

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC11-1263**

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**CLARENCE JAMES JONES**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT  
OF THE SECOND JUDICIAL CIRCUIT,  
LEON COUNTY, FLORIDA**

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**INITIAL BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

Clarence James Jones appeals the circuit court's denial of his successive motion for post-conviction relief. In response to Mr. Jones' argument that the decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) created a change in Florida *Strickland* jurisprudence that requires consideration and granting of Mr. Jones' post-conviction claims, the circuit court ruled that *Porter* does not establish a new fundamental constitutional right. The circuit court found that the Florida Supreme Court has already addressed this issue, and that Mr. Jones' argument is untimely and successive. Mr. Jones identifies errors in each of those rulings.

## **CITATIONS TO THE RECORD**

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

(R. \_\_\_\_ ) - Record on direct appeal;

(PC-R. \_\_\_\_ ) - Record in this instant appeal.

All other references will be self-explanatory.

## **REQUEST FOR ORAL ARGUMENT**

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

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## **INTRODUCTION**

Clarence Jones was deprived of a reliable sentencing proceeding due to the ineffective assistance of trial counsel at the penalty phase in violation of the Sixth Amendment to the U.S. Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Porter v. McCollum*, 130 S. Ct. 447 (2009), the United States Supreme Court found this Court's prejudice analysis in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. At 455. In *Porter v. State*, this Court conducted the following prejudice analysis:

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

*Porter v. State*, 788 So. 2d at 923.

The United States Supreme Court rejected this analysis, and implicitly this Court's case law on which it was premised as an unreasonable application of *Strickland*:

The Florida Supreme Court's decision that Porter was not prejudiced by this counsel's failure to conduct a thorough-or even cursory investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing.

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Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

*Porter v. McCollum*, 130 S. Ct. At 454-55.

The *Porter* decision establishes that the previous denial of Mr. Jones' claims that he did not receive a reliable sentencing proceeding was premised on this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1994). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such, *Porter* constitutes a change in state law as it has been routinely applied. Mr.

Jones' *Porter* claim is cognizable in these post-conviction proceedings. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

In *Sears v. Upton*, 130 S. Ct. 3266 (2010), the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia post-conviction court failed to apply the proper prejudice inquiry under *Strickland*. The Georgia state court “found itself unable to assess whether counsel’s inadequate investigation might have prejudiced Sears” and unable to “speculate as to what the effect of additional evidence would have been” because Sears’ counsel “did present some mitigation evidence during Sears’ penalty phase.” *Id.* at 3261. The United States Supreme Court found that “[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case.” *Id.* at 3264. The United States Supreme Court explained the state court’s reasoning as follows:

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

Id.

After *Porter*, it is necessary to conduct a new analysis in Mr. Jones' case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's prejudice analysis to be in error, Mr. Jones' claims that he was deprived of an individualized and reliable sentencing proceeding must be readdressed in light of *Porter*. The judge and jury at Mr. Jones' trial "heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability. Id. at 454. A truncated, cursory analysis of prejudice does not satisfy *Strickland*. In Mr. Jones' case, this is precisely the sort of analysis that was conducted. *Sears* held that post-conviction courts must speculate as to the effect of unrepresented evidence in order to make a *Strickland* prejudice determination not only when little or no mitigation evidence was presented at trial but in all instances. As *Sears* points to *Porter* as the recent articulation of *Strickland* prejudice correcting a misconception in state courts, the failure to conduct a probing, fact-specific prejudice analysis can be characterized as "*Porter* error."

#### **STATEMENT OF THE CASE AND FACTS**

On July 28, 1988, Mr. Jones was indicted for first-degree murder and other charges in the circuit court for the Second Judicial Circuit, Leon County, Florida (R. 1-3). Mr. Jones pled not guilty to all charges (R. 17).

On September 22, 1989, a jury found Mr. Jones guilty on all charges (R. 128-33). On September 25, 1989, the jury recommended a death sentence by a vote of 11 to 1 for the first-degree murder conviction (R. 161). On September 26, 1989, Mr. Jones was sentence to death for the first-degree murder conviction and to three consecutive life terms, plus five years (R. 183-90).

#### **A. Direct Appeal**

Mr. Jones appealed, raising seven issues: (1) exclusion of jurors opposed to the death penalty, (2) restrictions on cross-examination of two witnesses, (3) admission of similar fact evidence, (4) exclusion of defense similar fact evidence, (5) exclusion of prior inconsistent statement of a State witness, (6) allowing evidence and instructions on certain aggravating circumstances, and (7) improper death sentence of defendant with borderline retarded or dull normal intelligence. This Court affirmed the convictions and sentences. *Jones v. State*, 580 So. 2d 143 (Fla. 1991) (*Jones I*), *cert. denied*, *Jones v. Florida*, 112 S. Ct. 221 (1991).

#### **B. Post-conviction Appeal**

Mr. Jones filed a motion under Fla. R. Crim. P. 3.850 and later amended that motion. Mr. Jones raised claims regarding (1) access to public records, (2) ineffective assistance of counsel at the penalty phase, (3) Mr. Jones being shackled during trial, (4) Mr. Jones' absence from critical stages, (5) ineffective assistance of counsel in failing to move for a change of venue, (6) unconstitutional jury instructions regarding aggravating circumstances, (7) unconstitutional automatic aggravating circumstance, (8) ineffective assistance of counsel in failing to object to improper prosecutorial closing argument, (9) lack of limiting constructions in jury instructions on aggravating circumstances, (10) trial court's failure to find established mitigating circumstances, (11) lack of adequate mental health evaluation, (12) shifting of burden of proof in penalty phase jury instructions, (13) cumulative error, and (14) violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The trial court denied all of Mr. Jones' claims after an evidentiary hearing held in 1996.

On appeal, Mr. Jones challenged the trial court's resolution of his penalty phase ineffective assistance of counsel claim and his *Brady* claim. This Court affirmed. *Jones v. State*, 732 So. 2d 313 (Fla. 1999) (*Jones II*).

On March 27, 2000, Mr. Jones filed a habeas corpus petition in this Court, raising four claims: (1) ineffective assistance of direct appeal counsel, (2) this

Court's application of an incorrect standard of review regarding mitigating circumstances on direct appeal, (3) this Court's failure to address certain issues on direct appeal, and (4) this Court's constitutionally inadequate harmless error review on direct appeal. This Court denied relief. *Jones v. Moore*, 794 So. 2d 579 (Fla. 2001).

### **C. Federal habeas proceedings**

In May, 2000, Mr. Jones filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida, Tallahassee Division. The petition raised the following claims: (1) ineffective assistance of counsel at the penalty phase, (2) *Brady* violation, (3) ineffective assistance of direct appeal counsel, (4) trial court's failure to find established mitigating circumstances, (5) improper presentation of aggravating factors to jury, and (6) this Court's constitutionally inadequate harmless error review on direct appeal.

The district court held the petition in abeyance pending the outcome of Mr. Jones' state habeas proceedings.

In March, 2002, Mr. Jones filed an amended petition to include the results of the state habeas corpus proceedings. The district court later held that petition in abeyance pending the outcome of state court proceedings regarding Mr. Jones' mental retardation claims.

**D. Post-conviction proceedings re: *Atkins v. Virginia*. 122 S.Ct. 2242 (2002).**

On June 17, 2002, Mr. Jones filed a motion pursuant to Fla. R. Crim. P. 3.851(d)(2)(B) and (C) and Fla. R. Crim. P. 3.851(e)(2)(2PC-R. 1-20).<sup>1</sup> Claim I of this motion alleged that Mr. Jones is mentally retarded and that his execution would violate the Florida and United States constitutions. Claim II of this motion contended that Florida's capital sentencing proceedings violated *Ring v. Arizona*, 122 S. Ct. 2428 (2002). After Mr. Jones and the State filed additional pleadings and presented oral argument, the court issued an order denying both claims on December 3, 2002 (2PC-R. 79-83). Mr. Jones appealed.

On November 12, 2004, this Court relinquished jurisdiction to the trial court for an evidentiary hearing on Mr. Jones' mental retardation claim under Rule 3.203, Fla. R. Crim. P.

After holding the evidentiary hearing on Mr. Jones' mental retardation claim, the trial court denied relief. Mr. Jones appealed to this Court. After supplemental briefing, the Court affirmed on May 2, 2005. *Jones v. State*, 2007 Fla. LEXIS 824 (Fla. May 2, 2005) (decision without published opinion). Mr. Jones filed a motion for rehearing, which was denied on July 6, 2007.

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<sup>1</sup>Mr. Jones was also a party in *Floyd, et al. v. Crist*, Fla. Sup. Ct. No. 02-2295, in which the petitioners asked this Court to promulgate rules to implement *Atkins v. Virginia*, 122 S. Ct. 2242 (2002). On March 14, 2003, this Court dismissed the *Floyd* petition without prejudice to raise his mental retardation claims in circuit court.



Mr. Jones supplemented his federal habeas petition pursuant to 28 U.S.C. Sec. 2254 to include the issues raised in his mental retardation and lethal injections claims. That habeas petition remains pending in federal district court.

**E. Post-conviction proceedings re: *Porter* and correcting the appellate record.**

On November 29, 2010, Mr. Jones filed a successive Rule 3.851 post-conviction motion based on the United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) and a claim that a defense exhibit previously admitted into evidence at trial and during post-conviction proceedings was fraudulent and admitted in error based on trial counsel's ineffectiveness (PC-R. 1-31).

After hearing argument of counsel, the trial court summarily denied the claims on March 23, 2011 finding Claim I untimely, that the "law of the case" barred the claim and found no merit to the claim. As to Claim II, the trial court also found the claim untimely, insufficiently pled, and without merit. (PC-R. 159-172). Mr. Jones' timely appealed to this Court on April 22, 2011 (PC-R. 173-188).

**SUMMARY OF THE ARGUMENTS**

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

retroactively. Applying *Porter* to the facts of Mr. Jones' case demonstrates that relief is warranted under *Strickland*.

The trial court erred in failing to correct the appellate record by finding that defense exhibit 9 admitted into evidence at trial was fraudulent and should have been stricken from the record. Through the ineffectiveness of trial counsel, defense exhibit 9 was admitted and considered by the trial court, the post-conviction court, and this Court in deciding this case.

The facts, as pled in Mr. Jones' post-conviction motion, should have been taken as true, and a hearing should have been held to decide whether the exhibit should be stricken from the appellate record. Appellate counsel has an obligation to ensure that the record before this Court is accurate and when facts become known that denigrate the integrity of the lower court record, it is incumbent upon appellate counsel to attempt to correct the record. The trial court's failure to have a hearing on this issue was error.

### **STANDARD OF REVIEW**

Mr. Jones was deprived of the effective assistance of trial counsel at his capital trial. This Court denied Mr. Jones' claim of ineffective assistance of

counsel in a manner found unconstitutional in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The United States Supreme Court decision in *Porter* establishes that the previous denial of Mr. Jones' ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such, *Porter* constitutes a change in law, which renders Mr. Jones' *Porter* claim cognizable in these post-conviction proceedings. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

A Rule 3.851 motion is the appropriate vehicle to present Mr. Jones' claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

The issues presented in this appeal consist of two parts: the first is the determination of whether the *Porter* claim is cognizable, and whether it creates a change in Florida law and is retroactive in nature. That issue is a question of law

that must be reviewed *de novo*. See *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993).

The second is the application of *Porter* to Mr. Jones' case, a determination for which deference is given to findings of historical fact. All other facts must be viewed in relation to how Mr. Jones' jury would have viewed those facts. See *Porter v. McCollum*, 130 S.Ct. 447 (2009); see *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995).

Further, the lower court's findings of fact are owed no deference by this Court when they are tainted by legal error. Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); see also *Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000).

## ARGUMENT I

### **MR. JONES' SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*.**

Mr. Jones' ineffective assistance of penalty phase counsel claim was heard and decided by this Court before *Porter* was rendered. *Jones v. State*, 580 So. 2d 143 (Fla. 1991) (*Jones I*), *cert. denied*, *Jones v. Florida*, 112 S. Ct. 221 (1991). Mr. Jones seeks in this appeal what George Porter received – to have his ineffectiveness claim re-considered and re-evaluated using the proper *Strickland* standard that United States Supreme Court applied in Mr. Porter's case to find a new sentencing was warranted.<sup>2</sup> Mr. Jones seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Jones seeks the proper application of the *Strickland* standard. Mr. Jones seeks to be treated equally and fairly.

The preliminary question is whether the United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and whether *Porter* constitutes a change in law which renders Mr. Jones' *Porter* claim cognizable in Rule 3.851 proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (a change in law can be raised in postconviction if it: “(a) emanates from this Court or the United States Supreme Court, (b) is

constitutional in nature, and (c) constitutes a development of fundamental significance . . .”).

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

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

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

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court addressed whether other death-sentenced individuals should be denied the benefit of the proper construction and application of federal constitutional law. On both occasions, this Court determined that fairness dictated that those death

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<sup>2</sup>When Mr. Porter’s case was returned to the circuit court for resentencing, he

sentenced inmates should be allowed to represent their claims and have those claims judged under the proper constitutional standards. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) (“We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law”); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because “it would not be fair to deprive him of the *Espinosa* ruling”).

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

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

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received a life sentence.

*Id.* (quotations omitted). A court’s inherent equitable powers were recently reaffirmed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the United States Supreme Court explained:

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

*Holland*, 130 S. Ct. at 2563.

As “the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery,” *id.* at 928, the *Witt* Court declined to follow the line of United States Supreme Court cases addressing the issue, characterizing those cases as a “relatively unsatisfactory body of law.” *Id.* at 926 (quotations omitted).



The United States Supreme Court held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).<sup>3</sup>

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

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At issue in *Danforth* was the retroactive application of a United States Supreme Court decision that was in different posture than the one at issue here. In *Danforth*, the United States Supreme Court had issued an opinion which overturned its own prior precedent. In *Porter*, the United States Supreme Court addressed a decision from this Court and concluded that this Court's decision was premised upon an unreasonable application of clearly established law. Thus, for federal retroactivity purposes, the decision in *Porter* is not an announcement of a new federal law, but instead an announcement that this Court has unreasonably failed to follow clearly established federal law.

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

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

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

Here, the issue hinges on the third consideration, as *Porter* emanates from the United States Supreme Court and is clearly constitutional in nature as a Sixth

Amendment *Strickland* case. We look to the *Linkletter* considerations and consider: the purpose to be served by the new rule would be to provide the same constitutional protection to Florida death-sentenced defendants as was provided to Mr. Porter, or to correct the same constitutional error that was corrected in *Porter*; the extent of reliance on the old rule is not presently knowable until reviewing *Porter* claims.

However, if *Porter* error is found to be extensive, there is a compelling reason to correct the constitutional violation because it is great. If *Porter* error is found to be extremely limited, the constitutional error must nevertheless be corrected. If *Porter* error is very limited, the effect on the administration of justice will be to correct a constitutional wrong without expending great resources. If *Porter* error is extensive, the effect will be to justifiably use whatever resources are necessary to correct a far-reaching constitutional problem in death cases.

While the *Linkletter* analysis is not conclusive, *Hitchcock* provides further guidance. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court demonstrated how the *Witt* standard was to be applied. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court issued a writ of certiorari to the Eleventh Circuit

Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida.

In reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence was in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed, and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).<sup>4</sup>

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<sup>4</sup> The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. This Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). On September 9, 1987, this Court issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, this Court stated: "We find that the United States Supreme Court's consideration of Florida's

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

In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood *Lockett*. The United States Supreme Court held that this Court had violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present,

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capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.” In *Downs*, this Court explained: “We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in *Downs*’ prior collateral challenges.” On October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap’s *Hitchcock* claim, but ruled that the *Hitchcock* error was harmless. On October 30, 1987, this Court issued its opinion in *Demps*, and addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error was harmless.

whether or not the particular mitigating circumstance had been statutorily identified. *See id.* at 1071.

Following *Hitchcock*, this Court found that *Hitchcock* “represents a substantial change in the law” such that it was “constrained to readdress . . . *Lockett* claim[s] on [their] merits.” *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because “*Hitchcock* rejected a prior line of cases issued by this Court.” *Downs*, 514 So. 2d at 1071.<sup>5</sup> Clearly, this Court saw that it had misread *Lockett* in

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<sup>5</sup> The United States Supreme Court did not indicate in its opinion that it was addressing any other case or line of cases other than Mr. Hitchcock’s case. The United States Supreme Court expressly stated:

Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. *See, e. g., Cooper v. State*, 336 So. 2d 1133, 1139 (1976) (“The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . .”), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued *Cooper*, pointing to the Florida Supreme Court’s subsequent decision in *Songer v. State*, 365 So. 2d 696 (1978) (per curiam), which expressed the view that *Cooper* had not prohibited sentencers from considering

a whole series of cases. This Court's decision in *Hitchcock* was not an anomaly, but reflected the erroneous construction of *Lockett* that had been applied by this Court consistently in virtually every case in which the *Lockett* issue had been raised. In *Thompson* and *Downs*, this Court acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error should be entitled to the same relief afforded to Mr. Hitchcock.<sup>6</sup>

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so too *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. In *Hitchcock*, the United States

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mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

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

<sup>6</sup> Because the result in *Hitchcock* was dictated by *Lockett* as the United States Supreme Court made clear in its opinion, there really can be no argument that the decision was new law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). Since the decision was not a break with prior United States Supreme Court precedent, *Hitchcock* was to be applied to every Florida death sentence that became final following the issuance of *Lockett*. Certainly, no federal court found that *Hitchcock* should not be given retroactive application. See *Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

Supreme Court found that this Court's decision affirming the death sentence was inconsistent with *Lockett*, a prior decision from the United States Supreme Court. In *Porter*, the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision in *Sears* that explained *Porter*.

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

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



Mr. Hitchcock's *Lockett* claim was not a decision that was simply an outlier. This Court's misreading of *Strickland* that the United States Supreme Court found unreasonable, appears in a line of cases.

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

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

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

The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction

hearing. . . . Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

*Porter v. McCollum*, 130 S. Ct. at 454-55.<sup>7</sup>

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a post-conviction hearing, *see id.* at 451, and “either did not consider or

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<sup>7</sup> The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard which is identical to the prejudice prong of the *Strickland* standard, the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result. In *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995), the majority in responding to a dissenting opinion explained:

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

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

unreasonably discounted” that evidence. *Id.* at 454. The United States Supreme Court noted that this Court’s analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that “the defendant’s background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable.” *Id.* at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel’s presentation of “almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability,” *id.* at 454, even though Mr. Porter’s personal history represented “the ‘kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.’” *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court’s jurisprudence demonstrates that the *Strickland* analysis used in *Porter v. State* was not an aberration, but was in accord with a line of cases from this Court, just as this Court’s *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This is evident in this Court’s decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that court relied on the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense’s mental health expert at a post-conviction evidentiary hearing. This

Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted inconsistencies in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in post-conviction proceedings.<sup>8</sup> In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996) were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a post-conviction evidentiary hearing. In *Grossman*, this Court affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision.<sup>9</sup> In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this

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<sup>8</sup> *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the Second District Court of Appeals was in conflict with *Grossman* as to the appellate standard of review to be used.

<sup>9</sup> This Court acknowledged that there were numerous cases in which it had applied the deferential standard used in *Grossman*. As examples, the court cited *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998); *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993); *Hudson v. State*, 614 So. 2d 482, 483 (Fla. 1993); *Phillips v. State*, 608 So. 2d 778, 782 (Fla. 1992); and *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). However, the list included in *Stephens* was hardly exhaustive in this regard. See, e.g., *Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

Court in *Rose* “independently reviewed the trial court’s legal conclusions as to the alleged ineffectiveness of the defendant’s counsel.” *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*’s very deferential standard in favor of the standard employed in *Rose*.<sup>10</sup> However, the court made clear that even under this less deferential standard

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

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

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<sup>10</sup> The majority opinion in *Stephens* receding from *Grossman* prompted Justice Overton, joined by Justice Wells, to write: “I emphatically dissent from the analysis because I believe the majority opinion substantially confuses the responsibility of trial courts and fails to emphasize a major factor of discretionary authority the trial courts have in determining whether defective conduct adversely affects the jury.” *Stephens v. State*, 748 So. 2d at 1035. Justice Overton explained: “My very deep concern is that the majority of this Court in overruling *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), has determined that it no longer trusts trial judges to exercise proper judgment in weighing conflicting evidence and applying existing legal principles.” *Id.* at 1036.

From an review of this Court’s case law, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard that was used in *Porter v. State* and used to justify this Court’s decision to discount and discard Dr. Dee’s testimony was “an unreasonable application of our clearly established law.” *Porter v. McCollum*, 130 S. Ct. at 455.<sup>11</sup>

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

At the heart of *Porter* error is “a failure to engage with [mitigating evidence].” *Porter*, 130 S. Ct. at 454. The United States Supreme Court found in

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

*Porter* that this Court violated *Strickland* by “fail[ing] to engage with what Porter actually went through in Korea.” *See id.* That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse, or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis.

To engage with the mitigating evidence is to embrace, connect with, internalize—to glean and intuit from mitigating facts the reality of the experiences and conditions that make up a defendant’s humanity. Implicit in the requirement that trial counsel must present mitigating evidence to “humanize” capital defendants, *id.* at 454, is the requirement that courts in turn must engage with that evidence to form an image of each defendant’s humanity. It stands to reason that nothing less than a profound appreciation for an individual’s humanity would sufficiently inform a judge or jury deciding whether to end that individual’s life. And it is the requirement that Florida courts *engage with humanizing evidence*--that is at the heart of the *Porter* error inherent in this Court’s prejudice analysis and *Stephens* deference.

The United States Supreme Court has recognized that “possession of the fullest information possible concerning the defendant’s life and characteristics” is

“[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence ...” *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

The crux of the *Porter* problem is in figuring out *how* this Court failed to engage with the evidence, and *how to* engage with evidence as *Strickland* envisions.

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

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

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

When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the



sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

*Id.* at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must “engage with [mitigating evidence],” *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a “[ ] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.”” *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must “‘speculate’ as to the effect” of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court’s prejudice inquiry must be to *try to find a constitutional violation*.

The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must *search* for it carefully, not dismiss the *possibility* of it with a glancing blow based on information that suggests it may not be there. Looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the unpresented evidence might reasonably have been discounted, it is not answering the question of whether it reasonably **may have mattered** to the jurors. If a court simply speculates as to how a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation **might have** occurred.

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

The Sixth Amendment vests a right to effective assistance of counsel in capital defendants such that when it is reasonably probable that a trial attorney's deficient performance changed the outcome of a case, a constitutional violation occurs. It does not matter whether it is also reasonably possible that the deficient performance did not change the outcome. That is a different inquiry and a contrary standard. The insidiousness of the error is its subtlety because the conclusions seem to have a tendency to negate or, at least, cut against one another. But since the standard is to look for a reasonable probability of a changed outcome, while it seems to tip the scale of the *Strickland* prejudice inquiry that the jury might have taken some of the unpresented evidence to cut against the defendant, that consideration has no place on the scale.

The *Strickland* inquiry being applied by this Court is that relief should be granted if there is a reasonable possibility that the unpresented evidence would not have mattered. But the proper inquiry is to look for any way a constitutional violation might have occurred. This means the Court should err on the side of finding a constitutional violation, rather than permitting an execution despite a violation because it could create a speculative explanation for how a violation might not have occurred. Both conclusions can be true, but *Strickland* is only concerned with one, so that if both are true, a constitutional violation must be

found. If a violation might, with reasonable probability have occurred, it did occur. This is true, regardless of whether the violation might with reasonable possibility have not occurred.

Courts cannot focus on the mitigation that was presented to preclude the consideration of the effects of mitigation that was not presented. By rummaging on the surface and pointing out the easy answer that enough mitigation was presented, by focusing on non-mitigating evidence and asking whether that evidence would have tended to support the outcome, the courts fail to respond to the *Strickland* prejudice inquiry which is to focus on the opposite.

Reversing the *Strickland* standard to ask whether there is a reasonable possibility that unpresented evidence would not have changed the outcome, reverses the standard of the inquiry and thus the burden on the defendant to make a claim under the standard. Dissenting in the denial for a writ of certiorari in *Gamache v. California*, Justice Sotomayor wrote:

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

131 S. Ct. 591, 593 (2010) (citations omitted).

Like the California courts, Florida courts must not violate *Kyles* by failing to take painstaking care in scrutinizing a post-conviction record for everything mitigating that could have made a difference to Mr. Jones' jury.

## **II. *Porter* error was committed in Mr. Jones' case**

Mr. Jones was deprived of the effective assistance of counsel during his trial. *Porter* error was committed in Mr. Jones' case.

Following the denial of Mr. Jones' claim of ineffective assistance of counsel by the trial court, this Court affirmed the denial of postconviction relief. *Jones v. State*, 732 So. 2d 313 (Fla. 1999). The entirety of this Court's ruling on this claim stated:

Assuming *arguendo* that trial counsel was ineffective, we agree with the trial court that appellant did not demonstrate prejudice. The State proved five aggravating circumstances beyond a reasonable doubt: (1) the murder was committed while appellant was under a sentence of imprisonment; (2) Appellant had a prior violent felony conviction; (3) the murder was committed during the course of a robbery; (4) the murder was committed to avoid or prevent arrest; and (5) the victim was a law enforcement officer engaged in performing his official duties. The trial court merged factors four and five. Although the court found no statutory or non-statutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of **most of the nonstatutory mitigation regarding defendant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and the excessive use of marijuana.** Nevertheless, the jury recommended a sentence of death by eleven to one vote, and the trial court sentence appellant in accordance with that recommendation. On this record, we conclude that appellant has failed to establish a reasonable probability that, absent the claimed

errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.

*Jones v. State*, 723 So. 2d at 321(emphasis added) .

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

In post-conviction proceedings, trial counsel testified that the sum total of his preparation for penalty phase of Mr. Jones' trial was to telephone three people in Baltimore (Mr. Jones' home), speak to his client and read his prison records (PC-R.IV 24). He got the information from his client for the Baltimore phone calls, but he had no records of the long distance calls in his motion for reimbursement indicating that he had, in fact, made those calls.

Trial counsel said that the substance of the phone calls was to ask if the family could pay for Mr. Jones' court clothes (PC-R. IV 27). Neither he nor his investigator traveled to Maryland, as his investigator focused solely on guilt phase investigation (PC-R. IV 26).

The prison records trial counsel reviewed were provided by the State in discovery. He did not attempt to get any other records (PC-R. IV 28).

Defense counsel did not investigate Mr. Jones' background thoroughly or provide the court-appointed mental health expert with detailed independent accounts of the effect that years of abandonment, physical and substance abuse had on Mr. Jones. He did not request financial or personnel resources to travel to Baltimore. Mr. Davis recalled that the people he spoke to could not afford to travel to Florida and he had a "feeling" the family "did not have enough interest" to help Mr. Jones (PC-R. IV 29-30). Testimony from family members at the postconviction evidentiary hearing refuted that "feeling." (PC-R. IV 129).

When the jury found Mr. Jones guilty at the end of guilt phase, trial counsel Davis finally requested court authorization to retain a mental health expert, which was on a Friday (PC-R IV 31). Mr. Davis then requested a continuance through the weekend because he was not prepared to go forward with penalty phase on Monday (PC-R. IV 32-33).

Dr. Larry Anis, whom Davis had not spoken to prior to the court's appointment on Friday, was given the same jail records the State provided and was asked to find statutory and non-statutory mitigation. He was given no independent background information (PC-R IV 32-33). Davis told Dr. Anis he was on a "fairly short notice" and would have liked to have had more time, but "the Court's given us until Monday morning to do what we're going to do. This is

what I have to work with. Do the best you can. Help.” (PC-R IV 66). He did not tell Dr. Anis to speak with family members because he had “no luck” with them (PC-R. IV 44).

Dr. Anis’s testimony reveals that he obtained the background information he used in his evaluation solely from Mr. Jones’ self report and the jail records provided by the State (PC-R. IV 44).

During penalty phase on the following Monday, Mr. Davis never asked Dr. Anis if he found statutory mental health mitigation despite the fact that he directed him to evaluate Mr. Jones for it (PC-R. IV 45). He asked Dr. Anis to address mental retardation, but not Mr. Jones’ chronic history of substance abuse or the effects of Mr. Jones’ HIV condition (PC-R. IV 46-47). Mr. Davis did not believe he “needed” anyone who knew anything about HIV and wanted to minimize Mr. Jones’ addictions and HIV disease (PC-RIV 66).

Trial counsel never questioned Dr. Anis during the penalty phase on either statutory or non-statutory mitigating factors relating to mental health, thus ignoring the entire purpose of the penalty phase proceeding. Davis believed the better theory was to talk about Mr. Jones’ “wasted life full of tragedy” and that was the only way to explain the crime (PC-R. IV 53). Davis testified that “[Jones] had a totally wasted life that had no positive impact whatsoever and why kill a person



for killing somebody else when in his culture and his entire mind-set it really wasn't a big deal to him; not that he was not remorseful, but that killing an officer did not hold the level of negativity with a person of his background than it would from a normal middle class background." (PC-R. IV 69).

In preparing his report, Dr. Anis said "I used a lot of statements that Mr. Jones stated. I was advised by the defendant." He never talked to anyone from Mr. Jones' family and in response to the prosecutor's question on cross examination, Dr. Anis testified, "I never met [Clarence Jones] until Friday." This was two days before penalty phase began.

Dr. Anis' cursory testimony was severely impeached due to counsel's lack of preparation. The State mocked Dr. Anis's testimony in its closing. Davis' unreasonable failure to investigate and present mitigating evidence for penalty phase left him with the following closing argument:

You know, the next time you talk to a right-to-lifer about probably an early death penalty, think about that. Listen. This probably is a life that never should have been to begin with. But once he's here, we can't weigh him by [a] standard that he has absolutely no concept of." (RT. 3510).

In the trial court's sentencing order, the judge found, "Dr. Anis did not testify, however, that the defendant Jones suffered from any form of mental or emotion illness at any time during his life, much less at the time of the commission

of the capital felony in this case.” (RT. 107). Throughout the sentencing order, the trial court made clear there was no evidence of any connection between Mr. Jones’ life history and the commission of the crime for statutory or non-statutory mitigation.

The evidence presented at the post-conviction hearing showed otherwise.

Cecilia Alfonso, a licensed clinical social worker, testified at the evidentiary hearing that she reviewed information from several sources and went to Baltimore to interview Mr. Jones’ sisters, Audrey, Jessie and Rachel, and the mother of Mr. Jones’ son, Antawan (PC-R IV 83).

She learned that three months after Clarence was born, his mother was incarcerated for 6-8 months for child neglect (PC-R IV 133). Clarence’s mother was such a severe alcoholic that she could not be a proper parent (PC-R. IV 89). She fed beer to Clarence as an infant to fatten him up (PC-R IV 126). He began drinking beer by himself at age 3 or 4 (PC-R IV 127).

Clarence’s father, Wesley, attempted to fill the roles of mother and father. He was 30 years older than Mrs. Jones and had eight children to raise, while working to try to support the family (PC-R. IV 88-89). Clarence’s parents fought physically and emotionally in front of the children because of his mother’s extramarital affairs (PC-R. IV 90).

When Clarence was 5 years old, his father shot one of his wife's boyfriends in front of the children who were frightened and horrified (PC-R. IV 91). Clarence's mother would routinely leave the children on a Friday and not return until Sunday or Monday. Then violence would erupt when she returned home.

One time, Wesley beat his wife with brass knuckles and she took his gun. Wesley got the gun away from her outside and shot her (PC-R. IV 118). He was arrested and Clarence's mother was taken to the hospital (PC-R IV 92).

When Clarence was 11 years old, a fire was deliberately set by a homeless woman who was living in their house. She set the fire in retaliation for being asked to leave the house. (PC-R. IV 97-98). Wesley was standing on the porch trying to find out if someone was in the house when the porch collapsed. His skull was fractured and he subsequently died (PC-R IV 97).

Clarence was greatly affected by his father's death. He became quiet and withdrawn (PC-R. IV 98). The loss was very traumatic in that his father was the only stabilizing force in his life.

After his father's death, family violence followed Clarence. His mother moved in with her long-time lover. During this time, his older sister, Audrey, got into an argument with her brother Theodore and stabbed him to death (PC-R IV. 94). The social worker, Ms. Alfonso, testified that Audrey's response was

indicative of the lessons Clarence's family had learned from their parents about how to resolve conflicts (PC-R. IV 95).

No one was there to replace Clarence's father, his mother provided no guidance and his other siblings were not present or capable of filling the void (PC-R IV 99). Clarence was closest to his brother, Michael Jones, who was later shot to death in a back alley craps game (PC-R IV. 100).

Clarence's coping mechanism was to descend into drug use and misbehaving (PCR. IV. 100, 142-43). Ms. Alphonso testified that "there was so much instability that there was no way to insulate the family" from "crime, violence, the drugs and substance abuse." (PC-R. 1V 103).

Police officer Viola White tried without success to get Clarence's mother to pay attention to her children (PC-R. IV 105 ). Ms Alphonso testified that the childhood trauma endured by Clarence had consequences into adulthood. Clarence suffered from significant mood changes in response to stress. He made bad decisions every time he was confronted with everyday life decisions (PC-R. IV. 188).

Mr. Jones' sister, Audrey Sullivan, testified that she was one of eight children and Clarence was the youngest (PC-R. IV. 114). Their parents did not get along often because of her mother's affairs. Her mother and another man

would stay away all weekend (PC-R. IV. 115-16). Wesley did not believe his wife was staying with a girlfriend and that led them to physically fight. Clarence was present during these fights (PC-R. IV. 117). Ms. Sullivan had killed their brother Theodore after he had scratched and bit her face. She responded by stabbing him and Theodore ultimately bled to death (PC-R. IV. 123). Two of Clarence's other brothers (Charles and Michael) died, one violently. Of Clarence's four brothers, three died early on (PC-R. IV. 125). Clarence's other brother, Herbert, was regularly in trouble and constantly locked up in jail (PC-R. IV. 138).

From Clarence's relationship with Carolyn Fenton, they had two children. One is deceased. The other, Antawan, was born on August 16, 1979 (PC-R. IV. 145). Like his father, Antawan has inherited his father's mental disabilities. Antawan has qualified for social services and has been labelled "disabled, mentally retarded and mentally disturbed" (PC-R. IV. 145-48).

Antawan was only reading at a fourth grade level in tenth grade. Ms. Felton testified that Antawan has mental and emotional problems that have existed since he was born and could be genetic (PC-R. IV. 148). Her last contact with Clarence was in February, 1983 when their daughter died (PC-R. IV. 150). Both

Ms. Felton and Ms. Sullivan would have been willing to testify at Clarence's penalty phase had they been asked by trial counsel (PC-R. IV. 149-50).

Dr. Jethro Toomer, a forensic psychologist, testified that the effects of being raised in this environment are lifelong unless there is some "significant intervention." (PC-R IV. 188-89). The earlier the child suffers from these deprivations, the more severe the effects. Dr. Toomer spoke with Ms. Felton and Ms. Sullivan, he reviewed extensive documents and conducted psychological testing. He interviewed Mr. Jones twice over a two year time period (PC-R. IV. 164-78). He administered a number of tests including the Bender-Gestalt Design test, the Wide Ranges Achievement Test, a revised Beta examination and a Carlson Psychological Survey (PC-R. V. 178).

Dr. Toomer found that Clarence's intellectual functioning was in the lower portion of the general population and that his reading skills were a second grade level, spelling was at a fourth grade level, and math at a fifth grade level (PC-R. V. 179). His psychological survey indicated that he was a depressed with significant deficits in self concept, a history of substance abuse, and poor social adjustment. He found indications of organic brain damage (PC-R V. 180).

Dr. Toomer found the family dysfunction included the inability to provide the necessary physical, emotional and psychological resources to raise a healthy

child (PC-R. V. 186). He had early onset trauma from being abandoned by his mother. He was constant witness to violence as he grew up and a lack of a caring and physically present family resulted in head trauma and abuse (PC-R. V. 181). These factors had behavioral consequences because they affected Clarence's decision-making and problem-solving abilities. He found there was no support from other sources, such as school or church. Clarence was left to "basically develop on his own." (PC-R. V. 183). He dropped out of school and was easily influenced by negative peers (PC-R. V. 187). He became a chronic user of alcohol and drugs, including marijuana and cocaine (PC-R. V. 185).

Dr. Toomer also found a family history of mental problems. One of Clarence's grandfathers died in a mental institution (PC-R. V. 185). His sister, Audrey Sullivan, was placed in special education classes (PC-R. V. 185). Clarence's "behavior was characterized by some significant cognitive and intellectual deficits as manifested by his special placement in school." (PC-R. V. 187).

Dr. Toomer found that Clarence suffers from a personality disorder and probably from neurological impairment and organic brain damage (PC-R. V. 189). These impairments have a long history and existed in July, 1988. This means Mr. Jones would lack the capacity to weigh the consequences or figure out alternatives

to particular acts which resulted in his impulsive behavior (PC-R. V. 190). He believed Clarence suffered from an extreme mental or emotional disturbance at the time of the crime (PC-R. V. 192), and his capacity to conform his conduct to the requirements of law was substantially impaired (PC-R. V. 195).

Dr. Barry Crown, a neuropsychologist, confirmed Dr. Toomer's suspicions that Mr. Jones suffered from organic brain damage (PC-R. V. 211-12). He conducted a battery of tests, reviewed the same background materials as Dr. Toomer, and performed an examination of Mr. Jones (PC-R. V. 209). Based on his review of the information and test results, Dr. Crown concluded that Mr. Jones has a "significant" neuropsychological impairment that means "organic brain damage and the relationship between his brain functioning and behavior." (PC-R. V. 211-12). He conducted a battery of tests which are the only way to determine brain damage. In addition to performing tests, he consulted with Dr. Toomer, Ms. Alphonso and spoke with family members including Mr. Jones' son, Antawan (PC-R. V. 214). The information he received from these individuals was consistent with his conclusions that Mr. Jones suffers from organic brain damage (PC-R. V. 214).

Mr. Jones' brain dysfunction affected his ability to move from concrete to abstract thinking (PC-R. V. 215). Mr. Jones was functioning like a 8.5 year old



child in this capacity (PC-R V. 216). This was consistent with Mr. Jones having these deficits in 1988 and confirmed by records at age 12 showing an IQ score of 67.

Dr. Crown found that Mr. Jones was under the influence of a mental or emotional disturbance at the time of the crime and that his ability to conform his conduct to the requirements of law was substantially impaired (PC-R. V. 218).

Scott Folk, a medical doctor whose practice is limited to treating adult infectious diseases such as HIV and AIDS, reviewed Mr. Jones' medical and inmate records (PC-R. V. 254). The records indicate that on July 14, 1988 and on August 9, 1988 tests established that Mr. Jones is HIV positive (PC-R. V. 255). Dr. Folk said Mr. Jones will develop AIDS which is the final stage of the HIV infection. There is no cure for the virus or AIDS. (PC-R. V. 256-57). Dr. Folk testified that AIDS kills people because the person becomes "increasingly vulnerable or susceptible to certain types of infections and cancers. Those infections and cancers in turn can be fatal." (PC-R. V. 257). Dr. Folk believed Mr. Jones could suffer this fate and die from AIDS (PC-R. V. 271).

Thus, it is clear the trial judge in his findings "failed to engage" with the testimony that could have been presented to Mr. Jones' jury had his counsel done a

reasonably competent investigation prior to trial. The findings in this case are starkly in violation of *Porter*.

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

Mr. Jones' substantial claim of ineffective assistance of counsel has not been given serious consideration as required by *Porter*. Mr. Jones requests that this court perform the analysis of this claim which has as of yet been lacking and examine the sheer volume of horrifying, mitigating personal history that is present in this case but as yet unrecognized.

This analysis is not the sort of probing and fact-specific analysis which *Porter* and *Sears* require, especially in light of the *Brady* claim that was never put before a judge or jury. This Court did not address what a jury may have thought compelling about such mitigation. Both the trial court's findings and the cursory acceptance of those findings by the this Court violate *Porter*, as a probing inquiry into the facts of this case leads only to the conclusion that counsel prejudiced Mr.

Jones by performing deficiently. As in *Porter*, this Court discounts to irrelevance Mr. Jones' mitigation.

At trial, the defense only presented evidence from Dr. Anis. Dr. Anis had only been retained the Friday before penalty phase that began on the following Monday. Defense counsel did not investigate Mr. Jones' background thoroughly or provide Dr. Anis with detailed and independent accounts of what his life was truly like.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In this case, as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis. It failed to conduct any analysis of what competent trial counsel could have done with the mitigation available. As it was presented, the jury had no idea of Mr. Jones' struggles. It is not what the trial judge would have been persuaded by, but what the jurors would have thought. See, *Light v. State*, 796 So. 2d 610 (Fla. 2d DCA 2001).

Mr. Jones' claim of ineffective assistance of counsel has not been given serious consideration as required by *Porter*. Mr. Jones requests that this Court

perform the analysis of this claim which has been lacking and examine the mitigating personal history that is present in this case but has gone unrecognized.

This Court failed to conduct a proper *Strickland* analysis on Mr. Jones' claim. While the errors committed by counsel are of varying severity—some relatively minor and some hugely prejudicial—it was incumbent on the court to take a thoughtful look and envision how those errors piled one on top of another might cumulatively prejudice Mr. Jones. 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*.

## **ARGUMENT II**

**THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING OR CORRECT THE APPELLATE RECORD WHEN MR. JONES SUFFICIENTLY PLED THAT TRIAL COUNSEL HAD INTRODUCED A FRAUDULENT GED DIPLOMA FROM THE MARYLAND DEPARTMENT OF CORRECTIONS INTO EVIDENCE WHEN THE DOCUMENT WAS NOT AUTHENTIC.**

At trial, Mr. Davis introduced during penalty phase, defense exhibit 9, a Maryland High School diploma/GED purportedly completed by Mr. Jones while incarcerated in Maryland's Department of Corrections on March 30, 1985. (PC-R. 30). However, during Dr. Anis' testimony he doubted whether Mr. Jones had the capacity to complete the test.

During the *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) hearing, Dr. Dennis Keyes, an expert in mental retardation, also doubted the accuracy of the GED examination, particularly after Mr. Jones told him he did not remember taking the test and did not believe he took it. Dr. Keyes discussed that Dr. Anis relied on a GED Mr. Jones had taken while he was in prison (T. 46). Dr. Keyes pointed out that Dr. Anis had concluded that the skill levels required for a GED and Mr. Jones' actual skill levels did not line up (T. 46). Dr. Keyes agreed with Dr. Anis' conclusion (T. 46). Mr. Jones did not specifically remember the GED test, but told Dr. Keyes that someone else probably took the test for him (T. 46-47).

It has been confirmed by the Maryland Board of Education that the GED registry number 164055 listed on defense exhibit number 9 taken from the State's discovery provided to defense counsel did not belong to Clarence J. Jones. There are no records of Mr. Jones ever getting a GED from the Maryland Board of Education. (PC-R. 30). As a result, the trial court has relied on incorrect and fraudulent information in rendering its decision. Likewise, the jury and this Court relied on the fact that Mr. Jones had completed a GED program in rejecting his penalty phase ineffective assistance of counsel claims at trial, in post-conviction and in rejecting his mental retardation claims at the mental retardation hearing.

Mr. Jones argued that trial counsel unreasonably presented defense exhibit 9 contrary to his client's comments that he could not remember taking such a GED course and without investigating the State's discovery. This prejudiced Mr. Jones, not only at trial, but in every legal proceeding since then because the courts had relied on inaccurate information in denying his claims of ineffectiveness and mental retardation. See, *Strickland v. Washington*, 466 U.S. 668 (1984).<sup>12</sup>

At the case management hearing, undersigned argued that it is incumbent on appellate counsel to correct the appellate record with accurate information. See,

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<sup>12</sup>Mr. Jones also argued in the alternative that the State knew and failed to disclose the fraudulent document. See, *Brady v. Maryland*, 373 U.S. 83 (1963); *Banks v. Dretke*, 540 U.S. 668, 696 (2004)(a rule "declaring 'prosecutor may hide,

*Stuyvesant Insurance Co. v. State*, 375 So. 2d 620 (Fla. 3d DCA 1979)(where record is inaccurate, it is the duty of the party concerned to submit and settle the matter in the lower court); *Nations v. State*, 145 So. 2d 239 (Fla. 2d DCA 1962)(evidence of fabricated record requires submission to the lower court). Thus, it was within the trial court's jurisdiction to correct the record regarding this fabricated diploma. See also, *Fla. R. App. P. 9.200(e)*. Mr. Jones also argued that a hearing was necessary to establish the fact that the GED was fraudulent and that the files and records did not conclusively rebut this claim. (PC-R. 199-201); see also *Lemon v. State*, 498 So. 2d 923 (Fla. 1986).

The trial court, however, refused to either correct the record or grant Mr. Jones an evidentiary hearing to establish that correcting the record was necessary (PC-R. 165-172). The court held that the claim was time barred. It also held the claim insufficiently pled citing *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006) and *Parker v. State*, 904 So. 2d 370, 378 (Fla. 2005). The court said Mr. Jones had not "alleged specific facts that, if accepted as true, established a *prima facie* case. (PC-R. 167). However, Mr. Jones had pled "specific" facts in his pleading showing that the exhibit was false and substantiated those facts with a copies of Maryland Department of Education correspondence showing the GED exhibit was

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defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

false. These documents were attached to the Rule 3.851 motion complete with the name of Nancy S. Grasmick, State Superintendent of Schools and the GED office phone number (PC-R. 30) .

It is unclear what additional facts the court required. The State had no difficulty responding to the claim, and the trial court did not hesitate to address the merits and find that the fraudulent exhibit had no effect on Mr. Jones' penalty phase or *Atkins* hearing. (PC-R. 168)(“if the falsity of the GED were proved or if the GED had not been used at trial, the totality of the evidence rebuts the prejudice required for this claim;” “whether Jones obtained his GED was inconsequential when he was sentenced and remains inconsequential now”). The trial court plainly addressed the merits by inserting its own conjecture as to the effects of the fraudulent GED exhibit on the trial and the mental retardation hearing decisions. It found the effects inconsequential, in part, because the trial court did not mention the GED in its order. Yet, it was the prosecution at trial that made the GED an issue to Mr. Jones' jury. It argued in closing:

You know, he [Mr. Jones] gave you those certificates concerning his past. I think he got his GED. He got a certificate in a woodworking course. I think he got a prison ministries certificate; he got a couple of certificates from the PTL Club signed by Mr. Bakker. You know, we're not interested in his past. (R. 2529).



The State asked the jury to disregard Mr. Jones' social history mitigation based on the GED and other prison certificates. Had the GED not been introduced, the State could not have made this argument at trial or at the mental retardation hearing. The trial court's conclusion that the introduction of the fraudulent exhibit did not prejudice Mr. Jones was not rebutted by the record. *Id.* Thus, Mr. Jones was entitled to a hearing on the issue.

The trial court also stated that neither *Strickland* nor *Brady* "appl[y] to postconviction proceedings. But, this reasoning ignores the mandate of *Kyles v. Whitley*, 115 S.Ct. 1555 (1995) and *Fla. Stat.* §27.702 (1988). *Kyles* states that the prosecution has a "continuing duty" to disclose evidence even in post-conviction. It also is incumbent upon collateral counsel to provide Mr. Jones with "effective legal representation" in post-conviction. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988)("[u]nder §27.702 each defendant under sentence of death is entitled as a statutory right to effective legal representation by the capital collateral representative.").

Finally, the trial court discounts Mr. Jones' argument that it is incumbent upon appellate counsel to "correct the appellate record" when she becomes aware of errors in it. The court said such allegations would "require an evidentiary hearing **in about every case** in which a postconviction defendant has claimed a

*Brady* or *Giglio* violation based on misrepresentations in the record.” (PC-R. 171)(emphasis added). In fact, Fla. R. Crim. P. 3.851 **does** allow for an evidentiary hearing in every case that raises a legitimate *Brady/Giglio* violation, even in a successor post-conviction motion. See Fla. R. Crim. P. 3.851 (5)(B ).

Moreover, the trial court misconstrued the law to only apply if the appellate review of the case has not been completed. Neither *Stuyvesant Ins. Co v. State*, 375 So. 2d 620 (Fla. 3d DCA 1979) nor *Nations v. State*, 145 So. 2d 259 (Fla. 2d DCA 1962) state that the issue of an improper trial exhibit cannot be raised when counsel receives evidence that proves the falsity of the exhibit. Moreover, the appellate review of this case has not been “completed” when a post-conviction motion and a federal habeas petition remain pending in state and federal courts.

Contrary to the trial court’s suggestion, this is not an instance where there is a mere difference of opinion or a conflicting interpretation of a trial transcript about what a witness said or did. Here, the Maryland Board of Education has definitively stated in writing that Mr. Jones has not obtained a GED. Thus, the diploma admitted into evidence at trial was a fake. There are no conflicting interpretations of this fact. Mr. Jones either did or did not receive a GED from the State of Maryland. At a minimum, Mr. Jones was entitled to an evidentiary hearing to prove this fact.



## **CONCLUSION**

Based on the foregoing, Mr. Jones respectfully requests that this Honorable Court find that the *Porter* claim is properly before this Court, and grant Mr. Jones a new penalty phase based on the deprivation of the effective assistance of counsel in introducing a fraudulent trial exhibit and this Court's misinterpretation of the *Strickland* prejudice analysis pursuant to *Porter*.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that counsel has furnished true and correct copy of the foregoing via U.S. Mail, first class postage prepaid, to opposing counsel this 31<sup>st</sup> day of August, 2011.

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**CERTIFICATE OF FONT**

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

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