IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-99

LOWER TRIBUNAL No. 90-CF-16062

CHADWICK WILLACY,

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. Willacy'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.

REQUEST FOR ORAL ARGUMENT[1]

Mr. Willacy has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Willacy, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

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

[1]Simultaneously with his brief, Mr. Willacy files a more detailed request for oral argument.

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INTRODUCTION

On November 30, 2009, the United States Supreme Court issued its decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009). There, the United States Supreme Court ruled that this Court's *Strickland*[2] analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S. Ct. at 455. Under the Anti-Terrorism Effective Death Penalty Act (AEDPA), the 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 to George Porter if this Court's *Strickland* analysis was not just wrong, but clearly and unreasonably wrong. It is in this context that the United States Supreme Court's ruling in *Porter v. McCollum* must be read.

Mr. Willacy's current appeal requires this Court to engage in an introspective look at the import of the decision in *Porter v. McCollum* and consider whether its own unreasonable analysis in *Porter v. State* was merely an aberration or was it in fact indicative of a systemic failure by this Court to properly understanding and apply *Strickland*.

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

In the relatively recent past, this Court has on two occasions assessed the effect to be accorded to a decision by the United States Supreme Court finding that this Court had misapprehended and misapplied United States Supreme Court precedent. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court granted federal habeas relief because this Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978), 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.[3] In *Espinosa v. Florida*, 505 U.S. 1079 (1992), the United States Supreme Court summarily reversed a decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.[4]

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

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

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

Mr. Willacy, whose ineffective assistance of counsel claims were heard and decided by this Court before *Porter v. McCollum* was rendered, seeks in this appeal what George Porter received. Mr. Willacy 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.[5] Mr. Willacy seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Willacy seeks the proper application of the *Strickland* standard. Mr. Willacy seeks to be treated equally and fairly.

STATEMENT OF THE CASE

In September, 1990, Mr. Willacy was indicted and charged with first degree murder and related offenses. Mr. Willacy pled not guilty. Mr. Willacy was tried in December of 1990. After he was convicted, he was sentenced to death. On appeal, this Court reversed Mr. Willacy's sentence of death and remanded. *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994).

A new penalty phase was held before a jury in the fall of 1995. Ultimately, the re-sentencing jury recommended death. On November 20, 1995, the circuit court sentenced Mr. Willacy to death. On appeal, this Court affirmed Mr. Willacy's death sentence. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997), *cert. denied Willacy v. Florida*, 522 U.S. 970 (1997).

In May, 1998, Mr. Willacy filed a Rule 3.851 motion seeking to vacate his conviction and sentence of death. Thereafter, Mr. Willacy amended the Rule 3.851 motion in March, 2002. The circuit court conducted an evidentiary hearing in late 2003 and early 2004. Thereafter, the circuit court denied all relief on November 19, 2004.

Mr. Willacy appealed. This Court affirmed the circuit court's order denying all relief. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007). In addressing Mr. Willacy's guilt phase ineffective assistance of counsel claim, this Court deferred to the circuit court's legal determination that trial counsel's strategy was reasonable. *Willacy v. State*, 967 So. 2d at 141 ("The postconviction trial court denied relief, finding that Erlenbach's evidence-elimination technique was a sound trial strategy under the circumstances of the case and that Willacy failed to show

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

prejudice. * * * The trial court's conclusion is supported by competent, substantial evidence."). In addressing Mr. Willacy's penalty phase ineffective assistance of counsel claim, this Court also gave complete deference to the circuit court's ruling. As to the legal question of whether trial counsel conducted a reasonable investigation and make a reasonable strategy decision to forego presentation of certain types of mitigating evidence, this Court said:

> The postconviction trial court's findings are supported by competent, substantial evidence. Kontos conducted a reasonable investigation into Willacy's mental condition and family history and made a reasonable strategic choice to forego presentation of negative mitigation evidence.

Willacy v. State, 967 So. 2d at 144. As to the prejudice arising from the failure to investigate and present evidence that Mr. Willacy was the victim of extreme child abuse, this Court deferred to the circuit court's rejection of the evidence of child abuse saying: "In addition, the postconviction trial court pointed out that, throughout the penalty phase in 1991 and the resentencing in 1995, Willacy and his family members, while under oath, repeatedly denied that Willacy was physically abused as a child." *Willacy v. State*, 967 so. 2d at 143-44. As to the prejudice arising from the failure to present substantive mental health mitigation, this Court said:

> there is no reasonable probability that the outcome of the proceeding would have been different if Kontos had chosen to focus on Willacy's abuse and mental health issues rather than on the positive aspects of Willacy's life. Accordingly, counsel was not ineffective for failing to present this evidence.

Id. at 144.

Simultaneously with his appeal from the denial of his Rule 3.851 motion, Mr. Willacy filed his initial petition for writ of habeas corpus. This Court denied all relied. *Id.*

On April 22, 2008, Mr. Willacy filed a federal petition for writ of habeas corpus in the United States District Court, Middle District of Florida. That petition is currently pending.

In October, 2009, Mr. Willacy filed a successive petition for writ of habeas corpus with this Court. In an order, dated March 19, 2010, this Court denied all relief. *Willacy v. McNeil*, Florida Supreme Court Case No. SC09-1859 (Fla. 2010).

On October 26, 2010, Mr. Willacy filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009). On November 16, 2010, the State responded. The circuit court held a case management conference on December 9, 2010. Thereafter, on December 13, 2010, the circuit court denied Mr. Willacy's motion. Mr. Willacy timely filed a notice of appeal. This appeal follows.

STATEMENT OF THE FACTS

The underlying facts of the crime in this case are set forth in two prior opinions of this Court. *See Willacy v. State*, 640 So. 2d 1079 (Fla. 1994); *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). In *Willacy v. State*, 640 So. 2d 1076 (Fla. 1994), this Court affirmed the Mr. Willacy's conviction for first-degree murder, arson, burglary, but reversed his sentence of death based on the trial court's failure to allow the defense the opportunity to rehabilitate a death-scrupled venire person. A second penalty phase was conducted in 1995, and a sentence of death was again imposed. This Court affirmed. 696 So. 2d 693 (Fla. 1997).

During Mr. Willacy's 1991 trial, he was represented by attorney Kurt Erlenbach. At the Rule 3.851 evidentiary hearing conducted in 2003-04, Mr. Erlenbach testified that prior to Mr. Willacy's trial he had never conducted a first-degree murder case either as a prosecutor or a defense attorney (PCR 634). He testified that his theory of defense in this case was to eliminate any evidence he could through motions and then attempt to explain away the other evidence (PCR 640). He characterized his defense as "try[ing] to shoot holes in the State's evidence" (PCR 652). Mr. Erlenbach admitted that he focused exclusively on eliminating evidence, and did not look for a plausible explanation for all the evidence or otherwise develop a defense (PCR 743).

Mr. Erlenbach recognized that Mr. Willacy's fingerprints on the gas can, fan and VCR rewinder were significant pieces of evidence for the State, as was his statement, the ATM photo, the victim's property and checkbook registry found in Mr. Willacy's home, the victim's blood-type found on his clothing, and a school boy's identification of Mr. Willacy. Specifically with regard to the ATM photo, Mr. Erlenbach explained that he believed that to be "a fairly incriminating piece of evidence, stronger than much of the other State evidence" (PCR 639).

Mr. Erlenbach did not recall telling Mr. Willacy that the State's case was strong or otherwise discussing the details of the case with him (PCR 637). He explained that it was his general practice to avoid discussing the actual details of a crime with clients. Rather he would review the discovery with the client and discuss ways to attack the evidence (PCR 704).

As to Mr. Willacy's videotaped statement to police, Mr. Erlenbach viewed the statement as the State's most damaging piece of evidence because, "it was largely a confession of at least felony murder" (PCR 640). He recalled only discussing having the statement suppressed (PCR 645). Mr. Erlenbach did not recall discussing with Mr. Willacy the option of allowing the statement to be introduced, thus offering an explanation to evidence which, if the statement were suppressed, would remain unexplained.

In this regard, he acknowledged that the content of Mr. Willacy's statement supported an independent act defense (PCR 644). He also testified that Mr. Willacy's videotaped statement was consistent with the lefthanded murderer theory and that the confidential informant's statement would have strongly supported an independent act defense.

He did not pursue an independent act defense because he was focused solely on suppressing the evidence. He maintained that it was vital to keep the statement out of evidence, and as a consequence accepted that there would be unexplained pieces of evidence (PCR 651-652; 656). He did not recall offering an explanation for Mr. Willacy possessing the victim's property.

Mr. Erlenbach testified:

> The problem came, it was difficult to rebut many of... those things and keep his statement out of evidence. It was a decision whether to keep the statement in, acknowledge he was involved and run the risk of felony murder.
>
> As I said, I believe his statement was tantamount to a confession of felony murder, go that route or the route of trying to suppress as much evidence as possible and poke holes at the rest.
>
> * * *
>
> Well, no, I think that it's—when you suppress his confession you're in a bit of a box in how to avoid dealing with the consequences of that. So the alternative would have been arguing that he was there, he was involved. I think in his statement he said he saw Ms. Sather tied up, I think. I can't argue he's not responsible for that which, under the felony murder theory is a harder sell than HL or some unexplained possession of property.

(PCR 654).

Mr. Erlenbach testified that he did not take the confidential informant's deposition at any time prior to trial. He felt that the confidential informant was not as important a witness as Alonzo Love, because the confidential informant's statement was hearsay. But inconsistently, he conceded that the confidential informant's statement constituted an admission and therefore, was admissible as an admission under Fla. Stat. § 90.803(18). He conceded that he did not depose the confidential informant, but instead took Mr. Love's deposition (PCR 648-650).[6]

At one point during voir dire the trial court refused to let Mr. Erlenbach attempt to rehabilitate a juror. Mr. Erlenbach testified that he believed that the trial court erred and he was confident he was going to receive a new trial. In this regard he stated, "I sat down after that and maybe even said to Susan the rest of this is practice, that was reversible error there. It turned out that it was for the penalty phase but not the guilt phase" (PCR 665). He further testified it was difficult to say exactly how this affected his presentation of the defense. He stated, "I cannot say that it did not affect things" (PCR 667).

Mr. Erlenbach testified that he considered the information he uncovered regarding Juror Clark's pending felony charges to be significant. He testified that he did not know about Juror Clark's pending charges at the time Juror Clark sat as a juror on Mr. Willacy's case. He did not recall knowing in 1991 that the pendency of criminal prosecution was a statutory disqualification. However he stated that, had he learned of the juror's pending charges during voir dire, he would have moved to strike Juror Clark for cause or would have used a peremptory challenge to remove him from the jury panel. He further stated that had he known of section 40.013, Florida Statutes, he would have challenged Juror Clark's eligibility to serve as a juror (PCR 671-672).

[6]Because he did not seek to depose the confidential informant, counsel did not learn the identity of the confidential informant and the confidential informant did not testify at trial. Terry Sirois was hired by collateral counsel in 2003 to identify and locate the confidential informant. Based on her investigation, she testified that the confidential informant was an individual named Earl Chance who died in 1994 (PCR 1357-1367).

He indicated that he would never have wanted Juror Clark to serve on the jury (PCR 673). He described Mr. Clark, a middle -class businessman entering PTI, as probably "the worst possible defense juror" (PCR 732-733). As to why he would strike a juror with pending charges, Mr. Erlenbach testified:

> Well, a juror who has pending charges is clearly in a position to be biased in favor of the State, particularly somebody in Mr. Clark's position.
>
> If I remember correctly he was a businessman and it was a business dispute that led to the criminal charges and a person in his position clearly has more to lose than many other folks who are charged with crimes and somebody in his position who is angling to get into a diversion program, a person who has not ever been charged with a felony before, perhaps never even been charged with a crime before. Certainly somebody in his position is very clearly—I wouldn't say clearly but likely very easily have a very strong bias for the State particularly in a case this serious. . . .

(PCR 692). He also stated:

> If a juror, any juror had said I am being prosecuted now, I'm about to go into PTI—if I remember this testimony right he had not had time to sit on the jury, he had not received his letter saying that he was going into PTI. But had he said I'm being prosecuted by this State Attorney's Office that would have made a very significant difference and I would have moved to challenge for cause and stricken him peremptorily had the opportunity arisen.

(PCR 684).

Mr. Erlenbach testified that while preparing the initial brief in the appeal of this case to the Florida Supreme Court, he decided to investigate the other jurors as a consequence of the *Neil*[7] issue involving the State's having struck Juror Payne (PCR 676). With regard to Mr. Payne, Mr. Erlenbach explained the State's position:

> His argument was the jury questionnaire, the question is designed to elicit information on any prior charge against the defendant never made that known to us, he withheld that all along. He also offered in voir dire that he testified on behalf of the defendant on a drug charge.

* * *

[7] *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

He failed to share any of this information with us during the course of voir dire and the questionnaire the Court handed out, he indicated that person should relate to us any sort of connection they may have had with the law and certainly if any charges had been filed against him.

(PCR 679). He testified that the State had urged that anyone with any involvement with law enforcement, particularly those with charges filed against them, should be telling the lawyers during voir dire (PCR 680).

Despite this backdrop, Mr. Erlenbach failed to ask the jury panel questions regarding whether anyone had pending charges or had ever had charges filed against them. Mr. Erlenbach indicated that this question, if answered honestly, would have prompted jurors to relay this type of information. He admitted that he did not ask Juror Clark if he had any pending charges. He therefore did not have any information regarding Juror Clark's pending felony charges and his referral to PTI at the time he was exercising challenges to the jury panel (PCR 673; 680-681; 684).

Lastly Mr. Erlenbach testified that he did not retain any experts in this case (PCR 618). Similarly he did not employ an investigator (PCR 637). He further testified that he never considered the benefits of employing a fingerprint expert (PCR 625). He agreed that experts can assist in developing cross-examination, suggesting areas that need further exploration and creating reasonable doubt (PCR 685).

Susan Erlenbach testified that her involvement in this case was limited to assisting Mr. Erlenbach in the jury selection process (PCR 753-754). According to Mrs. Erlenbach, Mr. Erlenbach questioned all the jurors during voir dire. She testified that had she learned of Juror Clark's status during voir dire, she would have strongly encouraged Mr. Erlenbach to strike him as a juror. She further stated that had she been the sole lawyer in this case, she would have undoubtedly moved to strike Juror Clark from the jury panel (PCR 757).

In this regard she testified that she absolutely would not have wanted a juror like Mr. Clark to sit as a juror on a criminal case. She stated:

> Well, because regardless of what Mr. White's mind-set is Mr. Clark is going to know that Mr. White is the one making the decision in his case and that any point in time Mr. White can decide not to go through with a PTI contract. So Mr. Clark had to know that, he had to feel beholden to the State or least consider him baring himself in the State's eyes and particularly Mr. White's eyes.

(PCR 758).

After the conviction was returned and the death sentence imposed, this Court affirmed Mr. Willacy's conviction but reversed the sentence of death and remanded the case for a new penalty phase proceeding in 1994. Thereafter, Dan Ciener represented Mr. Willacy from mid-January 1995 until April 13, 1995 at which time James Kontos was retained by the Defendant (PCR 980-981). Mr. Kontos had previously worked for Mr. Ciener's law firm. In January 1995 Mr. Kontos opened his own law practice. Mr. Kontos testified that this was his first big case (PCR 999).

In the five years Mr. Kontos worked at Mr. Ciener's office, Mr. Ciener had not conducted any death penalty proceedings. However, Mr. Kontos along with Mr. Ciener had tried one first-degree murder case (PCR 1086). While involved in preparing various motions in death penalty cases, Mr. Kontos had never litigated a penalty phase proceeding (PCR 976). Mr. Kontos had never observed any lawyer conduct a penalty phase proceeding,

nor had he attended any death penalty seminars (PCR 978; 1000). Mr. Kontos also testified that his co-counsel, Jeffrey Thompson, had no prior experience litigating a capital case (PCR 977). With regard to his educational preparation for this case, he stated:

> A. I would say my preparation which would include reading case law regarding the death penalty, conversations with Mr. Ciener's office about the plan of attack that he was going to use in defending Mr. Willacy and a conversation at some point with Mr. Erlenbach regarding how he was going to represent Mr. Willacy and also a review of the trial transcript and death penalty phase that Mr. Erlenbach conducted.
>
> I think I had—I know I had the Susan Schaeffer book at some point, I don't remember when I got that and I think I probably—
>
> Q. And that's Judge Schaeffer?

A. Yes. And I think I probably had access to one of the death penalty seminar books although I can't tell you how much of that I reviewed. I'm sure I reviewed some portion of it but I don't think I read it page by page, or not every page.

(PCR 978).

Upon taking over the case Mr. Kontos did not speak to Mr. Ciener, but rather spoke to Andy Fouche, an associate lawyer working for Mr. Ciener. Mr. Kontos testified that he asked Mr. Fouche "how they were going to defend Mr. Willacy." As to this, Mr. Kontos testified:

> [a]s best I can recollect and I don't remember all of the conversation but they were going to stipulate to the majority of the facts in what was originally the trial phase and present essentially the same or something similar to what Mr. Erlenbach did at his penalty phase.

(PCR 981-982). Mr. Kontos was unaware whether Mr. Fouche had reviewed the discovery or read the trial transcripts in this case at the time of this conversation. Mr. Kontos explained that he believed that Mr. Ciener's office had a defense plan, but stated that he did not "know how much they knew before they came up with a plan" (PCR 982). Mr. Kontos did not speak with Mr. Erlenbach until a right before the penalty phase. He indicated that by that time he had already developed his defense, and this conversation had little impact on his preparation (PCR 985-986).

Mr. Kontos testified that he was not very familiar with the use of experts. He indicated that he was influenced by Mr. Ciener's methodology of not employing experts in that "there was not a great deal of comfort using experts because I just haven't done it" (PCR 998-999).

Mr. Kontos testified that his defense plan had four parts:

1. factual mitigation which was essentially the mitigation previously presented by Mr. Erlenbach;
2. legally and/or factually attack the aggravating circumstances sought by the State;
3. preserved any and all error; and
4. residual doubt.

(PCR 987-988). As to residual doubt, Mr. Kontos testified:

> also wanted to aggressively cross examine the witnesses. . . regarding the facts of the murder in order to try and create this perception that there might be, maybe he didn't do it or maybe there's this little glimmer of doubt in their mind as to whether he did do it and therefore even though you couldn't necessarily argue residual doubt a jury might think we're not 100 percent positive so we're not going to execute this individual or suggest that he be executed.

(PCR 988). Mr. Kontos testified that he hoped that he could convince the jury that maybe Mr. Willacy had not committed the murder. He acknowledged in his testimony that residual doubt was not a lawful argument. To get around this, he stated:

> I think I attempted to argue it in a way that I was legally. . . allowed to argue it by trying to bring it in under the theory that he was a minor participant.

(PCR 988-989).

He explained that he did not approach this case from the premise that Mr. Willacy had already been found guilty. Rather he stated that the "whole purpose of cross-examining the [state's] witnesses" was to attempt to create an impression in the jury that "maybe this guy didn't do it. Whether legally they could presume that or not, factually they might." (PCR 991). He just hoped that the jury would disregard the jury instructions (PCR 1090).

As to his strategy to preserve error, Mr. Kontos explained that as an attorney you can "look for areas of potential error and foster them" and try to "make sure" to "do everything you can to see that they are sufficient to be reversible or be as close to being reversible as possible" (PCR 993). He said that to plan on an ineffective judge was not a legitimate legal strategy,[8] but yet stated "there was certainly that hope, okay? I don't know if that was necessarily a strategy but it is certainly hope." (PCR 993; 995).

With regard to employing Dr. Riebsame, Mr. Kontos indicated that he contacted Dr. Riebsame because, "someone who I respect told me to but I really [didn't] think there's going to be anything that comes out of it" and that "it was probably going to be a waste of time"

[8]During this line of questioning, the trial court interjected, stating, "You might want to consider your oath as a lawyer as well in answering

(PCR 1005; 1076). He testified that today the first thing he would do in preparing a capital case is hire a mental health expert (PCR 1076-1077).

He testified that he did not send Dr. Riebsame any articles, case law or sufficient background information in order to fully investigate potential mitigating circumstances (PCR 1006; 1009). He denied that there was any strategy involved in this decision (PCR 1010). He also did not discuss Mr. Willacy's drug use with Dr. Riebsame or in any way attempt to have Dr. Riebsame relate Mr. Willacy's drug usage to the homicide. He testified:

> I did not specifically not do it, it wasn't a strategic decision, it wasn't a thought-out decision, I don't think I ever considered it.

(PCR 1023).

Mr. Kontos testified that an attorney has an obligation to provide an expert with whatever the expert may need. As to Dr. Riebsame, he stated, "I . . . probably assumed Dr. Riebsame would tell me whatever he needed if he needed anything more and that was probably an incorrect assumption or my part." (PCR 1012).

He testified that he believed that he had explained to Dr. Riebsame that he wanted Dr. Riebsame to focus on mitigation. He further stated:

> and I remember Dr. Riebsame asking me whether he wanted . . . me to have him do a competency exam also and I said yes so there may have been some miscommunication, it's certainly possible.

(PCR 1013).

Mr. Kontos testified that following his examination of Mr. Willacy, Dr. Riebsame mentioned that the testing showed indicators that he might be a sociopath or psychopath, and he then "closed" and "locked" the door on employing Dr. Riebsame. He did not authorize

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your questions" (PCR 994).

Dr. Riebsame to conduct any further testing to confirm the possible diagnosis. He did not research the meaning of antisocial personality or sociopath. He failed to tell Dr. Riebsame any information regarding good deeds by Mr. Willacy. Importantly, Mr. Kontos testified that this decision was not a strategic decision (PCR 1026-1027).

He indicated that his decision to not use an investigator was not necessarily a strategic one, but rather he did not realize the value of an investigator. He stated that today he would certainly employ an investigator in a death penalty case (PCR 1013-1014). Mr. Kontos did not obtain any school or medical records. He testified that there was no strategy involved in not obtaining these records, rather he simply "did not do it." (PCR 1014).

With regard to presenting factual mitigation, Mr. Kontos sought to "paint a picture of Chad Willacy as a life worth saving" and hoped the jury would see him as "a regular person" and not as "a cold-blooded murderer" (PCR 1021).

Mr. Kontos had no knowledge of alcohol abuse by Mr. Willacy's father (PCR 1016). Similarly, he had no knowledge of Mr. Willacy being physically abused by his father. He did not recall asking Mr. Willacy's family members about any physical or alcohol abuse in their household. He conceded that most people do not volunteer that they abuse their child (PCR 1020; 1100). Mr. Kontos also did not know that Mr. Willacy had been homeless for a period due to his drug use (PCR 1022).

Similarly, he did not know he had Attention Deficient Hyperactivity Disorder (ADHD). In this regard, he stated that had he known this, he would have sought jurors who had children with ADHD because they would have readily understood that children with ADHD are impulsive and lose control. He further indicated that he would not have been dissuaded by Dr. Danziger's, the State's mental health expert, opinions on ADHD because he believed that a jury who understood ADHD would not accept Dr. Danziger's opinion that people with ADHD are not impulsive and not prone to violent outbursts (PCR 1028; 1031).

He further explained that "one of the main problems I had was not explaining why what happened happened" (PCR 1024). He acknowledged that Mr. Willacy's drug use was a potential explanation for the murder.

As to establishing the minor participant mitigator, Mr. Kontos recalled presenting only evidence of the left-handedness of the assailant. He did not recall considering introducing Mr. Willacy's videotaped statement to the jury (PCR 1038; 1046). He acknowledged that Mr. Willacy's statement supported the minor participant mitigating circumstance, and could have also supported additional mitigation (PCR 1048). He did not introduce the confidential informant's statement regarding Mr. Love. He did not recall introducing any evidence that someone else was involved in the murder (PCR 1044-1045). He testified that he sought on cross-examination to elicit whatever facts supported the mitigator. However he acknowledged that his cross, which was very similar to Mr. Erlenbach's cross-examination, focused on the idea that only one person was involved in the crime. He was unable to recall any evidence elicited on cross-examination that supported the mitigator. He further acknowledged that in order for the jury to have found that there was another participant, evidence would have had to have been introduced (PCR 1040-1041).

Mr. Kontos testified that he learned sometime during the 1995 Spencer hearing that Judge Yawn had come into the courtroom with a prepared sentencing order (PCR 1052; 1061). Despite knowing this, Mr. Kontos testified that he never thought of moving to disqualify Judge Yawn (PCR 1053). He denied any strategy involved in that decision.

At the conclusion of the evidence in the 1995 penalty phase proceedings, Mr. Kontos failed to request the felony murder instruction. As to this, Mr. Kontos testified that there was no strategy involved in his failure to request the felony murder instruction. He stated, "No, in fact I would think I would have wanted to . . . ." (PCR 1061).

Similarly, at the conclusion of the 1995 penalty phase proceeding, Mr. Kontos did not request a special jury instruction pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982). Mr. Kontos stated he had "never even thought of requesting an instruction based on [*Enmund*]" (PCR 1063). Again his failure to request an Enmund instruction did not involve any strategy.

Dr. William Riebsame, a licensed psychologist, testified that he was contacted by Mr. Kontos on September 7, 1995. At that time, Mr. Kontos informed him that he was conducting a death penalty proceeding within the week and that he wanted Dr. Riebsame to see Mr. Willacy at the Brevard County jail. Dr. Riebsame testified that Mr. Kontos requested only a competency evaluation and forwarded a two-page arrest affidavit to Dr. Riebsame on September 8, 1995 (PCR 1112-1114).

According to Dr. Riebsame, he met with Mr. Willacy on September 8, 1995. At that time, he gathered background information from him. His interview took approximately one hour, and the psychological testing of Mr. Willacy also took about one hour (PCR 1115-1120).

Dr. Riebsame testified that based on his examination of Mr. Willacy, he found him aware of the charges against him and able to communicate with his attorneys. He concluded that Mr. Willacy was competent and promptly conveyed his findings to Mr. Kontos. He also testified that in reviewing the test results with Mr. Kontos, he told Mr. Kontos that a portion of the testing revealed some indicators of antisocial personality characteristics (PCR 1124-1125). He estimated that his conversation with Mr. Kontos lasted twenty minutes (PCR 1130).

Dr. Riebsame stated that an eleven-day period of time is an insufficient amount of time to conduct a thorough mental health evaluation for a penalty phase proceeding. As a general practice in a penalty phase evaluation, he would conduct a thorough review of all academic, medical and prior mental health treatment records relating to a defendant. He would speak to relatives of the defendant and would meet with the defendant on several occasions. He would also conduct a battery of psychological and neuropsychological testing to ascertain any existing mental disorders in the defendant. He testified that he would not have been unable to complete such an evaluation in the time period provided by Mr. Kontos (PCR 1112-1113).

He also stated the two-page arrest affidavit, the sole document, faxed to him by Mr. Kontos would have been insufficient or inadequate for preparation of mitigation evidence. He stated that based on the materials provided he did not understand that he was to evaluate potential mitigation evidence (PCR 1115-1116).

In 2000, Dr. Riebsame was contacted by collateral counsel regarding mitigation in this case. At that time, he was furnished with the following material: Mr. Willacy's videotaped statement to police, a transcript of the statement, a transcript of confidential informant's statement to police, a transcript of Alonzo Love's statement to police, prior psychological testing of Mr. Willacy conducted by Dr. James Brown, a personal history of him gathered by a defense investigator, arrest reports from Freeport and Nassau Police Departments, elementary, high school and college records, results of a psychological evaluation from Hofstra University, medical records, prison records, and an evaluation performed by the State's expert, Dr. Jeffrey Danziger. He was asked to review the testing performed by Dr. Brown and to perform an evaluation of any potential death penalty mitigation. He testified that he reviewed all the material provided, met with Mr. Willacy on a number of occasions, and performed a thorough battery of psychological and neuropsychological tests (PCR 1131-1132).

Based on his examinations, he diagnosed Mr. Willacy with the following: cocaine abuse, cannabis abuse, alcohol abuse, ADHD, antisocial personality disorder, and cocaine intoxication and cocaine withdrawal (PCR 1172-1173). In addition, Dr. Riebsame found the presence of one statutory mitigating circumstance, namely, Mr. Willacy was under the extreme mental or emotional disturbance (PCR 1189-1190).

As to the cocaine abuse and alcohol abuse, Dr. Riebsame testified that a cocaine abuse diagnosis would include Mr. Willacy was ingesting crack cocaine in a binge-like manner to the level of intoxication, across a three to four-day period (PCR 1279). He explained that this diagnosis is confirmed by third-party sources such as Alonzo Love, Carlton Chance and the confidential informant, all of whom confirm Mr. Willacy's drug

abuse around the time of the homicide (PCR 1173-1174).

As to his diagnosis of ADHD, Dr. Riebsame explained that ADHD is a mental disorder that reflects impulsivity and poor judgment, rather than reasoned decision-making. According to Dr. Riebsame, individuals with ADHD have problems making decisions that require them to focus on a number of different factors at the same time. In summary ADHD individuals are easily distracted, get off task,

have difficulty completing projects, appear forgetful and have difficulty making effective decisions (PCR 1219; 1225). He testified that evidence of ADHD is found in Mr. Willacy's school records, which reflect behavioral problems, attentional problems, and a lack of achievement consistent with his intellectual ability. He also testified that there is evidence of a conduct disorder in Mr. Willacy's childhood history, noting that a child with ADHD often receives an accompanying conduct disorder diagnosis (PCR 1175; 1177). He further noted that often children diagnosed with ADHD come from

physically abusive homes where the abuse is regular and severe.

Dr. Riebsame testified that typically ADHD continues into adulthood (PCR 1174). Specifically he explained that by age 21, the hyperactivity component has usually subsided, but the attentional and impulsivity components remain present (PCR 1221). Importantly he testified that drug addiction intensifies the impulsivity component of ADHD (PCR 1271).

With regard to his diagnosis of antisocial personality disorder, Dr. Riebsame testified that Mr. Willacy meets the criteria for the disorder. However, Dr. Riebsame noted that there are aspects of his personality that are not consistent with the diagnosis such as having maintained extended relationships, helped others for no personal gain, attempted to stop abusing drugs, and having adopted the Islamic religion solely for spiritual reasons (PCR 1177-1178). He explained that there exists a significant correlation between adult males diagnosed with antisocial personality disorder having a history of chronic and severe physical abuse (PCR 1271). He also testified that when one has ADHD combined with cocaine intoxication, the characteristics of antisocial personality disorder are intensified or worsened (PCR 1277).

Lastly as to his diagnosis of cocaine intoxication and cocaine withdrawal, Dr. Riebsame testified that Mr. Willacy's appearance on the videotaped statement to police offers markers of cocaine withdrawal (PCR 1179). He noted that an individual who is under the influence of cocaine would show very poor judgment, remain sleepless for several days, be talkative and may be agitated and disagreeable. Further his thinking may be confused and his impression of himself may be grandiose (PCR 1196). Specifically as to Mr. Willacy, Dr. Riebsame noted

that based on third-party reports, Mr. Willacy had been sleepless for several nights and doing crack cocaine for several days, including the morning and afternoon of the murder (PCR 1208).

As to the statutory mitigating circumstance of extreme mental or emotional disturbance, Dr. Riebsame testified:

> Yes, I would suggest that there are very extreme mental or emotional disturbances in this case given the crack cocaine intoxication at the time and symptoms of the other mental disorder.
>
> * * *
>
> he was amidst of a crack cocaine binge and was very much...likely intoxicated on crack cocaine at the time of the offense. Symptoms associated with this particular disorder would surely impair his judgment and affect his behavior substantially. I think it's also a diagnosis of Attention Deficit Hyperactivity
> Disorder in this case that would lay the foundation for someone who is going to act impulsively, show poor judgment and not recognizing the consequences of their behavior anyway. In combination with the cocaine intoxication you have an individual who is extremely mentally disturbed. If you look at the circumstances surrounding Ms. Sather's death, I think the way the offense was carried out reflects extreme mental
> disturbance simply on the facts of the evidence.

(PCR 1189-1190).

He further testified:

> I think the cocaine intoxication in particular lends itself towards the extreme emotional disturbance, in my opinion what was going on in his life or around that period of time in terms of the cocaine use. I think that the actual facts of the murder itself, how it was carried out, what was done to Ms. Sather also reflects extreme emotional disturbance.
>
> * * *
>
> We have now in this circumstance where he's behaving as if he has a very limited IQ, his actions are disorganized, ineffective and he doesn't even recognize his lack of success.
>
> Then he leaves the scene in a rather ignorant manner being observed by others, immediately proceeds to an ATM machine where he's observed there. These are not the actions of someone with an IQ of I think it was 120 or something like that. It doesn't make sense unless we see the symptoms of mental disorder or cocaine intoxication. There is something else going on with Mr. Willacy at the time of this crime. That's how I come to answer your question.

(PCR 1223-1224).

He described Mr. Willacy's actions during the homicide, not as a rage but rather as impulsive, haphazard and ineffective. He opined that Mr. Willacy's decision to kill the victim was impulsive in that he failed to consider the consequences of his actions as well as other available options such as fleeing, stopping what he was doing, or knocking the victim out and running away (PCR 1225; 1228).

Dr. Riebsame opined that it was not Mr. Willacy's antisocial personality disorder that caused the murder. Rather Dr. Riebsame opined that it was merely one factor (PCR 1241). He explained that he believed the murder to directly reflect a crack cocaine binge and to have been driven for the sake of obtaining crack cocaine (PCR 1187).

He stated that he would have had these opinions in 1995 regarding mitigation. He specifically explained that the diagnoses were present in Mr. Willacy at the time of the murder, and he was under the influence of the symptoms associated with these diagnoses (PCR 1182; 1191). Regarding his involvement in 1995, Dr. Riebsame testified:

> Yes, if I was aware at the time of my conversation with Mr. Kontos of that crack cocaine involvement, via the other source of information that I now have, I would have commented on how crack cocaine and the addiction on Mr. Willacy's part could explain much of what occurred.

(PCR 1188).

As to the presence of non-statutory mitigating circumstances, Dr. Riebsame testified that Mr. Willacy had a history of physical abuse, substance abuse and the diagnosis of a mental disorder (PCR 1182). He further testified that Mr. Willacy's ability to appreciate the criminality of his conduct was impaired, although not substantially, stating:

> There's some impairment, given what occurred and given that...he was intoxicated on crack cocaine and associated with this mental disorder but not substantial in nature.

(PCR 1186).

Heather Willacy, Mr. Willacy's sister, testified that her father began physically abusing her brother when her brother was between eight and ten years old (PCR 1319). She described the abuse as a constant occurrence in their home, occurring several times a week for six to seven years. Ms. Willacy testified that the abuse of her brother stopped when he was 16 or 17 years of age (PCR 1339).

She classified these beatings as severe, such that "where I thought he was really like going to hurt him bad" (PCR 1322). Their father left bruises and welts on her brother. She indicated that her father would use a thick leather belt and that once, her father broke a chair leg and beat Mr. Willacy with the leg (PCR 1323-1324). According to Ms. Willacy her father would hit her brother "wherever he could get him." She testified that her brother would become frightened and try to run away, but her father would run after him (PCR 1326).

Ms. Willacy also testified that her father physically abused her mother. She testified that her father would attack her mother, hitting, slapping or pushing her mother. She stated that during these attacks she and Mr. Willacy would be present in the home, huddled together crying. She recounted an incident when Chadwick was 14 or 15 years old, in which he tried to stop his father from beating his mother. Ms. Willacy testified her father then turned on Chadwick and beat him (PCR 1319-1320; 1322).

Ms. Willacy testified regarding alcohol abuse by her father, stating that her father would drink to intoxication three times a week (PCR 1330). She also testified that her brother became involved in drugs at the age of 16 and that at 18, his parents kicked him out of the house because of his drug use (PCR 1334-1336).

She indicated that the attorneys representing her brother never asked her about any physical abuse or alcohol abuse by their father (PCR 1330). In fact, Ms. Willacy testified that she never spoke to Mr. Erlenbach (PCR 1338). As to Mr. Kontos, she stated, "He wanted to know, he wanted me to tell good things about my brother which is what I did" (PCR 1343).

Colin Willacy, Mr. Willacy's father, testified that drinking half a quart of rum was a daily pastime for him. He described his drinking as steady and excessive, resulting in irrational behavior. He testified that "very often things got so heated that I have many times got physical with [his wife]." He stated he would slap or punch her with his fist "anywhere from

six to ten blows depending on however resistant she became." He described these as "really hard punches" (PCR 1418; 1417-1418).

He also testified that he began beating Chadwick when he was about 7 or 8 years old, and that the beatings, while regular, got more brutal as Chadwick got older. With regard to Chadwick, he stated, "I would go frantic. . . I would use anything. If there was a chair there, anything, because I was in a state really that I got very abusive." (PCR 1420).

He stated that he would "really, really let him have it for disobeying me." (PCR 1421). He explained that, in Jamaica corporal punishment is practiced, but "what I did, I gave that and more . . . what I inflicted as corporal punishment was brutal" (PCR 1449). He described the blows to Chadwick as "oh, to the full extent of whatever power that I had, very hard." He would strike Chadwick with his belt on "any part of his body, 15 to 20 times" (PCR 1428; 1429). Mr. Willacy recounted a specific incident where he beat his son with a chair leg:

> Well, I don't remember when it was but I went in his room and I confronted him. And the closest thing, they had a chair in his room and I grabbed the chair because I was so frantic and mad at his disobeying me and I just broke the chair on him.

(PCR 1422). He stated that during this incident he struck the his son four to six times with the chair leg. Mr. Willacy testified that he stopped beating Chadwick when he was in high school (PCR 1421; 1423).

He also testified that due to Chadwick's drug use he and his wife kicked him out of their home. During that time, Chadwick was homeless, living on a rooftop (PCR 1449).

During the 1995 penalty phase proceedings, testimony was presented the Mr. Willacy had been a strict disciplinarian. He testified that at no time did the defense attorneys inquire further or ask him to provide any details regarding his being a strict disciplinarian. Thus, he never told the attorneys about the physical abuse or his alcohol abuse. He indicated that while he was ashamed of his conduct, he would have told the lawyers if he had been asked (PCR 1426). In this regard, he explained that he had no idea that this information was so critical in the penalty phase proceeding. Mr. Willacy testified:

When the penalty phase came up I was not told that I should, I was told that what counted is his good behavior, the good deeds that he had done.

(PCR 1434-1435).

Chadwick Willacy's mother, Audrey Willacy, testified that she married her husband in 1966. She stated that Chadwick's father began drinking prior to their marriage, and it continued following their marriage. She described her husband as unsteady, easily irritated, and unapproachable when he was drinking. According to Mrs. Willacy, he drank at least two to three times a week and especially on the weekends (PCR 1369). She stated that when he drank, they would have heated arguments that would progress into physical confrontations. She testified that her husdband began abusing her in the third year of their marriage while she was pregnant with their second child. She explained that during this incident, her husband pushed her down a flight of stairs, and she received an injury over her eye. Mrs. Willacy stated that he would slap her or punch her in the back with his fist, often striking her eight to ten times. She testified that while the abuse was sporadic, it was extensive. She further testified that the abuse lasted over a ten-year period, occurring approximately 25 times (PCR 1372; 1374-1376).

Mrs. Willacy testified that the physical abuse of her son occurred much more frequently, at least four times a week. She testified that almost every time her husband was drunk there was a physical attack on Chadwick. Mrs. Willacy related that the abuse began when he was approximately 8 years old and ended when he was 15 or 16 years old (PCR 1379).

Mrs. Willacy described these beatings as extreme with Chadwick being beaten with a belt, fists, furniture, or whatever was available or handy at the moment. She recounted that when Chadwick was as young as 8 years old, Mr. Willacy would beat him with his fist or a belt in the head, back or "anywhere he could get the blow" (PCR 1379). She stated the abuse usually occurred over trivial things like Chadwick failing to walk the dog or to do his homework (PCR 1381).

She testified about an incident involving a chair leg:

> He came home and he was as I say drunk. And he was, he was talking to Chad. And there was the chair and he broke the chair, took the foot of the chair and beat Chad with it. I tried to intervene and I got hit, not seriously but I got hit during the time that I was trying to get in-between him and the chair and Chad.

(PCR 1380). She recounted a second incident when a friend witnessed Mr. Willacy beating her son, and the friend, concerned over the intensity of the blows, stated, "You're going to kill him" (PCR 1390).

In the 1991 or 1995 penalty phase proceedings, Mrs. Willacy did not testify about any abuse. She explained that she was never asked specifically about abuse, and therefore, she did not volunteer or otherwise detail any abuse witnessed or suffered by Chadwick. She related that the defense attorneys never discussed with her any potential significance of abuse. She indicated that she met with Mr. Kontos three or four times, but he never pressed her for any such information (PCR 1389). Rather:

> Mr. Kontos and Mr. Erlenbach told me that I should get , . . . people who can tell of Chad's good behavior and good conduct and good things that he had done in the penalty phase.

(PCR 1385). According to Mrs. Willacy, Mr. Kontos instructed her to focus on the good things about her son (PCR 1412). She testified that had someone asked about the abuse, she would have told them (PCR 1384-1385).

Mrs. Willacy also did not tell the defense attorneys about the Chadwick's mental health counseling as a child at Hofstra University. She did not discuss with the defense attorneys that she and Mr. Willacy kicked Chadwick out of their home when he was approximately twenty years old due to his drug abuse. Mrs. Willacy testified that her son was gone from their home for about one month, and during this time he was living on a rooftop and without any food (PCR 1386; 1387; 1392).

SUMMARY OF ARGUMENT

Mr. Willacy 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. Willacy'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. Willacy's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

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

A. INTRODUCTION

Mr. Willacy was deprived of the effective assistance of trial counsel at the guilt and penalty phase of his case. Mr. Willacy presented his ineffective assistance of counsel claims in a Rule 3.851 motion that was initially filed in 1998. Following an evidentiary hearing, the circuit court erroneously denied Mr. Willacy's ineffective assistance of counsel claims. When this Court heard Mr. Willacy's appeal of that decision, it failed to conduct a *de novo* review of legal questions contained within an ineffectiveness analysis and instead employed a standard of review that was highly deferential to the circuit court's erroneous legal conclusions in violation of *Porter v. McCollum*, 130 S.Ct. 447 (2009).

The decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Willacy's ineffective assistance of counsel claims was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* was a repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein,[9] which renders Mr. Willacy's *Porter* claim cognizable in collateral proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("We hold we are required by this *Hitchcock* decision

[9]As explained herein, *Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance of counsel claim in *Porter v. State*. Thus, Mr. Willacy 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.

to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d at 669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

Mr. Willacy presented his claim under *Porter v. McCollum* to the circuit court in a Rule 3.851 motion in light of this Court's ruling in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, should be raised in Rule 3.850 motions). At the State's urging, the circuit court refused to find that fairness principles dictated that *Porter v. McCollum* should be treated just like *Hitchcock v. Dugger* and *Espinosa v. Florida*, as new Florida law within the meaning of *Witt v. State*. Accordingly, Mr. Willacy seeks a determination by this Court that he is entitled to have his previously presented ineffective assistance of counsel claims judge by the same standard that the United States Supreme Court employed when finding George Porter's ineffectiveness claim was meritorious and warranted habeas relief.

B. *PORTER* QUALIFIES UNDER *WITT* AS A DECISION FROM THE UNITED STATES SUPREME COURT WHICH WARRANTS THIS COURT REHEARING MR. WILLACY'S INEFFECTIVENESS CLAIMS

1. Retroactivity under *Witt*.

It is Mr. Willacy's position and the circuit court conceded that as to whether *Porter* qualifies as new law, the question is one of law (PC-R2. 181). Therefore, initially, this Court must independently review that aspect of Mr. Willacy's claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law.[10] Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Willacy's ineffective assistance of counsel claims, both at the guilt and penalty phases, giving only deference to historical facts. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations as to both the guilt and penalty phases, are questions of law to which no deference is to be accorded to the judge who presided at evidentiary hearing. As *Porter* also makes clear, an evaluation of the evidence presented to establish prejudice

[10]Indeed, the State argued in Mr. Willacy's case and in others cases in which *Porter v. McCollum* claims have been presented, that only this Court can determine whether a decision from the United States Supreme Court qualifies as new law under *Witt v. State*.

under the prejudice prong of the *Strickland* standard must also be evaluated without according any deference to the presiding judge's findings as to that evidence. Absolute *de novo* review is required of evidence offered to establish prejudice under *Strickland*. The issue is not what impact the evidence of prejudice had on the judge presiding at a collateral evidentiary hearing, but what impact such evidence may have had upon the jury who heard the case had it been presented. *See Porter v. McCollum*, 130 S. Ct. at 454-55.[11]

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

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the United States Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), this Court found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926.

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[11] As the United States Supreme Court noted in *Kyles v. Whitley*, 514 U.S. 419 (1995), the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute her credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the state. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

This Court in *Witt* recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." *Id.* at 929. This Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id.* at 926.

This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id.* at 931. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock,* a death sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt,* this Court agreed and ruled that *Hitchcock* constituted a change in Florida law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).[12]

[12]The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in

a number of cases, this Court was soon thereafter called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. Therein, this Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). Then on September 9, 1987, this Court issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, this Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default." In *Downs*, this Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, this Court issued its opinion in *Demps*, and thereto addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. *See Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the United States Supreme Court held that this Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id.* at 1071.

Following *Hitchcock*, this Court found that *Hitckcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs,* this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[13] Clearly, this Court read the opinion in *Hitchcock* and saw

[13]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

that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error should be entitled to the same relief afforded to Mr. Hitchcock.[14]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Lockett*, a prior decision from the United States Supreme Court, here in *Porter* the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears v. Upton*, 130 S.Ct. 3529 (2010). As *Hitchcock* rejected this Court's

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> other matters have [sic] no place in that proceeding . . ."), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in Songer v. State, 365 So. 2d 696 (1978) (per curiam), which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

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

[14]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).

analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received. And just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, this Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

Another decision from the United States Supreme Court finding that this Court had failed to properly apply Eighth Amendment jurisprudence was *Espinosa v. Florida*. At issue in *Espinosa* was this Court determination in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), that the United States Supreme Court decision in *Maynard v. Cartwright*, a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

Smalley v. State, 546 So. 2d at 722. In *Espinosa*, the United States Supreme Court determined that *Maynard v. Cartwright* did apply in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in *Maynard*.

Following the decision in *Espinosa*, this Court found that the decision qualified under *Witt v. State* as new Florida law which warranted revisiting previously rejected challenges to the "heinous, atrocious or cruel aggravating circumstance. *James v. State*, 615 So. 2d 668, 669 (Fla. 1993)(*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

This Court should for exactly the same reasons that it treated *Hitchcock* and *Maynard* as qualifying as new law under *Witt*, find that *Porter v. McCollum* qualifies under *Witt* and warrants reconsidering previously denied ineffective assistance of counsel claims under the proper and correct *Strickland* standard which was applied to George Porter's ineffectiveness claim and resulted in collateral relief in his case and ultimately a life sentence. Refusing to reconsider Mr. Willacy's ineffectiveness claims and apply the now recognized proper standard of review would arbitrarily deny him the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would itself establish that Mr. Willacy's death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *Porter v. McCollum* and review of ineffective assistance of counsel claims under *Strickland*.

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

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

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

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

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

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id.* at 451, and "either did not consider or unreasonably discounted" that evidence. *Id.* at 454. The United States Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Id.* at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id.* at 454, even though Mr. Porter's personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court, just as this Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that Court relied upon the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001). And in Mr. Willacy's case, this Court relied on *Sochor* to conduct its analysis of Mr. Willacy's claims.[15]

[15]In Mr. Willacy's case, this Court stated: "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)." *Willacy*, 967 So. 2d at 140-41.

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where the Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings.[16] In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision.[17] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the Court made clear that even under this less deferential standard:

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

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

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[16] It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the 2nd DCA was in conflict with *Grossman* as to the appellate standard of review to be employed.

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

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

In Mr. Willacy's case, as in *Porter*, this Court erroneously deferred to the trial court's findings to justify its decision to unreasonably "discount to irrelevance" pertinent mitigating evidence. *Id.* at 455. *Porter* makes clear that the failure to present the kind of troubled history relevant for the jury in the penalty phase to assess moral culpability prejudices a defendant. Here, that prejudice is glaringly apparent. After *Porter*, it is necessary to conduct a new prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's analysis used in this case to be in error, Mr. Willacy'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 that standard applies to the circumstances of this case." *Id.* at 3264. The Court explained:

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

2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.

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

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

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

C. MR. WILLACY'S CASE

Porter error was committed in Mr. Willacy's case. Following the denial of Mr. Willacy's claim of ineffective assistance of counsel by the trial court, this Court affirmed the denial of relief. As to the guilt phase ineffective assistance, this Court erroneously deferred to the

legal ruling that counsel's failure to investigate further and his resulting strategic decisions were reasonable. The reasonableness of counsel's decisions are questions of law as was recognized in *Porter v. McCollum*. Similarly, the failure of penalty phase counsel to investigate was found by the circuit court to be a reasonable strategic decision. This Court again treated that conclusion as one of fact, when it is as explained in *Porter v. McCollum*, a question of law subject to *de novo* review. This Court affirmed the circuit court's alternative holding that prejudice was not shown on the basis that "[t]he postconviction trial court's findings are supported by competent, substantial evidence." *Willacy*, 967 So. 2d at 144.[18] This analysis was not *de novo* and was not the sort of probing and fact-specific analysis which *Porter* and *Sears* require. Both the trial court's findings and the cursory acceptance of those findings by this Court violate *Porter*, as a probing inquiry into the facts of this case and leads only to the conclusion that counsel prejudiced Mr. Willacy by performing deficiently.

1. Deficient Performance.

In Mr. Willacy's case, trial counsel failed in his duty to conduct a reasonable investigation, including an investigation of guilt phase and penalty phase issues.

a. guilt phase

As to the guilt phase, as stated previously trial counsel had no strategic basis for failing to adequately conduct voir dire and move to challenge Juror Clark[19] and to challenge the State's case or present exculpatory evidence in defense of Mr. Willacy. Trial counsel failed to ask the venire any questions about criminal charges and failed to act on the information regarding Juror Clark. In addition, trial counsel failed to depose critical witnesses, obtain expert assistance or present exculpatory evidence. *See supra* p. 7-15.

[18]In its order denying relief, the trial court determined that trial counsel's strategy of humanizing Mr. Willacy was sound; that any mental mitigation evidence would have opened the door to aggravating facts; that Mr. Willacy's actions were deliberate and not the product of someone under the influence of an extreme emotional disturbance or cocaine intoxication; that there was overwhelming evidence of Mr. Willacy's guilt; that there were substantial aggravating factors; and that Mr. Willacy and his family members denied any abuse during the prior sentencing proceedings. *Willacy*, 967 So. 2d at 143-44.

[19]It is Mr. Willacy's position, the State withheld the information concerning Juror Clark's arrest and criminal charge from his attorneys and him.

b. penalty phase

James Kontos, Mr. Willacy's trial counsel, testified at the postconviction evidentiary hearing that his defense plan consisted of four parts: (1) factual mitigation which was essentially the mitigation previously presented during Mr. Willacy's original sentencing proceeding; (2) legal and/or factual attacking the aggravating circumstances sought by the State; (3) preserve any and all error[20]; and (4) residual doubt (PCR 987-88).[21]

[20]As to his strategy to preserve error, Kontos explained that as an attorney you can "look for areas of potential error and foster them" and try to "make sure" to "do everything you can to see that they are sufficient to be reversible or be as close to being reversible as possible." (PCR 993). Kontos acknowledged that to plan on an ineffective judge was not a legitimate legal strategy, but yet stated "there was certainly that hope, okay? I don't know if that was necessarily a strategy but it is certainly hope." (PCR 993; 995).

[21]As to residual doubt, Kontos testified that he hoped that he could convince the jury that maybe Mr. Willacy had not committed the murder. However, Kontos acknowledged that residual doubt was not a lawful argument (PCR 988-89).

With regard to presenting factual mitigation, Kontos sought to "paint a picture of Mr. Willacy as a life worth saving" and hoped the jury would see him as "a regular person" and not as "a cold-blooded murderer." (PCR 1021).[22] Kontos contacted a mental health expert, Dr. Riebsame, eleven days before the resentencing proceeding was to commence.[23] Kontos indicated that he contacted Dr. Riebsame because, "someone who I respect told me to but I really [didn't] think there's going to be anything that comes out of it" and that "it was probably going to be a waste of time." (PCR 1005; 1076).[24] Kontos testified that he did not send Dr. Riebsame any articles, case law or sufficient background information in order to fully investigate potential mitigating circumstances (PCR 1006; 1009). He also did not discuss Mr. Willacy's drug use with Dr. Riebsame or in any way attempt to have Dr. Riebsame relate Mr. Willacy's drug usage to the homicide. While Kontos testified that an attorney has an obligation to provide an expert with whatever the expert may need, he stated, "I . . . probably assumed Dr. Riebsame would tell me whatever he needed if he needed anything more and that was probably an incorrect assumption or my part." (PCR 1012). Kontos further testified that following his examination of Mr. Willacy, Dr. Riebsame mentioned that the testing showed indicators that Mr. Willacy might be a sociopath or psychopath, and he then "closed" and "locked" the door on employing Dr. Riebsame. Kontos acknowledged that he did not authorize Dr. Riebsame to conduct any further testing to confirm the possible diagnosis (PCR 1026-27).

[22]While having been involved in preparing various motions in death penalty cases, Kontos had never previously litigated a penalty phase proceeding (PCR 976). Moreover, Kontos had never observed any lawyer conduct a penalty phase proceeding, nor had he attended any death penalty seminars (PCR 978; 1000).

[23]Kontos testified that he was not very familiar with the use of experts. He indicated that he was influenced by his former employer's methodology of not employing experts and that "there was not a great deal of comfort using experts because I just haven't done it." (PCR 998-99).

[24]Kontos acknowledged that today the first thing he would do in preparing a death penalty case is to hire a mental health expert (PCR 1076-77).

With regard to background investigation, Kontos did not employ an investigator because he did not realize the value of one (PCR 1013-14).[25] He did not obtain any school or medical records. Kontos testified that there was no strategy involved in not obtaining these records, rather he simply "did not do it." (PCR 1014). Further, Kontos had no knowledge of alcohol abuse by Mr. Willacy's father (PCR 1016). And he had no knowledge of Mr. Willacy being physically abused by his father (PCR 1020).[26] Kontos also did not know that Mr. Willacy had been homeless for a period due to his drug use, nor was he aware of the fact that Mr. Willacy had Attention Deficient Hyperactivity Disorder (ADHD) (PCR 1033; 1028; 1031).

2. Prejudice.

a. guilt phase

Had trial counsel conducted an adequate voir dire, he would have learned that Juror Clark had pending criminal charges at the time of Mr. Willacy's trial. He could have removed Juror Clark from the jury. There is no doubt that Juror Clark's relationship to the State prejudiced Mr. Willacy.

Further, had trial counsel challenged the State's case he could have defended Mr. Willacy of the independent act theory as well as shown the jury that much evidence supported the theory that Mr. Willacy did not kill the victim. Due to trial counsel's failure to adequately investigate and prepare, prejudice has been established. *See supra* p. 7-15.

b. penalty phase

The mitigation presented at Mr. Willacy's Rule 3.851 evidentiary hearing was qualitatively and quantitatively different from that presented at trial. During the evidentiary hearing, Mr. Willacy presented lay witnesses and a mental health expert to establish numerous mitigating factors. Dr. William Riebsame testified that he was contacted by Kontos on September 7, 1995. At that time, Kontos informed Dr.

[25]Kontos stated that today he would certainly employ an investigator in a death penalty case (PCR 1013-14).

[26]Kontos did not recall asking Mr. Willacy's family members about any physical or alcohol abuse in their household. He acknowledged that most people do not volunteer that they abuse their child (PCR 1020; 1100).

Riebsame that he was conducting a death penalty proceeding within the week and that he wanted Dr. Riebsame to see Mr. Willacy at the Brevard County jail. Dr. Riebsame testified that Kontos requested only a competency evaluation of Mr. Willacy and forwarded a two-page arrest affidavit to Dr. Riebsame on September 8, 1995 (PCR 1112-14). Dr. Riebsame testified that based on his examination of Mr. Willacy, he found Mr. Willacy to be aware of the charges against him and able to communicate with his attorneys. Dr. Riebsame concluded that Mr. Willacy was competent, and he promptly conveyed his findings to Kontos. Dr. Riebsame also testified that in reviewing the test results with Kontos, he told him that a portion of the testing revealed some indicators of antisocial personality characteristics in Mr. Willacy (PCR 1124-25). He estimated that his conversation with Kontos lasted twenty minutes (PCR 1130).

As a general practice in a penalty phase evaluation, Dr. Riebsame would conduct a thorough review of all academic, medical and prior mental health treatment records relating to a defendant. He would speak to relatives of the defendant and would meet with the defendant on several occasions. He would also conduct a battery of psychological and neuropsychological testing to ascertain any existing mental disorders. Dr. Riebsame testified that he would not have been able to complete such an evaluation in the time period provided by Kontos (PCR 1112-13). He also stated the two-page arrest affidavit, the sole document faxed to him by Kontos, would have been insufficient or inadequate for preparation of mitigation evidence. Dr. Riebsame testified that based on the materials provided he did not understand that he was to evaluate potential mitigation evidence (PCR 1115-16).

In 2000, Dr. Riebsame was contacted by collateral counsel regarding mitigation in this case. At that time, Dr. Riebsame was furnished with the following material: Mr. Willacy's videotaped statement to police; a transcript of the statement; a transcript of a confidential informant's statement to police; a transcript of Alonzo Love's statement to police; prior psychological testing of Mr. Willacy conducted by Dr. James Brown; a personal history of Mr. Willacy gathered by a defense investigator; arrest reports from Freeport and Nassau Police Departments; elementary, high school and college records of Mr. Willacy; results of a psychological evaluation from Hofstra University; and medical records, prison records, and an evaluation performed by the State's expert, Dr. Jeffrey Danziger. Dr. Riebsame was

asked to review the testing performed by Dr. Brown and to perform an evaluation of any potential mitigation. He testified that he reviewed all the material provided, met with Mr. Willacy on a number of occasions, and performed a thorough battery of psychological and neuropsychological tests (PCR 1131-32). Based on his examination, Dr. Riebsame diagnosed Mr. Willacy with the following: cocaine abuse, cannabis abuse, alcohol abuse, Attention Deficit Hyperactivity Disorder (ADHD), antisocial personality disorder, cocaine intoxication and cocaine withdrawal (PCR 1172-73). In addition, Dr. Riebsame found the presence of one statutory mitigating circumstance, namely, at the time of the offense, Mr. Willacy was under an extreme mental or emotional disturbance (PCR 1189-90).

As to his diagnosis of ADHD, Dr. Riebsame explained that this is a mental disorder that reflects impulsivity and poor judgment, rather than reasoned decision-making. According to Dr. Riebsame, individuals with ADHD have problems making decisions that require them to focus on a number of different factors at the same time. ADHD individuals are easily distracted, get off task, have difficulty completing projects, appear forgetful and have difficulty making effective decisions (PCR 1219; 1225). Dr. Riebsame testified that evidence of ADHD was found in Mr. Willacy's school records, which reflect behavioral problems, attentional problems and a lack of achievement consistent with Mr. Willacy's intellectual ability. Dr. Riebsame also testified that there was evidence of a conduct disorder in Mr. Willacy's childhood history, noting that a child with ADHD often receives an accompanying conduct disorder diagnosis (PCR 1175; 1177). He further noted that often children diagnosed with ADHD come from physically abusive homes where the abuse is regular and severe.[27] With regard to his diagnosis of antisocial personality disorder, Dr. Riebsame testified that Mr. Willacy meets the criteria for the disorder. However, Dr. Riebsame noted that there are aspects of Mr. Willacy's personality that are not consistent with the diagnosis, such as Mr. Willacy having maintained extended relationships, helping others for no personal gain, attempting to stop abusing drugs, and having adopted the Islamic

[27]Dr. Riebsame testified that typically ADHD continues into adulthood (PCR 1174). By age 21, the hyperactivity component has usually subsided, but the attentional and impulsivity components remain present (PCR 1221). Importantly, Dr. Riebsame testified that drug addiction intensifies the impulsivity component of ADHD (PCR 1271).

religion solely for spiritual reasons (PCR 1177-78). Dr. Riebsame explained that there exists a significant correlation between adult males diagnosed with antisocial personality disorder having a history of chronic and severe physical abuse (PCR 1271). He also testified that when one has ADHD combined with cocaine intoxication, the characteristics of antisocial personality disorder are intensified or worsened (PCR 1277).[28]

As to his diagnosis of cocaine intoxication and cocaine withdrawal, Dr. Riebsame testified that Mr. Willacy's appearance on the videotaped statement to police offers markers of cocaine withdrawal (PCR 1179). He explained that a cocaine-intoxicated individual would show very poor judgment, remain sleepless for several days, be talkative and possibly agitated and disagreeable. Further, such an individual's thinking may be confused and his impression of himself may be grandiose (PCR 1196). Specifically as to Mr. Willacy, Dr. Riebsame noted that based on third-party reports, Mr. Willacy had been sleepless for several nights and doing crack cocaine for several days beforehand, including the morning and afternoon of the murder (PCR 1208).

As to the statutory mitigating circumstance of extreme mental or emotional disturbance, Dr. Riebsame testified:

> Yes, I would suggest that there are very extreme mental or emotional disturbances in this case given the crack cocaine intoxication at the time and symptoms of the other mental disorder.
>
> * * *
>
> . . . he was amidst of a crack cocaine binge and was very much likely intoxicated on crack cocaine at the time of the offense. Symptoms associated with this particular disorder would surely impair his judgment and affect his behavior substantially. I think it's also a diagnosis of Attention Deficit Hyperactivity Disorder in this case that would lay the foundation for someone who is going to act impulsively, show poor judgment and not recognizing the consequences of their behavior anyway. In combination with the cocaine intoxication you have an individual who is extremely mentally disturbed. If you look at the circumstances surrounding Ms. Sather's death, I think the way the offense was carried out reflects extreme mental disturbance simply on the facts of the evidence.

[28] Contrary to *Porter, 130 S.Ct. at 455*, this Court failed to recognize that the finding of an antisocial personality disorder is consistent with the mitigation, as Dr. Riebsame explained.

(PCR 1223-24). Dr. Riebsame described Mr. Willacy's actions during the homicide not as a rage but rather as impulsive, haphazard and ineffective. He opined that Mr. Willacy's decision to kill the victim was impulsive in that he failed to consider the consequences of his actions as well as other available options such as fleeing, stopping what he was doing, or knocking the victim out and running away (PCR 1225; 1228).

In conclusion, as to the presence of non-statutory mitigating circumstances, Dr. Riebsame testified that Mr. Willacy had a history of physical abuse, substance abuse and the diagnosis of a mental disorder (PCR 1182). He further testified that Mr. Willacy's ability to appreciate the criminality of his conduct was impaired, although not substantially (PCR 1186).

Heather Willacy, Mr. Willacy's sister, testified at the evidentiary hearing that her father began physically abusing her brother when he was between eight and ten years old (PCR 1319). She described the abuse as a constant occurrence in their home, occurring several times a week for six to seven years. Ms. Willacy testified that the abuse of her brother stopped when he was 16 or 17 years of age (PCR 1339). She classified these beatings as severe, such that "where I thought he was really like going to hurt him bad." (PCR 1322). Ms. Willacy stated that their father left bruises and welts on Mr. Willacy. She indicated that her father would use a thick leather belt and that once, her father broke a chair leg and beat Mr. Willacy with the leg (PCR 1323-24). According to Ms. Willacy, her father would hit Mr. Willacy "wherever he could get him." She testified that Mr. Willacy would become frightened and try to run away, but her father would run after him (PCR 1326).

Ms. Willacy also testified that her father physically abused her mother. She testified that her father would attack her mother, hitting, slapping or pushing her. She stated that during these attacks she and Mr. Willacy would be present in the home, huddled together crying. She recounted an incident when Mr. Willacy was 14 or 15 years old, in which he tried to stop his father from beating his mother. Ms. Willacy testified that her father then turned on Mr. Willacy and beat him (PCR 1319-20; 1322). Ms. Willacy also testified regarding alcohol abuse by her father, stating that he would drink to intoxication three times a week (PCR 1330).[29]

[29]Ms. Willacy indicated that the attorneys representing her brother never asked her about any physical abuse or alcohol abuse by their

father (PCR 1330). Rather, Kontos "wanted to know, he wanted me to tell good things about my brother which is what I did." (PCR 1343).

Colin Willacy, Mr. Willacy's father, testified that drinking half a quart of rum was a daily pastime for him. He described his drinking as steady and excessive, resulting in irrational behavior. He testified that "very often things got so heated that I have many times got physical with [his wife]." He stated he would slap or punch her with his fist "anywhere from six to ten blows depending on however resistant she became." He described these as "really hard punches." (PCR 1418; 1417-18).

Colin Willacy also testified that he began beating Mr. Willacy when he was about 7 or 8 years old, and that the beatings, while regular, got more brutal as Mr. Willacy got older. He stated, "I would go frantic . . . I would use anything. If there was a chair there, anything, because I was in a state really that I got very abusive." (PCR 1420). Colin Willacy would "really, really let him have it for disobeying me." (PCR 1421). He explained that, in Jamaica corporal punishment is practiced, but "what I did, I gave that and more . . . what I inflicted as corporal punishment was brutal." (PCR 1449). He described the blows to Mr. Willacy as "oh, to the full extent of whatever power that I had, very hard." He would strike Mr. Willacy with his belt on "any part of his body, 15 to 20 times." (PCR 1428; 1429). Colin Willacy recounted a specific incident where he beat Mr. Willacy with a chair leg:

> Well, I don't remember when it was but I went in his room and I confronted him. And the closest thing, they had a chair in his room and I grabbed the chair because I was so frantic and mad at his disobeying me and I just broke the chair on him.

(PCR 1422). Colin Willacy stated that during this incident, he struck Mr. Willacy four to six times with the chair leg. He testified that he stopped beating Mr. Willacy when he was in high school (PCR 1421; 1423). He also testified that due to Mr. Willacy's drug use he and his wife kicked Mr. Willacy out of their home. During that time, Mr. Willacy was homeless, living on a rooftop (PCR 1449).[30]

[30]During the 1995 penalty phase proceedings, testimony was presented that Colin Willacy had been a strict disciplinarian. He testified that at no time did the defense attorneys inquire further or ask him to provide any details regarding his being a strict disciplinarian. Thus, he never told the attorneys about the physical abuse or his alcohol abuse. He indicated that while he was ashamed of his conduct, he would have told the lawyers if he had been asked (PCR 1426). In this regard, Colin Willacy explained that he had no idea that this information was so critical in the penalty phase proceeding. Colin Willacy testified:

> When the penalty phase came up I was not told that I should, I was told that what counted is his good behavior, the good deeds that he had done.

(PCR 1434-35).

Mr. Willacy's mother, Audrey Willacy, testified during the postconviction proceedings that she married Mr. Willacy's father in 1966. She stated that Colin Willacy began drinking prior to their marriage, and it continued following their marriage. She described her husband as unsteady, easily irritated, and unapproachable when he was drinking. According to Mrs. Willacy, he drank at least two to three times a week and especially on the weekends (PCR 1369). She stated that when he drank, they would have heated arguments, including physical confrontations. After being married for a few years, Colin Willacy began abusing her in the third year of their marriage while she was pregnant with their second child. She explained that during this incident Colin Willacy pushed her down a flight of stairs, and she received an injury over her eye. Mrs. Willacy stated that he would slap her or punch her in the back with his fist, often striking her eight to ten times. She testified that while the abuse was sporadic, it was extensive. She further testified that the abuse lasted over a ten-year period, occurring approximately 25 times (PCR 1372; 1374-76).

Mrs. Willacy testified that the physical abuse of her son occurred much more frequently, at least four times a week. She testified that almost every time Colin Willacy was drunk there was a physical attack on Mr. Willacy. Mrs. Willacy related that the abuse began when Mr. Willacy was approximately 8 years old and ended when he was 15 or 16 years old (PCR 1379). Mrs. Willacy described these beatings as extreme, with Mr. Willacy being beaten with a belt, fists, furniture, or whatever was available or handy at the moment. She recounted that when Mr. Willacy was as young as 8 years old, Colin Willacy would beat Mr. Willacy with his fist or a belt in the head, back or "anywhere he could get the blow." (PCR 1379). She stated the abuse usually occurred over trivial things like Mr. Willacy failing to walk the dog or to do his homework (PCR 1381). In addition to the incident involving a chair leg (PCR 1380), Mrs. Willacy recounted a second incident when a friend witnessed Colin Willacy beating Mr. Willacy, and the friend, concerned over the intensity of the blows, stated, "You're going to kill him." (PCR 1390).[31]

[31]In the 1991 and 1995 penalty phase proceedings, Mrs. Willacy did not testify about any abuse. She explained that she was never asked specifically about abuse, and therefore, she did not volunteer or otherwise detail any abuse witnessed or suffered by Mr. Willacy. She related that the defense attorneys never discussed with her any potential significance of abuse. Mrs. Willacy indicated that she met with Kontos three or four times, but he never pressed her for any such information (PCR 1389). Rather, Mrs. Willacy testified that "Mr. Kontos and Mr.

Erlenbach told me that I should get people who can tell of Chad's good behavior and good conduct and good things that he had done in the penalty phase."(PCR 1385). Mrs. Willacy testified that had someone asked about the abuse, she would have told them (PCR 1384-85).

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Willacy had a vast amount of non-statutory mitigation as well a statutory mental health mitigator. Counsel's performance was clearly deficient, and Mr. Willacy was prejudiced. It is inconceivable that Mr. Willacy'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*.[32] The mitigating evidence brought out in postconviction was riveting and 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.

3. Analysis under *Porter*.

This Court's previous opinion merely accepts the circuit court's faulty determinations, which are not supported by the record. Neither the circuit court order nor this Court's opinion properly considered the record before it when finding that Mr. Willacy was not prejudiced by trial counsel's deficient performance. The findings in this case violate *Porter*.

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

[32]As in *Porter*, 130 S.Ct. at 454, this Court here either did not consider or unreasonably discounted the mitigating evidence adduced in the postconviction hearing. For example, with regard to mental health mitigation, this Court found that trial counsel's failure to utilize a mental health expert was reasonable because Dr. Riebsame's preliminary testing contained potentially negative information. *Willacy*, 967 So. 2d at 144. This is the same analysis which this Court applied in *Porter v. State* and which was subsequently rejected by the United States Supreme Court as unreasonable: "[N]either 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 that his testimony might have had on the jury or the sentencing judge." *Porter,* 130 S.Ct. at 455.

Mr. Willacy's substantial claims of ineffective assistance of counsel have not been given serious consideration as required by *Porter*. Mr. Willacy requests that this Court perform the analysis of his claims which has as of yet been lacking and examine the significant, exculpatory evidence and mitigating personal history that is present in this case but as yet unrecognized or unreasonably discounted.

CONCLUSION

In light of the foregoing arguments, Mr. Willacy requests that this Court grant him a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Barbara Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 14th day of April, 2011.

CERTIFICATE OF FONT

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

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