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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-719

JAMES AREN DUCKETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Duckett's successive motion for post-conviction relief. The circuit court denied Mr. Duckett's claims without hearing evidence. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in the direct appeal.

"PC-R1. ___" - Record on appeal from first post-conviction proceedings.

"PC-R2.___" - Record on appeal from second post-conviction proceedings.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Duckett, an innocent man, remains in jail for a crime he did not commit, and whether he is executed for this crime. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Duckett, through counsel, respectfully urges the Court to permit oral argument.

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STATEMENT OF THE CASE AND FACTS

James Duckett is innocent. He has presented to the court a multitude of constitutional violations, all of which support his assertion that he has been imprisoned and sentenced to death for a crime which he did not commit.

A. COURSE OF PROCEEDINGS

In May of 1988, Mr. Duckett was convicted of first degree murder and one count of sexual battery, crimes which he did not commit. He was sentenced to death by a jury vote of eight to four. The evidence against Mr. Duckett was circumstantial.

On direct appeal, this Court affirmed Mr. Duckett's convictions and sentences. *State v. Duckett*, 568 So. 2d 891 (Fla. 1990).

Mr. Duckett filed a Motion to Vacate Convictions and Sentence on May 1, 1992, which was amended in November of 1994 (PC-R1. 1859-70; 337-470). Evidentiary hearings were conducted on claims I, II - A, C (¶22-23), D, E and F, III, V and IX on January 7-8, 1997, October 28-30, 1997, December 17, 1997, October 26-27, 1998, and February 19, 1999 (PC-R1. 778).

On August 13, 2001, the circuit court signed the state's proposed order verbatim, errors included, denying Mr. Duckett relief on all claims (PC-R1. 1782-1819). A timely appeal, which was consolidated with Mr. Duckett's habeas

petition, was denied by this Court on October 6, 2005. *Duckett v. State*, 918 So. 2d 224 (Fla. 2005) [1] Rehearing was denied on December 22, 2005.

Mr. Duckett's Petition for Writ of Habeas Corpus was denied by the United States District Court on March 25, 2010, and his motion to alter or amend the judgment was denied on June 1, 2010. The district court denied Mr. Duckett a COA on August 23, 2010. The Eleventh Circuit Court of Appeals denied Mr. Duckett a COA on October 26, 2010.

Mr. Duckett filed a Successive Motion to Vacate Judgments of Conviction and Sentence on November 29, 2010, which was amended on January 24, 2012, and again on September 19, 2012. The initial motion raised four issues: 1) this Court's failure to properly analyze Mr. Duckett's ineffectiveness claims pursuant to *Porter v. McCollum*, 2) newly discovered evidence regarding the presentation of false testimony from the key witness at trial, Gwen Gurley, 3) the due process violation that occurred when the new perjury statutes were used to effectively prohibit Ms. Gurley from testifying truthfully in the evidentiary hearing, and 4)

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[1]Following oral argument, the Court *sua sponte* remanded the case to the circuit court to "determine whether clothing exists that can be tested for DNA." (PC-R1. 1891). Following remand, the case was returned to this Court and consolidated with the pending appeal and state habeas. The parties filed supplemental briefs addressing the issues in the remand. No further oral argument was permitted.

newly discovered evidence regarding the veracity of the trial testimony of FBI hair analyst Michael Malone. The January 24 amended motion raised two issues: 5) newly discovered evidence of an independent hair examiner hired by the FBI which called into question the veracity of Malone's hair analysis and testimony and 6) a revision of the *Porter* claim. The second amended motion consolidated Claim IV in the initial motion with Claim V in the January 24 motion, per instruction from the circuit court. The circuit court summarily denied all claims without an evidentiary hearing.

Following the denial, Mr. Duckett perfected his appeal to this Court.

B. STATEMENT OF RELEVANT FACTS[2]

Gwen Gurley's testimony was the lynchpin of the prosecution's case. Not only was she the sole witness to place the victim, Teresa McAbee, in Mr. Duckett's car, but she testified he drove off alone and then circled back around, picking up his passenger on the side of the Circle K by the dumpster. The only inference the jury could draw from this, and the proposition the state argued throughout the trial, was that Mr. Duckett snuck back to pick up Ms. McAbee so that he could sexually

[2]The facts regarding this case were presented in detail in Mr. Duckett's appeal to this Court following the denial of his initial Rule 3.830 motion. In this brief, Mr. Duckett will only outline the facts directly relevant to the claims presented herein, but relies on the facts as previously presented in support of his assertion that this Court must conduct cumulative analyses of the claims.

assault and kill her.[3] Of course, the testimony was false.

Two witnesses were with Ms. Gurley on the night Ms. McAbee was last seen and both discount Ms. Gurley's account of events on that night and neither of those witnesses, Vicky Davis and Jessie Gaitain, support Ms. Gurley's assertion that she ever saw Ms. McAbee in Mr. Duckett's car (PC-R1. D. Exh. 9, p. 6; PC-R1. D. Exh. 8, p 8-9; PC-R1. 1326, 1402). Ms. Davis has also testified that Ms. Gurley asked her to lie to help Ms. Gurley get out of jail, that the state officers were present during this discussion, and that the state turned off the tape during her deposition and told her what to say when she had difficulty answering the questions (PC-R1. 1326, 1327, 1329-30, 1331). Neither Mr. Gaitan or Ms. Davis were called to present this critical evidence at trial. Several witnesses, including Roscoe Higgenbotham, Raine Payne and Troy Merck, have testified in post-conviction that Ms. Gurley lied at trial in order to get out of jail earlier (PC-R1. 1341-42; 2/24/05 hrg., p. 48; 10/29/97 hrg., p. 398)). Ms. Gurley's sister, Mary Gurley, testified about men from the state attorneys office getting Gwen out of jail pre-trial and letting her see her boyfriend and giving her a script that she was to try to remember word for word (10/30/97 hrg, pp. 376-378). None of these witnesses

[3]Because Ms. Gurley was pregnant, the parties agreed to let her testify in a video deposition, without the scrutiny of a live jury.

was called to testify in front of the jury. Prison records presented in previous evidentiary hearings support a finding that Ms. Gurley was in fact released early from the prison sentence she was serving at the time of Mr. Duckett's trial.[4] When Ms. Gurley was called as a witness in post-conviction proceedings, she asserted her Fifth Amendment rights to avoid a charge of perjury by contradictory statements

Since her trial testimony in 1988, Ms. Gurley has recanted that version of events in at least six separate interviews to different people. One of these interviews was in fact a sworn statement with a court reporter present. Ms. Gurley originally recanted her trial testimony in a taped statement with investigator Ron Hill in June of 1989 (PC-R1. Def. Ex. 3). In August of 1989, Ms. Gurley confirmed this recantation in detail in a statement under oath to trial attorney Jack Edmund and Mr. Hill (PC-R1. Def. Ex. 4). There were also major inconsistencies in Mr. Gurley's many statements. Though this impeachment evidence was available, defense counsel failed to investigate and provide it to the jury,

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[4]Ms. Gurley's Department of Corrections file indicates that she was sentenced to two years on three counts of grand theft auto with credit for 104 days on November 24, 1987, that she was not eligible for parole consideration and was to serve the maximum sentence, and that her sentence of incarceration was to expire on August 11, 1989 (D. Exh. 38). In fact, Ms. Gurley was released from prison on April 14, 1988, one year and four months before the expiration of her sentence and one week before her video deposition in Mr. Duckett's case (*Id.*; D. Exh. 39).

sacrificing an opportunity to weaken the star witness's testimony. Mr. Duckett subpoenaed Ms. Gurley to the prior evidentiary hearing to allow her to once and for all tell the true facts surrounding her testimony in 1988, but she was unwilling to testify due to newly enacted perjury laws.

There is a wealth of evidence that corroborates Ms. Gurley's recantation, as opposed to her trial testimony. Much of that evidence was available at trial and much of it was presented in Mr. Duckett's initial 3.850 proceedings. Most recently, Ms. Gurley's own two children have provided further evidence that Ms. Gurley testified falsely at Mr. Duckett's trial (PC-R2. 122-127). Unfortunately for Mr. Duckett, the jury did not hear any of this evidence, and as a result he was found guilty of a murder he did not commit.

The other key evidence offered against Mr. Duckett at his trial came through the testimony of FBI hair analyst Michel Malone. After the State's initial hair expert from the FDLE concluded she was not able to make a match between the question hair and Mr. Duckett's known hair, the State made the unprecedented move of expert shopping and sent the hair to Malone at the FBI. Mr. Malone was able to make the match that was apparently sought by the State, and testified to that during the trial. In his initial postconviction proceedings, Mr. Duckett presented significant evidence that Malone had testified falsely in previous cases, that

Malone had lied in Mr. Duckett's case, and that Malone had violated FBI policy when he retested the hair evidence in this case after it had been tested by the FDLE. Mr. Duckett presented further evidence that the chain of custody of the hair was destroyed by the expert shopping the case. Also, a second unknown hair which was found on the victim and did not match Mr. Duckett was not disclosed to the jury at trial. Mr. Malone's work has been questioned on several occasions. After he was found to be not credible in a case examined by the DOJ, the FBI began sending out independent examiners to retest evidence in cases in which he had worked as an expert. When this independent examiner reviewed Malone's work in Mr. Duckett's case, he concluded that all areas of Mr. Malone's work and testimony he had been asked to review raised concerns.

In April of 1997, the Department of Justice issued a report detailing many deficiencies within the FBI Laboratories.[5] The report detailed several problems within the laboratories, including, but not limited to, problems with the testimony of Mr. Malone in a 1985 hearing relating to former U.S. District Judge Alcee Hastings. The DOJ investigation disclosed that not only had Malone not performed

[5]This report was the result of an investigation done by the DOJ after FBI analyst Frederic Whitehurst testified in a high profile 1995 federal case that he was told by his superiors to ignore findings that did not comport to the prosecution's theory of the case.

the test he testified he had performed, but that his testimony was in "[d]irect contradiction to laboratory findings supported by data" and that he "present[ed] apparently and potentially exculpatory information as incriminating" (*Id*. at 383). The report concluded that Malone had "falsely testified that he had himself performed the tensile test and that he testified outside his expertise and inaccurately concerning the test results" (*Id.* at 385; *see also* PC-R1. 1783)[6]. The DOJ found that Malone's false testimony was inexcusable and criticized the FBI for failing to properly address the problem (D. Exh. 69, p. 17).

Neither the jury nor the judge heard critical evidence relating to the tire casts taken at the scene. Both Mascotte Police Chief Mike Brady and Officer Troy Smith were present at the crime scene the day the body was discovered and noted where various vehicles were parked. After they learned that someone from the sheriff's office had taken plaster casts of tire prints at the crime scene, they returned to the scene to specifically attempt to find evidence of the location of the tire prints. This occurred in the evening after the crime scene perimeter had been taken down and the investigating officers had left. These officers thoroughly investigated the area around the pumphouse and the dirt road that ran through the area and the only

[6]In response to the FBI's contention that it was inappropriate to characterize Malone's testimony as false, the DOJ responded: "We here use the term 'false' as it is employed in other legal contexts; that is, to describe something that is untrue or not in accord with the facts" (D. Exh. 69, p. 385).

evidence of plaster casts being taken was in the area where all of the cars, including Mascotte police cars, had been parked earlier that day (PC-R1. 1194-95).

The State's case was that the victim's fingerprints were on the hood of the police car where she was sexually assaulted. Defense counsel failed to present an expert to counter this information. Fingerprint expert Mervin Smith was available to counter the State's erroneous arguments concerning the fingerprints (PC-R1. 1065-66).

Counsel also failed to present critical evidence concerning Mr. Duckett's police vehicle that would have precluded the scenario the State proposed during the trial. The State's theory required the victim to remain on the car for at least some period of time. Yet, the Mascotte police officer who drove the car after Mr. Duckett testified in an evidentiary hearing that the hood of the car heated up in a very short period of time so that you could not lean on it for more than a brief time or you would risk being burned. He testified that he could not even write tickets on the hood of the car because of the excessive heat (PC-R1. 1115-16). This officer called Mr. Duckett's attorney on the end of the first day of trial and gave him this information (PC-R1. 1116), yet Mr. Duckett's attorney unreasonably failed to present this critical evidence to the jury.

The coup de grace of the State's case was the testimony of the three

Williams rule witnesses. During argument concerning the *Williams* rule evidence, the trial court noted that the *Williams* rule evidence did not lead to the conclusion of first degree murder (R. 1386). This comment indicates that the trial court believed the evidence was only relevant, if at all, to the charge of sexual battery. Defense counsel argued that it became apparent early on that the purpose of the sexual battery charge was to attempt to introduce the *Williams* rule evidence. Yet, defense counsel, knowing this, stipulated to consolidation of the charges of sexual battery and first degree murder (R. 2325). There can be no tactical or strategic reason for this. Counsel's actions paved the way for this highly prejudicial testimony. There is much more than a reasonable probability that, but for counsel's actions, the results of the proceedings would have been different.

After the trial court had ruled that the *Williams* rule evidence was to be admitted, it became imperative that the defense impeach these witnesses. Defense counsel failed to call witnesses who could have provided critical evidence to rebut the State's case, such as Peggy Locke who would have pointed out that Linda Upshaw was drunk on the night of the alleged incident. She also would have testified that at no time did Ms. Upshaw mention any alleged sexual advances by Mr. Duckett. Again either the State failed to disclose or defense counsel failed to discover this impeachment evidence and Mr. Duckett was denied an adversarial

testing.

In his ruling to admit the evidence of these witnesses, the trial court stressed that Mr. Duckett "used his badge of authority" to lure these young women into his car (R. 1402-03). The court found that the evidence was relevant to the issues of identity and common scheme or plan because each incident happened when the defendant was in uniform and on duty. Ms. Upshaw testified that the alleged incident with Mr. Duckett occurred on a Friday night, May 1, 1987. Though defense counsel attempted to ascertain through various witnesses that Mr. Duckett did not work on that evening (R. 1543, 1678), he failed to introduce concrete evidence in the form of Mr. Duckett's time sheet that Mr. Duckett did not work on Friday, May 1, 1987 (PC-R1, D. Exh. 1). Defense counsel testified that he had no tactical nor strategic reason for failing to use this time sheet to 1) argue against the admissibility of this witness's testimony and/or 2) impeach this witness (PC-R1. 978). Defense counsel's failure to present this critical evidence to the Court and the jury constituted deficient performance.

From the moment Officer Chuck Johnson met James Duckett on May 11 and decided he was somehow involved in the homicide ("the feeling was there"), any chance of investigating other suspects ceased. Had defense counsel deposed Chief Brady prior to trial, he would have discovered that it was common practice for this

sheriff to pick a suspect and build a case around him. Though Shirley Williams was a witness for both defense and prosecution, she was never deposed. A thorough interview with Ms. Williams would have uncovered the fact that Salvador Calisto, one of the three Mexican boys last seen with Teresa, returned to the Circle K after midnight, was in an extremely agitated state, and made a call to someone on the pay phone out front (PC-R1. 1127).

On June 2, 1987, an all points bulletin was sent from St. Tammany Parish Sheriff's Office to "All Florida" (PC-R1, Def. Ex. 10). This bulletin asked the receiving offices to advise if any department had a homicide on May 20, 1987, or in the days before where suspects are three Mexican males possibly driving a 70's model bluish/green Chevy (*Id.*). The bulletin adds that the homicide possibly occurred in a state park, beach, or lake area (*Id.*). A copy of this bulletin was received by sheriff's investigator Rocky Harris pretrial (PC-R1. 1629) and was in the files from the sheriff's office received by post-conviction counsel pursuant to a public records request. Defense counsel testified in post-conviction that this evidence was never disclosed to him prior to trial (PC-R1. 1009) and that the evidence was important because it corroborated the statement of Richard Reynolds and because it would have provided further leads for investigation (PC-R1. 1009).

Also, though it is common police practice to search the house of the victim

in a homicide, this was never done in this case (PC-R1. 1630). This was a home where several people who were not blood relatives of the victim lived (PC-R1. 1159, 1629). It was not uncommon for different men to hang around the house (PC-R1. 1159). The boyfriend of the victim's mother, Tony Tula, was never fingerprinted, gave no hair samples and was never interviewed by the police (PC-R1. 1159). Had defense counsel spoken with Wayne Butler, the victim's uncle, he would have discovered that the victim did not like many of these men and often stayed with her aunt and her uncle to avoid these men (PC-R1. 1160). Mr. Butler testified in post-conviction that there was one man who particularly scared the victim, a man known as "Peoples" (PC-R1. 1159). She hated this man because he would grab her and try to pull her on the couch every time she walked by, and often tried to touch her in a sexual manner (PC-R1. 1159). "Peoples" disappeared from the area soon after the murder and was never investigated as a suspect. "Peoples" was also never fingerprinted, gave no hair samples and was never interviewed by the police.

Wayne Butler also testified that he was notified of the victim's death by her Aunt Shirley somewhere between 7:15 a.m. and 7:30 a.m. on the morning of May 12 (PC-R1. 1160). Though Shirley testified at trial that she was down in the area of the pumphouse early that morning and did not see the body (R. 1797), in a

conversation with Wayne Butler before 7:30 a.m. she said the victim was probably in the lake behind Polly's Bar in Mascotte (PC-R1. 1160). Yet, according to police reports, the victim's body was not discovered until after 9:00 a.m. and the next of kin was not notified until 11:10 a.m.

The jury also never heard evidence of two other prime suspects in this murder, Charles and Louie Partain. The Partains were friends of the victim's mother and were both seen in the victim's yard between 8:00 and 8:30 a.m. the day the body was discovered (PC-R1. 1179, 1629). Had defense counsel investigated, he would have discovered numerous witnesses to corroborate Mane Davis, a witness who could testify about the violent reputation of these brothers (PC-R1. 1161, 1171). Neither of these men were ever investigated by the Sheriff's Office in relation to this homicide.

Further, evidence that Mr. Duckett was telling the truth in his many statements and was not the perpetrator of this crime was available from Richard Reynolds. Mr. Reynolds was a patron of the laundromat on the evening of May 11 and observed Mr. Duckett speaking with the victim (D. Exh. 28). After Mr. Duckett left the Circle K, Mr. Reynolds observed the victim getting into a blue-hatchback car with a male with black hair and driving off down Sunset Avenue (PC-R1. 1135). Though the State learned of Mr. Reynolds on May 15, 1987 and

interviewed him at this time, counsel for Mr. Duckett was not given his name and location until five days before trial. Mr. Reynolds was interviewed by an investigator for the defense, William Arbashaw, but changed his statement when he arrived at the courthouse (PC-R1. 1009). Had defense counsel located Mr. Reynolds earlier and spoken to him about this evening, he would have learned that around 10:30 p.m. Mr. Reynolds observed the police officer speaking with a little girl who had earlier been talking to some Mexican boys. After this, the officer left and turned onto Highway 50 and soon after, the little girl drove off with a man in a little blue car (PC-R1. 1133-35).

Had this evidence been presented to the jury, there is no question that Mr. Duckett would have been acquitted of all charges.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. The legal conclusions of the lower court are to be reviewed independently. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). While generally this Court must give deference to the factual findings of lower courts, because the lower court in this matter denied an evidentiary hearing, the facts presented by the appellant in this appeal must be taken as true in determining whether evidentiary development is appropriate or summary denial was proper.

Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF ARGUMENT

1. Mr. Duckett presented significant newly discovered evidence that Agent Malone testified falsely at trial. This evidence includes testimony from an FBI independent examination of Malone's work and testimony and evidence from other cases regarding Malone's work and propensity to testify falsely or to exaggerate his findings. The circuit court erred when it failed to provide an evidentiary hearing on these claims and when it failed to grant Mr. Duckett a new trial.

2. The Court's failure to apply *Porter v. McCollum* to Mr. Duckett's claim of ineffective assistance of counsel which violated the Sixth and Eighth Amendments and denied him due process of the law.

3. Newly discovered evidence in the form of testimony from Gwen Gurley's two children establishes that Ms. Gurley testified falsely at Mr. Duckett's trial when she stated she saw the victim in his car. Consideration of this new evidence warrants a new trial.

4. The state's use of the perjury statutes to prohibit Ms. Gurley from testifying truthfully in Mr. Duckett's evidentiary hearing denied him due process

and a fair and reliable hearing.

ARGUMENT I

THE CIRCUIT COURT'S SUMMARY DENIAL OF CLAIM VII IN MR. DUCKETT'S RULE 3.851 WHICH PRESENTED THE FBI'S INDEPENDENT REVIEW OF MALONE'S TESTING AND THE NEWLY DISCOVERED EVIDENCE REGARDING THE VERACITY OF MALONE'S TRIAL TESTIMONY WAS ERROR AND THIS COURT SHOULD GRANT MR. DUCKETT A NEW TRIAL WHEN THIS EVIDENCE IS CONSIDERED CUMULATIVELY WITH THE EVIDENCE PRESENTED IN MR. DUCKETT'S INITIAL 3.850 PROCEEDINGS REGARDING THE PRESENTATION OF THE HAIR EVIDENCE. ALTERNATIVELY, THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING.

A. The Independent Review Conducted By The FBI Of Malone's Testing and Testimony Establishes That The Hair Evidence Should Not Have Been Presented To The Jury.

FBI Agent Michael Malone's testimony at Mr. Duckett's trial, which stated that the pubic hair found on the victim was microscopically identical to Mr. Duckett's hair, was the linchpin of the state's case. The report prepared by FBI analyst Steve Robertson provides conclusive evidence that this testimony was false and misleading (*see* PC-R2, Appendix 21, Independent Case Review Report of Steve Robertson, May 16, 2011). The hair evidence which played a pivotal role in Mr. Duckett's conviction has been determined to be unreliable and inaccurate. This is clearly newly discovered evidence as contemplated by Rule 3.851. Mr. Duckett asserts that the circuit court erred when it failed to conduct an evidentiary

hearing on this issue, and when it failed to grant relief on this issue.

Mr. Duckett has asserted throughout trial and post-conviction that Mr. Malone's testimony concerning the hair evidence was false and misleading and should not have been presented to the jury. Following the Department of Justice (DOJ) report in which Malone was found to have testified falsely, the DOJ hired independent experts who began reexamining Malone's reports and testimony in cases in which he had provided testimony. In these cases, the DOJ communicated the availability of this reexamination to the state authorities in charge of the prosecution. (*See, e.g.*, PC-R2, Appendix 22, Correspondence between DOJ and state attorney in *State v. Brett Bogle*, Case No. 91-12952; *see also* Appendices 7, 11, 21). Initially, the FBI had two independent forensic experts to review these cases, but one expert left soon after the reviews began and the remaining forensic expert, Mr. Steve Robertson, conducted the reviews in each of the Malone cases. *Id.*

When Mr. Duckett learned that prosecutors were being contacted regarding the possibility of an independent review of Malone's testimony in particular cases he requested any evidence of such contact in his case. Despite repeated requests for this information about an independent review of Malone's testimony in his

case, no information was forthcoming.[7] Thus, in an effort to determine if in fact a review of Mr. Malone's testimony had been undertaken by an independent forensic

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[7]Mr. Duckett has requested throughout state post-conviction proceedings that any such correspondence with state agents in his case be provided, but to date has received nothing. Mr. Duckett has also made several requests to both the FBI and the DOJ pursuant to the Freedom of Information Act for all records, correspondence, and files relating to Mr. Duckett and / or to OIG investigation of Michael Malone by the DOJ, but has not received any correspondence between the DOJ and the State concerning the reexamination of evidence in his case, the OIG investigation of Malone, or an independent review of Malone's testing and testimony.

If there has been contact between the FBI and the State regarding the reexamination of this evidence, it should be disclosed as the State has a continuing obligation to reveal any potentially materially exculpatory evidence to the defense. The State's duty to reveal exculpatory or impeachment information includes a duty to seek out and discover evidence or information within the knowledge or custody of other state, government, or law enforcement agencies. As the Supreme Court reaffirmed in *Strickler v. Greene*, 527 U.S. 263 (1999), the state "has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Strickler* at 281, *quoting Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "The State's duty to disclose exculpatory material is ongoing." *High v. Head*, 209 F.3d 1257, n.8 (11th Cir. 2000). *See also Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979) ("The duty of disclosure is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused."); *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1977); *Smith v. Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969); *Royal v. Dutton*, 392 F.2d 544 (5th Cir. 1968); *Jackson v. Wainwright*, 390 F.2d 288, 296 (5th Cir. 1968); *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975) (*en banc*) ("evidence actually or constructively in [the state's] possession *or accessible to it*") (emphasis added), *cert. denied*, 425 U.S. 911 (1976); *United States v. Duetsch*, 475 F.2d 55, 57 (5th Cir. 1973)(United States Post Office and Justice Department one entity for purposes of *Brady*), *overruled on other grounds*, *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Hendricks*, 661 F.2d 38, 42 n.4 (5th Cir. 1981); and *Kyles v. Whitley*.

examiner in his case, or, if not, why this had not occurred, undersigned counsel contacted Mr. Robertson directly. Mr. Robertson immediately directed counsel to FBI attorney Paula Wulff.[8] Upon a review of the case file, Ms. Wulff determined that no independent analysis of Malone's work in Mr. Duckett's case had been undertaken by the FBI. Because no review had previously been conducted, the FBI requested that Mr. Robertson conduct the same review in Mr. Duckett's case as he had conducted in all other cases in which Malone was the state's expert.

In each examination of Malone's work, Mr. Robertson answers a series of five questions. This same approach was followed in Mr. Duckett's case. Tellingly, not one of the five questions in Mr. Duckett's case is answered in the affirmative. Mr. Robertson finds that the examination results set forth in the laboratory reports are not adequately documented in the bench notes, that the testimony of Mr. Malone is not consistent with the laboratory reports, that the testimony is not consistent with the bench notes, and that the testimony is not

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[8]Ms. Wulff has been counsel for the FBI for approximately three years at the time the 3.851 motion was filed and in this role had been assigned the task of responding to any inquiries concerning agent Michael Malone and his role in various cases throughout the country. Upon information and belief, she has no historical knowledge of Mr. Malone's role in these cases nor of the DOJ investigation of Mr. Malone nor of Mr. Robertson's review of these cases, and all attorneys who were with the FBI when the OIG report was published and when the subsequent review of Malone's work by Robertson occurred have since retired from the FBI.

within the bounds of the examiner's expertise. (*See* PC-R2, Appendix 21) [9] . Based upon the independent review provided by the FBI, there is no question that the jury in Mr. Duckett's case heard false, unreliable and misleading testimony from the FBI agent who testified at his trial.

B. An Evidentiary Hearing Is Required.

Mr. Duckett has presented sufficient evidence to warrant an evidentiary hearing on these matters and thereafter relief from his unconstitutional convictions and sentences. This Court recently addressed a similar issue in *State v. Derrick Smith* (see PC-R2, Appendix 22.). In *Smith*, the State presented evidence of comparative bullet lead analysis (CBLA) in support of their argument that Mr. Smith committed the murder in question. Following Mr. Smith's trial, the FBI reviewed the testimony of the FBI expert who provided this evidence at trial, and determined that he had overstated the significance of the results of his examination.[10] Counsel for Mr. Smith raised this issue in a Rule 3.851 motion and

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[9]Mr. Robertson was unable to determine if the appropriate tests were performed in a scientifically appropriate manner because the notes do not provide sufficient information to make such a determination (*Id.).*

[10]Specifically, the FBI noted: "Dear Sir or Madam: This letter follows up on our previous communication regarding bullet lead analysis conducted by the Federal Bureau of Investigation (FBI) Laboratory. Thank you for providing the information requested from the above-referenced case. After reviewing the testimony of the FBI's examiner, it is the opinion of the FBI Laboratory that the examiner overstated the significance of the results of the examinations conducted,

requested an evidentiary hearing. The circuit court summarily denied the claim without a hearing, and counsel appealed to this Court. This Court reversed and remanded for an evidentiary hearing. *Smith v. State*, 75 So. 3d 205 (Fla. 2011).

This Court similarly relinquished another capital case for an evidentiary hearing involving the FBI and the reexamination of previously presented expert testimony. This expert testimony in question, which like the testimony in *Smith* involved the use of CBLA, was presented in the case of Thomas Anthony Wyatt who was convicted and sentenced to death. *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994). Following Mr. Wyatt's trial, several studies, including a 2004 report by the National Research Council, undermined the scientific reliability of CBLA. Mr. Wyatt raised the issue in a successive Rule 3.851 motion. Mr. Wyatt's Rule 3.851

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possibly leading the jury to misunderstand the probative value of the evidence. Your office is encouraged to consult appellate specialists in your jurisdiction to determine whether you have any discovery obligations with respect to the finding stated above.
After reviewing the testimony transcripts, it is the opinion of the FBI Laboratory that the testimony provided by Examiner Donald Havekost at the 1990 trial overstated the significance of the results, possibly leading the jury to misunderstand the probative value of the evidence. Additionally, it is the opinion of the FBI Laboratory that the testimony provided by Examiner Charles Peters in the 2002 post-conviction proceeding conformed to the appropriate standards." May 28, 2008, Letter from to Melissa Ann Smrz, Acting Assistant Director of FBI to Marie King, State Attorney's Office, PO Box 5028, Clearwater, FL 33758, Re: Case Name: Derrick Tyrone Smith CRC-83-02653-CFANO FBI File Number: 95-255253.

motion was denied and appealed to this Court. In 2008, after the notice of appeal had been filed, the FBI sent letters stating that the testimony at trial regarding comparative bullet lead analysis "exceeds the limits of the science and cannot be supported by the FBI." A motion to relinquish jurisdiction back to the circuit court was filed with this Court. On April 7, 2009, this Court entered an order not only granting the relinquishment, but further compelling that the circuit court conduct an evidentiary hearing on the allegations regarding the CBLA evidence. *Wyatt v. State*, Case No. SC08-655 (Fla. April 7, 2009).

Although the circuit court subsequently denied Mr. Wyatt's 3.851 motion for reasons specific to Mr. Wyatt's case and this Court affirmed, this Court did find that, consistent with their prior decisions regarding newly discovered evidence, the 2008 letter qualified as newly discovered. *Wyatt v. State*, 78 So. 3d 512 , 527 (2011).[11]

C. Newly Discovered Evidence Of Malone's Pattern Of Providing False And Exaggerated Testimony Would Have Provided Valuable Impeachment Evidence To Mr. Duckett.

[11]In a case factually similar to that of Derrick Smith where the FBI sent a similar letter concerning ballistics evidence, the State of Florida conceded that a new trial was warranted on the basis of the FBI's acknowledgment that the state presented misleading trial testimony from the expert regarding compositional bullet-lead analysis. *State v. Ates*, 1st Jud. Cir. Okaloosa County, Case No. 97-945-CFA.

Mr. Malone's hair examination and testimony regarding his examination has been called into question in several recent cases around the country. The testimony and findings in these cases provides critical impeachment to Malone's testimony in Mr. Duckett's case and should result in a new trial for Mr. Duckett.

In *United States v. Donald Gates*, the defendant presented DNA evidence that precluded him from being the real suspect in the case (*See* App. 10, *United States v. Donald Gates*, D.C. Sup. Ct, Crim. Case No. 1981 FEL 6602, December 15, 2009, hearing). Mr. Gates criminal conviction relied heavily upon the hair analysis of Malone. Malone's testimony in Gates was similar to that in Mr. Duckett's case, in that he claimed that the forensic hairs were "microscopically identical". Mr. Gates was fortunate as DNA evidence was available to show that Malone's testimony that the hairs were identical was not true. Gates is just the latest in a series of cases where Malone's trial testimony has been found to be false.[12]

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[12]Mr. Duckett has presented these cases to the courts as he becomes aware of them. For example, Mr. Duckett previously presented the case of Anthony Bragdon to this Court. On March 14, 2003, the Superior Court of the District of Columbia found that in a 1992 rape trial in that court, Michael Malone had testified falsely, had failed to disclose potential exculpatory information during his testimony and had performed testing that was not sufficient to draw the kinds of conclusions about which he had testified. Order Granting Defendant's Petition to Set Aside, Vacate, and/or Correct Conviction and Sentence as to the Convictions for Assault with Intent to Rape While Armed (Count L) and Possession of A

In *State v. Bogle*, Hillsborough County Circuit Court, Case No. 01-12952 , Robertson asked the same five questions as he did in Mr. Duckett's case. In that case, Mr. Robertson noted that there had been a discrepancy in the notes, report and testimony of Malone (*Id.* at 980). Mr. Robertson also testified that he had been asked by the DOJ to review around 150 cases involving Mr. Malone because "there were allegations made the work was improper, flawed or testimony was not accurate" *(Id.* at 975).[13]

This evidence is critical impeachment evidence that should have been

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Firearm During a Crime of Violence (Count H), *United States v. Anthony Bragdon*, Case No. F-4131-91, Superior Court of the District of Columbia, Washington, DC, March 14, 2003 Based upon the presentation of this false testimony, the court vacated the Mr. Bragdon's convictions and granted a new trial.

Mr. Duckett also presented the evidence of Mr. Malone's incompetence in the case of Jay William Buckley. Mr. Buckley was charged with the capital murder of a 33 year old woman in upstate New York. As in Mr. Duckett's case, when an examiner from the New York State Crime Laboratory was unable to conclude that any of the hair evidence belonged to the defendant the prosecution called in the FBI. Providing critical testimony for the prosecution, Malone testified that a hair he believed belonged to the victim was found on a white blanket in the van belonging to Mr. Buckley's accomplice. The New York State examiner had found what she termed "unaccountable dissimilarities" between the victim's hair and the hair on the white blanket. In truth, the evidence had been mislabeled and the hair that Mr. Malone had testified was the victim's was found on a blanket that had never even been near the crime scene. Mr. Buckley was acquitted. *See* Laurie Cohen, *Mystery of the Blond Fibers*, WALL ST. J., April 16, 1997, at A1.

[13]Mr. Robertson testified that he had been instructed by the FBI not to provide any information about evaluation in other cases. *Id.* at 995.

disclosed to Mr. Duckett. There is no question that the jury would evaluate Mr. Malone's testimony differently if they learned that the agency who employed him was now having other examiners review his work as it was deemed to be "improper or flawed."

There is another aspect in Mr. Gates and Mr. Bogle's cases that is of relevance to Mr. Duckett, and that is the admission of the state that the reexamination of Malone's work is widespread. When defense counsel in *Gates* learned of the Department of Justice report outlining the issues with respect to the credibility of Agent Malone, they brought it to the attention of the court. At some point after the defense counsel raised the issue, it was learned that the Government had the information in their possession as early as 2004 (defense counsel discovered it in 2009), but due to some communication issue which is not clear from the transcript, did not disclose the evidence to defense counsel (See *Gates* transcript, p. 21). The district court released Mr. Gates and then ordered the state to investigate why the information concerning Mr. Malone had not been disclosed to the defense.

Contained in the *Gates'* file was the notation made by the FBI that "[t]he analyst that testified in this case has been discredited, caution, beware, be advised and government remember your Brady obligations" (*See Gates* transcript, p. 19).

The judge ordered a full investigation into why this information had not been made available to the defense in 2004 and how many other cases existed where similar questions had been raised. The judge's concern was that no other innocent people should remain in prison as a result of the state's failure to inform defense counsel of these investigations (*See* PC-R2, Appendix 10, *Gates* hearing, Dec. 15, 2008, p. 28).

The Washington Post recently published a series of articles discussing the FBI's flawed forensic examinations and this lack of transparency employed by the agency in its review of evidence that it had found to be questionable (*See* Appendices 23 and 24 - Spencer Hsu, *Convicted defendants left uninformed of forensic flaws found by Justice Dept.,* Wash. Post, April 16, 2012; Spencer Hsu, *DOJ review of flawed FBI forensics processes lacked transparency*, Wash. Post, April 17, 2012). The articles detail the ongoing problems that defendants have encountered with investigation into the flawed FBI forensic examinations, and the difficulties with getting the information known to the state agencies concerning the review of evidence in individual cases. The articles also detail several instances where defendants whose convictions relied on the flawed forensic evidence of the FBI at trial were later exonerated as a result of newly discovered evidence. In response to these articles and to the recent exonerations of defendants whose

convictions rested upon flawed FBI examinations[14], the FBI has announced that they will begin another review of criminal cases where FBI forensic examinations were at issue. *See* Spencer Hsu *FBI to review use of forensic evidence in thousands of cases*, Wash. Post, July 10, 2012. Any investigation that exposes more of the shoddy examination techniques of Mr. Malone in other cases or of his propensity to exaggerate his findings during his testimony is relevant to Mr. Duckett's case and should be disclosed.

Mr. Robertson's report in Mr. Duckett's case and the results in the many other cases involving hair analysis have shined a much needed light on the inherent flaws in this area of forensic science. The National Research Counsel of the National Academy of Sciences recently completed a major study of forensic science and produced a landmark report which was particularly damning with regard to the "science"of hair microscopy. The report states:

> No scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population. There appear to be no unfirm standards on the number of features on which hairs must agree before an examiner may declare a "match."***

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[14]In addition to Mr. Gates, defendants Santae Tribble and Kirk Odom, have had their convictions vacated as a result of newly discovered evidence (*See* PC-R2, Appendix 25). Like Mr. Gates and Mr. Duckett, both Mr. Tribble and Mr. Odom were convicted largely on the testimony of FBI hair analysts.

> An FBI study found that, of 80 hair comparisons that were "associated" through microscopic examinations, 9 of them (12.5 percent) were found in fact to come from different sources when reexamined through [mitochondrial] DNA analysis [;] [t]his illustrates ... the imprecision of microscopic hair analyses...***
>
> The committee found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA.

Strengthening Forensic Science in the United States: A Path Forward, National Research Council, National Academy of Sciences [hereinafter NRC Forensic Science Report], 160-161 (2009).

A study of the trial transcripts of persons who were later exonerated by DNA evidence found that microscopic hair comparison analysis played a role in 65 trials out of 137 trials examined. Of those, in 25 – or 38% – of the cases the hair comparison was invalid. Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction*, 95 Va. L.R. 1, 47 (2009). Most of these cases involved either overstatements of the degree of similarity in hairs, or invalid individualizing claims. Mr. Malone's testimony at Mr. Duckett's trial included both types of inaccuracy.

Mr. Malone's claim that the forensic hairs were "microscopically identical" to Mr. Ducketts' pubic hairs was erroneous. It is well recognized within the forensic hair comparison community that "no two hairs are exactly the same in every detail," even two hairs that come from the same person. Federal Bureau of

Investigation's Scientific Working Group on Material Analysis (SWGMAT), Forensic Human Hair Comparison Guidelines, § 14.3 (cited in NRC Forensic Report at 157, n. 69). Further, Malone's testimony that it was "highly unlikely" that the hairs could have come from someone else was an invalid individualizing claim. While microscopic comparison of physical characteristics may be "useful for determining which hairs are sufficiently similar to merit comparisons with DNA analysis and for excluding suspects and assisting in criminal investigations," the National Research Council's review panel "found no evidence that microscopic hair analysis can reliably associate a hair with a specific individual." NRC Forensic Science Report at 160; NRC, "*Badly Fragmented" Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques Lacking* at 3 ("NRC Press Release); *see also* Garrett and Neufeld at 52 ("No...systematic efforts to research the frequency with which particular microscopic features occur in any population have been conducted. Thus, there is not and has never been any statistical basis for hair comparison.").

In *Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001), this Court addressed the need to protect the integrity of the criminal justice system by culling "scientific fiction and junk science from fact." In *Ramirez*, the court explained that the use of unreliable or invalid scientific evidence required a third reversal of a conviction:

> In each of the three successive murder trials in the present case, police crime technician Robert Hart made the extraordinary claim that his newly formulated knife mark identification procedure was infallible. He contended that he could identify the murder weapon to the exclusion of every other knife in the world-even if there had been two million consecutively produced knives of the same type-based on a striation "signature" arising from microscopic imperfections in the steel of the blade. The trial court in all three trials admitted expert testimony based on Hart's testimony, and Ramirez each time was convicted of first-degree murder and sentenced to death. Our review of the record convinces us that under the general acceptance test of Frye, the State has failed to prove that the testing procedure used to apply the underlying scientific principle to the facts has gained general acceptance in the field in which it belongs. In sum, Hart's knife mark identification procedure-at this point in time-cannot be said to carry the imprimatur of science. The procedure is a classic example of the kind of novel "scientific" evidence that Frye was intended to banish-i.e., a subjective, untested, unverifiable identification procedure that purports to be infallible. The potential for error or fabrication in this procedure is inestimable. In order to preserve the integrity of the criminal justice system in Florida, particularly in the face of rising nationwide criticism of forensic evidence in general, state courts-both trial and appellate-must apply the Frye test in a prudent manner to cull scientific fiction and junk science from fact. Any doubt as to admissibility under Frye should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case.

Id.

At issue in Mr. Duckett's case is the State's reliance on testimony from FBI Agent Malone at Mr. Duckett's trial which the FBI has now publicly recognized as

scientifically unreliable and misleading.[15] Just as DNA testing has been conducted in a number of cases years after a trial and has shown that the evidence or the testimony that the jury heard when returning a conviction was erroneous, the FBI has acknowledged that expert testimony on which Mr. Duckett's conviction relies is unreliable. The Florida Legislature and this Court have both recognized that the results of DNA testing which constitute new evidence not previously available and which are favorable to the convicted defendant can and should be presented in a Rule 3.851 motion in order to determine whether a new trial is warranted. The report from Mr. Robertson renouncing the evidence presented by FBI agent Malone is no different. State actors presented unreliable, inaccurate, misleading, and invalid testimony at Mr. Duckett's trial and during collateral proceedings. The circuit court is required to accept these factual allegations as true, unless and until an evidentiary hearing is conducted. *Lightbourne v. Dugger*, 549 So. 2d at 1365. No such hearing occurred. A new trial is warranted even if the newly discovered evidence is only impeachment evidence. *See State v. Mills*, 788 So. 2d 249, 250

[15]To the extent the state was aware of the unreliability of Malone's testimony prior to the issuance of the report and failed to notify Mr. Duckett, a constitutional deprivation has occurred which requires relief. *Banks v. Dretke*, 540 U.S. 668, 676-77 (2004)("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.").

(Fla. 2001). Mr. Duckett urges this Court to conduct the appropriate cumulative analysis on this newly discovered evidence with the previously presented evidence. Because Mr. Duckett's convictions are premised upon scientifically invalid evidence, and because the denial of collateral relief was premised upon scientifically invalid evidence, his convictions cannot stand; they must be vacated and a new trial ordered.

ARGUMENT II

MR. DUCKET'S SENTENCE OF DEATH VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER v. MCCOLLUM*, AND THE FAILURE TO APPLY *PORTER* TO MR. DUCKETT'S CLAIMS IS ARBITRARY IN VIOLATION OF *FURMAN V. GEORGIA* AND THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT

I. *Porter's* applicability to Mr. Duckett's case

In *Porter v. McCollum*, the U.S. Supreme Court found this Court's analysis of the ineffectiveness of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) to be unreasonable. 130 S. Ct. 447, 455 (2009). Mr. Duckett asserted in his 3.851 motion that *Porter v. McCollum* represents a change in Florida law, specifically this Court's *Strickland* jurisprudence, and that, based on *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *Porter* should be retroactively applied to Mr. Duckett's ineffective assistance of counsel claims. On December 1, 2011, this Court issued its opinion in *Walton v. State*, 77 So. 3d 639 (Fla. 2011), rejecting that view, and finding that *Porter* "does not constitute a fundamental change in the law that mandates retroactive application under *Witt*." *Walton*, 77 So. 3d at 644. In *Walton*, this Court essentially found that correcting the lack of reason in its *Strickland* analysis identified in *Porter* did not fundamentally change this Court's *Strickland*

jurisprudence such that retroactive application of *Porter* was required under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). 77 So. 3d 639, 644 (Fla. 2011). However, in doing so, this Court acknowledged that *Porter* is an "evolutionary refinement and development of the *Strickland* analysis" applied by this Court. *Id*. at 644.

This Court has been found to have committed *Porter* error outside that particular case, and other defendants have thus received the benefit of the *Porter* refinement of *Strickland* that Mr. Porter received. Most recently, in *Pope v. Crews*, 2013 WL 1289257 (S.D. Fla. Mar. 26, 2013), the U.S. District Court for the Southern District of Florida granted capital habeas relief to an ineffective assistance of counsel claimant whose claim had been denied by this Court under its unreasonable *Strickland* analysis containing *Porter* error. The district court determined that it was "not inclined to make the same *Porter* error of unreasonably looking for ways to discount mitigating evidence in the form of compelling expert testimony rather than considering how that evidence may have weighed in favor of a recommendation for life in the minds of the jurors." *Id*. at *41. Another clear finding of *Porter* error can be found in *Sochor v. Sec'y, Dept. of Corrs.*, where the United States Court of Appeals for the Eleventh Circuit explained:

> As measured against the decision of the Supreme Court of the United States in *Porter II*, the Supreme Court of Florida unreasonably applied *Strickland* to decide the issue of prejudice in *Sochor IV* when it failed to consider

> or discounted entirely the mental health evidence that Sochor had presented in the postconviction evidentiary hearing.

685 F.3d 1016, 1029 (11th Cir. 2012). Beyond *Pope* and *Sochor*, Florida defendants have been granted relief with citations to *Porter* for the proposition that this Court failed to properly apply *Strickland*. *See*, *e.g.*, *Johnson v. Sec'y, Dept. of Corrs.*, 643 F.3d 907 (11th Cir. 2011); *Cooper v. Sec'y, Dept. of Corrs.*, 646 F.3d 1328 (11th Cir. 2011).

Thus, we know that this Court's standard that came before *Porter* was an unreasonable application of federal law. We know that the new present day Florida standard is something different than that standard, so much so that it can yield different results and has meant life rather than death for some defendants. And we therefore know that the *Porter* refinement is significant enough to alter Florida's capital sentencing system to the extent that different outcomes occur.

That implicates the prohibition on arbitrary death sentencing found in *Furman v. Georgia*, 408 U.S. 238 (1972). The retroactivity question of whether selective application of *Porter* across defendants, across time, causes a fundamental difference in Sixth Amendment treatment and the Eighth Amendment question of whether it causes arbitrary treatment are separate and different inquiries. In this case, the circuit court's denial of Mr. Duckett's *Porter* claim is an

instance of arbitrary treatment that implicates the Eighth Amendment such that even if this Court is not inclined to revisit *Porter's* retroactivity, a constitutional violation exists.

In reviewing Florida's capital sentencing system for Eighth Amendment non-arbitrariness on its face, the U.S. Supreme Court relied in part on the fact that the system "allow[s] the sentencer to consider the individual circumstances of the defendant, his background, and his crime," citing *Lockett v. Ohio*, 438 U.S. 586 (1978), to bring the system into *Furman* compliance. *See Spaziano v. Florida*, 468 U.S. 447, 460 (1984). Of course, the *Lockett* right to present mitigating evidence is contingent on effective counsel investigating and presenting that evidence. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Porter*, 130 S. Ct. at 453. If trial counsel's performance is necessary to the exercise of a right, the satisfaction of which is essential to the reason and non-arbitrariness of Florida's capital sentencing system, then varying the standard under which counsel must perform--varying that right--arbitrarily varies the results that Florida's capital sentencing system yields. Moving the constitutional goalpost on defendants, making it easier on some and harder on others to obtain relief, is just the sort of capricious administration of the death penalty with which *Furman* is concerned.

Further, in *Proffitt v. Florida*, when the U.S. Supreme Court first reviewed

Florida's post-*Furman* capital sentencing system for arbitrariness on its face, it relied on the fact that arbitrariness "is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 428 U.S. 242, 253 (1976) (citing *Songer v. State*, 322 So. 2d 481, 484 (Fla. 1975)). Again, we see not only that counsel's performance in bringing mitigation to light--so that the trial court, and this Court, can review that evidence--is essential to the non-arbitrariness of Florida's system, but also we see the interrelatedness of the *Strickland/Lockett* right with *Furman* protection. As this Court's error in *Porter* was failing to independently engage with and review mitigating evidence, the *Porter* error undermines doubly the essential *Furman* features of Florida's system identified in *Spaziano* and *Proffitt*: it undermines both the defendant's right to present mitigation and the check of appellate review on capital trial proceedings by reviewing that mitigation, both of which are relied on as critical standardizing forces against arbitrariness in Florida capital sentencing. In other words, merely because Florida's system has been held to have enough protections in place to prevent arbitrariness does not mean that altering or arbitrarily applying those protections cannot result in a capital process that runs afoul of *Furman*.

Appreciating the significance of *Porter* to the *Spaziano/Proffitt* line of cases (conducting *Furman* review of Florida's capital sentencing system), we see that consistent application of evolutionary refinements to the essential *Furman* features of Florida's capital sentencing system are required. This involves a right which is at the center of *Furman* protection: the right to present mitigation so defendants are not arbitrarily sentenced without proper regard to their humanity and individuality and so defendants are treated equally by being provided with counsel and a fair and equal opportunity to present mitigation which serves the *Furman* protection of appellate review of that mitigation.

Mr. Duckett is arguing for justice through consistent treatment. As the State's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), it is unclear to Mr. Duckett why the State opposes providing him with the same constitutional treatment received by other capital defendants. An unconstitutional execution was poised to happen in *Porter* based on an unreasonable *Strickland* analysis; is it not possible that one is poised to happen in this case?

According to this Court's analysis in *Walton*, the "evolutionary refinement and development" of the *Strickland* analysis that the U.S. Supreme Court announced in *Porter v. McCollum* did not constitute a fundamental enough change

in Florida law to qualify under *Witt* for retroactive application. But of course, the U.S. Supreme Court chose to announce this "evolutionary refinement and development" of the *Strickland* standard in *Porter v. McCollum* and apply it to George Porter's 1986 capital sentencing proceeding, a ruling the Eleventh Circuit found governed and applied at Terrell Johnson's 1980 trial and Dennis Sochor's 1987 death sentence. The Southern District applied the *Porter* refinement to Thomas Pope's 1982 convictions. How can this rule be fairly and justly held not to apply to Mr. Duckett's 1988 sentence. There is no remaining basis to put a temporal limit on the *Porter* refinement. The *Porter* refinement was part of Johnson's right to effective representation in a 1980 capital trial, Pope's at his 1982 trial, Sochor's at his 1987 trial, and others, long before the *Porter* decision issued. To have such an "evolutionary refinement" apply in a 1980 capital trial, but not in a 1987 capital trial, can only be described as arbitrary. It is arbitrary within the meaning of the Eighth Amendment as interpreted by *Furman v. Georgia*, 408 U.S. 238 (1972). And, likewise, it is arbitrary within the meaning of the Equal Protection and Due Process Clauses of the Fourteen Amendment. Due to this Court's recognition that *Porter v. McCollum* constitutes an "evolutionary refinement and development" of the *Strickland* analysis, it violates Mr. Duckett's right to equal protection and due process to deprive him of the same benefit that

other defendants received at their capital sentencing proceedings that predate Mr. Duckett's. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (fairness requires the recognition of "the principle of treating similarly situated defendants the same"). Indeed, there will be a number of similarly situated death-sentenced individuals in Florida who, merely by virtue of the timing of their federal habeas petitions and because their federal habeas petitions have yet to be finally resolved, will receive the benefit of the decision in *Porter v. McCollum* and have that decision applied by federal courts in determining whether this Court properly applied clearly established federal law to their cases. *See Johnson v. Sec'y, Dept. of Corrs*., 643 F.3d 907 (11th Cir. 2011); *Cooper v. Sec'y, Dept. of Corrs.*, 646 F.3d 1328 (11th Cir. 2011); *see also Sochor v. Sec'y, Dept. of Corrs.*, 685 F.3d 1016 (11th Cir. 2012).

Therefore, while Mr. Duckett recognizes this Court's recent opinion in *Walton* resolved the issue of whether *Porter v. McCollum* constitutes new Florida law within the meaning of *Witt v. State*, he argues that to deprive him of the benefit of the *Porter* refinement would violate his rights under the Eighth and Fourteenth Amendments. Mr. Duckett's right to equal protection and due process must mean that at his trial he was entitled to the same Sixth Amendment right to effective representation that was accorded to Terrell Johnson, Richard Cooper, George

Porter, Dennis Sochor and Thomas Pope. Accordingly, regardless of this Court's resolution of how *Witt v. State* applies to *Porter v. McCollum*, depriving Mr. Duckett of the benefit of the *Porter* refinement of the *Strickland* analysis violates Mr. Duckett's Eighth and/or Fourteenth Amendment rights.

Over thirty years ago, the U.S. Supreme Court announced that under the Eighth Amendment the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972). At issue in *Furman* were three death sentences: two from Georgia and one from Texas. The petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death penalty schemes were then operating to be arbitrary and capricious. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws

no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *id*. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *id*. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *id*. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *id*. at 365-66 (Marshall, J., concurring) ("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop." (footnote omitted)). As a result, *Furman* stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random

handful" of individuals. *Id*. at 310.

However, in the manner in which Mr. Porter, Mr. Johnson, Mr. Cooper, Mr. Sochor, and Mr. Pope have received the benefit of *Porter v. McCollum*, while this Court in *Walton* declared the change in Florida constitutional law brought about by *Porter* to have been merely an "evolutionary refinement" not significant enough to merit retroactive application, it is now clear that, in Mr. Duckett's case, an arbitrary factor has infected the process. A key feature of non-arbitrariness in Florida--the right to effective presentation of a mitigation case--has been reduced in Mr. Duckett's case in a way that, for other defendants, has been shown to mean the difference between an unconstitutional execution and a life sentence through *Strickland*-compliant analysis.

According to this Court, the *Strickland* standard as applied in Florida evolved in *Porter*. This acknowledgment means that Florida's present day *Strickland* analysis is something that is now different than it was before the decision in *Porter v. McCollum*. We know that this Court's standard that came before was an unreasonable application of federal law, because that was what the U.S. Supreme Court held in *Porter*. We know that the new present day Florida standard can yield different results than were obtained under the old discarded standard, because it yielded different results for George Porter, Terrell Johnson,

Richard Cooper, and Thomas Pope, and required their death sentences to be overturned. Knowing all that, it cannot be denied that the newly evolved and refined *Strickland* standard of this Court, announced in *Porter*, may require a different result for Mr. Duckett if and when his ineffective assistance of counsel claims are again reviewed under the *Porter* standard.

Knowing that, the issue now becomes whether, in order to avoid the expense of another proceeding, the State is constitutionally permitted to execute someone in the face of constitutional doubt. Yet, *Furman* has already spoken to this. The question is whether this Court, being found in a capital case to have reached a decision unreasonably applying a federal law that it applied in other cases, is not something that merits a second look in those other cases before they result in the State taking life. Again, *Furman* has already spoken to this. An unconstitutional execution was poised to happen in *Porter* based on an unreasonable *Strickland* analysis. Is it not possible that one is poised to happen in this case? *Furman* has already addressed the injection of arbitrariness into death sentences. These questions and issues strike at the heart of the State of Florida's decision to have the death penalty, because if it is going to employ that absolute and irrevocable punishment, it must expend the resources to be absolutely sure it does not do so arbitrarily, such as under circumstances where the constitutional claim of a

condemned defendant is resolved under a standard subsequently refined to eliminate unreasonableness in the analysis. We know this because *Furman* says reliability is an essential component of a constitutional capital sentencing.

Thus, the question is not *do we or do we not want to be sure before we execute someone*, because *Furman* has already provided the answer to that question. Arbitrariness cannot be permitted to infect a constitutional sentence of death: we must be sure. In order to comport with the requirements of the Eighth and Fourteenth Amendments and to comport with the requirements of *Furman*, Mr. Duckett's ineffective assistance of counsel claim must be evaluated under *Porter v. McCollum* and what this Court called an evolutionary refinement of the *Strickland* standard for measuring whether a capital defendant received his Sixth Amendment right to effective representation.

Kansas v. Marsh explains that there are two broad requirements imposed by *Furman* and one of those is "permit[ing] a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record[and] personal characteristics . . . ." 548 U.S. 163, 173-74 (2006). If properly appreciating the significance of *Porter* to the *Spaziano/Proffitt* line of applying *Furman* to Florida's capital sentencing system, it is clear that selective and inconsistent application of *Porter* across defendants goes to the *Furman*

requirements identified in *Marsh*. That individualized sentencing determination, that consideration of personal characteristics, is the very requirement that is tinkered with when *Porter* is turned on and off-or down and up-depending on the court and the defendant and the point in time.

II. Applying *Porter* to the facts of Mr. Duckett's case

Mr. Duckett was deprived of exculpatory information in the possession of the State and the effective assistance of trial counsel at the guilt and penalty phases of his case. *Porter v. McCollum*, 130 S. Ct. 447 (2009), establishes that the denial of Mr. Duckett's ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984) and *Brady v. Maryland*, 373 U.S. 83 (1963).

a. Ineffective assistance at the guilt phase

This Court's materiality analysis under *Brady* is fungible with and indistinguishable from its analysis of prejudice under *Strickland*. In *Rivera v. State*, this Court recognized that "the materiality prong of *Brady* has been equated with the *Strickland* prejudice prong," and thus an analysis of one precludes the need to perform an identical analysis for the other. 995 So. 2d 191, 205 (Fla. 2008) (citing *Derrick v. State*, 983 So. 2d 443 (Fla. 2008) for the proposition that *United States v. Bagley*, 473 U.S. 667 (1985) expressly applied the *Strickland* standard of

"reasonable probability" to *Brady* cases). Thus, the U.S. Supreme Court's rejection of this Court's *Strickland* prejudice analysis implicates and applies to this Court's *Brady* materiality analysis as well.

Porter error was committed in Mr. Duckett's case. The jury never heard the considerable and compelling evidence that would have shown that Mr. Duckett did not commit the murder. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, no one disputes the jury did not hear the evidence in question. However, this Court committed *Porter* error in failing to give proper consideration to Mr. Duckett's claims.

The State's key witness at trial, Gwen Gurley, testified that Mr. Duckett came back to the Circle K and picked up the victim. The impact of that testimony on Mr. Duckett's defense was devastating as Ms. Gurley was the only witness to connect Mr. Duckett with the victim after he left the Circle K.

The hair evidence found on the victim was critical to the State's case. The issue of Malone's credibility is of particular import and has been detailed in previous pleadings in this Court but was not considered by this Court in its analysis. As noted throughout the statement of facts, there was a wealth of exculpatory evidence available that simply was not provided to the decision

makers at trial.

While the wealth of exculpatory evidence that the State either failed to disclose or defense counsel failed to discover continues, this Court denied Mr. Duckett's claims. This Court ruled:

> Duckett fails to demonstrate that his counsel performed deficiently. As to his cross-examination of Gurley, the jury heard of Gurley's prior felony convictions, and defense counsel impeached her with inconsistencies between her deposition and trial testimony. As to Gurley's false sexual harassment allegation, it was made to the Lake County Sheriff's Department, a wholly separate entity from the Mascotte Police Department. Duckett fails to establish how counsel reasonably could have discovered this information from a different case at a different police department.
>
> Duckett also fails to establish prejudice. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. As explained above, even without Gurley's testimony, there was strong circumstantial evidence presented at trial.

Duckett v. State, 918 So. 2d 224, 234 (Fla. 2005). The Court continued, "[h]is conclusory claim that a second unknown hair was found on the victim but never presented to the jury is denied as insufficiently pled because it fails to identify the alleged hair as Brady material and fails to argue the effect the evidence would have had at trial." *Id*. at 235. "Duckett fails to establish that the State 'either willfully or inadvertently' suppressed the information [regarding Malone]." *Id*. "Regarding the

tire tracks, . . . Duckett's conclusory arguments on this issue are legally insufficient and fail to present a proper basis for relief. *Id*.

> Regarding the fingerprints, Duckett presents a conclusory claim . . . . This claim is legally insufficient. Furthermore, at the evidentiary hearing it was established that defense counsel obtained a fingerprint expert in preparation for trial and did not present an additional expert at trial because, in trial counsel's words, "the report I got [from the expert] was not significantly helpful, as a matter of fact, not helpful at all to the Defense." Trial counsel considered the possibility of presenting a rebuttal expert but made a strategic decision not to call the expert.

Id. As in *Porter*, this Court dismissed the fact that a wealth of evidence was not presented based on the fact that some of that evidence came out in some form at trial. The court failed to conduct the probing, fact-specific inquiry that *Porter* requires, and dismissed its prejudice analysis as an afterthought.

b. Ineffective assistance at the penalty phase

Trial counsel also failed with regard to his duties during the penalty phase. He failed to fully investigate and develop crucial evidence in mitigation. No tactical motive can be ascribed to an attorney whose tactical omissions are based on lack of knowledge, *see Nero v. Blackburn*, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare.

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of

imposition of the death penalty. *Miller v. State*, 373 So. 2d 882 (Fla. 1979); *Robinson v. State*, 520 So. 2d 1 (Fla. 1988). Yet, the prosecution argued in closing to the jury that they should consider the heinous and atrocious use of a badge and police car when they were determining whether James Duckett should live or die (R. 2059). The trial court also improperly relied upon Mr. Duckett's position as a uniformed police officer in sentencing him to death (R. 2241). The prosecutor's introduction and use of, and the sentencer's reliance on, wholly improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment. Defense counsel's failure to know the law and to object to this line of argument was prejudicial deficient performance.

Mr. Duckett's defense counsel was not prepared for the penalty phase. The jury returned a verdict at 10:55 a.m. on May 10 (R. 2008). Penalty phase began at 1:00 p.m. (R. 2012) on the same date. During this break, the charge conference was held in judge's chambers (R. 2013). Defense counsel had less than three hours to re-group and prepare for this critical stage which would determine whether James Duckett lived or died.

Defense counsel testified in the evidentiary hearing that he believed there was no mitigation that could result in a life sentence in this case (PC-R1. 700). He felt that a conviction in this case would essentially result in a mandatory death

sentence, and that the penalty phase was nothing but an exercise in futility (PC-R1. 700). Based upon this belief, defense counsel presented only 4 witnesses at penalty phase, including Mr. Duckett. Mr. Duckett's testimony consisted of a plea for his life. The other three witnesses spoke briefly about Mr. Duckett's background. A very incomplete picture of Mr. Duckett was painted to the jury. Ample evidence was available which defense counsel failed to investigate. As a result Mr. Duckett was sentenced to die by a judge and jury who knew very little about his background and the substantial mitigation which existed to warrant a life sentence.

Defense counsel's failure to investigate and present further evidence was constitutionally deficient performance. The unreasonable belief that nothing can change the outcome of a sentencing hearing cannot support a tactical decision not to investigate a case and present evidence to the jury. Many cases with far worse facts have resulted in life sentences. Even in this case, where counsel presented minimal evidence in support of a life sentence, four jurors refused to vote for death. Counsel's decision was constitutionally unreasonable. A wealth of available evidence existed that would have resulted in a life sentence.

Thirteen witnesses testified live at the evidentiary hearing (PC-R1. Vols. XXII and XXIII). Additional witnesses testified via affidavit after the circuit court ruled that he did not wish to hear all of the witnesses live (PC-R1. 721). This

substantial and compelling mitigating evidence was easily available and accessible to trial counsel, but was not investigated and prepared for presentation to either the jury or the judge. As a result, Mr. Duckett was sentenced to death by a judge and jury who heard little of the mitigation which was essential to an individualized capital sentencing determination.

Not only did defense counsel not present evidence, he inexplicably failed to argue in closing any of the mitigation that was in fact presented. Instead he used this opportunity to berate the jury for how little time they spent on their deliberations at the end of the guilt phase (R. 2060). It is clear that this portion of the argument only served to insult the jury as after they retired they sent a note out objecting to these statements made by defense counsel (R. 2084). Counsel then requested that the jurors once again discuss the guilt phase testimony to see if it would convince them to recommend life (R. 2060-62). This argument was in essence a request to the jury to consider lingering doubt in their deliberations, a consideration that this Court has repeatedly said is not proper in a penalty phase. *King v. State*, 514 So. 2d 354, 358 (Fla. 1987). There can be no tactical or strategic motive for this failure.

Defense counsel also failed to obtain and present psychological testing. A clinical psychologist who evaluated Mr. Duckett in post-conviction provided

compelling and persuasive testimony concerning his psychological background (PC-R1. 912-960). The testimony supports the conclusion that Mr. Duckett's psychological makeup and history are not consistent with a sex offender. Additionally, the testimony showed that Mr. Duckett scored lowest on the antisocial, aggressive and sadistic personality portions of the psychological tests (Id. at 939-40). Counsel testified he had no reason for failing to present this type of evidence or consult with a mental health professional.

There was no tactical or strategic reason for not presenting complete mental health mitigation. Additional mitigation to support a judicial override of the eight-to-four death recommendation could have been presented at the judge sentencing proceedings. However, counsel failed to investigate for additional mitigation. This is a case of prejudicially deficient performance. The fact that some testimony was obtained does not establish effective assistance where further investigation into additional mitigation was warranted. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991). Counsel was ineffective. *Loyd v. Smith*, 899 F.2d 1416 (5th Cir. 1990).

These omissions on behalf of defense counsel are exacerbated by the fact that during the guilt phase closing argument counsel stated that whoever committed this crime should go to the electric chair (R. 1932). The next day Mr. Duckett was convicted (R. 2009). The only issue to be determined during the

penalty phase, whether or not Mr. Duckett should die, was conceded by defense counsel. Just in case the jury had forgotten about this, the state noted it again in closing (R. 2059). Counsel's concession of the only issue to be decided at penalty phase was patently ineffective and no adversarial testing occurred. *See Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983).

This Court's ruling on the penalty phase ineffectiveness claim was based on *Porter* error. This Court reasoned as follows:

> In claim 2, Duckett argues that trial counsel was ineffective for failing to call additional witnesses to testify at the penalty phase about Duckett's good character, close family upbringing, loving relationship with his (now ex) wife and two sons, his decision to enter the police force, and general all-around "normal" life before the murder. Duckett fails to show either deficient performance or prejudice. At the penalty phase, trial counsel presented four witnesses: Duckett's brother, a family friend, his wife, and himself. These witnesses testified that Duckett lived an ordinary family life with his wife and two sons, was a good person and hard worker, and did not exhibit any strange sexual behavior outside his marriage or toward young girls. At the postconviction evidentiary hearing Duckett presented several additional witnesses, including several members of his extended family, as well as family friends and professional acquaintances. The testimony of these witnesses was generally cumulative to that presented at the penalty phase. Trial counsel's performance was not deficient simply because he did not present cumulative evidence.

Duckett v. State, 918 So. 2d 224, 236-37 (Fla. 2005) (citations omitted). Precisely as this Court did in *Porter*, this Court in this case discounted mitigation evidence because *some* evidence was presented.

Mr. Duckett was sentenced to death by a judge who heard little of the available mitigation which would have allowed an individualized capital sentencing determination. Because counsel failed to pursue, develop, and present mitigation, confidence is undermined in the outcome of the sentencing proceeding. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different. The findings in this case are starkly in violation of *Porter*.

This Court's ruling with respect to Mr. Duckett's ineffective assistance of counsel and *Brady* claims merely deferred to the circuit court's credibility findings and failed to make a meaningful inquiry. The findings in this case are starkly in violation of *Porter*. The U.S. Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland* and *Brady*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the prejudice analysis required by *Strickland* and *Brady*. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis. At the heart of *Porter* error is "a failure to engage with [the evidence]." *Porter*, 130 S. Ct. at 454. The U.S. Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually

went through in Korea." *See id*. That admonition by the U.S. Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with evidence, be it heroic military service or exculpatory evidence, will pass for a constitutionally adequate *Strickland* and *Brady* analysis.

Mr. Duckett's substantial claim of ineffective assistance of counsel has not been given serious consideration as required by *Porter*. Mr. Duckett requests that this Court perform the analysis of this claim which has as of yet been lacking in this case.

ARGUMENT III

NEWLY DISCOVERED EVIDENCE CONCERNING THE FALSE TESTIMONY OF THE KEY WITNESS IN THE CASE, GWEN GURLEY, REQUIRES THAT MR. DUCKETT RECEIVE A NEW TRIAL. A CUMULATIVE ANALYSIS OF ALL EVIDENCE PRESENTED CONCERNING THE FALSE TESTIMONY IS WARRANTED. MR. DUCKETT WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE STATE'S MISCONDUCT AND DEFENSE COUNSEL'S FAILURE TO PROVIDE CONSTITUTIONALLY ADEQUATE COUNSEL. THE CIRCUIT COURT ERRED WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING ON THIS ISSUE.

Mr. Duckett has asserted throughout the proceedings in his case that the key witness at his trial, Gwendolyn Gurley, lied. She has recanted her trial testimony on six different occasions, both in sworn deposition testimony and in a sworn affidavit.

Mr. Duckett has recently learned of two new witnesses who provide very important information supporting his claim that Gwen Gurley lied. Two of Ms. Gurley's children, Brandie and Brandon Campos, have come forward to discuss their knowledge of Ms. Gurley's lies at trial (PC-R2. 123-127). Both Mr. and Ms. Campos were prepared to testify that Gwen Gurley told them she lied at Mr. Duckett's trial in order to get out of jail early. Contrary to the finding of the circuit court (see PC-R2. 947-951), Mr. Duckett brought this evidence to the court at the

first opportunity. Until his counsel was contacted on behalf of Ms. Campos, Mr. Duckett had no reason to know that either she or her brother would have evidence relevant to his case. This new evidence requires this Court to revisit this previously presented claim that he did not receive an adequate adversarial testing. In order to conduct a cumulative evaluation of the favorable evidence that was not heard by his jury, but that undermines confidence in the reliability of the outcome, the Court must now consider this evidence. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996).

At the time Mr. Duckett filed his previous post-conviction motions, he did not have any indication that either Brandie or Brandon Campos possessed pertinent information. The information that Mr. and Ms. Campos have now provided is new within the meaning of Rule 3.851(d)(2)(A).

The evidence constitutes newly discovered evidence under the standard recognized in *Jones v. State*, 591 So.2d 911 (Fla. 1991). Where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence, the existence of which was unknown at trial, a new trial is warranted if the previously unknown evidence would probably have produced an acquittal or a life sentence had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial

is required. Impeachment evidence may qualify under *Jones v. State* as evidence of innocence that may establish a basis for Rule 3.850 relief. *See State v. Robinson*, 711 So.2d 619, 623 (Fla. 2d DCA 1998). Evidence which qualifies under *Jones v. State* as a basis for granting a new trial must be considered cumulatively in deciding whether in fact a new trial is warranted. *State v. Gunsby*, 670 So.2d 920, 923-24 (Fla. 1996).

As this Court recently noted in another death case, "society's search for the truth is the polestar that guides all judicial inquiry and when the State knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar." *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010). The Court should evaluate this newly discovered evidence in light of all of the previously presented evidence concerning this same issue. *See Johnson v. State*, 44 So. 3d at 73 (newly discovered evidence of misconduct of original prosecutor reviewed with entire record to determine that misconduct required a new sentencing hearing).[16] The circuit court erred when it denied Mr. Duckett the opportunity to present this newly discovered evidence in a hearing below.

There is no question that Mr. Duckett was denied a reliable adversarial

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[16]In *Johnson, t*he newly discovered evidence, handwritten notes of the prosecutor, was given to the defense in 1997 but the true value of the notes was not discovered until an evidentiary hearing in defendant's second successive motion to vacate proceedings in 2007.

testing by the presentation of false testimony of a key witness. In order "to ensure that a miscarriage of justice [did] not occur," *United States v. Bagley*, 473 U.S. 667, 675 (1985), it was essential for the jury to hear the available evidence favorable to Mr. Duckett. The United States Supreme Court specifically indicated that information impeaching "the reliability of the investigation" was evidence favorable to the accused within the meaning of *Brady*. *Kyles v. Whitley*, 514 U.S. 419, 446 (1995). Here, confidence must be undermined in the outcome since the jury did not hear the evidence of Ms. Gurley's deal and the wealth of evidence that rebuts Ms. Gurley's version of events. This Court must analyze the cumulative affect of all of this evidence, including that discovered post-trial. Though error may arise from individual instances of nondisclosure and/or deficient performance, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434; *see also Porter,* 130 S.Ct. at 454; *Sears v. Upton*, 130 S.Ct. 3259, 3266-67 (2009). The proper analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later. The analysis must be conducted when all of the exculpatory evidence which the jury did not

know becomes known.

ARGUMENT IV

MR. DUCKETT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS PROHIBITED FROM PRESENTING EVIDENCE ON HIS BEHALF AT THE PRIOR EVIDENTIARY HEARING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As has been presented throughout this brief, Gwen Gurley is the key witness against Mr. Duckett. Without Gwen Gurley, the evidence produced at trial is that Mr. Duckett was last seen driving off alone in the opposite direction from Ms. McAbee who was last seen walking around the corner toward her house which was 400 feet behind the Circle K. Ms. Gurley was the only person who put Ms. McAbee in Mr. Duckett's car. Mr. Duckett has attempted to present evidence from Ms. Gurley herself that her trial testimony was not actually true. Mr. Duckett believes that if Ms. Gurley had no fear of being charged with perjury, she would take the stand and tell the truth which is that she never saw Teresa McAbee in Mr. Duckett's car. Mr. Gurley has been unable to so testify because the state has chosen not to give her immunity for any possible charges that could occur as a result of her testifying differently than she did at trial.

In September 1997, the Florida Legislature added Fl. Stat. §837.021, Perjury by Contradictory Statements, which provides in relevant part: "Whoever, in one or

more official proceedings that relate to the prosecution of a capital felony, willfully makes two or more material statements under oath which contradict each other, commits a felony of the second degree...." Fl. Stat. § 837.021 (2). The statute adds that it is not necessary to prove which, if any, of the contradictory statements are not true. *Id.* at (3)(c). Unlike the previous law, the prosecution need only prove that a witness has changed her testimony about a material element, not that she is in fact lying in her testimony. Thus, a witness who plans to take the stand and *truthfully* testify in a subsequent capital proceeding when she has previously provided contradictory (false) testimony in a prior proceeding, is now at risk of a charge of perjury.[17] Prior to her testimony at the evidentiary hearing, Ms. Gurley was told by the prosecutor that she would be charged with perjury if she changed her trial testimony (PC-R1. 1315 -1316). Not surprisingly, Ms. Gurley chose to assert her Fifth Amendment protections and say nothing.[18]

In *State v. Wickham,* a Leon County circuit court was faced with a very

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[17]Additionally, the penalty for violation of the perjury statute in capital case has increased from a third degree felony to a second degree felony. *Compare* Fl. Stat. § 837.02 (1996) (making of a false statement in a official proceeding is a third degree felony) *with* Fl. Stat. § 837.02(1997) and § 837.021 (1997) (making of a false or contradictory statement under oath in a proceeding that relates to a capital felony is a second degree felony).

[18]Ms. Gurley could have repeated her trial testimony without any fear of reprisal.

similar issue. *State v. Wickham*, Leon County Circuit Court, Case No. 1987-3970. The defendant in that case wished to call several witnesses in his evidentiary hearing. These witnesses had testified for the state in Wickham's 1988 trial. An evidentiary hearing was held in 2004, at which point several of the witnesses refused to testify because of fear of being charged under the new perjury statute and asserted their Fifth Amendment privileges. Mr. Wickam ultimately lost his Rule 3.850 motion and appealed the denial, including the denial regarding the perjury issue, to this Court. On September 25, 2008, this Court issued an opinion that remanded Mr. Wickam's case on other issues. *Wickham v. State*, No. SC05-1012 (Sept. 25, 2008). In the opinion, this Court addressed the issue to provide guidance to the circuit court on the remand. Of relevance to Mr. Duckett's case, the Court stated:

> For example, if a recanting witness testifies that testimony at Wickham's trial in 1988 was false, that witness cannot be prosecuted for perjury in an official proceeding because the statute of limitations has run. Likewise, if he refers to an affidavit in 1995 that patently contradicts his earlier testimony at Wickham's trial, the three-year statute of limitations also bars his prosecution for perjury by contradictory statements. However, if his affidavit executed in 2004 contains statements that contradict his testimony in 1988, then prosecution for perjury may be possible in light of the Legislature's removal in 1997 of the statute of limitations for perjury in capital cases.

Id. On first blush, it appears the Court was saying that a witness who later recants

false testimony from a 1988 trial – the position Ms. Gurley will be in if she recants on the stand – cannot be tried for perjury, but then the Court appeared to say that the a person who offered a contradictory statement after the 1988 trial might be at risk of a perjury charge.

Shortly after issuing this opinion, this Court withdrew it and issued a revised opinion that made no mention at all of the issue regarding the application of the perjury statute in Wickham's case. *Wickham v. State*, 998 So. 2d 593 (Fla. 2008)(revised opinion).

In April of 2010, the circuit court held a new evidentiary hearing in Mr. Wickham's case. After hearing argument, the circuit court ruled that any statements made prior to the change in the statute (1997) were not subject to prosecution because the statute of limitations has expired. *State v. Wickham*, April 20, 2010 transcript, p. 323, 326, PC-R2, Appendix 6. The court concluded that as the statute of limitations had run there was no privilege for the witnesses to assert. *Id.* The witnesses then were permitted to take the stand and testify.[19]

The application of this perjury statute to Ms. Gurley, given the circuit court's ruling in an identical fact situation in *Wickham* that permitted the witnesses

[19]The state took the position that they would be unable to charge the witnesses with perjury if the court precluded them from asserting their Fifth Amendment privileges. *Id.* at 324.

to testify, is a denial of due process for Mr. Duckett.

The law is clear that neither the court nor the prosecutors may misuse a supposed ethical mandate in a way that is oppressive towards the defendant and serves to drive witnesses off the stand. *See Webb v. Texas*, 409 U.S. 95 (1972)(judge's remarks threatening the witness with perjury effectively drove witness off stand and deprived him of due process); *see also Muhammed v. State*, 782 So. 2d 343 (Fl. 2001) (dicta reminding trial courts not to violate *Webb*). "If such a due process violation occurs, the court must reverse without regard to prejudice to the defendants." *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980); *Reese v. State*, 382 So. 2d 141, 144 (Fla. 4th DCA 1980) (finding a deprivation of due process because the witness "believed that if she continued to testify contrary to her deposition testimony, she was going to be sent to jail."); *see also United States v. Heller*, 830 F.2d 150, 152-54 (11th Cir. 1987) (applying *Webb* to similar conduct by prosecutors); *United States v. Morrison*, 535 F.2d 223, 227-31 (3d Cir. 1976) (same). By permitting Ms. Gurley to assert an inapplicable privilege, and by allowing the State to use impermissible tactics to scare her off the stand, the Court violated Mr. Duckett's rights under the Sixth Amendment. The Sixth Amendment guarantees a defendant the right to compel the attendance of

witnesses at trial. U.S. Const., amend. VI.[20] The Supreme Court has defined this right as "the most basic ingredients of due process of law" that is incorporated in the due process clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 18-19 (1969). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.*

The perjury statute that was used to prohibit Ms. Gurley's testimony is an arbitrary rule, "*i.e.*, a rule that exclude[s] important defense evidence but [does] not serve any legitimate interests." *Holmes v. South Carolina*, 547 U.S. 319 (2006). As the Supreme Court noted in *Holmes*, "the Constitution [] prohibits the exclusion of defense evidence under rules that serve no legitimate purpose...". *Id.* at 320. Clearly, denying a defendant the opportunity to present exculpatory evidence at trial serves no legitimate purpose.

The Supreme Court has long recognized that, whether rooted in the Fourteenth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process or Confrontation Clauses, the U.S. Constitution guarantees

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[20]The Florida constitution guarantees this same right and so is implicated here. *See* Art. I §§ 9 & 16; *see also State v. Montgomery*, 467 So. 2d 387, 392 (Fla. 1985).

every criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (*quoting California v. Trombetta*, 467 U.S. 479, 485 (1984)). Applying these principles, this Court has invalidated numerous evidentiary bars to the admission of defense witness testimony. *See, e.g., Holmes,* 547 U.S. at 320 (listing several evidentiary bars struck down by the Court because they served no legitimate state interest).

To permit the State to use their power to silence defense witnesses results in an unlevel playing field. Such an unlevel playing field offends the constitutional guarantee of fundamental fairness. This Court has the power to resolve this inequity. As the United States Supreme Court recently noted in *Holland v. Florida*, "often courts must exercise their equity powers ... on a case by case basis ... demonstrating flexibility and avoiding mechanical rules...in order to relieve hardships....arising from a hard and fast adherence to more absolute legal rules." *Holland*, 560 U.S. 631, 130 S.Ct. 2549, 2553 (2010).

Mr. Duckett urges this Court to remand to the circuit court for an evidentiary hearing and instruct the state to allow Ms. Gurley's to testify without fear of reprisal. After permitting Ms. Gurley to testify, the Court must analyze all of the evidence that has been presented in post-conviction regarding this false testimony

and the state's role in it.[21] The standard for reversal of convictions and sentences obtained through the use of false or misleading testimony is clear: reversal is required if the false testimony could in any reasonable likelihood have affected the outcome. *United States v. Bagley*, 473 U.S. 667 (1985). There can be no doubt that Gwen Gurley's testimony affected the outcome of Mr. Duckett's case.

CONCLUSION

On the basis of the arguments presented herein, Mr. Duckett urges that this Honorable Court remand this case for an evidentiary hearing and thereafter set aside his unconstitutional convictions and death sentence, and order his immediate release if the state fails to retry him within a reasonable period of time.

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[21]This evidence includes, but is not limited to: 1) the unrebutted testimony of Mr. Higgenbotham that Ms. Gurley told him she lied at trial (February 24, 2005, hearing, at p. 48); 2) the two witnesses who were with Ms. Gurley on the night in question, both of whom assert that Ms. Gurley was not at the Circle K at the time she testified (PC-R1. 1331; 1402); 3) the uncontroverted post-conviction testimony of Vickie Davis that Gwen Gurley told her she needed to lie about what happened that night (PC-R1. 1326); 4) Vickie Davis' testimony that she was coached on what to say during a taped interview of her and Ms. Gurley by the sheriff's office (PC-R1. 1329-31; *see also* D. Exh. 8 - Taped Statement of Vickie Davis, October 28, 1987); 5) the fact that none of the eight witnesses who were at the Circle K when Mr. Duckett was there and who gave statements and/or testified concerning who or what they saw that night mentioned seeing Ms. Gurley, Ms. Davis or Mr. Gaitan at the Circle K that night (PC-R1. 1407-09); and, 6) the issue of Ms. Gurley's early release from jail (D. Exh. 38, 39).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief[22] of Appellant has been furnished by electronic delivery to Mitchell Bishop, Office of the Attorney General, on November 11, 2013.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Amended Initial Brief of Appellant complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Times New Roman, 14 point type, not proportionately spaced, this date, November 12, 2013.

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[22]Mr. Duckett's Initial Brief failed to contain the Table of Authorities which this Amendment does contain. Counsel for the State, Mr. Nunnelley, was contacted by undersigned counsel and states he does not object to the filing of this Amended Brief.