IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-947

NORBERTO PIETRI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Pietri appeals the circuit court's denial of his successive motion for postconviction relief. In response to Mr. Pietri's argument that the decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) created a change in Florida's *Strickland* jurisprudence that requires consideration and granting of Mr. Pietri's postconviction claims, the circuit court ruled that *Porter* does not create a successive postconviction claim because it did not change the ineffective assistance standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). (PCR2. 184-85). Below, Mr. Pietri explains that the court's finding was in error because *Porter* need not have changed the *Strickland* standard to have changed a misapplication of that standard in Florida.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record in this appeal:

References to direct appeal record are cited as "(R. #)." References to the initial state postconviction record are cited as "(PCR1. #)." References to the instant record are cited as "(PCR2. #)." All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Pietri respectfully moves this Court for oral argument on his appeal.

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INTRODUCTION

In *Porter v. McCollum*, the United States Supreme Court ruled that this Court's *Strickland* analysis in *Porter v. State*, 788 So. 2d 917 (Fla. 2001) was "an unreasonable application of our clearly established law." 130 S. Ct. 447, 455 (2009). The United States Supreme Court made that determination pursuant to the standard established by the Anti-Terrorism Effective Death Penalty Act ("AEDPA"), which does not permit a federal court to reverse a state court ruling on constitutional grounds simply because the federal court disagrees or the federal court thinks the state court was wrong, but rather requires what is treated as an extremely high level of deference to state court rulings, prohibiting federal courts from altering state court judgments and sentences unless the application of federal law by the state court, which in the *Porter* case was *Strickland*, was unreasonable, meaning not even supported by reason or a rationale. It is in this context that the United States Supreme Court's ruling in *Porter* must be read. When asking whether *Porter* requires a change in this Court's jurisprudence going forward, it must be considered that the United States Supreme Court in *Porter* found this Court's application of *Strickland* to be so unreasonable that the United States Supreme Court found it appropriate to reach past its concerns of federalism and deference to state courts and respect for state sovereignty to correct the unconstitutional ruling.

Mr. Pietri asks this Court to consider *Porter* introspectively, looking past the first blush language of the opinion, and inquiring into whether or not *Porter* forbids something that this Court has done in the present case. In other words, giving *Porter* a read-through and asking if this case is distinguishable may be insufficient to identify the underlying constitutional problem; Mr. Pietri asks this Court to attain a sense for the problem in conceptual approach that *Porter* identifies and then ask if something similar happened here. This Court must consider whether the unreasonable analysis in *Porter* was merely an aberration, limited solely to the penalty phase ineffectiveness claim in that case and wholly different and separate from other *Strickland* analyses by this Court, or was it in fact indicative of a non-isolated conceptual problem in this Court's approach to *Strickland* issues that occurred also in the present case.

STATEMENT OF CASE AND FACTS

Case history

The Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, Judge Marvin U. Mounts presiding, entered the judgment of conviction and sentence of death at issue in this case. Following Mr. Pietri's conviction for first degree murder (R. 2673, 3603), the penalty phase of Mr. Pietri's trial occurred on February 22, 1990. The jury voted in favor of death by a margin of eight-to-four (R. 3099-3102). The court sentenced Mr. Pietri to death

(R1. 3133). This Court struck the aggravating circumstance of cold, calculated and premeditated but held it to be harmless error and affirmed. *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). Mr. Pietri's petition to the United States Supreme Court was denied on June 19, 1995. *Pietri v. Florida*, 515 U.S. 1147 (1995).

On March 3, 2000, after several initial filings, Mr. Pietri filed a final consolidated motion to vacate (PCR1. 4547-4673). The lower court granted a limited evidentiary hearing (PCR1. 4863), after which, on August 27, 2002, the court denied all relief in a one-page order, stating simply that "[a] copy of the State's [post-evidentiary hearing memorandum] is incorporated by reference and made a part of the record." (PCR1. 6902); *Pietri v. State*, 885 So. 2d 245, 251 (Fla. 2004) (quoting trial court order). This Court affirmed the denial of Mr. Pietri's motion for postconviction relief. *Id*. at 251-72.

Mr. Pietri's federal habeas petition was denied on April 18, 2008. The United States Supreme Court of Appeals for the Eleventh Circuit affirmed.

Mr. Pietri filed the present successive motion for postconviction relief on November 29, 2010. The circuit court denied relief (PCR2. 183-85), and Mr. Pietri timely filed a notice of appeal. The present appeal follows.

Facts relevant to the underlying *Strickland* claim

The defense argued during the guilt phase that Mr. Pietri did not form premeditated intent (R. 2538). However, the only witness called by the defense at

the guilt phase of the trial was Mr. Pietri. Lead trial and direct appeal counsel Peter Birch testified in postconviction proceedings that he could not recall why he failed to call other witnesses at the guilt phase to support or bolster Mr. Pietri's testimony (PCR1. 6098). He believed that there was no premeditation and that the facts supported his position, so he did not view the case as one where his goal was to negate premeditation (PCR1. 6115). He testified that his defense in Mr. Pietri's case was "that there was no premeditation, this was second degree murder" and that "the conduct of Norberto Pietri was not that of someone who was engaged in a premeditated killing (PCR1. 6164-65). He did not recall ever having a conversation with Mr. Pietri specifically involving a decision not to use an intoxication defense (PCR. 6168).

Mr. Birch testified that the preparation for Mr. Pietri's testimony about his drug use at the guilt phase was Donnie Murrell's responsibility (PCR1. 6150). Trial counsel Donnie Murrell testified in postconviction that his view of the guilt phase was that it was a "classic second degree murder" case, involving the "irrational actions of a dope addict" (PCR1. 6197). He testified that his goal in his direct examination of Mr. Pietri was to negate premeditation (PCR1. 6197). He described voluntary intoxication as "a sub-theme of our entire defense. I don't think it was ever the theory of defense that we, that we put our money on" (PCR1. 6202). He stated that there were witnesses he and Mr. Birch could have called at

the guilt phase who could have corroborated Mr. Pietri's substance abuse around the time of the shooting (PCR1. 6205). He stated that presenting corroborative witnesses at the guilt phase would have done no harm (PCR1. 6247).

Mr. Pietri's testimony concerned his personal history, his experience with life-long drug addiction and the events surrounding the crime, including his cocaine use and state of mind at the time of the shooting. He explained that he became addicted to cocaine and started committing robberies to support his habit (R. 2277-81). He testified about his arrests and incarcerations that occurred because of his desire for drugs and how he again became addicted to drugs once he was released from prison (R. 2285, 2325). Mr. Pietri testified that on the day of the crime, he pulled over at the direction of Officer Chappell and sat there feeling "frozen" (R. 2391). As Officer Chappell approached, Mr. Pietri grabbed the gun and shot but he did not think about trying to kill the officer and did not intend to kill him when he shot the gun (R.2391).

Mr. Birch testified that he and co-counsel Mr. Murrell, as of October 1989, had no specific plan for how to try the case (PCR1. 6067-68). He "never gave [an intoxication defense] serious consideration" (PCR1. 6095). He testified that "[b]ased on my knowledge of cocaine, which I admit was not extensive and based on my understanding of cocaine intoxication as a defense, I would have felt that he needed to be under the influence of cocaine, having ingested it earlier in the day

for that to have any viable chance" (PCR1. 6096). He had never used an intoxication defense during his legal career (PCR1. 6097). At the time of the trial, he had a general understanding of the cocaine addiction withdrawal process as it related to intoxication and stated that his investigation had been deficient:

> My thinking back then, as best as I could recall, would be that the influence of drugs would had to have been directed at that time by direct -- I mean, he is suffering from the influence of cocaine that he ingested earlier that day or the night before. So it wasn't like he had to have had much cocaine in his body. To be honest, I don't think I ever knew how much cocaine he had in his body on August 22, 1988.

(PCR1. 6097). Mr. Birch testified that he did not recall if he had questioned potential jurors about their feelings about the intoxication defense (PCR1. 6113).

Mr. Birch stated that until the day before the trial commenced he had attempted to plead out Mr. Pietri's case, and that in fact a plea agreement had been reached with the State for a life sentence plus 130 years for the additional felonies for which Mr. Pietri was charged (PCR1. 6142-43). Mr. Pietri had signed the plea agreement and was in full agreement to pleading guilty (PCR1. 6144). According to Mr. Birch, the father of the victim scuttled the plea to a life sentence (PCR1. 6143).

A defense psychologist, Dr. Harry Krop, had been appointed on December 22, 1989, about a month before the case initially went to trial (PCR1. 6074). Mr. Birch hired Dr. Krop primarily but not exclusively to assist counsel in the

preparation of the penalty phase (PCR1. 6074-75). Mr. Birch testified that the experts that he eventually presented at the penalty phase, social worker Jody Iodice and psychologist Dr. Caddy, were unknown to him at the time he was preparing the guilt phase case (PCR1. 6116).

Mr. Birch stated that he also had failed to depose or interview Mr. Pietri's brother, Luis Serrano, one of four people present at the Airport Hotel and the Aqua Hotel with Mr. Pietri doing drugs throughout the seven days after Mr. Pietri walked away from Lantana Correctional and around the time of the shooting (PCR1. 6110-11). He testified that he could not recall as to why he never interviewed or deposed Luis Serrano (R. 6170). Mr. Birch testified that he could recall no reason for his failure to investigate these witnesses to Mr. Pietri's drug use around the time of the offense, stating that "[w]e, obviously, thought calling No[r]berto himself was the way to go" (PCR1. 6112).

He testified that the depositions he took of Yoris Santana and Mickie Brantley [Serrano], two friends of Mr. Pietri who were staying with him at the hotels before the August 22, 1988 shooting, contained information about Mr. Pietri's substance abuse that would have been useful in supporting both a guilt phase intoxication defense and statutory and non-statutory mitigation (PCR1. 6099-6107). Mr. Birch testified he was aware that Randy Roberts was another of the "circle of friends" who was with Mr. Pietri before the shooting, that he failed to

interview Mr. Roberts and, after he reviewed the police statements of Mr. Roberts, that the information therein about Mr. Pietri's addiction to rock cocaine and constant use of cocaine in the days before the murder would have been useful to present in support of an intoxication defense and penalty phase mitigation (PCR1. 6107-13).

Joriseli Santana testified at trial and at the evidentiary hearing on October 23, 2001 (PCR1. 6174-87). He testified that he was staying with Mr. Pietri, Luis Serrano, Mickie Brantley and Randy Roberts at the Airport Inn and the Acqua Motel from August 18 until August 24, 1988 (PCR1. 6177). Mr. Santana described Mr. Pietri as an "uncontrollable" crack cocaine user during the week he spent with Mr. Pietri before and after Officer Chappell was killed (PCR1. 6180-83). He agreed with his prior deposition that Mickie Brantley and Luis Serrano were also doing cocaine all the time with Pietri (PCR1. 6182). He described Pietri's behavior when he was smoking crack cocaine during the week at the two motels as "[l]ike somebody whose out of their mind" (PCR1. 6184).

Mr. Murrell testified that he never knew that Dr. Krop was retained to evaluate Mr. Pietri (PCR1. 6206-08). He did not recall ever talking to Dr. Krop or to Dr. Haynes for Mr. Pietri's case (PCR1. 6209). He had no experience using neuropharmacologists and no knowledge as to their expertise other than generally as substance abuse experts (PCR1. 6210). Mr. Birch also testified that at the time

of the trial he did not know the field of neuropharmacology existed (PCR1. 6172). Mr. Murrell testified that at the time of Mr. Pietri's trial he knew very little about psychological testing (PCR1. 6211). He was appointed to the case only about ninety days before they went to trial (PCR1. 6213). Mr. Murrell did not recall ever discussing with Mr. Birch the possibility of using Jody Iodice as an expert about cocaine addiction at the guilt phase (PCR1. 6214). However, he testified that Ms. Iodice's penalty phase testimony about cocaine abuse was potentially relevant to the issue of premeditation (PCR1. 6220). Similarly, he testified that it would have been useful to get Dr. Caddy's proffered testimony at the penalty phase that Mr. Pietri did not have the specific intent to kill before the jury at the guilt phase (PCR1. 6241). He testified that if Dr. Caddy had been available at the guilt phase, he would have supplied him with the evidence that helped to establish that Mr. Pietri was suffering from cocaine withdrawal at the time of the offense (PCR1. 6244). Mr. Murrell testified that as to the guilt phase and the penalty phase, they were unprepared because they did not have experts (PCR1. 6265).

Mr. Murrell testified that Mr. Pietri's family members were not called at the guilt phase because he did not think their accounts of Mr. Pietri's drug binging "were sufficient to make a jury understand that the intent could not be formed" (PCR1. 6245).

The defense called eight witnesses at the penalty phase. They included four of Mr. Pietri's siblings: William Pietri, Marino Pietri, Ramona Rivera and Ada Liddell. In addition the defense called Yoris Santana, who had been with Mr. Pietri around the time of the offense; Roger Paul, a prison minister who visited Mr. Pietri in the Palm Beach County Jail; and two experts, Jody Iodice, a licensed clinical social worker who never met with Mr. Pietri and Glen Ross Caddy, a clinical psychologist who interviewed Mr. Pietri the day before he testified.

Mr. Birch testified in postconviction that it was his "guess" that Virginia Snyder, the only paid investigator who worked on the case, probably did no work on the penalty phase of the case (PCR1. 6066). He stated that he did not have a paid investigator working on the penalty phase (PCR1. 6125). He testified that he recalled receiving a letter from Dr. Krop after Dr. Krop met with Mr. Pietri and that he was "extremely disappointed in the outcome of his evaluation" (PCR1. 6077-79). He acknowledged that Dr. Krop had asked in his letter for additional background materials that he never provided to Dr. Krop. Mr. Birch did not provide Dr. Krop with the depositions and police statements of Mickie Brantley, Randy Roberts or Yoris Santana or with any background materials about Mr. Pietri's drug problems in prison (PCR1. 6116). He testified that his recollection was that he believed at the time that "[Dr. Krop] would not be ideal for Phase II [the penalty phase]" (PCR1. 6079). Mr. Birch reviewed his motion for payment of

expert fees (PCR1. 6121) and testified that it documented that the initial telephone consultation with Dr. Caddy was five days prior to the penalty phase, and that Dr. Caddy's evaluation of Mr. Pietri took place on the day before the penalty phase hearing began (PCR1. 6122). Mr. Birch was unable to say what if any psychological testing was performed by Dr. Caddy (R. 6124). He testified that he did not personally prep either Dr. Caddy or Jody Iodice for their testimony (R. 6124). He was "pretty sure" that expert Jody Iodice never met with Mr. Pietri because "the focus of her testimony had to do with addiction in general and not specifically Norberto" (PCR1. 6125). If he had examined the defense experts at the penalty phase, he would have attempted to elicit statutory mitigation from them (PCR1. 6126). He did not believe that at the trial he had obtained four different Department of Corrections ("DOC") records that he agreed were evidence that Mr. Pietri had substance abuse problems while he was incarcerated, including the reported use of cocaine "a couple of days" before his final walkaway from Lantana Correctional (PCR1. 6127-6132). If he had had these DOC reports of drug use by Mr. Pietri, he would have provided them to Dr. Caddy (PCR1. 6133).

Mr. Murrell testified in postconviction that the Pietri case was his first capital case and his first work on a penalty phase (PCR1. 6190). Although his assignment was not clearly broken down, generally he was working on the penalty phase of the case (PCR1. 6193). Neither he nor Mr. Birch travelled to Mr. Pietri's

homeland, Puerto Rico, and he had minimal contact with investigator Virginia Snyder (PCR1. 6194). Mr. Murrell testified that Ms. Iodice never met with Mr. Pietri or any of his family members (PCR1. 6216). He examined her at Mr. Pietri's penalty phase, but he never asked her about the presence of statutory or non-statutory mitigation in Mr. Pietri's case (PCR1. 6216-17). Mr. Murrell did not recall having Mr. Pietri's prison records regarding drug use at the time of the trial (PCR1. 6221-23). He agreed that if he had been aware of the records, they would have been useful to experts and as evidence before the jury at both the guilt phase and at the penalty phase, especially in light of the trial court's sentencing order finding no mitigation (PCR1. 6224). He was "almost a hundred percent certain" that he was unaware at the time of trial that there was a DOC report of Mr. Pietri using cocaine days before the escape from Lantana Correctional (PCR1. 6226).

He testified that Dr. Caddy did not do any psychological testing (PCR1. 6227). He stated that Dr. Caddy's evaluation of Mr. Pietri the day before he testified at the penalty phase was at "the 11th hour and 30 minutes" (PCR1. 6236). During his examination of Dr. Caddy, Dr. Caddy indicated no knowledge of Mr. Pietri's drug use in prison (PCR1. 6239). Mr. Murrell testified that "Caddy was hand strung. He did not have the time to do what he needed to do correctly" (PCR1. 6239). Based on his review of his billing statement, Mr. Murrell testified that neither he nor

Peter Birch met Dr. Caddy face to face until the morning of the day he testified at Mr. Pietri's penalty phase (PCR1. 6243).

> Caddy didn't have any of the things that he needed. He had a three hour meeting with our client and that's it. He did no testing, he had nothing to corroborate what our client told him. He had no – didn't read the depositions, no opportunity to read the police reports. He didn't have anything he needed to make an informed opinion. I think, I think it completely destroyed his credibility.

(PCR1. 6244).

Mr. Murrell testified that he and Birch misused Jody Iodice by not having her meet and interview Mr. Pietri (PCR1. 6250). His testimony summarized his view of their presentation of Dr. Caddy in the circumstances where he was unable to do "a complete psychological work-up:" "The State was able to just cut him down at the knees because he had nothing to corroborate what he sat there and talked about other than our client's statements to him and [an] interview with one sister" (PCR1. 6251). Mr. Murrell testified that after reviewing his opening statement at the penalty phase, it "certainly looks like" his comments were focused on Mr. Pietri's use of cocaine (PCR1. 6253).

Mr. Murrell testified that Dr. Caddy's testimony at the penalty phase regarding Mr. Pietri allegedly telling him that he "aimed" the gun at the victim, was the result of lack of preparation time with Dr. Caddy (PCR1. 6344). He described the testimony as "totally inconsistent with anything else we had

presented, argued or ever heard. I think Caddy, frankly, made a mistake in what he thinks the client told him" (PCR1. 6344). On re-cross, Mr. Murrell said that he was uncertain if Dr. Caddy's subsequent testimony that Mr. Pietri's actions were "a psychotic reacted decision" undid the damage caused by his prior "picked up the gun and aimed it" testimony (PCR1. 6347). In response to a question from the lower court, Mr. Murrell described the performance of himself and Mr. Birch at the penalty phase as "woefully inadequate" (PCR1. 6351).

At the postconviction evidentiary hearing, five of Mr. Pietri's siblings testified in graphic detail concerning: the childhood Mr. Pietri and his 14 siblings had growing up without enough money, going to bed hungry; their father, who was an alcoholic and a brutal wife beater, including while she was pregnant, and child abuser, using belts, switches from trees, and electrical cords, not permitting the children to cry during the beatings and causing Mr. Pietri to urinate in his pants during one beating (PCR1. 6281-87, 6294, 6311-13); their mother, who received no prenatal care until the eighth month of her pregnancy (PCR1. 6285-86); Mr. Pietri's personality growing up, being scared all the time, not acting like a normal child, working with his parents as migrant workers after moving to California from Puerto Rico, moving into his sister's two-bedroom house with 10 people (PCR1. 6289, 6292-93); Mr. Pietri's involvement with gangs and drugs, battling addiction, inhaling spray paint, using marijuana, taking pills and doing THC (acid horse

tranquilizers), free basing cocaine, and smoking crack "every day, every night" (PCR1. 6294-96, 6317-19, 6321-24, 6357, 6394); their own convictions, including murder (PCR1. 6310, 6354), and familial drug problems and addiction (PCR1. 6328, 6357); how nobody ever approached them about testifying at Mr. Pietri's 1990 trial even though they would have been willing to testify (PCR1. 6321-24, 6362-63, 6388, 6393-94); Mr. Pietri's time spent doing drugs with friends at the Airport Inn and the Acqua Inn in August 1988 around the time of the shooting, smoking crack "twenty-four seven" (PCR1. 6383-84) and being "always high" on crack for a week (PCR1. 6394); and opining that crack was "the only thing got my brother in trouble right now, him being on that stuff. He needs help, he don't need no death row, just needs some help" (PCR1. 6386).

Dr. Harry Krop testified as an expert psychologist for the defense at the evidentiary hearing (PCR1. 5484-5544). Dr. Krop testified that he performed an initial evaluation of Mr. Pietri on December 12, 1989 at the request of Mr. Birch (PCR1. 5493). He defined his evaluation as being "preliminary" (PCR1. 5494-95). Dr. Krop testified that based on Mr. Pietri's self-report he could have testified in 1990 that he "most likely was intoxicated to some degree at the time of the incident in question" (PCR1. 5506-07). He also testified that if he had the background materials he reviewed in postconviction, he would have been able to testify in more detail on the guilt phase intoxication issue (PCR1. 5509).

Dr. Krop testified that he reported to Mr. Birch, in correspondence dated December 26, 1989, that Mr. Pietri's primary diagnosis was substance abuse, that he had family problems and he had a history of physical and sexual abuse, all factors that were potentially mitigating. He informed Mr. Birch that he would need additional information to proceed with a mitigation evaluation, specifically DOC records, medical records, school records, police reports, depositions of witnesses and past PSI reports. He also requested a meeting with Mr. Pietri's family members (PCR1. 5494-95, 5539). He testified that he needed independent data to corroborate Mr. Pietri's self-report (PCR1. 5496). Dr. Krop testified that he informed Mr. Birch of his preliminary findings, then waited for further instructions, but had no further involvement with trial counsel or with Mr. Pietri's case until he was contacted regarding postconviction proceedings (PCR1. 5500-01). Dr. Krop would have recommended to trial counsel that Mr. Pietri undergo a full neuropsychological evaluation (PCR1. 5539). Depending on the results, he would also have recommended a neurological examination (PCR1. 5539). With the additional information he reviewed in postconviction, Dr. Krop stated that he could have testified at trial and supported his testimony about: Mr. Pietri's dysfunctional life, his father's abandonment of him, the considerable domestic violence in the home, his sexual abuse victimization, his feelings of being unprotected, that Mr. Pietri suffers from a cognitive disorder, his limited intellectual ability, his problems

with impulse control, disinhibition and reasoning, the effects of chronic substance abuse on him, the effects of cocaine, Mr. Pietri's cognitive disorder not otherwise specified, his poly-substance abuse chronic and his personality disorder not otherwise specified (PCR1. 5507-10). Had he had the information he requested from trial counsel, Dr. Krop testified that he would also have opined that Mr. Pietri had a serious emotional disturbance or disorder at the time the incident occurred and that Mr. Pietri's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired (PCR1. 5512-13).

Dr. Jonathan Lipman, a Chicago based board-certified neuropharmacologist, testified on February 5, 2002 at the evidentiary hearing (PCR1. 5545-5695). Dr. Lipman testified that he interviewed Mr. Pietri over two days in March 2000 and reviewed two packages of background material (PCR1. 5567-68). He testified that he interviewed a number of persons other than Mr. Pietri and received supplemental records concerning Mr. Pietri (PCR1. 5573). He testified that the extensive history that he obtained from the interviews with Mr. Pietri's siblings and friends all supported his opinion that Mr. Pietri's prior use of drugs "to the point of addiction and dependence and psychosis" "was important to my understanding of how drugs would affect him when he used them at the time of the offense" (PCR1. 5601-02). Specifically, he testified that the history he obtained

supported a finding of "kindling" in reference to Mr. Pietri's drugs use, and he opined that Mr. Pietri was an individual of this type who was "super sensitive to the adverse affects of psychostimulants" (PCR1. 5602). He also testified that the limited information he obtained from Dr. Goldberg indicates that Mr. Pietri has a frontal lobe brain function vulnerability that relates to intoxication (PCR1. 5617). Dr. Lipman testified that in his opinion, Mr. Pietri did not have the specific intent to kill Officer Chappell in August of 1988 (PCR1. 5618-29). He stated that "[t]he evidence I reviewed is not consistent with the conclusion that he had the specific intent to kill. It is consistent with an impulsive act, a separate impulsive act that was over before he even knew he had done it" (PCR1. 5629). Dr. Lipman explained that metabolic intoxication is not determined by the cocaine level in the bloodstream and that low blood levels of cocaine do not mean that a chronic user is not under the influence of cocaine (PCR1. 5620, 5626). Dr. Lipman testified that in his opinion Mr. Pietri was suffering from an organic mental disorder at the time of the offense due to intoxication (PCR1. 5628). Dr. Lipman testified that Mr. Pietri was in a paranoid psychotic state at the time of the offense due to his metabolic intoxication from chronic use of cocaine (PCR1. 5626) ("Metabolic intoxication occurs when . . . the chemistry of the brain becomes so disrupted that even though the drug has left the system, the brain chemistry has not returned to normal. The person is intoxicated but the drug has gone"). Dr. Lipman testified that both mental

health statutory mitigating circumstances were present at the time of the offense (PCR1. 5617).

Dr. Glenn Caddy testified at the evidentiary hearing on February 5 and 6, 2002 (PCR1. 5696-5710, 5729-77). Dr. Caddy testified that he was retained as a clinical and forensic psychologist prior to the penalty phase in 1990 (PCR1. 5697). He examined Mr. Pietri for a total of three and a half hours the day before he testified (PCR1. 5698). Dr. Caddy testified that his evaluation of Mr. Pietri was "the best that he could do under the time available" and that it was "an effort to try to get as much material together as [he] reasonably could" (PCR1. 5706). He stated that it was in no way a comprehensive mitigation evaluation (PCR1. 5701). Dr. Caddy testified that he would normally do far more when asked to perform a penalty phase evaluation, becoming involved as early as possible and getting as much information as counsel could provide (PCR1. 5700-01). He testified that he also would have liked to have conducted detailed psychological testing "or if there were any psychological testing done previously, to be able to examine that" (PCR1. 5701). He had an opportunity to speak with a few family members on the morning that he testified at the penalty phase, but he stated that he failed to meet with them individually and did not have an opportunity to assess their credibility (PCR1. 5704-05). He testified that he failed to obtain any corroboration of his interview with Mr. Pietri because of lack of time (PCR1. 5702), defining his

evaluation as a ". . . frantic effort to do a consultation as prelude to the next phase of this trial, the sentencing phase" (PCR1. 5702-03). He had no further involvement in the case until he was contacted by postconviction counsel and was provided with two volumes of background materials and a number of depositions and statements of experts and witnesses (PCR1. 5709-10). Dr. Caddy testified that he reviewed background materials and various depositions of experts and witnesses that he had not previously reviewed in preparation for his testimony (PCR1. 5729-31). He stated that his review of these additional materials did not change his testimony from 1990, but rather he stated, "I have a much stronger frame of reference based on all that material" (PCR1. 5733). He testified that given his review of background materials and interviews it was likely that Mr. Pietri was "extremely impaired by his withdrawal state from drugs and from the entire array of underlying personality issues" at the time of the offense, and that "[i]t shouldn't be excluded as a factor in his state of mind at the time he committed the murder" (PCR1. 5741). Dr. Caddy further testified that his opinion in 1990 "moved somewhat in the direction" of supporting the proposition that Mr. Pietri was unable to appreciate the criminality of his conduct or to conform his conduct to the law (PCR1. 5743). He stated that his opinion now "hasn't changed all that much, although it's simply perhaps a firmer position" because it is "most definitely better founded" (PCR1. 5743).

In response to a question from the trial court, Dr. Caddy summarized his opinion regarding intoxication: "I can't rule out the possible significance of a cocaine intoxication state . . . triggering him to do something that perhaps not being cocaine-involved may have caused him to perhaps flash and think about, but not do" (PCR1. 5765).

Dr. Faye Sultan, a clinical psychologist specializing in childhood sexual abuse, testified at the evidentiary hearing that Mr. Pietri is "quite, quite impaired," based on Dr. Goldberg's psychological testing, in several discrete areas: information processing, the ability to make good judgments, the ability to acquire new information from the environment and response to it appropriately, attention problems, and impulse control difficulties (PCR1. 5793) and that Mr. Pietri was a very serious addict, unable to control his behavior and very driven by the need to use more of the substance that he was addicted to (PCR1. 5794-95).

Dr. Terry Goldberg, a neuropsychologist, testified at the evidentiary hearing about a neuropsychological battery of tests he administered to Mr. Pietri (PCR1. 6417-6557). His ultimate opinion, was that "[Mr. Pietri's cognitive impairments were due to cerebral dysfunction" (PCR1. 6442) and that these cognitive impairments identified in his testing, on their own, rose to the level of non-statutory mitigation (PCR1. 6444). Dr. Goldberg testified that he had an informal contact with his colleague, neurologist Dr. Thomas Hyde, who advised him that he

had examined Mr. Pietri, who Dr. Hyde said exhibited several neurologic signs of frontal lobe dysfunction (PCR1. 6543). Dr. Thomas Hyde, a behavioral neurologist, provided an authenticating affidavit dated June 14, 2002 in support of his written report of neurological evaluation of Mr. Pietri that was entered into evidence at the evidentiary hearing (R. 6782-83).

SUMMARY OF THE ARGUMENTS

I. *Porter* represents a change in the *Strickland* jurisprudence of this Court that creates a claim cognizable in a successive 3.851 motion because it applies retroactively.

II. Applying *Porter* to the facts of Mr. Pietri's case demonstrates that relief is warranted under *Strickland*.

STANDARD OF REVIEW

The issues presented in this appeal consist of two parts: the first is the determination of whether the *Porter* claim is cognizable, meaning whether it creates a change in Florida law and is retroactive in nature. That issue is a question of law that must be reviewed de novo. *See Pietri v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993). The second is the application of *Porter* to Mr. Pietri's case, a determination for which deference is given findings of historical fact. All other facts must be viewed in relation to how Mr. Pietri's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct.

447 (2009); *see Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995). However, the trial court in this proceeding made no findings of fact such that there are no findings in the instant proceeding to which this Court should defer.

ARGUMENT

MR. PIETRI'S SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*

Mr. Pietri was deprived of the effective assistance of trial counsel at the penalty phase of his trial. This Court denied Mr. Pietri's claim of ineffective assistance of counsel in a manner found unconstitutional in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The recent decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Pietri's ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Pietri's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Pietri's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S.

393 (1987), a case in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

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

The preliminary question that must be addressed is whether the United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Pietri's *Porter* claim cognizable in Rule 3.851 proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . .").

I. *Porter* constitutes a change in Florida *Strickland* jurisprudence that is retroactive and thus creates a successive claim for relief

There are two recent occasions upon which this Court has assessed the effect to be accorded to a decision by the United States Supreme Court finding that this Court had misapprehended and misapplied United States Supreme Court precedent.

In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court granted federal habeas relief because this Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Hitchcock*, this Court had failed to find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances while deliberating in a capital penalty phase proceeding on whether to recommend a death sentence.

The other United States Supreme Court case finding that this Court had failed to properly apply federal constitutional law was *Espinosa v. Florida*, 505 U.S. 1079 (1992). There, the United States Supreme Court summarily reversed a decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death sentenced individuals whose death sentences had also been affirmed by this Court due to the same

misapprehension of federal law should arbitrarily be denied the benefit of the proper construction and application of federal constitutional law. On both occasions, this Court determined that fairness dictated that those, who had not received from this Court the benefit of the proper application of federal constitutional law, should be allowed to re-present their claims and have those claims judged under the proper constitutional standards. *See Pietri v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

The *Hitchcock/Espinoza* approach to determining what constitutes a retroactive change in the law provides the best guidance to make that determination in the present case.

In *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. 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). A court's inherent equitable powers were recently reaffirmed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the United States Supreme Court explained:

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 360, 375 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid*.

Holland, 130 S. Ct. at 2563.

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," 387 So. 2d at 925, the *Witt* Court declined to follow the line of United States Supreme Court cases addressing the issue, characterizing those cases as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations

omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).[1]

Thus, we are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Pietri does not allege that *Porter* changes *Strickland*. Rather, our question is whether this Court believes that *Porter* strikes at a problem in this Court's jurisprudence that goes beyond the *Porter* case. Since this Court can identify a federal precedent as a change in Florida law and extend it however it sees fit, the question is whether this Court recognizes *Porter* error in other opinions such as this one and believes that other defendants should get the same correction of unconstitutional error that Mr. Porter received.

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the

[1] At issue in *Danforth* was the retroactive application of a United States Supreme Court decision that was in different posture than the one at issue here. In *Danforth*, the United States Supreme Court had issued an opinion which overturned its own prior precedent. In *Porter*, the United States 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 instead an announcement that this Court has unreasonably failed to follow clearly established federal law.

United States Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926. So as this Court reviews this issue, it should keep in mind the heightened need for fairness in the treatment of each death-sentenced defendant.

The *Witt* Court recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." *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 old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to this Court and the United States Supreme Court. *Id*. at 930.

This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931.

Here, we see our issue hinge on the third consideration, as *Porter* emanates from the United States Supreme Court and is clearly constitutional in nature as a Sixth Amendment *Strickland* case. Thus we can look to the *Linkletter* considerations and consider that: the purpose to be served by the new rule would be to provide the same constitutional protection to Florida death-sentenced defendants as was provided to Mr. Porter, or to correct the same constitutional error that was corrected in *Porter*; the extent of reliance on the old rule is not presently knowable until reviewing *Porter* claims, however, if *Porter* error is found to be extensive, there is a compelling reason to correct the constitutional violation because it is great, and if *Porter* error is found to be extremely limited, the constitutional error must nevertheless be corrected; and, if *Porter* error is very limited, the effect on the administration of justice will be to correct a constitutional wrong without expending great resources, and if *Porter* error is extensive, the

effect will be to justifiably use whatever resources are necessary to correct a far-reaching constitutional problem in death cases.

While the result of the *Linkletter* analysis is not certainly conclusive, the *Hitchcock* example provides further guidance. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Pietri 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).[2]

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

[2] The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon thereafter called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. Therein, this Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). Then on September 9, 1987, this Court issued its opinions in *Pietri* and *Downs* ordering resentencings in both cases. In *Pietri*, 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 Pietri, to defeat the claim of a procedural default." In *Downs*, this Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, this Court issued its opinion in *Demps*, and thereto addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

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

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

Downs, 514 So. 2d at 1071.[3] Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every

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

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

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

case in which the *Lockett* issue had been raised. And in *Pietri* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.[4]

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

[4] Because the result in *Hitchcock* was dictated by *Lockett* as the United States Supreme Court made clear in its opinion, there really can be no argument that the decision was new law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). Since the decision was not a break with prior United States Supreme Court precedent, *Hitchcock* was to be applied to every Florida death sentence that became final following the issuance of *Lockett*. Certainly, no federal court found that *Hitchcock* should not be given retroactive application. *See Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland*. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received.

The fact that *Porter* error is more elusive, or difficult to identify, than *Hitchcock* error is, does not mean that *Porter* is any less of a repudiation of this Court's *Strickland* analysis than *Hitchcock* is of this Court's former *Lockett* analysis.

Just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, this Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases.

In *Porter v. McCollum*, the United States Supreme Court found this Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455. This Court's *Strickland* analysis in *Porter v. State* was as follows:

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two

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

Porter v. State, 788 So. 2d at 923 (emphasis added). The United States Supreme Court rejected this analysis (and implicitly this Court's case law on which it was premised) as an unreasonable application of *Strickland*:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. . . . Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

Porter v. McCollum, 130 S. Ct. at 454-55.[5]

[5] The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard which is identical to the prejudice prong of the *Strickland* standard, the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result. In *Kyles v. Whitley*, 514

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

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U.S. 419, 449 n.19 (1995), the majority in responding to a dissenting opinion explained:

> Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 1583-1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Thus, it was made clear in *Kyles* that the presiding judge's credibility findings did not control.

personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id*. (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court, just as this Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that court relied upon the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

Indeed in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings.[6] In *Stephens*, this Court noted that its

[6] It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the Second District Court of Appeals was in conflict with *Grossman* as to the appellate standard of review to be employed.

decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996) were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision.[7] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*.[8] However, the court made clear that even under this less deferential standard

[7] This Court acknowledged that there were numerous cases in which it had applied the deferential standard employed in *Grossman*. As examples, the court cited *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998); *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993); *Hudson v. State*, 614 So. 2d 482, 483 (Fla. 1993); *Pietri v. State*, 608 So. 2d 778, 782 (Fla. 1992); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). However, the list included in *Stephens* was hardly exhaustive in this regard. *See, e.g*, *Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

[8] The majority opinion in *Stephens* receding from *Grossman* prompted Justice Overton, joined by Justice Wells, to write: "I emphatically dissent from the analysis because I believe the majority opinion substantially confuses the responsibility of trial courts and fails to emphasize a major factor of discretionary authority the trial courts have in determining whether defective conduct adversely affects the jury." *Stephens v. State*, 748 So. 2d at 1035. Justice Overton explained:

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

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, the court relied upon this very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923.

From an examination of this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard which was employed in *Porter v. State* and used to justify this Court's decision to discount and discard Dr. Dee's testimony was "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455.[9]

"My very deep concern is that the majority of this Court in overruling *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), has determined that it no longer trusts trial judges to exercise proper judgment in weighing conflicting evidence and applying existing legal principles." *Id.* at 1036.

[9] As the United States Supreme Court noted in *Kyles*, the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear

But it is critical to recognize that *Porter* error runs deeper than that, and that the issue of the *Stephens* standard is but one manifestation of the underlying *Strickland* problem that can pervade a *Strickland* analysis.

At the heart of *Porter* error is "a failure to engage with [mitigating evidence]." *Porter*, 130 S. Ct. at 454. The United States Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually went through in Korea." *See id*. That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage is to embrace, connect with, internalize–to glean and intuit from mitigating evidence the reality of the experiences and conditions that make up a defendant's humanity. Implicit in the requirement that trial counsel must present mitigating evidence to "humanize" capital defendants, *id.* at 454, is the requirement that

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because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute her credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the state. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

courts in turn must engage with that evidence to form an image of each defendant's humanity. It stands to reason that nothing less than a profound appreciation for an individual's humanity would sufficiently inform a judge or jury deciding whether to end that individual's life. And it is that requirement–the requirement that Florida courts *engage with humanizing evidence*--that is at the heart of the *Porter* error inherent in this Court's prejudice analysis and *Stephens* deference. The United States Supreme Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . ." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

The crux of the *Porter* problem is in figuring out *how* this Court failed to engage with the evidence, and conversely *how to* engage with evidence as *Strickland* envisions. An analogy can assist with conceiving of the answer:

If a person is presented with a batch of apples and asked if it is reasonably probable that there are more red apples than green, and he rummages through the top of the batch, sees mostly green apples, and responds that it is reasonably possible that more are green, he has not answered the question he was asked. Whether there is a reasonable possibility that more are green does not tell us whether there is a reasonable probability that more are red. The conclusions are not

determinative of one another and in fact have very little or nothing to do with one another, since, to put figures to it for the sake of conceptualizing the fallacy, a 51% probability that more are red still allows for a 49% possibility that more are green. By treating the two conclusions as mutually exclusive, the apple inspector committed the logical fallacy of creating a false dilemma, i.e. *there is either a reasonable possibility that more are green or a reasonable probability that more are red so that finding the former precludes the latter*. The problem with the apple inspector's method is that it reverses the standard of his inquiry. If a reasonable probability of more red apples represents a problem for which the apple inspector is requested to inspect batches of apples, his fallacy would result in him determining that there is not a problem when in fact there is. The apple inspector's method permits him to base his conclusion on an assumption that saves him from having to dig to the bottom of every batch, i.e. *if most of the apples I notice on the surface are green I can assume that there is not a reasonable probability that digging into the batch would reveal more are red*. That method reverses the standard of inquiry because a negative response—*no, there is not a reasonable probability of more red apples*—comes not from finding that probability does not exist but from finding that an opposing possibility does exist. By attempting to prove a negative, the method places the focus of the inspector's inquiry on green apples instead of on red.

This Court has on many occasions addressed the manner in which lower courts should apply *Strickland v. Washington*, 466 U.S. 668 (1984), but a fundamental error persists in Florida jurisprudence, which was evident in *Porter*, which is evident in this case, and which is as simple as pointing out green apples when asked to find red.

Mr. Pietri does not mean to suggest that non-mitigating evidence cannot be considered. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Mr. Pietri does not mean to suggest that non-mitigating evidence should be ignored.

To prove prejudice under the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

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

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that

would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to *try to find a constitutional violation*. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must *search* for it carefully, not dismiss the *possibility* of it based on information that suggests it may not be there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non-presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional

violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry is to *try to find prejudice* by aggregating all the pieces of mitigating evidence, engaging with them and painstakingly speculating as to whether the State is poised to execute an individual whose trial attorney failed to present evidence that might have resulted in a life sentence. It is the focus on non-mitigating evidence to support a reverse-*Strickland* inquiry that runs afoul of and unreasonable misapplies *Strickland*.

The Sixth Amendment vests a right to effective assistance of counsel in capital defendants such that when it is reasonably probable that a trial attorney's deficient performance changed the outcome of a case a constitutional violation occurs. It does not matter whether it is also reasonably possible that the deficient performance did not change the outcome. That is a different inquiry and a contrary standard. The insidiousness of the error is its subtlety because the conclusions seem to have a tendency to negate or at least cut against one another. But since the standard is to look for a reasonable probability of a changed outcome, while it seems to tip the scale of the *Strickland* prejudice inquiry that the jury might have taken some of the non-presented evidence to cut against the defendant, that

consideration has no place on the scale. The *Strickland* inquiry being applied by the Florida Supreme Court, by its very terms, regardless of the fact that it may also quote the correct *Strickland* prejudice standard, is as follows: relief should be granted if there is a reasonable possibility that the non-presented evidence would not have mattered. But the proper inquiry is about looking for any way a constitutional violation might have occurred, meaning we err on the side of finding one, rather than permitting an execution despite a constitutional violation because there is some speculative explanation for how that violation might reasonably not have actually occurred. Both conclusions can be true, but *Strickland* is only concerned with one, so that if both are true, a constitutional violation must be found. If a violation might with reasonable probability have occurred, it did occur, regardless of whether it might with reasonable possibility have not.

Courts cannot focus on green apples to answer whether any are red. By rummaging in the top of the batch and pointing out green apples, by focusing on non-mitigating evidence and asking whether that evidence would have tended to support the outcome, the courts fail to respond to the *Strickland* prejudice inquiry.

Reversing the *Strickland* standard to ask whether there is a reasonable possibility that non-presented evidence would not have changed the outcome, reverses the standard of the inquiry and thus the burden on the defendant to made a claim under the standard. Dissenting in *Gamache v. California*, Justice Sotomayor

wrote that

> With all that is at stake in capital cases, *cf. Kyles v. Whitley*, 514 U. S. 419, 422 (1995) ("'[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case'" (quoting *Burger v. Kemp*, 483 U. S. 776, 785 (1987)), in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*.

562 U. S. ____ (November 29, 2010) (citations omitted). Like the California courts, Florida courts must not violate *Kyles* by, rather than taking painstaking care in scrutinizing a postconviction record for anything and everything that might add up to something that probably would have made a difference, rummaging through the top of the batch looking for green apples that support the conclusion that there are no red apples to be found below.

In *Sears v. Upton*, the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears" and unable to "speculate as to what the effect of additional evidence would have been" because "Sears' counsel did present some mitigation evidence during Sears' penalty phase." *Id*. at 3261. The United States Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this

case." *Id*. at 3264. The United States Supreme Court explained the state court's reasoning as follows:

> Because Sears' counsel did present some mitigation evidence during his penalty phase, the court concluded that "[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." The court explained that "it is impossible to know what effect [a different mitigation theory] would have had on [the jury]." "Because counsel put forth a reasonable theory with supporting evidence," the court reasoned, "[Sears] . . . failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced."

Id. at 3264 (citations omitted).

Of the errors found by the United States Supreme Court in the state court's analysis, the Court referred to the state court's improper prejudice analysis as the "more fundamental[]" error. *Id.* at 3265. The Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. §

> 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. . . . And, in Porter, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, requires in all cases a "probing and fact-specific analysis" of prejudice. *Id*. at 3266. A truncated, cursory analysis of prejudice will not satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Pietri's ineffective assistance of counsel claim must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate that the

failure to present the sort of troubled past relevant to assessing moral culpability causes prejudice.

Sears teaches that postconviction courts must speculate as to the effect of non-presented evidence in order to make a *Strickland* prejudice determination not only when little or no mitigation evidence was presented at trial but in all instances. As *Sears* points to *Porter* as the recent articulation of *Strickland* prejudice correcting a misconception in state courts, the failure to conduct a probing, fact-specific prejudice analysis can be characterized as "*Porter* error."

Porter makes clear that the failure to present critical evidence to the jury prejudices a defendant Here, that prejudice is glaringly apparent. After *Porter*, it is necessary to conduct a new prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's prejudice analysis used in this case to be in error, Mr. Pietri's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

II. *Porter* error was committed in Mr. Pietri's case

Mr. Pietri was deprived of the effective assistance of counsel during the penalty phase of his trial, and this Court committed *Porter* error in denying his claim. This Court found that "[d]efense counsel was not deficient in their investigation and presentation of mental health evidence, and even if deficient, Pietri has totally failed to demonstrate any prejudice." *Pietri*, 885 So. 2d at 266.

This Court found no error in the state court's one-page order adopting the State's posthearing memorandum, attaching it by reference, and denying relief. However, this Court stated that "the better practice is for the trial judge to compose the final order, in which the court reviews the testimony given and evaluates the credibility of the witnesses presented. An unquestionably independent review and independent order best serve the parties involved and the appellate process in these actions that may result in the ultimate punishment." *Pietri*, 885 So. 2d at 270. So this Court recognized a problem with the trial court simply adopting the State's memorandum, because it showed a lack of independent review and consideration.

Despite the fact that it thought the lower court's failure to make findings was problematic, this Court cited to *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla.1999) for the proposition that it defers to the trial court's findings of fact. *Pietri*, 885 So. 2d at 252. Thus, the very problem that occurred in *Porter*—deference to a lower court's unreasonable findings in light of substantial mitigating evidence to the contrary—occurred here. This Court relied on *Stephens* to discount the defense expert testimony of Dr. Lipman, just as it did in *Porter* to discount the testimony of defense expert Dr. Dee.

However, the error is even greater here because there were no trial court findings to defer to. Rather, the trial court had simply adopted the State's argument. Thus, this Court was essentially, and necessarily, deferring to the

State's argument as to the facts. While courts are in the business of applying standards to make factual findings; advocates are in the business of arguing what facts they think should be found. For this Court to defer to an argument concerning what the State viewed as facts useful to its case defies the essential structure of judicial factfinding. This Court chose the State's version of the facts in the face of substantial expert testimony from the defense, which was not given fair consideration by the State's argument.

Dr. Lipman testified in postconviction that Mr. Pietri did not know what he was doing when he committed the crime. He did not intend to do it, based on long-term drug use that caused his behavior to be reactive. Regardless of how that factors into the conviction, it is certainly strong mitigation.

And the testimony of Dr. Caddy and Dr. Iodice at the penalty phase was drastically different from Dr. Lipman's testimony, such that it cannot be considered cumulative. Dr. Iodice stated that drug usage "does not impair the ability to make cognitive decisions." *Pietri,* 885 So. 2d at 260. Dr. Caddy testified that coming off cocaine makes one hyperkinetic or stressed in a way that they overreact to things. *Id*. at 261. That testimony is drastically different from Dr. Lipman's conclusion that Mr. Pietri did not have the specific intent to kill Officer Chappell in August of 1988 (PCR1. 5618-29). Dr. Lipman stated that "[t]he evidence I reviewed is not consistent with the conclusion that he had the specific

intent to kill. It is consistent with an impulsive act, a separate impulsive act that was over before he even knew he had done it" (PCR1. 5629). To discount Dr. Lipman's conclusion that Mr. Pietri did not know what he was doing when he shot the victim based on Dr. Caddy and Dr. Iodice's vague testimony about the effects of drug use, including the contrary testimony that it does not impair cognitive decisionmaking, citing to *Stephens* nonetheless to defer to the State's position on the subject, is indistinguishably consistent with what this Court did in *Porter*.

The trial court did not make credibility findings as to the experts such that this Court could defer to them under *Stephens*. How can this Court, a non-evidence-taking Court, presume to know which experts were more convincing at the evidentiary hearing when it has no findings on which to rely? This Court stated that "[a]n unquestionably independent review and independent order best serve the parties involved and the appellate process in these actions that may result in the ultimate punishment." *Pietri*, 885 So. 2d at 270. That is the review that Mr. Pietri still seeks. After *Porter*, this Court's actions in this case cannot be viewed the same way. It is simply not constitutionally acceptable to discount ample mitigating evidence and expert testimony without well-considered findings from the trial court below and an independent review of the evidence.

The evidence of Mr. Pietri's background, presented at the evidentiary hearing through testimony by experts and different family members and friends

who knew far more about Mr. Pietri around the time of the offense, was filled with detailed descriptions of frontal lobe disorder, low IQ, drug addiction, poverty, sexual and physical abuse and neglect.

Only Dr. Krop and Dr. Caddy, both psychologists, met with Mr. Pietri prior to the penalty phase. *Pietri*, 885 So. 2d at 262. Dr. Krop recommended that additional work needed to be done, but trial counsel never made it so. There was never any psychological or neurological testing of Mr. Pietri until postconviction. Counsel's deficient performance was the direct cause for the jury never hearing the information that came out at the evidentiary hearing about Mr. Pietri's mental status and brain damage.

This Court acknowledged that the mental health evaluation/examination of Mr. Pietri by Dr. Caddy that was conducted immediately prior to the penalty phase was "more limited" than the extensive postconviction evaluations. *Pietri*, 885 So. 2d at 266. A reasonable investigation and development of social history would have provided support for the penalty phase testimony of Dr. Caddy at trial. The court also acknowledged that there was non-cumulative evidence concerning Mr. Pietri's mental status presented at the evidentiary hearing as a result of the postconviction evaluations: an IQ score of 76, performance in the mild to moderately impaired range, an opinion that Mr. Pietri suffered from organic brain damage that was supported by other experts' findings, and expert opinions

supporting the presence of statutory and non-statutory mitigation. *Id*. Despite this recognition, the Court found that Mr. Pietri "totally failed to explain what impact the additional work by counsel would have had." *Id*. at 261. However, in a post-*Porter* world we know that it is this Court's responsibility to speculate with perspicacity about how the evidence might have affected the jury. Here, that was not done, and without factual findings, it could not be done.

While this Court's deference under *Stephens* was found to be unconstitutional in *Porter*, this Court cannot take evidence, and needs facts and findings to review in its own independent *Strickland* analysis.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis.

CONCLUSION

Mr. Pietri's substantial claim of ineffective assistance of counsel has not been given the consideration required by *Porter*. Mr. Pietri requests that this court perform that analysis and grant relief.

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that counsel has furnished true and correct copies of the foregoing via U.S. Mail, first class postage prepaid, to opposing counsel this __ day of September, 2011.

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