IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-973

LOWER TRIBUNAL No. 91-373

ANTONIO MELTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summarily denial of Mr. Melton's successive motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850 and 3.851.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R" -- record on direct appeal to this Court;

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

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

STANDARD OF REVIEW

The issues presented in this appeal consist of two parts: the first is the determination of whether *Porter* must be applied retroactively. That issue is a question of law and must be reviewed *de novo*. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). The second is the application of *Porter* to Mr. Melton's case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Melton's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009).

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INTRODUCTION

On November 30, 2009, the United States Supreme Court decided *Porter v. McCollum*, 130 S. Ct. 447 (2009), and ruled that the Florida Supreme Court's *Strickland*[1] analysis utilized in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S. Ct. at 455. Under the Anti-Terrorism Effective Death Penalty Act (AEDPA), the United States Supreme Court was required to give some deference to this Court's application of *Strickland*. It could not grant habeas relief from a state court judgment merely because it disagreed with the state court's application of federal constitutional law. Specifically, habeas relief could only be issued if this Court's *Strickland* analysis was not just wrong, but clearly and unreasonably wrong. It is in this context that the United States Supreme Court's ruling in *Porter v. McCollum* must be understood.

Mr. Melton's current appeal requires this Court to critically consider the significance and subsequent consequences of the decision in *Porter v. McCollum* and consider whether its analysis in *Porter v. State* was merely an aberration or was it indicative of a systemic failure by this Court to properly understand and apply *Strickland*.

In the relatively recent past, this Court has on two occasions assessed the effect to be accorded to a decision by the United States Supreme Court finding that this Court had

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

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 the Florida Supreme Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978), and find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances when returning an advisory verdict in a capital penalty phase proceeding.[2] In *Espinosa v. Florida*, 505 U.S. 1079 (1992), the United States Supreme Court summarily reversed a decision by the Florida Supreme Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.[3]

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, the Florida Supreme 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

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[2]The AEDPA was not in effect at the time of the decision in *Hitchcock v. Dugger*, so there was no need for the United States Supreme Court to determine that the Florida Supreme Court's decision was clearly or unreasonably wrong. The United States Supreme Court's review in *Hitchcock* was *de novo*.

[3]The decision by the United States Supreme Court in *Espinosa v. Florida* was in the course of direct review of this Court's decision affirming a death sentence on direct appeal. The United States Supreme Court's decision was not through the prism of federal habeas review, and thus the United States Supreme Court employed *de novo* review.

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

Mr. Melton, whose ineffective assistance of counsel claims were heard and decided by this Court before the *Porter v. McCollum* decision was rendered, seeks to have his ineffectiveness claims reheard and re-evaluated using the proper *Strickland* standard that the United States Supreme Court applied in Mr. Porter's case to find a re-sentencing was warranted.[4]

STATEMENT OF THE CASE AND FACTS

On January 23, 1991, Antonio Melton and Bendleon Lewis were arrested for killing pawn shop owner George Carter. Thereafter, on February 5, 1991, Mr. Melton was charged by indictment for first degree murder and armed robbery with a firearm in this case (R. 1117).

On March 15, 1991, Lewis gave a statement to the

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

authorities implicating Mr. Melton and a man named Tony Houston in another murder case, the killing of cab driver Ricky Saylor (T. 54, 57-58, 203). Mr. Melton was initially tried for the murder and armed robbery of Saylor, and a jury found him guilty on September 13, 1991. On November 6, 1991, Mr. Melton received two life sentences in the Saylor case (R. 924).[5]

Mr. Melton was tried before a jury in the Carter case on January 27, 1992. According to the testimony at trial, Lewis and Mr. Melton were caught inside the pawn shop immediately after Carter was shot (R. 501-02). Lewis stated that Mr. Melton alone had shot Carter, while Lewis was in another part of the pawn shop (R. 636). Mr. Melton stated that Carter's gun went off during a struggle for control of the weapon (R. 691-95). On January 30, 1992, Mr. Melton's jury returned verdicts of guilty of first degree felony murder and robbery with a firearm (R. 895-96, 1275-76).

During the penalty phase proceedings, the State utilized the Saylor conviction to secure a death sentence against Mr. Melton. The jury recommended death by a vote of eight (8) to four (4) (R. 1112, 1285). On May 19, 1992, the trial court imposed a sentence

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[5]Mr. Melton's conviction in the Saylor case did not rest on any physical evidence or eye witness testimony from the crime scene. The only direct evidence to convict Mr. Melton of first degree murder and robbery was the testimony of co-defendant Tony Houston (R2. 396-401) and Ben Lewis, who was not charged in the murder.

In fact, the only physical evidence tying anyone to the scene was a fingerprint belonging to Tony Houston found on the back seat passenger door of the cab (R2. 337). Houston pled guilty to Second Degree Murder.

of death for the murder and life imprisonment on the armed robbery (R. 1380-1401, 1413-22).

In its sentencing order, the trial court relied on two aggravating circumstances, pecuniary gain and the prior violent felony from the Saylor case (R. 1394-95). Regarding the aggravating factor of a prior violent felony, the trial court found:

> 1. The defendant was previously convicted of another capital felony and of a felony involving the use or threat of violence to the person. The evidence established conclusively and beyond any reasonable doubt that the defendant was previously convicted of first degree murder and armed robbery. In that case, as in this case, the victim was killed by a shot to the head while the defendant was participating in the robbery of the victim. In both cases, the evidence established that the defendant fired the fatal shots. The violent crimes of which defendant were convicted were extremely violent and life-threatening, and resulted in the death of the victim. They were committed with no pretense of moral justification, for pecuniary gain, and with disregard to the life of the victim. The Court gives great weight to this aggravating circumstance.

(R. 1395).

While addressing the issue of mitigating circumstances, the court gave no weight to the defense's argument of disparate treatment of co-defendants, the defendant's domination by co-defendant Lewis, or that the death of Carter occurred under accidental circumstances:

> 3. Lenient treatment or disparate sentences, actual and inchoate, given to co-defendants. The Court finds that no mitigating circumstance in this regard was proved by the greater weight of the evidence. Co-defendant Bendleon Lewis has not been sentenced in this case. There can be little doubt that Bendleon

Lewis expects and will receive some degree of leniency (certainly less than a death sentence) for his cooperation, and considering the fact that the evidence conclusively establishes the defendant, and not Bendleon Lewis, as the trigger man who committed the actual killing in this case. There are legitimate reasons for imposition of a lesser sentence on Bendleon Lewis, and such lesser sentence would not be disparate or constitute a mitigating circumstance.

Not charging or prosecuting Bendleon Lewis in the death of Ricky Saylor is not lenient treatment and does not constitute a mitigating circumstance. The greater weight of the evidence proves that the State does not have sufficient valid evidence to do so; nor does failure of the State to prosecute Bendleon Lewis for perjury. Sentencing of co-defendant Tony Houston in the prior case to twenty years imprisonment is not lenient or disparate treatment in that case, and would not be a mitigating circumstance in this case if it were. Again, in the prior case, Antonio Melton was proved to be the trigger man, not co-defendant Tony Houston, and legitimate reasons existed for differing sentences.

4. Defendant's domination by co-defendant, Bendleon Lewis. This circumstance is not proved by the greater weight of the evidence, and has only the defendant's testimony to support it. The evidence is clear that the defendant voluntarily participated in this robbery and in fact armed himself with a firearm which he personally carried into the store to facilitate the robbery. There is no doubt from the evidence that he acted of his own volition and as a willing participant in the robbery. Defendant did not act under the substantial domination of any other person.

5. The death of Mr. Carter occurring under accidental circumstances. This circumstance was not proved by the greater weight of the evidence. It is supported only by the defendant's testimony and is inconsistent with most of the other evidence in this case. Mr. Carter had every right to resist, but the reliable evidence indicates that he did not do so – only the defendant's testimony. It is difficult to believe that, in a struggle, the victim was "accidentally" shot in the exact spot in the head that would

> produce immediate death. In the trial phase of the case, the jury had a reasonable doubt as to whether the killing was premeditated. However, in the penalty phase of the trial, it is evident that the jury rejected any contention that the shooting was "accidental" in recommending death by an eight to four vote.

(R. 1397-99)(emphasis in original).

On direct appeal, the Florida Supreme Court affirmed Mr. Melton's convictions and sentences. Melton v. State, 638 So. 2d 927 (Fla. 1994). Mr. Melton filed a petition for writ of certiorari to the United States Supreme Court, which was denied on October 31, 1994. Melton v. Florida, 115 S. Ct. 441 (1994).

Mr. Melton's initial Fla. R. Crim. P. 3.850 motion was filed on January 16, 1996 (PCR. 74-200). An amended motion was filed on July 5, 2001 (PCR. 907-1083). Following a Huff hearing on October 18, 2001, the circuit court granted a limited evidentiary hearing on several of Mr. Melton's claims (PCR. 1191-93). On February 11, 2002, Mr. Melton amended his Rule 3.850 motion (PCR. 1365-1558). On February 13-15, 2002, the circuit court held an evidentiary hearing.

The evidentiary hearing involved several issues, including claims based upon ineffective assistance of counsel at the guilt and penalty phases, Brady/Giglio, and newly discovered evidence of innocence. With regard to the ineffective assistance claim at the penalty phase, Frankie Stoutemire, Sr., Antonio Melton's father, testified that he

was in the service when Antonio was raised (T. 558). While Stoutemire would have visits with Antonio (T. 559-60), Antonio's mother was living with David Booker at the time (T. 560).[6] It seemed that every time Stoutemire came home to see his son, Antonio's mother would get repercussions from Booker (T. 561).

Stoutemire had heard that Booker was abusing Antonio's mother (T. 560).[7] This led to a confrontation with Booker. Stoutemire told him that "if he ever touched my son, it was going to be me and him out on the street." (T. 560).

Stoutemire recalled a conversation where Antonio told him he was out of school and couldn't get a real job (T. 563). Stoutemire advised him to join the service and get out of town (T. 563). Antonio shook his head and that was the last time Stoutemire saw him (T. 563). According to Stoutemire, the religion that Antonio's mom believed in did not agree with going into the military (T. 563). Antonio's mom had raised him, so Stoutemire backed off (T. 563). Stoutemire lamented that Antonio didn't have any guidance his whole life (T. 564).

Latricia Davis, Mr. Melton's mother, testified that the family had lived in subsidized housing called Truman Arms (T. 661-62), which was a rough, bad place (T.

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[6]They lived in the projects (T. 562).

[7]He also knew that Booker was a heroine addict (T. 561).

662). Davis was strict with Antonio because she didn't want him turning out like a lot of the young people that she was seeing around (T. 663). She did what she could being a single, working parent (T. 663). Davis had been married to David Booker, who had a drug problem (T. 666). This caused many problems at home, and Booker was verbally and physically abusive (T. 667).

Later on during Antonio's youth, Davis became active in the Jehovah's Witness Church (T. 669). She tried to get Antonio to live that type of lifestyle, because she thought it was best for him (T. 669). This involved keeping him away from school activities (T. 670).

Finally, Davis took Antonio out of school when he was 16 years old because of the bad associations that he was exposed to (T. 664). Ben Lewis was one of the people that Davis didn't want her son hanging around with at school (T. 666). Antonio looked up to these kids because he was sheltered and they had so much street knowledge (T. 664). Lewis, for example, seemed so much wiser and street smart (T. 666).

When Antonio was 16, Davis got married and moved to Mobile, Alabama (T. 663). Antonio stayed with his grandmother and aunt in Pensacola, Florida (T. 665).

Davis spoke to trial counsel prior to the penalty phase (T. 668). Counsel didn't ask about Davis trying to keep Antonio away from unsupervised children in the projects

(T. 668). According to Davis, postconviction counsel asked about more details than trial counsel (T. 684).

Margaret Parker, Mr. Melton's aunt, testified that Mr. Melton would sometimes stay with her after he was 16 years old (T. 746). Parker noted that after Antonio's mom moved, he was out more often (T. 748). According to Parker, Antonio was less mature than other children his age (T. 752), and he trusted other kids (T. 753). Parker observed that in regard to Antonio, Ben Lewis, and Tony Houston, it was Houston who seemed to be the leader of the group, then Lewis (T. 749).[8] No one from Antonio's defense team ever spoke to Parker (T. 750-51). Had they done so, she would have spoken to them about the information she provided during her testimony (T. 754).

Lawrence Gilgun, a clinical psychologist, evaluated Mr. Melton on January, 28, 1992, approximately one week before Mr. Melton's trial (T. 310). Dr. Gilgun acknowledged during his evidentiary hearing testimony that this was not standard practice, and that usually, he would be involved at least two months before trial (T. 310).

Dr. Gilgun noted that his bill did not reflect any discussions with the trial attorney (T. 311, D-Ex. 11). He would have recorded a face to face meeting on his bill (T. 311). While Dr. Gilgun did not recall independently what records were provided to him, he spoke of evaluating school

[8]Lewis and Houston were bother older than Antonio (T. 749).

records and depositions in his penalty phase testimony (T. 312). However, he was not provided with Mr. Melton's statement to the police, nor did he speak to any of Mr. Melton's family or friends (T. 312). Trial counsel did not supply any of this information to him, nor any information about Mr. Melton's upbringing (T. 312).[9]

Dr. Gilgun did not know what trial counsel's plan was regarding the penalty phase (T. 339). Usually, he would discuss these things with the attorney (T. 340). Dr. Gilgun concluded that if he had been given more information, he could have potentially given more mitigation (T. 341).

Dr. Henry Dee is a clinical psychologist with a subspecialty in clinical neuropsychology (T. 367). Dr. Dee saw Mr. Melton in January 1996 and again in November 2001 for approximately 14 hours (T. 369-70). During this time, he conducted a neuropsychological evaluation and extensive interviewing (T. 370). According to Dr. Dee, Mr. Melton was very open and seemed to be genuinely remorseful (T. 379).[10]

Dr. Dee reviewed discovery materials, school records, juvenile records, a previous evaluation by Dr. Gilgun, the Florida Supreme Court appeal, and witness testimony at the penalty phase of the Carter trial (T. 370-71). Dr. Dee

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[9]Dr. Gilgun explained that the importance of other materials is for corroboration (T. 313). Also, these materials help him to structure his interview and to elicit more information (T. 313).

[10]Mr. Melton denied any involvement in the Saylor case (T. 379).

spoke to Mr. Melton's mother, his aunt Margaret Faye Johnson, Latricia Davis and his father, Frankie Stoutemire (T. 380). Dr. Dee expressed his belief that this material is necessary to investigate the issue of mitigation, and it is also helpful to have independent corroborative evidence (T. 371).

While Mr. Melton didn't have any brain damage, Dr. Dee did find evidence of other mitigation (T. 372). Mr. Melton had an unusual childhood (T. 373). He was in a sense overprotected (T. 373). Dr. Dee explained that Mr. Melton's mother was a Jehovah's witness and she involved him in this religion (T. 373). While Mr. Melton had been a gifted athlete when he was younger, his mother forced him to give it up and be more and more involved in intensive Bible study (T. 373). Also, she withdrew him from athletics in part because she didn't care for the influence of peers (T. 374). By the time he reached middle adolescence, Mr. Melton was fairly isolated from his peers (T. 374).[11]

With regard to emotional maturity, Mr. Melton was a strikingly immature boy for 18 (T. 381). By the time he entered high school, he had almost no social contact (T. 381). Dr. Dee felt that Mr. Melton could be easily

[11]Dr. Dee explained that Davis worked a lot to support Mr. Melton and his brother (T. 373). Thus, from a fairly young age, Antonio was taking care of his brother after school (T. 373).

manipulated (T. 383).[12] That's why his mother didn't want him around the locker room and withdrew him from football (T. 383).

According to Dr. Dee's evaluation, Mr. Melton went from a situation of being isolated and/or in the church to being with a bunch of criminals by the time he got to high school (T. 374). Mr. Melton immediately fell in with these people (T. 374). He began to skip school, use drugs, and talk back (T. 374).

As a result of this, Davis withdrew her son from school at age 16 (T. 374). She gave him a choice of either conforming to everything she believed in or to move out (T. 375). From then until the time he was arrested, Mr. Melton would sometimes be with his grandmother or aunt (T. 375). During the two years prior to his arrest, Mr. Melton had essentially no supervision (T. 378).

Dr. Dee commented that Mr. Melton's stepfather was a very harsh man (T. 375). He was abusive towards Davis in front of Antonio (T. 376), to the point where he broke her arm (T. 376). Mr. Melton's stepfather used heroin and would bring other women into the house in front of him (T. 376). It was frankly grossly immoral conduct and probably shocking to a young child (T. 376).

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[12]Mr. Melton viewed Lewis and Houston as more sophisticated than himself (T. 383).

Dr. Dee testified that Mr. Melton's father did not have much contact with him (T. 376). He went into the Service for about three years at the time Mr. Melton was born (T. 376). He injured his back badly and had to have a series of operations (T. 376-77). By the time he returned, his son was already an adolescent and living with his grandmother (T. 377). Unfortunately, Mr. Melton's only male role model was an abusive heroin addict (T. 377).

Dr. Dee testified that Mr. Melton has an IQ of 98 (T. 390). While Dr. Dee made several errors in the scoring, the mistakes are not significant (T. 415). Mr. Melton's IQ was in the normal range (T. 409), and Dr. Dee made nothing of those results (T. 415).

The Honorable Terry Terrell, presently a circuit court judge, also testified during the postconviction evidentiary hearing (T. 153). Prior to becoming a judge, Terrell was the chief assistant public defender for the First Judicial Circuit of Florida (T. 154). He worked for the Public Defender's Office for fifteen years (T. 154). Terrell was first assigned to represent Mr. Melton on the Carter case (T. 155), where he was charged with first degree murder and armed robbery (T. 155). Terrell also represented Mr. Melton when he was arrested for the Saylor murder (T. 155).

Terrell testified that his trial schedule was busy back in 1991 and 1992 (T. 183-84). While he retained a psychologist, Dr. Gilgun, to evaluate Mr. Melton (T. 183),

this evaluation occurred a week before trial (T. 186). This was not Terrell's standard practice in preparing for a penalty phase (T. 186). Terrell did not recall if there was any reason for that timing (T. 187).

If Terrell had information that Mr. Melton's mother lived with a heroin addict during Mr. Melton's youth, he may have presented it if it had an impact on Mr. Melton's development (T. 187). He also likely would have presented an expert who could testify to Mr. Melton being raised in a church with no exposure to criminal elements until age 16 (T. 188).

Terrell possibly would have presented information that Mr. Melton was new to the streets in comparison to Lewis (T. 188). This is particularly true given that Mr. Melton was 17 years old when Saylor was killed (T. 188). If Terrell had known it at the time, he would have presented Lewis' reduced charge to the jury as it goes to proportionality (T. 189). Terrell would also have presented Houston's 20-year sentence in the Saylor case to the jury during the Carter penalty phase (T. 189).

Terrell called Mr. Melton's mother at the penalty phase to bring out Antonio's background, for what value it had (T. 247). He did not consult with anyone in the Melton family regarding any religious activities as it might impact on Mr. Melton's development (T. 247). He did not at the time

consider this to be other than a personal family issue (T. 247).

Additionally, at the postconviction evidentiary hearing, multiple witnesses were presented, and numerous exhibits were introduced, with regard to claims involving ineffective assistance of counsel at the guilt and penalty phases, Brady/Giglio, and newly discovered evidence of innocence. Six individuals were called to testify regarding separate statements made to them by Ben Lewis while they were inmates in the Escambia County Jail.[13] The first witness, David Sumler, testified that he came into contact with Lewis in 1991 (T. 420).[14] During a conversation, Lewis stated that he and Houston shot a taxi driver and that Mr. Melton wasn't there at the time (T. 420).[15] According to Sumler, Lewis was bragging in the cell, which contained 24 other inmates (T. 435). Everyone in the cell knew what Lewis was doing (T. 433).

Subsequently, someone from law enforcement came to

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[13]Postconviction counsel also called Terry Rhines, a CCRC investigator, to testify to his efforts to locate these witnesses (T. 526-40).

[14]Sumler testified that he has known Ben Lewis, Tony Houston and Antonio Melton since they were little children in the neighborhood (T. 437).

[15]Lewis did not specifically say who shot the taxicab driver, only that Mr. Melton was not there and he and Houston were (T. 435).

see Sumler (T. 430).[16] He was asked whether Lewis had said anything about Mr. Melton being at the scene where the taxi driver got shot (T. 430). Sumler related the same information (T. 430). To his knowledge the officer who interviewed him was obtaining information to present to the courts on Mr. Melton's behalf (T. 439).

The second witness to testify regarding a statement made to him by Ben Lewis while in the Escambia County Jail was Paul Sinkfield. Sinkfield recalled that during this conversation,[17] Lewis confided in him about two robberies and murders (T. 452-53).[18] Lewis stated that he robbed and killed a cab driver with T.H. [Tony Houston] (T. 453).[19] Lewis said he himself shot the cab driver because "he was just nervous, got excited and shot him" (T. 454).

Lewis also told Sinkfield about the pawn shop murder (T. 455). He said that he got into a struggle with the owner, that Mr. Melton ran over to help and that's when the gun went off and killed the victim (T. 456). During the

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[16]The witness did not recall who it was specifically that came to see him or how they got his name (T. 430).

[17]This conversation occurred in 1990 or 1991 (T. 451-52).

[18]Sinkfield testified that this conversation took place in a private room and that to his knowledge, no one else could hear the conversation (T. 460). However, Sinkfield was not always in the same cell with Lewis and didn't know who he was talking to when he was in the other cell (T. 476-77).

[19]Lewis mentioned that he was with Mr. Melton earlier in the day (T. 454).

time of this conversation, Lewis was very worried; he was facing life in prison for murder (T. 457).

On a subsequent occasion, Sinkfield saw Lewis in the holding cell (T. 458). Lewis said he was relieved, that he had spoken to his attorney, and that he was going to get a deal (T. 458).

Sinkfield knew Lewis from the streets of Pensacola (T. 450), where he was involved in selling drugs (T. 451), and Lewis was into robbing drug dealers with a pistol (T. 451).[20] Sinkfield only knew Tony Houston by his reputation, which was bad (T. 464).

Sinkfield first met Antonio Melton in the Escambia County Jail in 1991 (T. 464-65), which was after his conversation with Lewis (T. 473). Sinkfield did not reveal the conversation he had with Lewis to Mr. Melton (T. 474).

Sinkfield first revealed Lewis' confession to Terry Rhines, a CCRC Investigator, at Wakulla CI about two weeks prior to his testimony at the evidentiary hearing (T. 459). He would most likely not have been willing to testify in 1991 because he had his own issues to worry about (T. 460, 480), no one had ever asked him to testify (T. 471), and he wouldn't want to hurt either Mr. Melton or Lewis (T. 471).[21]

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[20]Lewis never robbed Sinkfield or vice versa (T. 463).

[21]In response to the State's attempt to impeach him, Sinkfield volunteered to take a lie detector test (T. 466).

Additionally, Sinkfield was unaware this information could help Mr. Melton (T. 466). Mr. Melton never discussed his charges with Sinkfield (T. 478). As far as he knew, Mr. Melton was guilty of an armed robbery in the pawn shop case where a man died (T. 475).

Lance Byrd also came into contact with Ben Lewis in the early 1990's at the Escambia County Jail (T. 485).[22] Lewis discussed the pawnshop case and was wondering if there was any way he could get out of the murder charge (T. 486). Lewis said that his lawyer told him if he could come up with something else, he could probably get a lesser sentence (T. 487).

Lewis said he knew about the taxicab murder (T. 488), and that he was going to tell his lawyer that Mr. Melton had done it (T. 488, 499). Lewis didn't say who did kill the taxicab driver (T. 499), but he did admit that Mr. Melton had left and that he and Houston were still there (T. 488, 500). While Lewis told the witness this information in private, Byrd didn't know what Lewis told other people (T. 503).

Next, Alphonso McCary testified to his conversation with Lewis in the Escambia County Jail. McCary had been in a cell with Antonio Melton, during which time Mr. Melton told him that Lewis was trying to put a murder charge on him

[22] Byrd also knew Lewis prior to their contact in the jail (T. 485).

(T. 507). When McCary asked Lewis about this, Lewis said that they came to him with a deal and he was trying to protect himself (T. 507).[23] However, Lewis, who seemed to be upset about what he was doing to Mr. Melton, said that after this was all over with, he would straighten out what he had done wrong (T. 507-08).

Lewis proceeded to state that Mr. Melton didn't know anything about the cab murder, but that he was trying to save himself now and it was better Antonio than him (T. 508).

McCary later saw Lewis years later at Century Correctional Institution (T. 509). Lewis again reiterated that he would help Mr. Melton when he got out (T. 509). McCary didn't tell anyone about this because Lewis told him he was going to clear it up; he figured that he was going to be a man of his word (T. 518). McCary came forward because he felt it was time to step up (T. 522).

The fifth witness to testify about jailhouse conversations with Ben Lewis was Bruce Crutchfield. Crutchfield was in the Escambia County Jail in early 1991 when he came into contact with Lewis. Lewis was hysterical, having a hard time coping with the reality of the situation and was in total agony (T. 592). Lewis confessed that he had shot a taxi driver and couldn't believe what he had done

[23]McCary was friends with both Lewis and Mr. Melton and had known them for many years before 1991 (T. 516-17).

(T. 592).[24] Crutchfield told him to keep his mouth shut, that if he needed to confess, he should confess to God (T. 592-93).[25] Crutchfield remembered this conversation because "when somebody walks up to you and tells you that they done something like that and they are sitting there beating their head on the wall and they are sitting there and you're talking to them, you don't forget it." (T. 622).[26]

The final witness to testify about a jailhouse confession by Lewis was Fred Harris. Harris was in the Escambia County Jail in 1990 and 1991 (T. 632-33). Lewis, who was a friend of his (T. 633), told him that in the pawn shop case, he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (T. 635).

Lewis was scared and needed some advice from Harris (T. 636). In response, Harris told him that he needed to do what he had to in order to save himself (T. 636). Lewis responded that he was going to state that Mr. Melton was the

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[24]Lewis said he was by himself when he killed the cab driver (T. 593).

[25]In fact, however, Lewis confessed to a lot of different people in the cell (T. 625-26).

[26]Crutchfield didn't tell on Lewis because that would make him a snitch (T. 616). He testified at the evidentiary hearing because he believed an innocent man was going to die for what someone else did (T. 623).

triggerman in the pawn shop case (T. 636).[27] According to Harris, this conversation was private (T. 647).[28]

With regard to the aforementioned witnesses, Terrell testified that if he had testimony from an inmate that Lewis stated that he, Carter and Mr. Melton were all struggling when the gun discharged, he would have presented this testimony (T. 172). This would have given him something to present that would reduce culpability (T. 172).

Terrell did not send an investigator to the Escambia County Jail to interview the cellmates of Ben Lewis (T. 713). Terrell testified that he did not have any strategic reason for not doing this (T. 182-83). He did not recall doing any independent investigative requests in this case (T. 712). Terrell had snitch cases before and these kinds of inquiries had been uniformly unproductive (T. 713). That is the only reason he could think of that he would not have done it (T. 713). After reviewing everything, Terrell concluded that he should have given it a try (T. 713-14); he should have interviewed friends of Lewis (T. 244).

According to Terrell, Mr. Melton absolutely denied involvement in the Saylor murder case (T. 156-57). He never

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[27]Lewis stated that the pawn shop owner was holding the gun when it went off (T. 647).

[28]Also, Lewis never spoke to the witness about the taxicab murder (T. 638).

wavered on this (T. 156).[29] In the Carter case, Terrell recalls that the only two aggravating circumstances were the prior crime of violence, which was Saylor's homicide, and the felony was committed for the purpose of pecuniary gain (T. 157). If the State only proved pecuniary gain, it would have been highly unlikely if not nonexistent that Mr. Melton would be eligible for the death penalty (T. 158).

In addition to the aforementioned testimony, a significant portion of the postconviction evidentiary hearing focused on various exhibits introduced into evidence. D-Ex. 1 is a letter to Terrell from Joseph Schiller dated August 9, 1991, and copied to John Spencer and Sam Hall (PCR. 1694-95).[30] The letter states:

> In order to reach a settlement on this case, I would like to propose the following disposition of the taxicab murder case:
>
> Melton would plead guilty to the armed robbery and first degree murder charge on the taxicab case. The State would not seek the death penalty and make a binding recommendation of life. The Court would adjudicate him guilty of the armed robbery and sentence Melton to 25 years on that count. The Court would withhold adjudication of guilt on the murder count and pass it until October for sentencing, or after the disposition and sentencing of the Carter case.
>
> We would then try the Carter case and if it gets to the penalty phase, we could only introduce the prior armed robbery conviction. There would

[29]Mr. Melton did not deny his involvement in the Carter case (T. 156).

[30]Schiller was the primary prosecutor in the Saylor case (T. 140). Spencer was the primary prosecutor in the Carter case (T. 140). Sam Hall tried the Saylor case with Terrell (T. 190).

> be no mention of the other count nor could the Court consider the taxicab murder case in sentencing because Melton still would not be adjudicated at that time of the murder.
>
> You, likewise, if it gets that far in the Carter case, could argue to the jury in the penalty phase as you have done so eloquently in the past, that your client already has 25 years and a life recommendation will ensure that he serves at least 50 years and there is no possible way he could be a threat to society again, etc.etc.
>
> Although I haven't cleared this with the victim's family in the taxicab case, I believe they would be in agreement because it gives the State some additional evidence in aggravation in the Carter case. If your client is agreeable to this proposition, let me know and I will discuss it with them.

While Schiller was not sure if he ever sent the letter (T. 109), Terrell recalls receiving a copy of it (T. 193). Terrell stated that Mr. Melton did not accept the offer (T. 193).

D-Ex. 2 is a subpoena to Ben Lewis to appear before Mike Patterson and John Spencer at the State Attorney's Office to testify (PCR. 1696).[31] Schiller testified that it is a Joe Doe subpoena and it doesn't state which case it is related to (T. 109-10).[32] According to Schiller, this is a state attorney subpoena and it is standard procedure, particularly if in an investigation, "they don't want other people to see the subpoena and know he's coming down to

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[31]Patterson was an assistant state attorney.

[32]Schiller didn't know if he was present for the interview (T. 110).

testify about a certain defendant, or if he's in jail with that same person." (T. 112-13). Schiller didn't know if part of the intent would be to make sure that Terrell didn't know about the interview of Mr. Melton's co-defendant during the pendency of Mr. Melton's capital case (T. 113).[33]

As to D-Ex. 2, Terrell saw this for the first time about eight days prior to his evidentiary hearing testimony (T. 203). He was not aware that Lewis had been issued a state attorney subpoena under a false name (T. 204).[34] Terrell would not have been able to find this subpoena in the clerk's office (T. 204). Terrell arguably would have used this to show that Lewis expected to receive a benefit for his testimony (T. 205).

Terrell did recall that Lewis hade been talking, but he didn't recall if he specifically knew about the interview with Patterson (T. 238). Terrell was later shown D-Ex. 13, which is a supplemental offense report by Officer Tom O'Neal[35] (T. 689, PCR. 1731-34).[36] It states that Ben Lewis was issued a subpoena to give information in the case (T. 690). It has other language about the Carter case and Lewis

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[33]Spencer testified that he did not have an independent recollection of what occurred pursuant to the subpoena (T. 359).

[34]Mr. Melton had been charged with capital murder at the time of the subpoena (T. 204).

[35]Officer O'Neal was a deputy sheriff in Escambia County in 1990 (T. 45). He was assigned to the homicide investigation of Ricky Saylor (T. 46).

[36]Terrell had this report in his file (T. 689).

making statements (T 690). However, there is nothing in there to give Terrell a lead as to whether or not Lewis approached the State to provide information to give favorable treatment (T. 691). Terrell testified as follows:

> Q. Now, on cross-examination of Mr. Schiller, within the confines of one of his questions, he indicated that you knew that Mr. Lewis had given a statement, had been subpoenaed to the State Attorney's Office and had given a statement, and that you did know that, at some point you came to know that?
>
> A. Yes.
>
> Q. Now, is there a categorical difference between Mr. Lewis being subpoenaed and forced to provide information or Mr. Lewis volunteering the information in an attempt to get favorable treatment? How would that have affected your strategy?
>
> A. Significantly different argument.
>
> Q. And if you would have known –
>
> A. And facts.
>
> Q. Different facts. If you would have known that Mr. Lewis, in fact, approached the State with information, would you have argued that to the jury?
>
> A. Yes.

(T. 735-36).

D-Ex. 3 is a handwritten numbered list of things to do (PCR. 1697). Schiller identified the handwriting as his (T. 115). He stated that these were notes to remind himself to do certain things on the Saylor case (T. 115). There are checkmarks in the margins by some of the numbers (T. 115,

PCR. 1697). Schiller testified that he had no idea as to why he checked them (T. 115).

On the list of things to do, one of the items is to locate Summerlin (T. 114). Schiller testified that he had never spoken to Summerlin, and that he first learned of Summerlin during the deposition when O'Neal testified (T. 115-16). Schiller had no knowledge that the man's name was actually Sumler, and he had no knowledge of David Sumler prior to the Saylor trial (T. 116-18).[37] If the witness had knowledge that Lewis told Sumler that Houston had shot the taxicab driver, he would have turned this information over to Terrell (T. 118). According to Schiller, Summerlin was not a c.i. (T. 117). He was just an inmate that O'Neal got wind of somehow (T. 117).

D-Ex. 4 is a waiver of speedy trial by Tony Houston, signed on August 28, 1991 (PCR. 1698). Schiller affixed his signature to this waiver of speedy trial (T. 129). He acknowledged that this had to do with Houston testifying against Mr. Melton in the taxicab case (T. 130). Schiller needed Houston to waive speedy trial in order for him to provide testimony against Mr. Melton in the Saylor case (T. 130). At the time, the State was in negotiations with Houston to agree to a plea (T. 131). Houston rejected the offer of 10-25 years (T. 131-32). Yet, Houston decided to

[37]Spencer also testified that he had no recollection of having spoken with David Sumler or Summerlin (T. 364).

testify against Mr. Melton without a plea (T. 131-32). After he testified, Houston signed the plea agreement (T. 132).

Terrell noted that D-Ex. 4 was executed just a couple of weeks before the Saylor trial (T. 200). He testified that it is somewhat unusual for a prosecutor to affix his signature to that form (T. 200). He had never seen it done before (T. 200-01). Terrell testified that it might support the theory that Houston expected a benefit for providing his testimony against Mr. Melton in the Saylor case (T. 201). Terrell acknowledged that the document was available in the court file (T. 252). He testified that he should have presented this to the jury and didn't recall a strategic reason for not doing so (T. 201-2).

D-Ex. 5 is a written plea agreement (PCR. 1699-1701). The agreement was executed by Houston on October 9, 1991 (PCR. 1701). The agreement was typed on August 28th, the same day that Houston waived his speedy trial rights (T. 134, PCR. 1701). It appears that Terrell had an unexecuted copy at the time of the trial in the Saylor case (T. 207).

D-Ex. 9 is the same plea agreement (PCR. 1710-12), with a few exceptions. Spencer testified that it appeared to be his signature at the bottom of page two of the agreement, with the date of November 13th handwritten over the date of August of 1991 (T. 349).[38] There are three other signature

[38]Houston was sentenced November 13th, 1991 (T. 350).

blocks, but they are not signed (T. 350). Spencer explained the discrepancy by stating he signed D-Ex. 9 as a memento as to when the sentencing actually took place (T. 351). According to Spencer, it has no significance whatsoever. (T. 352). It was signed the same day as D-Ex. 5 (T. 352).

Spencer did not know if the waiver of speedy trial was part of the consideration for the plea agreement (T. 354). Schiller was lead counsel and the witness was not privy to all of the conversations between Schiller, Houston and Houston's attorney (T. 354). Yet, Spencer signed the plea agreement (T. 356).

D-Ex. 6 are notes by Terrell regarding the deposition of Bruce Frazier (T. 160, PCR. 1702-05). The notes reflect that Frazier was reporting to Don West that Lewis was in his cell talking (T. 160). Terrell didn't ask for the deposition, which was taken on the eve of trial, to be transcribed because he didn't think it would be fruitful (T. 221).

D-Ex. 7 is a Florida Department of Corrections post sentence investigation report of Ben Lewis, dated July 21, 1992 (T. 177-78; PCR. 1706-08). The relevant portion of D-Ex. 7 states, "After Mr. Carter opened the safe he apparently began struggling with Melton. Melton and Lewis then struck the victim, knocking him to the floor." (PCR. 1706).

Terrell saw this document for the first time the day before his testimony (T. 177). This report, which would have been produced after the completion of Terrell's representation of Mr. Melton (T. 179), arguably would have been corroborative of witness' testimony who indicated that Lewis said that he, Mr. Melton and the victim were involved in a struggle (T. 179). It also arguably would have corroborated Mr. Melton's statement that he gave to law enforcement when he was first arrested (T. 179).

D-Ex. 10 is a billing statement by attorney Jim Jenkins that was provided to the county for his representation of Ben Lewis in the Carter case (T. 292, PCR. 1713-24). Jenkins testified he first saw Lewis at the jail after he was appointed (T. 283).[39] He thought the evidence was overwhelming and believed that the next time he saw Lewis, he suggested he cooperate (T. 283).

Jenkins testified that he approached the State about Lewis' cooperation and any benefit he might receive (T. 285). His bill reflects a February 14, 1991 phone conference with the State Attorney's Office (PCR. 1713). Jenkins proceeded to tell Lewis that his cooperation in this case alone would probably not be sufficient, but that if he had any information on any other crimes, he might want to come forward (T. 285-86). Jenkins testified that these

[39]Lewis was arrested on January 23, 1991 (T. 292).

events occurred early in his representation of Lewis (T. 286).

The next time Jenkins saw Lewis at the jail, probably a week or two later, Lewis had information about Mr. Melton regarding the Saylor homicide (T. 286-87). Jenkins told Lewis that if the information rose to a sufficient level, it might work out for something less than a life sentence (T. 290). Jenkins believes he gave this information to either Schiller or Spencer (T. 289). The State told Jenkins that his client's cooperation would be considered in resolving his case but there was no agreement (T. 291, 303).[40]

Jenkins' bill reflects the following contact with the State prior to Lewis' interview on March 15, 1991, pursuant to the John Doe subpoena: On February 14, 1991, a phone conference with the State Attorney's Office for fifteen minutes; on February 25, 1991, phone calls to Tom O'Neal, Mike Patterson and John Spencer, for a total of forty five minutes; on February 26, 1991, a phone call to Mike Patterson and a phone call from Tom O'Neal for a total of thirty minutes; on February 27, 1991, a phone call to Tom O'Neal for 15 minutes; on February 28, 1991, a phone conference with Mike Patterson and a phone call to Tom O'Neal for a total of fifteen minutes; on March 1, 1991, phone conferences with Mike Patterson, John Spencer and Tom

[40]Jenkins was hoping for a reduction to second degree murder (T. 291).

O'Neal for a total of one hour and thirty minutes; on March 5, 1991, phone calls to John Spencer and Tom O'Neal, and a phone call from Tom O'Neal for a total of thirty minutes; on March 6, 1991, a phone call to John Spencer and a meeting with John Spencer for a total of thirty minutes; on March 12, 1991, a phone call from Tom O'Neal for six minutes; on March 14, 1991, a phone call from Tom O'Neal for less than twelve minutes (PCR. 1713-15).[41]

Terrell called Jenkins to testify during the penalty phase of the Carter case (T. 172). Terrell wanted to bring to the jury's attention the benefit for Lewis to place responsibility solely on Mr. Melton and to argue proportionality (T. 172). It would have been helpful to present the information that Jenkins had suggested to Lewis (T. 173). Further, Terrell testified that had he known about all the conversations Jenkins had with Tom O'Neal, John Spencer and Mike Patterson prior to Lewis' statement implicating Melton, he likely would have wanted to bring forward this information to the jury:

> Q. (By Mr. Strand) Now, you had indicated that you had put Mr. Jenkins on in the trial in Mr. Saylor's case and also in the penalty phase, the Carter case, and you indicated what your strategy was. If you had known that Mr. Jenkins had had telephone conversations and meetings with Tom O'Neal beginning February 25th, 1991, I guess -- we have conversations on February 25th, 26th, 27th, 28th, March 1st, March 5th, March 12th, March 14th, and March 15th --all of those dates

[41]Schiller did not dispute Jenkins' billing records about their meetings (T. 784).

conversations Mr. Jenkins had had with Thomas O'Neal, would you have presented that information to the jury?

A. If I understood it to be about this case or these cases, I should have.

Q. And particularly the understanding that Mr. Lewis never gave his statement implicating Mr. Melton until March 19th?

A. Exactly.

Q. Now, if you would have known that Mr. Jenkins had conversations with John Spencer, Mike Patterson on February 25th, with Mike Patterson on February 26th, with John Spencer, Mike Patterson on March 1st, with John Spencer on March 5th, with John Spencer on March 6th, all of these conversations prior to Mr. Lewis giving a statement implicating Mr. Melton in the -- Mr. Saylor's murder, would you have wanted that information to be brought forward to the jury?

A. Likely so.

Q. And what would be the reason that you would have wanted the information relative to the conversations that Mr. Jenkins with Mr. O'Neal and Mr. Spencer and Mr. Patterson, why would you have wanted the jury to know about those conversations, at least that they had happened?

A. If it could establish that there were ongoing discussions that could suggest that Mr. Lewis was at risk of serious punishment and might benefit from cooperating with the State; if there was a total lack of information about Mr. Saylor's death and any alleged involvement of Mr. Melton in that incident; or any other factor that might establish a motivation for Mr. Lewis to falsely accuse Mr. Melton, those, I think, would all be serious matters that should have been presented to the trier of fact if they could be established.

(T. 180-81).

S-Ex.1 is a set of notes by Officer O'Neal (T. 51, PCR. 1560-65). These are notes that he made during interviews at the jail and with Lewis (T. 51).

Initially, Officer O'Neal did not have any suspects in the Saylor case (T. 47). He was aware of the subsequent homicide at Carter's Pawnshop (T. 47) and as a result, he spoke to Lewis, who was apprehended coming out of the pawnshop (T. 47). Officer O'Neal interviewed Lewis about other homicides, to which he indicated he had no knowledge (T. 47-48).

After receiving information that Lewis was making comments about the pawnshop murder and also a murder involving a cabdriver (T. 49), Officer O'Neal interviewed Bruce Frazier "and a subject that was originally identified as a Summerlin, later confirmed to be a Sumler." (T. 49).[42] With regard to Summerlin, no recorded statement was taken, but the Officer did take notes (T. 51).[43] According to the notes, Lewis told Summerlin that his partner had shot the cab driver and that Lewis had admitted being there (T. 51-52). The word "Melton" was scratched out from the notes and replaced by "partner":

> Q. Okay. Now in your notes there, you have the word, looks like, Melton scratched out and the word partner wrote in there.
>
> A. Yes, sir.
>
> Q. Do you recall why that happened or how that happened?

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[42]During these interviews, Officer O'Neal was accompanied by Don West from FDLE, as he had been first contacted by the aforementioned people (T. 50).

[43]The interview was on February 25, 1991 (T. 53).

A. Because I was thinking his partner being Melton but Summerlin did not specifically say Melton, so I took it out.

Q. Okay. Did he use the word partner?

A. Yes, sir.

(T. 52).

Officer O'Neal was of the opinion that during his deposition, Terrell had copies of his notes, which comprise S-Ex. 1 (T. 61-62). He recalled seeing Schiller handing copies of the notes to Terrell during the deposition (T. 75). However, Officer O'Neal did not know if the document with Mr. Melton's name scratched out was in the packet of notes handed to Terrell (T. 76).

Terrell believed that he first saw page one of S-Ex. 1 on the day prior to his testimony at the evidentiary hearing (T. 161, 163).[44] Terrell could have made an argument that because Melton's name was scratched out, that Lewis had indicated to Summerlin that it was someone else, not Melton (T. 264).

This note would have been relevant to Mr. Melton's defense (T. 161), in that it could have demonstrated that Lewis had created information (T. 162-63). The fact that the note was dated February 25th, and that Lewis' interview was on March 19th, was very relevant (T. 163).

[44]Terrell did not recall seeing the note in his files on the Melton cases (T. 163-64).

Also, with this note, Terrell would have done further investigation (T. 164):

> Q. Now, if you had received this note prior to the trial in Mr. Saylor's case, would it have led you to any further investigation?
>
> A. I would expect so.
>
> Q. And what type of investigation would that be, sir?
>
> A. Well, finding out who the individual was who had a statement from Mr. Lewis saying that his partner, allegedly not Melton, had shot the cabbie, meaning Mr. Saylor, at the minimum.
>
> Q. And if you would have known that the individual who made that statement was incarcerated with Mr. Lewis at the Escambia County Jail when the statement was made, would you have considered that fact in forming your investigation?
>
> A. I should.
>
> Q. And if you would have received that note, would you have attempted to interview Mr. -- the individual who wrote that?
>
> A. If I had the note, certainly, and if I knew who the individual was, yes.
>
> Q. And would you have began an investigation to attempt to corroborate this individual's statement?
>
> A. I should have.
>
> Q. If you would have had it, sir, would you have?
>
> A. I would think with this information, yes.

(T. 164-65). Had Lewis made similar statements to other inmates, Terrell would have presented their testimony (T. 169, 170).

On cross-examination, after further review of the O'Neal deposition, Terrell acknowledged that it appeared that he had seen the notes and was aware of Summerlin (T. 225). Ultimately, in reading back the deposition transcript, Terrell believed that O'Neal disclosed the content of these notes but did not provide the notes themselves (T. 265). Whether or not he saw the note, Terrell should have attempted to find Sumler (T. 266).

On March 23, 2004, the circuit court issued an order denying relief (PCR. 1937-2018). On July 27, 2004, the circuit court denied Mr. Melton's motion for rehearing (PCR. 2026-33). Mr. Melton appealed the denial of relief and simultaneously filed a petition for writ of state habeas corpus.

On November 30, 2006, the Florida Supreme Court affirmed the denial of postconviction relief and denied the habeas corpus petition. Melton v. State, 949 So. 2d 994 (Fla. 2007), rehearing denied February 15, 2007. The mandate issued on March 5, 2007.

In a successive postconviction motion filed March 9, 2009 and denied by this Court on February 9, 2011, Mr. Melton alleged newly discovered evidence that Tony Houston lied about the facts of the Saylor murder, and also that Ben Lewis confessed that Mr. Melton was not present during the robbery and murder of Ricky Saylor. Mr. Melton further asserted that when this newly discovered evidence is

considered cumulatively with evidence adduced at the prior postconviction evidentiary hearing, he would probably have received a life sentence.

Tony Houston died on August 26, 2007. It was only after his untimely death that his brothers were willing to share with an investigator for postconviction counsel what they knew about their brother's involvement in the Saylor murder. Both men maintain that they would never have discussed what their brother had told them while he was alive.

Jamal Houston, Tony Houston's brother, was interviewed on March 10, 2008 and January 15, 2009. Jamal related that his brother confessed to him in 2006 that he, Tony Houston, was the trigger man in the Saylor murder. Tony Houston confided that he knew the cab driver, Ricky Saylor, and that Saylor owed him a drug debt.[45] Tony Houston further confided that he pointed a gun at Antonio Melton and forced him out of the cab, telling him to leave the area. Importantly, Tony Houston made it clear to Jamal Houston that he was the triggerman and Antonio Melton had nothing to do with the robbery and murder of Ricky Saylor.

Tony Houston also confessed to Jamal Houston that it was Ben Lewis' idea to pin the murder of Ricky Saylor on

[45]Tony Houston dealt drugs and used certain cabs to transact business. He would typically call the cab company and request specific cabs by number.

Antonio Melton. Ben Lewis convinced Tony Houston to save himself, as Ben was doing. Ben Lewis told Tony that Mr. Melton was already going down for the pawn shop murder, so why not put the Saylor murder on him as well.

Jamal Houston recalled that at the time of the Saylor murder that he shared a room with Tony Houston in their family's home. Jamal Houston recalled that the Monday after the robbery and murder his brother came home drunk, with blood on his clothes, and was acting unusual.

In 2006 when confessing his involvement in the Saylor murder Tony Houston was HIV positive and in failing health. Tony stated to Jamal, "You don't know what it feels like to have killed a man." Jamal spoke to Tony the night before he died from prison. Tony told Jamal that he had made peace with himself and to do what he felt was right in regards to the Saylor murder.

Jamal Houston stated that his brother confessed that he wanted to "do the right thing for Melton" when contacted previously by postconviction investigators, but he could not because of charges pending against him. Tony Houston feared what the State would do if he recanted. As long as he had charges pending against him, Tony Houston felt he was too vulnerable to come forth with the truth about what really happened in the Saylor murder.

In a separate interview conducted on March 12, 2008, Manadra Houston, another brother of Tony Houston, stated

that on Christmas Day in 2005 Tony Houston confessed to him that he was the one who really committed the Saylor murder. The two men were sitting on the back of a pick-up truck when this conversation took place and Tony Houston stated to his brother "[y]ou don't know what it feels like to have taken a man's life and to have that on your mind." Tony said "he got off good and only received twenty years."

A third individual, Adrian Brooks, has stated that Tony Houston confessed that Antonio Melton was not present for the robbery and murder of Ricky Saylor.

Brooks was also a cellmate of Ben Lewis in the Escambia County Jail during the time period that Lewis, Houston, and Melton were incarcerated there on the Saylor case. Lewis informed Brooks that Mr. Melton was not even present for the robbery and murder of Ricky Saylor.

Lewis reported to Brooks that he was putting the Saylor murder on Mr. Melton because he was already going to be convicted of the Carter homicide. Additionally, Lewis was concerned that Mr. Melton or Houston would make a deal to testify against him first.

Years later Brooks ran into Tony Houston at the funeral of Brook's aunt. After the funeral, Tony Houston told Brooks that Mr. Melton did not shoot Ricky Saylor and was not involved in the robbery.

This Court affirmed the trial court's summary denial of the newly discovered evidence on February 9, 2011 in *Melton*

v. State, SC09-2017 by erroneously characterizing the newly discovered evidence claim as a premature claim based upon *Johnson v. Mississippi*, 486 U.S. 578 (1988). Instead, the Court should have considered the newly discovered evidence claim cumulatively with other evidence demonstrating that Mr. Melton's conviction in the Saylor murder case should be afforded no weight or very little weight as an aggravating circumstance.

SUMMARY OF ARGUMENT

Mr. Melton was deprived of the effective assistance of trial counsel at the guilt and penalty phases of his case, in violation of *Porter v. McCollum*, 130 S.Ct. 447 (2009). The decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Melton's ineffective assistance of counsel claims was premised upon the Florida Supreme Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein, which renders Mr. Melton's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

CLAIM I

MR. MELTON'S SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY *PORTER V. MCCOLLUM*.

Mr. Melton was deprived of the effective assistance of trial counsel at the penalty phase of his case conducted before a jury that returned a death recommendation, in violation of *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. Melton's ineffective assistance of counsel claim was premised upon the Florida Supreme Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The Florida Supreme Court's *Strickland* jurisprudence was conclusively repudiated by the United States Supreme Court in *Porter*. Therefore, *Porter* established a change in this Court's jurisprudence, which renders Mr. Melton's *Porter* claim cognizable in these postconviction proceedings.[46] *See Witt v.*

[46]As explained herein, *Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting Porter's ineffective assistance of counsel claim in *Porter v. State*. Thus, Mr. Melton does not argue that *Porter v. McCollum* announced new federal law. Instead, it announced a failure by this Court to properly understand, follow and apply the clearly established federal law. Thus, the decision is new Florida law because it is a rejection of this Court's jurisprudence. *Porter v. McCollum* was an announcement that this Court's precedential decision in *Porter v. State* was wrong, and in doing so announced new Florida law. This is identical to the rulings in *Hitchcock v. Dugger* and *Espinosa v. Florida*, in which the United States Supreme Court found that this Court had failed to properly understand, follow and apply federal constitutional law.

State, 387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Melton'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 the Florida Supreme Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

In *Witt*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. This Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id*. (quotations omitted).

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of

law will be cognizable under [their] post-conviction relief machinery," *id*. at 928, the Court declined to follow the line of United States Supreme Court cases addressing the issue, which it characterized as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactivity analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).[47]

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)

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[47]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 the Florida Supreme Court and concluded that the Florida Supreme 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 the Florida Supreme Court has unreasonably failed to follow clearly established federal law.

and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon the Florida Supreme 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 the Florida Supreme Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt,* the Florida Supreme Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).[48]

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[48]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, the Florida Supreme 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, the Florida Supreme 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, the Florida Supreme Court issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, the Florida Supreme Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default." In *Downs*, the Florida Supreme 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, the Florida Supreme 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, the Florida Supreme Court issued its opinion in *Demps*, and thereto addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). The Florida Supreme Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. The Florida Supreme Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. *See Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that Florida Supreme 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 the Florida Supreme 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*, the Florida Supreme 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,* the Florida Supreme 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.[49] Clearly, the Florida Supreme Court read the opinion in *Hitchcock* and

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[49]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 397*397 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.

saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. The Florida Supreme 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 the Florida Supreme Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, the Florida Supreme 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.[50]

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 the Florida Supreme Court's decision affirming the death sentence was contrary to or an unreasonable application of

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[50]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).

Lockett, a prior decision from the United States Supreme Court, here in *Porter* the United States Supreme Court found that the Florida Supreme 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. The Florida Supreme Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears v. Upton*, 130 S.Ct. 3529 (2010). As *Hitchcock* rejected the Florida Supreme Court's analysis of *Lockett*, *Porter* rejects the Florida Supreme Court's analysis of *Strickland* claims. Just as the Florida Supreme Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received. And just as the Florida Supreme Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, the Florida Supreme Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

In *Porter v. McCollum*, the United States Supreme Court found the Florida Supreme Court's *Strickland* analysis which

appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S. Ct. at 455. In *Porter v. State*, the Florida Supreme Court explained:

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

Porter v. State, 788 So. 2d at 923 (emphasis added). The United States Supreme Court rejected this analysis (and implicitly the Florida Supreme 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.

The Florida Supreme 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 the Florida Supreme 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 the Florida Supreme Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id*. at 454, even though Mr. Porter's personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id*. (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

An analysis of the Florida Supreme 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 the Florida Supreme Court, just as the Florida Supreme Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from the Florida Supreme 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. The Florida Supreme Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001). And in Mr. Melton's case, the Florida Supreme Court relied on *Sochor* to conduct its analysis of Mr. Melton's claims.[51]

In *Porter v. State*, the Florida Supreme Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where the Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings. In *Stephens*, the Florida Supreme Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, the Florida Supreme Court had affirmed the trial court's rejection of Mr.

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[51]For example, in finding that Mr. Melton failed to establish that there was a reasonable probability that the result of the penalty phase proceeding would have been different if defense counsel had conducted a reasonable investigation into the lay witness testimony, the Florida Supreme Court stated the standard of review by stating: Because both prongs of the *Strickland* test present mixed questions of law and fact, this court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. See Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004). *Melton v. State*, 949 So.2d 994, 1002. The Court went on to defer to the trial court's factual finding that even if defense counsel had presented the evidence it essentially mirrored that presented by defense counsel). *Melton*, 949 So. 2d at 1005.

Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision.[52] In *Rose*, the Florida Supreme Court employed a less deferential standard. As explained in *Stephens*, the Florida Supreme 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. The Florida Supreme Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*.[53] However, the court made clear that even under this less deferential standard:

> We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate

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

[53]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*, 748 So. 2d at 1035. Justice Overton explained: "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.

> 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 the Florida Supreme Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just of 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 the Florida Supreme 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.

In Mr. Melton's case, as in *Porter*, the Florida Supreme Court erroneously deferred to the trial court's findings to justify its decision to unreasonably "discount to irrelevance" pertinent mitigating evidence. *Id*. at 455. *Porter* makes clear that the failure to present the kind of troubled history relevant for the jury in the penalty phase to assess moral culpability

prejudices a defendant.[54] 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 the Florida Supreme Court's prejudice analysis used in this case to be in error, Mr. Melton's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

In *Sears v. Upton*, the United States Supreme Court expounded on 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

[54]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 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. The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

that standard applies to the circumstances of this case." *Id*. at 3264. The Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
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> 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:
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> > "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. Melton'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 error was committed in Mr. Melton's case. Following the denial of Mr.Melton's claim of ineffective assistance of counsel by the trial court, the Florida Supreme Court affirmed the denial of postconviction relief. *Melton v. State*, 949 So. 2d 994 (Fla. 2006). The Court stated:

> In sum, while the additional evidence presented at the evidentiary hearing certainly *could* have been offered at the trial to paint a more complete picture of Melton's childhood, we find no error in the trial court's conclusion that the evidence below essentially mirrors the evidence presented by trial counsel during the penalty phase. We find no error in the trial court's assessment that the additional mitigation presented at the evidentiary hearing does not undermine confidence in the ultimate outcome of the proceedings. *Melton* at 1005.[55]

[55]The state court's prejudice analysis is remarkably similar to the analysis that was rejected in *Porter*, where the United

This analysis is not the sort of probing and fact-specific analysis which *Porter* and *Sears* require. Both the trial court's findings and the cursory acceptance of those findings by the Florida Supreme Court violate *Porter*, as a probing inquiry into the facts of this case leads only to the conclusion that counsel prejudiced Mr. Melton by performing deficiently.

In postconviction proceedings, Mr. Melton's trial counsel failed to conduct an adequate investigation for the penalty phase. This failure was detailed by Mr. Melton in his pending federal habeas petition as follows:

> 9. The evidentiary hearing involved several issues, including claims based upon ineffective assistance of counsel at the guilt and penalty phases, Brady/Giglio, and newly discovered evidence of innocence. With regard to the ineffective assistance claim at the penalty phase, Frankie Stoutemire, Sr., Antonio Melton's father, testified that he was in the service when Antonio was raised (T. 558). While Stoutemire would have visits with Antonio (T. 559-60), Antonio's mother was living with David Booker at the

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States Supreme Court determined that "[t]he Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter, 130 S.Ct. at 454*. With regard to nonstatutory mental health mitigation, the United States Supreme Court stated, "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 that his testimony might have had on the jury or the sentencing judge." *Id. at 455*. The United States Supreme Court further determined that the Florida Supreme Court unreasonably discounted to irrelevance the evidence of Porter's abusive childhood, and it also unreasonably concluded that Porter's military service would be reduced to inconsequential proportions "simply because the jury would also have learned that Porter went AWOL on more than one occasion." *Id.*

time (T. 560).[56] It seemed that every time Stoutemire came home to see his son, Antonio's mother would get repercussions from Booker (T. 561).

10. Stoutemire had heard that Booker was abusing Antonio's mother (T. 560).[57] This led to a confrontation with Booker. Stoutemire told him that "if he ever touched my son, it was going to be me and him out on the street." (T. 560).

11. Stoutemire recalled a conversation where Antonio told him he was out of school and couldn't get a real job (T. 563). Stoutemire advised him to join the service and get out of town (T. 563). Antonio shook his head and that was the last time Stoutemire saw him (T. 563). According to Stoutemire, the religion that Antonio's mom believed in did not agree with going into the military (T. 563). Antonio's mom had raised him, so Stoutemire backed off (T. 563). Stoutemire lamented that Antonio didn't have any guidance his whole life (T. 564).

12. Latricia Davis, Mr. Melton's mother, testified that the family had lived in subsidized housing called Truman Arms (T. 661-62), which was a rough, bad place (T. 662). Davis was strict with Antonio because she didn't want him turning out like a lot of the young people that she was seeing around (T. 663). She did what she could being a single, working parent (T. 663). Davis had been married to David Booker, who had a drug problem (T. 666). This caused many problems at home, and Booker was verbally and physically abusive (T. 667).

13. Later on during Antonio's youth, Davis became active in the Jehovah's Witness Church (T. 669). She tried to get Antonio to live that type of lifestyle, because she thought it was best for him (T. 669). This involved keeping him away from school activities (T. 670).

14. Finally, Davis took Antonio out of school when he was 16 years old because of the bad associations that he was exposed to (T. 664). Ben Lewis was one of the people that Davis didn't want her son hanging around with at school (T. 666). Antonio looked up to these kids because he was sheltered and they had so much street knowledge (T. 664). Lewis, for example, seemed so much wiser and street smart (T. 666).

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[56]They lived in the projects (T. 562).

[57]He also knew that Booker was a heroine addict (T. 561).

15. When Antonio was 16, Davis got married and moved to Mobile, Alabama (T. 663). Antonio stayed with his grandmother and aunt in Pensacola, Florida (T. 665).

16. Davis spoke to trial counsel prior to the penalty phase (T. 668). Counsel didn't ask about Davis trying to keep Antonio away from unsupervised children in the projects (T. 668). According to Davis, postconviction counsel asked about more details than trial counsel (T. 684).

17. Margaret Parker, Mr. Melton's aunt, testified that Mr. Melton would sometimes stay with her after he was 16 years old (T. 746). Parker noted that after Antonio's mom moved, he was out more often (T. 748). According to Parker, Antonio was less mature than other children his age (T. 752), and he trusted other kids (T. 753). Parker observed that in regard to Antonio, Ben Lewis, and Tony Houston, it was Houston who seemed to be the leader of the group, then Lewis (T. 749).[58] No one from Antonio's defense team ever spoke to Parker (T. 750-51). Had they done so, she would have spoken to them about the information she provided during her testimony (T. 754).

18. Lawrence Gilgun, a clinical psychologist, evaluated Mr. Melton on January, 28, 1992, approximately one week before Mr. Melton's trial (T. 310). Dr. Gilgun acknowledged during his evidentiary hearing testimony that this was not standard practice, and that usually, he would be involved at least two months before trial (T. 310).

19. Dr. Gilgun noted that his bill did not reflect any discussions with the trial attorney (T. 311, D-Ex. 11). He would have recorded a face to face meeting on his bill (T. 311). While Dr. Gilgun did not recall independently what records were provided to him, he spoke of evaluating school records and depositions in his penalty phase testimony (T. 312). However, he was not provided with Mr. Melton's statement to the police, nor did he speak to any of Mr. Melton's family or friends (T. 312). Trial counsel did not supply any of this information to him, nor any information about Mr. Melton's upbringing (T. 312).[59]

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[58]Lewis and Houston were bother older than Antonio (T. 749).

[59]Dr. Gilgun explained that the importance of other materials is for corroboration (T. 313). Also, these materials help him to structure his interview and to elicit more information (T. 313).

20. Dr. Gilgun did not know what trial counsel's plan was regarding the penalty phase (T. 339). Usually, he would discuss these things with the attorney (T. 340). Dr. Gilgun concluded that if he had been given more information, he could have potentially given more mitigation (T. 341).

21. Dr. Henry Dee is a clinical psychologist with a subspecialty in clinical neuropsychology (T. 367). Dr. Dee saw Mr. Melton in January 1996 and again in November 2001 for approximately 14 hours (T. 369-70). During this time, he conducted a neuropsychological evaluation and extensive interviewing (T. 370). According to Dr. Dee, Mr. Melton was very open and seemed to be genuinely remorseful (T. 379).[60]

22. Dr. Dee reviewed discovery materials, school records, juvenile records, a previous evaluation by Dr. Gilgun, the Florida Supreme Court appeal, and witness testimony at the penalty phase of the Carter trial (T. 370-71). Dr. Dee spoke to Mr. Melton's mother, his aunt Margaret Faye Johnson, Latricia Davis and his father, Frankie Stoutemire (T. 380). Dr. Dee expressed his belief that this material is necessary to investigate the issue of mitigation, and it is also helpful to have independent corroborative evidence (T. 371).

23. While Mr. Melton didn't have any brain damage, Dr. Dee did find evidence of other mitigation (T. 372). Mr. Melton had an unusual childhood (T. 373). He was in a sense overprotected (T. 373). Dr. Dee explained that Mr. Melton's mother was a Jehovah's witness and she involved him in this religion (T. 373). While Mr. Melton had been a gifted athlete when he was younger, his mother forced him to give it up and be more and more involved in intensive Bible study (T. 373). Also, she withdrew him from athletics in part because she didn't care for the influence of peers (T. 374). By the time he reached middle adolescence, Mr. Melton was fairly isolated from his peers (T. 374).[61]

24. With regard to emotional maturity, Mr. Melton was a strikingly immature boy for 18 (T. 381). By the time he entered high school, he had almost no social contact (T. 381). Dr. Dee felt that Mr. Melton could

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[60]Mr. Melton denied any involvement in the Saylor case (T. 379).

[61]Dr. Dee explained that Davis worked a lot to support Mr. Melton and his brother (T. 373). Thus, from a fairly young age, Antonio was taking care of his brother after school (T. 373).

be easily manipulated (T. 383).[62] That's why his mother didn't want him around the locker room and withdrew him from football (T. 383).

25. According to Dr. Dee's evaluation, Mr. Melton went from a situation of being isolated and/or in the church to being with a bunch of criminals by the time he got to high school (T. 374). Mr. Melton immediately fell in with these people (T. 374). He began to skip school, use drugs, and talk back (T. 374).

26. As a result of this, Davis withdrew her son from school at age 16 (T. 374). She gave him a choice of either conforming to everything she believed in or to move out (T. 375). From then until the time he was arrested, Mr. Melton would sometimes be with his grandmother or aunt (T. 375). During the two years prior to his arrest, Mr. Melton had essentially no supervision (T. 378).

27. Dr. Dee commented that Mr. Melton's stepfather was a very harsh man (T. 375). He was abusive towards Davis in front of Antonio (T. 376), to the point where he broke her arm (T. 376). Mr. Melton's stepfather used heroin and would bring other women into the house in front of him (T. 376). It was frankly grossly immoral conduct and probably shocking to a young child (T. 376).

28. Dr. Dee testified that Mr. Melton's father did not have much contact with him (T. 376). He went into the Service for about three years at the time Mr. Melton was born (T. 376). He injured his back badly and had to have a series of operations (T. 376-77). By the time he returned, his son was already an adolescent and living with his grandmother (T. 377). Unfortunately, Mr. Melton's only male role model was an abusive heroin addict (T. 377).

29. Dr. Dee testified that Mr. Melton has an IQ of 98 (T. 390). While Dr. Dee made several errors in the scoring, the mistakes are not significant (T. 415). Mr. Melton's IQ was in the normal range (T. 409), and Dr. Dee made nothing of those results (T. 415).

30. The Honorable Terry Terrell, presently a circuit court judge, also testified during the postconviction evidentiary hearing (T. 153). Prior to becoming a judge, Terrell was the chief assistant public defender for the First Judicial Circuit of Florida (T. 154). He worked for the Public Defender's Office for fifteen years (T. 154). Terrell was first assigned to represent Mr. Melton on the Carter case (T.

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[62]Mr. Melton viewed Lewis and Houston as more sophisticated than himself (T. 383).

155), where he was charged with first degree murder and armed robbery (T. 155). Terrell also represented Mr. Melton when he was arrested for the Saylor murder (T. 155).

31. Terrell testified that his trial schedule was busy back in 1991 and 1992 (T. 183-84). While he retained a psychologist, Dr. Gilgun, to evaluate Mr. Melton (T. 183), this evaluation occurred a week before trial (T. 186). This was not Terrell's standard practice in preparing for a penalty phase (T. 186). Terrell did not recall if there was any reason for that timing (T. 187).

32. If Terrell had information that Mr. Melton's mother lived with a heroin addict during Mr. Melton's youth, he may have presented it if it had an impact on Mr. Melton's development (T. 187). He also likely would have presented an expert who could testify to Mr. Melton being raised in a church with no exposure to criminal elements until age 16 (T. 188).

33. Terrell possibly would have presented information that Mr. Melton was new to the streets in comparison to Lewis (T. 188). This is particularly true given that Mr. Melton was 17 years old when Saylor was killed (T. 188). If Terrell had known it at the time, he would have presented Lewis' reduced charge to the jury as it goes to proportionality (T. 189). Terrell would also have presented Houston's 20-year sentence in the Saylor case to the jury during the Carter penalty phase (T. 189).

34. Terrell called Mr. Melton's mother at the penalty phase to bring out Antonio's background, for what value it had (T. 247). He did not consult with anyone in the Melton family regarding any religious activities as it might impact on Mr. Melton's development (T. 247). He did not at the time consider this to be other than a personal family issue (T. 247).

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Melton had a vast amount of non-statutory mitigation as well as two statutory mitigators. Counsel's performance was clearly deficient, and Mr. Melton was prejudiced. It is inconceivable that Mr. Melton's case is less egregious than *Porter*, in which relief was granted due to the Florida courts' failure, as in this case, to properly apply *Strickland*. The mitigation evidence brought out in

postconviction was compelling and would have resulted in a life recommendation. Without a tactical or strategic reason, defense counsel failed to investigate, prepare, and present the wealth of statutory and non-statutory mitigating evidence that was available. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

Here, the Florida Supreme Court overlooked the record wherein deficient performance was unrefuted. The Florida Supreme Court's ruling with respect to Mr. Melton's ineffective assistance of counsel claims merely accepts the circuit court's conclusory language, which is not supported by the record. Neither the circuit court order nor the Florida Supreme Court's opinion considered the record before it when finding that Mr. Melton was not denied the effective assistance of counsel. The findings in this case are starkly in violation of *Porter*.

The United States Supreme Court made clear in *Porter* that the Florida Supreme Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, the Florida Supreme 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 the Florida Supreme Court fails to do under its current analysis.

Mr. Melton's substantial claim of ineffective assistance of counsel has not been given serious consideration as required by

Porter. Mr. Melton requests that this Court perform the analysis of this claim which has as of yet been lacking and examine significant, mitigating personal history that is present in this case but as yet unrecognized or unreasonably discounted.

CONCLUSION AND RELIEF SOUGHT

Mr. Melton requests that this Court vacate his judgment and sentence in the above-styled cause.

CERTIFICATE OF FONT

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050 this 1st day of September 2011.

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