mental and emotional stress that combat had." *Porter,* 130 S. Ct. at 455. But like Porter, Turner's military experience was worth nothing to the State, the trial court, and the other courts that reviewed his post-conviction allegations and evidence—without even granting him a hearing at which to further develop and prove his claims. *Porter* resoundingly condemns giving such short shrift to military service—and to combat experience in particular.

c. The State's Erroneous Assertion that Turner's Vietnam Service Was "Too Remote" in Time to be Mitigating

In its answer brief, the State quotes the Eleventh Circuit, which, in turn, quoted the trial court's rule 3.850 holding for the proposition that Turner's war experiences should not count in his favor because his service was too far in the past to matter:

> [T]he trial court determined that Turner's Vietnam service was almost twenty years prior to the murders and too remote in time to act as persuasive mitigating evidence: "The Court finds this factor to exist, but must consider the fact that the defendant was discharged in 1968."

AB 9 (quoting *Turner v. Crosby*, 339 F.3d 1247, 1278 (11th Cir. 2003)).

But in discounting Turner's Vietnam duty due to its purported "remoteness," the State mistakenly regards his service as an issue of causation rather than as an issue of mitigation. *Porter* makes clear that military service is *mitigating*: "Our Nation has a long tradition of according leniency to veterans in recognition of their service." *Porter*, 130 S. Ct. at 455. "Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Id.* at 454-55 (quoting *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). The State thus violates the seminal requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings* that *any* evidence offered by a capital defendant as a basis for a life sentence *must* be considered by capital sentencers as *mitigating.*[2]

2. Instructing the *Penalty Phase* Jury to Consider All *Guilt Phase* Evidence Cannot Substitute for Presenting Evidence in the Penalty Phase

The State also asserts that the failure by Turner's trial counsel to present proof and evidence of Turner's Vietnam combat experience was cured by the trial court's instruction to the jury that it could consider any evidence adduced in the *guilt phase* in its *penalty-phase* deliberations. AB 7. But the State again misapprehends the very *purpose* of a penalty phase and the role of mitigation in

[2] It is worth noting that Porter's Korean War service was even more remote in time than Turner's service in Vietnam.

that process. For two compelling reasons, the fallacy of the State's view should be recognized and remedied in light of *Porter's* insistence on the proper consideration of military service by capital sentencers.

First, the notion that the trial court's blanket instruction obviated the need for penalty phase evidence invites the obvious question of why a penalty phase should occur at all. Indeed, if purportedly mitigating material adduced in the guilt phase is on a par with penalty phase evidence as to its applicability in the sentencing determination, the penalty phase is relegated to an mere afterthought or subordinate proceeding. Such a derogation of the penalty proceeding undermines four decades of capital jurisprudence.

Jurors are expressly instructed at the guilt phase that the issue of penalty has nothing to do with their guilt-innocence verdict and that they should not consider potential sentences in deliberating whether to convict. If that admonition means what it says, the law assumes that conviction-phase jurors are not thinking about punishment. To assume later that the jurors *were* actually paying attention to first-phase evidence with an eye towards sentencing renders the guilt-phase instruction a nullity. It makes no sense to instruct jurors in phase one *not* to think about punishment and then expect them to remember and consider in phase two evidence from phase one that bears *solely* on punishment.

Second, the blanket instruction that the jury may consider all evidence from the guilt phase in its penalty decision applies equally to *aggravating* evidence adduced at the earlier phase. The guilt phase is exclusively about the circumstances of the crime. Anything that happens to be mitigating about the defendant is largely incidental and irrelevant to the guilt determination. In this case, the offense tragically involved a fatal stabbing, the entirety of which was captured on a 9-1-1 tape that was played for the jury two times during the guilt phase. In all likelihood, the tape recording of the stabbing and expiration of Joyce Brown in a telephone booth had a substantially greater impact on the jurors than isolated references by mental health experts to Turner's military service.

Here again, the all-important function of mitigation in the capital *penalty phase* is obliterated by lumping together explicitly irrelevant guilt-phase evidence in mitigation of punishment with inflammatory offense details. To suggest, therefore, that the court's blanket instruction as to all *guilt-phase* evidence was an adequate substitute for the presentation of mitigating evidence at the *penalty phase* improperly derogated the crucial role of the latter phase in the capital sentencing process.

It was trial counsel's clear duty to present mitigating evidence—and, specifically, evidence of Turner's service in the Vietnam War—to the penalty-phase jury. But Turner's counsel did not even *mention* "Vietnam" in his penalty-

phase closing argument or refer to the much-touted guilt-phase evidence of Turner's Vietnam service. Thus, even accepting the illogical argument that the guilt-phase testimony as to Vietnam was sufficient mitigation evidence, counsel's failure to so much as *refer* to that evidence was glaringly deficient.

3. Submission of a Memorandum to the Court *After* Rendition of the Jury's 7-to-5 Vote for Death Was Too Little and Far Too Late

The State has similarly pointed to trial counsel's post-jury memorandum to the trial court as ample presentation of Turner's Vietnam service. AB 7. Obviously, that proffer had no effect on the jury's penalty verdict. Given the importance of the jury in Florida's capital sentencing scheme, the post-verdict memorandum was clearly too, little too late. *See Tedder v. State*, 322 So. 2d 908 (Fla. 1975) (requiring sentencing judge to give "great weight" to the jury's verdict as to punishment) (cited in *Porter*, 130 S. Ct. at 453).

Had the jury known what the trial judge eventually knew about Turner's Vietnam service, there is a reasonable probability that at least one more juror would have voted for life, rendering the jury vote 6-to-6, which would have constituted a recommendation for life. The failure to discover and present that evidence to the jury constituted deficient performance on counsel's part.[3]

[3] The State gratuitously and improperly refers to trial counsel as "former Florida Bar president Hank Coxe." AB 20. This fact is not in the record and is plainly inserted by the State to improperly influence this court concerning trial counsel's

C. TRIAL COUNSEL'S PENALTY-PHASE PERFORMANCE WAS INDEED "DEFICIENT," AND IT CANNOT BE CONSIDERED IN A VACUUM WITHOUT REGARD TO THE HUGE AMOUNT OF COMPELLING MITIGATING EVIDENCE COUNSEL FAILED TO DISCOVER AND PRESENT THAT ALMOST CERTAINLY WOULD HAVE RESULTED IN A LIFE RECOMMENDATION

It is impossible to assess the reasonableness of what Turner's trial counsel *did* present without considering what counsel, with a proper investigation, *could* have presented but did not. The courts here have refused even to *consider* Turner's voluminous post-conviction proffer, finding, in a veritable vacuum, that counsel's penalty-phase performance was objectively reasonable and not deficient. *Porter* commands, however, that this court look anew at that proffer—and, in particular, to the compelling evidence of Turner's Vietnam combat experience, which is weighty mitigation evidence that was unknown to the penalty-phase jury that considered Turner's worthiness to live.

Interestingly, in Porter's case, this court "expressly declined to answer the question of [trial counsel's] deficiency." *Porter,* 130 S. Ct. at 451, n. 6 (referencing this Court's analysis in *Porter v. State*, 788 So. 2d 917, 925 (2001)). This court nevertheless went on to examine the mitigating evidence presented by

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performance. The State refers to Coxe by name six other times, seemingly with the same intent. (AB 2, 15, 28 (four times, once again as "Hank Coxe")). Coxe represented Turner more than 20 years before assuming his office with the Bar, and his eventual leadership in the organization is a wholly improper consideration in this action.

Porter during post-conviction proceedings and determined that that evidence would not have changed the outcome. However, the United States District Court granted habeas relief—only to be reversed by the Eleventh Circuit. The Supreme Court then reversed the Eleventh Circuit, stating:

> Like the District Court, we are persuaded that it was objectively unreasonable to conclude that there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard *the significant mitigation evidence that Porter's counsel neither uncovered nor presented*.

Porter, 130 S. Ct. at 448 (emphasis added).

Here, the courts have all found trial counsel's performance to be adequate without even *considering* a massive amount of wide-ranging and powerful mitigating evidence *undiscovered* by trial counsel and proffered during rule 3.850 proceedings. It should be self-evident that a reliable and accurate assessment of alleged deficiencies in counsel's performance would require some sort of comparison with post-conviction mitigating evidence proffered to show what counsel *failed* to do—evidence as to whether reasonable capital counsel would have used that evidence and whether it probably would have made a life-or-death difference here.

Such a comparison is used to determine the "prejudice" from counsel's omissions and is applicable here in correctly assessing counsel's performance. "To assess that probability [of a different outcome], we consider "the totality of the

available mitigation evidence—both that adduced at trial and "the evidence adduced in the habeas proceeding." *Porter,* 130 S. Ct. at 454 (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

In accurately comprehending the deficient performance of Turner's counsel, it is also critical to consider the relative amounts of time available to trial counsel versus the time available to post-conviction counsel to investigate and develop mitigating evidence. As noted in Turner's initial brief, trial counsel had 13 months to prepare for the penalty phase. By contrast, post-conviction counsel had barely four months from their appointment until the rule 3.850 motion was due. During that time, counsel had to familiarize themselves with the entire record, review trial counsel's files, review prosecution and law enforcement files, *reinvestigate* the case, and prepare Turner's rule 3.850 motion, with its voluminous appendix of mitigating affidavits and evidence. Contrary to the State's intimation that post-conviction counsel had the luxury of time relative to trial counsel, collateral counsel had *less than one-third* of the time available to trial counsel in which to perform all of the above time-consuming and necessary functions.

Even so, working under arduous time constraints, post-conviction counsel readily found and proffered a massive amount of mitigating evidence neglected by trial counsel. In his initial brief, Turner summarized the compelling new evidence proffered in his rule 3.850 motion. The new evidence included: proof that Turner

was a consummate Good Samaritan and exemplary citizen prior to this offense, including three life-saving rescues of strangers and major assistance to prosecutors in a homicide case; proof that Turner is a model prisoner; proof that Turner has profound mental illness; and (most importantly for present purposes) hard proof of Turner's Vietnam combat service.

Counsel's unreasonable omissions regarding Turner's Vietnam combat service are discussed above. Additionally, as in *Porter*, trial counsel here unreasonably failed to discover and present a wealth of readily available evidence of Turner's serious mental illness, including: records of his wife's efforts to "Baker Act" him shortly before the offense; a statement from her lawyer describing reasons for seeking to commit Turner involuntarily; a statement from the most experienced capital defense attorney in Jacksonville describing Turner's extreme derangement during their jail visit hours after the offense; a statement from a jail nurse who observed Turner "slipping in and out of reality" during his pretrial incarceration; and statements from six eyewitnesses who observed Turner's psychotic state *during* the offenses. Surely, "[t]his is not a case in which the new evidence 'would barely have altered the sentencing profile'" of Turner. *Porter*, 130 S. Ct. at 454.

This case is remarkably similar to Porter's in several important ways, all of which were seemingly taken into account in granting relief to Porter. In both

cases: (1) counsel failed to present evidence of combat service; (2) counsel failed to present dispositive verifiable proof of serious mental illness; (3) counsel failed to present additional nonstatutory mitigating evidence; (4) the defendant acted from an "emotionally charged, desperate, frustrated desire to meet with his former lover [wife]"; (5) there were two contemporaneous homicides charged for which the jury imposed life on one count and death on the other; (5) the trial court refused to find mental mitigating factors—either statutory or *nonstatutory*—because it found the defendant's capacity was not "*substantially* impaired" nor his "mental or emotional disturbance *extreme,*" under the statutory language; and (7) several justices of this court dissented or concurred on direct appeal.

One key difference, however, is that Porter was afforded the opportunity to present evidence in support of his ineffectiveness claim at an evidentiary hearing. But Turner's compelling and weighty post-conviction proffer was summarily denied *20 days after it was filed,* without so much as a court appearance in the trial court—a practice no longer even permissible in capital cases. *See, e.g., Huff v. State,* 682 So. 2d 982, 983 (1993). This court affirmed and Turner was never permitted to prove counsel's deficiencies in court.

In *Sears v. Upton*, 558 U.S. --, 130 S. Ct. 3259 (2010), the United States Supreme Court expounded on *Porter*, finding that a Georgia post-conviction court failed to apply the proper prejudice inquiry under *Strickland*. *Id.* 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.*" 130 S. Ct. at 3261 (emphasis added).

The Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Id*. at 3264. The Court explained:

> We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . .
>
> 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. . . .

Id. at 3266-67 (emphasis added; footnotes and some 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, however, that is precisely what occurred.

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. But no prejudice analysis has *ever* been done in Turner's case. His unconstitutional condemnation to death thus violates *Porter* and sentencing relief is warranted.

D. *PORTER* IS NOT MERELY AN EXTENSION OF *STRICKLAND*, BUT INSTEAD ESTABLISHES AN EIGHTH AMENDMENT RIGHT FOR WAR VETERANS TO HAVE THEIR MILITARY SERVICE KNOWN AND CONSIDERED BY THEIR CAPITAL SENTENCERS

In *Porter*, the United States Supreme Court for the second time held that this court's failure to consider nonstatutory mitigating evidence violates the Constitution. *See also Hitchcock v. Dugger*, 481 U.S. 393 (1987). Specifically, the Court held that the failure of counsel to present evidence of Porter's Korean

War service violated his Sixth Amendment right to the effective assistance of counsel.

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). In *Witt*, this 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 held that changes in the law could be raised retroactively in post-conviction proceedings under certain circumstances. "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; emphasis added).

Of great significance here, this court applied the *Witt* standard after the United States Supreme Court's decision in *Hitchcock*, in which the Court (precisely as in *Porter*) criticized this court's constitutionally insufficient consideration of nonstatutory mitigating evidence. The *Hitchcock* decision was predicated on the Court's seminal holding in *Lockett v. Ohio*, 438 U.S. 586 (1978), that a capital sentence cannot be precluded from considering nonstatutory mitigating evidence. The Supreme Court found that Hitchcock's unconstitutional

death sentence resulted from this court's misreading of *Lockett*, in violation of the Eighth Amendment.

Shortly after the decision in *Hitchcock*, a Florida defendant with a pending execution date argued to this court that he was entitled to the benefit of *Hitchcock*. This court applied the retroactivity doctrine set forth in *Witt* 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 Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *see also Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987). This court found that after *Hitchcock*, it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660.

Clearly, this court read *Hitchcock* to say that it had misread *Lockett*. And precisely as *Hitchcock* rejected this court's analysis of *Lockett*, *Porter* rejected this court's analysis of *Strickland* claims—and specifically did so with regard to the failure of counsel to present, and the failure of post-conviction courts to consider, a defendant's military service. Therefore, just as this court granted *Hitchcock* relief to capital litigants whose rights had been violated by the same *Lockett* error found to be unconstitutional in *Hitchcock*, so too should this court grant relief to Turner, who has raised the same *Strickland* issue as that found unconstitutional in *Porter*.

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 introduced at a post-conviction hearing, but 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. 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's trial court found his military service to be "of inconsequential proportions." Due to his counsel's ineffectiveness, Turner's court found his service of "little significance." The failure of counsel in each case to investigate and present such evidence was deficient and prejudicial. In *Porter,* the Supreme Court specifically carved out a new requirement for capital counsel and courts with regard to the presentation of a particular form of nonstatutory mitigation: military service, especially in combat. *Porter* thus created a new constitutional right under the Eighth and Sixth Amendments applicable to Turner. He is therefore entitled to the benefit of *Porter*.

E. THIS IS NOT AN ATTEMPT TO "RE-LITIGATE" TURNER'S PRIOR INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM

The State insists that Turner's *Porter* motion was an attempt by Turner to "re-litigate" his claim of attorney ineffectiveness at his penalty phase. AB 11, 20-

22, 31-21. To be sure, Turner proffered evidence of trial counsel's failure to document his Vietnam experience, and a wealth of other mitigating factors, *in 1990.* Had counsel presented the proffered evidence at trial and had the Florida courts actually given proper consideration to that evidence, Turner's death sentence surely would have been overturned two decades ago. Since that time, as argued above, the Supreme Court has created a constitutional right for Turner to have his service in the Vietnam War presented and appropriately considered.

Turner does not seek to relitigate. He seeks the constitutional protection recently carved out precisely for individuals like Porter and him. The key facts in both cases are, for present purposes, the same. The constitutional violation is likewise the same. Turner is therefore entitled to, and deserves, the benefit of the new constitutional right accorded to Porter.

CONCLUSION

In light of the foregoing arguments, together with the arguments in his initial brief, Turner requests that this court reverse the order denying his *Porter* motion and grant him a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this 28th day of November, 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.

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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