IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-182

LEONARDO FRANQUI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S STATEMENT OF CASE AND FACTS

There are numerous inaccuracies and downright falsities in the Statement of the Case and Facts set forth in the State's Answer Brief. Rather than catalogue them all, Mr. Franqui herein addresses those most pertinent to the issues before this Court.

In addressing the motion for appointment of the undersigned, Martin McClain, as registry counsel which was served on November 26, 2010, the State omits any reference to the reason that the Eleventh Circuit Court of Appeals in Atlanta discharged Mary Catherine Bonner as counsel for Mr. Franqui. As set forth in the motion, Mr. McClain on behalf of Mr. Franqui explained:

> After the Florida Supreme Court affirmed the denial of collateral relief, Ms. Bonner sought and obtained the appointment under the Criminal Justice Act to represent Mr. Franqui in the U.S. District Court federal habeas proceedings in which Mr. Franqui challenged his state court conviction and sentence. However, a conflict of interest arose between Ms. Bonner and Mr. Franqui when he filed Rule 60(b) motion alleging that she had committed fraud upon the federal courts. The State recognized that a conflict of interest had arisen which precluded Ms. Bonner remaining as Mr. Franqui's counsel in a pleading filed in the Eleventh Circuit Court of Appeals entitled Response to Response to Appellant's *Pro Se* Motion for Appointment of Counsel and Extension of Time, provided in pertinent part:

> Under *Gonzalez v. Crosby,* 545 U.S. 524, 532, 125 S. Ct. 2641, 2648 (2005), a Rule 60 motion must allege "some defect in the integrity of the federal habeas proceedings" and "not the substance of the federal court's resolution of a claim on the merits" to avoid being considered a successive petition. Here, the alleged defect in the habeas proceeding on which Appellant chose to base his motion was that his counsel allegedly committed "egregious misconduct" and a "fraud on the court."
>
> Response to Response to Appellant's *Pro Se* Motion for Appointment of Counsel and Extension of Time, at 4-5 (footnote omitted). After receiving the State's pleading, the Eleventh Circuit Court of Appeals removed Ms. Bonner as Mr. Franqui's counsel. As a result, undersigned counsel was appointed by the Eleventh Circuit to assume collateral representation of Mr. Franqui in federal court as to his challenge to the conviction and sentence of death.

(2PC-R. 82). Thus, Ms. Bonner was removed as counsel due to a conflict which the State recognized as a conflict which warranted the appointment of new counsel.

After omitting any reference to how Ms. Bonner had been removed from the case by the federal court, the State then indicates that in the motion for appointment of counsel, "[Mr. McClain] suggested that Defendant **was somehow** without counsel to represent him in state court and sought to be appointed because he was familiar with the case." (Answer Brief at 10 (emphasis added).) There was no "somehow" about it; it was explained that a conflict arose and that the State recognized the conflict in federal court.

The State makes reference to the December 2, 2010 hearing before Judge Trawick on the motion for appointment that had been served on November 25, 2010. The State ignores the fact that the hearing was held without notice to either

Mr. McClain or Mr. Franqui. Indeed after denying the motion and appointing the public defender's office, Judge Trawick directs his staff in the courtroom: "Make sure, Tomeka, that Albert has a copy of the attorney's name, phone number because he has to call him, tell him that the Public Defender is being appointed and not himself." (2PC-R. 254.) As to this December 2 hearing, the State does assert that even though Judge Trawick conducted a hearing on the motion, he "had not been assigned to hearing the case." (Answer Brief at 10.) The State's assertion is just baffling. Judge Trawick presided at the December 2 hearing, and at hearings on December 7, 9, and 21 of 2010. (2PC-R. 31.)

The State does make the point that the Chief Judge "[b]y order dated December 8, 2010" assigned Mr. Franqui's case Judge Stanford Blake. Answer Brief at 10. However as the order plainly shows it was not filed in the case until December 13, 2010, at 2:19 PM. (2PC-R. 87.) Though the order of assignment indicates that a copy was to be provided to Mr. McClain, it was not until he arrived for a hearing set before Judge Trawick on December 21, 2010, that as Mr. McClain explained on the record, he learned that "the case ha[d] been transferred to Judge Blake." (2PC-R. 32, 258.)

The State then asserts: "On December 21, 2010, Mr. McClain attempted to get Judge Trawick to enter an order appointing him as counsel even though he was aware the matter was assigned to Judge Blake." (Answer Brief at 13.)

Fortunately, we have a record that more accurately shows what transpired. Counsel for the State, Kathy Sagesse, indicated: "I spoke with Ms. Levine, she called your chambers. She said that Your Honor would remember that there was something." (2PC-R. 258.) Judge Trawick responded, "I know." Mr. McClain, not being privy to the contact between Ms. Levine and the judge's chamber, then inquired: "That it was transferred to Judge Blake." Judge Trawick responded: "Not without me having been told about it. I know that Judge Blake is supposed to hear it, but we're trying to deal with this attorney issue as well." (2PC-R. 258.) Thereupon, the following exchange occurred:

> THE COURT: Judge Blake is likely going to be handling this case because he's dealt with it up to this point, but that's still pending. It's not been shifted to him, so I hope to deal with this at one time. We can't do anything right now because, number one, Ms. Levine is not here, and number two, Judge Blake has not gotten back to me, and number three, where is Mr. Franqui?
>
> MR. MCCLAIN: Death row.
>
> THE COURT: He's on death row. Well, I don't have to deal with number three.
>
> So counsel, let me go ahead, hear from you on the issue of counsel. Do you want to be hear on this right now?
>
> MR. MCCLAIN: Your Honor, I'm happy to heard right now. I'm happy to explain my position or, you know, if it needs to be delayed at some point in time in the future that's fine as well.
>
> THE COURT: Considering this is a death case, I'll be more comfortable in having the present.
>
> MR. MCCLAIN: I understand that.

(2PC-R. 259.)

As to the subsequent proceedings before Judge Blake, the State asserts:

> Recognizing that Defendant's original post conviction counsel had not been discharged, the lower court then setting [sic] the matter for a hearing who would represent Defendant. (PCR@. 277-81) At a hearing on January 13, 211, the lower court permitted Defendant's original post conviction counsel to withdraw and appointed Mr. McClain to represent Defendant over the State's objection

(Answer Brief at 14.) Actually on January 10, 2011, even though the State had told the federal courts that Ms. Bonner had a conflict and should not remain as Mr. Franqui's counsel, the State argued that "Ms. Bonner has not been released by the State. The federal courts can't tell the state court, 'Look, you to have his counsel here [sic],' Ms. Bonner remains to be his counsel." (2PC-R. 273.) Judge Blake announced: "I am going to take a break. I will let you guys go and I'm going with with [sic] Mr. Franqui's case." (2PC-R. 276.) He later said: "So what I will probably do, Ms. Jaggard, is set a phone conference with you, Ms. Bonner and Mrs. Fay to make sure everyone is in this hearing, and I will appreciate your help with this." (2PC-R. 280.)

The January 13, 2011, hearing before Judge Blake commenced with Judge Blake explaining:

> All right, Mr. McClain, let me explain what just occurred or what has happened since we were last in court. There is some question whether Ms. Bonner is still on Mr. Franqui's case or not or if anyone else is appointed in Mr. Franqui's case, and subsequent to that hearing, I had my J.A. reach Ms. Bonner's office, who said, "Well, I'm not on the case," and I was asking her to appear today. She is maybe at the airport or on a plane, but her office said that Thomas Fallis, who is in Jacksonville, is the attorney of record on this case.

(2PC-R. 286.) After some discussion at the January 13th telephonic hearing regarding who Mr. Fallis was, Judge Blake interrupted and announced:

> Ms. Bonner is on the phone now. I have just been informed and she indicated that Mr. Fallis is not the attorney of record, that she says that you are. However, you are appointed in the federal court to take over after Ms. Bonner.

(2PC-R. 288.) It was after Judge Blake reported that Ms. Bonner had advised that she was not counsel for Mr. Franqui and had been his counsel since Mr. McClain was appointed to represent him in federal court that Judge Blake then granted the motion for appointment of counsel. (2PC-R. 119.) The order entered by Judge Blake made no mention of a discharge of Ms. Bonner; it merely appointed Mr. McClain as Mr. Franqui's registry counsel *nunc pro tunc* to November 1, 2010.

ARGUMENT I

MR. FRANQUI MUST RECEIVE THE BENEFIT OF THE EVOLUTIONARY REFINEMENT OF *STRICKLAND* ANNOUNCED IN *PORTER V. MCCOLLUM*

The entirety of the State's argument as to whether disparate application of *Porter v. McCollum*, 130 S. Ct. 447 (2009) may result in unconstitutionally arbitrary treatment of capital defendants rests on the premise that Mr. Franqui is asserting that "the refusal to apply any alleged change in law retroactively in a capital case results in a violation of *Furman v. Georgia*." (Answer Brief at 19.) However, the State fails to appreciate the constitutional significance of the

evolutionary refinement of *Strickland* in *Porter*. It is not, of course, all changes in or refinements of law that implicate the Eighth Amendment or require retroactive application. The reason selective and inconsistent application of *Porter* implicates the Eighth Amendment protection against arbitrariness in capital sentencing is that it alters, or undermines, one of the particular features of Florida's capital sentencing system that the U.S. Supreme Court explicitly relies on to keep that system *Furman*-compliant.

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 not merely incorrect but *unreasonable*—to be unsupported by reason. 130 S. Ct. 447, 455 (2009). In *Walton*, this Court found that correcting that lack of reason in its *Strickland* analysis did not fundamentally change its *Strickland* analysis such that retroactive, or consistent, application of *Porter* was required under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). However, 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 reviewing Florida's capital sentencing system for 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 fair treatment, 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 (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, just 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*. That is the critical point that the State is missing: Mr. Franqui is not arguing that every change in law must be applied consistently or retroactively in order to prevent unconstitutionally arbitrary results, only those that strike at the heart of Florida's capital process and were explicitly relied on by the U.S. Supreme Court in finding that process to be, as a general matter, constitutional.

And the State should be every bit as concerned as capital defendants with the proper workings of that process.

> If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. *Zant v. Stephens*, 462 U.S. 862, 873–880, 103 S. Ct. 2733, 2741–2744, 77 L. Ed. 2d 235 (1983); *Furman v. Georgia*, 408 U.S., at 294, 92 S. Ct., at 2754 (BRENNAN, J., concurring).

Spaziano, 468 U.S. at 460. It is simply irrational to apply one of the essential underpinnings of Florida's *Furman*-compliance differently across defendants. And the State has an obligation, if it wants to have death as a criminal penalty, to administer that penalty rationally and consistently.

The State cites *Kansas v. Marsh* for the proposition that there are "two requirements that *Furman* actually imposes and neither of them is retroactive application of any alleged change in law." (Answer Brief at 27.) Assuming that the State, if properly appreciating the significance of *Porter* to the *Spaziano/Proffitt* line of *Furman* application to Florida's system, would continue to assert that neither of the *Furman* requirements identified in *Marsh* require consistent application of *evolutionary refinements to the essential* Furman *features of Florida's capital sentencing system* (rather than merely "any alleged change in law"), it must be made clear that selective and inconsistent application of *Porter* across defendants goes to the *Furman* requirements identified in *Marsh*. *Marsh* identifies one requirement as "permit[ing] a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's

record[and] personal characteristics . . . ." *Marsh*, 548 U.S. at 173-74. That individualized sentencing determination, that consideration of personal characteristics, is the very requirement that is tinkered with when *Porter* is turned on and off depending on the court and the defendant and the point in time. That requirement of *Furman* for individualization is the very thing that is jeopardized by requiring more of some capital trial defense attorneys than others.

The State fails to recognize that Mr. Franqui was tried after Mr. Porter. How can it be said that the *Porter* refinement, which we know to be *significant enough to mean life rather than death for George Porter, Terrell Johnson and Richard Cooper*, does not cause arbitrary results when it is applied to the 1986 Porter trial, then suspended for Mr. Franqui's 1998 resentencing proceeding, and then reinstated for post-*Porter* cases, and otherwise selectively applied to defendants in between? The very thought is offensive to our sense of justice, and while that alone is not necessarily a constitutional problem, this mistreatment of defendants 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 opportunity—the same opportunity—to present mitigation which serves further to trigger the *Furman* protection of appellate review of that mitigation.

The State, disastrously confusing the notions surrounding the present issue, argues that the U.S. Supreme Court has held that retroactivity "is not a constitutional issue at all," (Answer Brief at 27), suggesting, apparently, that the nature of the underlying constitutional right affected by a new case bears no relation, "at all," to the need for consistent or retroactive application of that right. That notion is soundly rejected by the very sources of authority the State cites to support the notion. The State cites *Solem v. Stumes*, which, in addition to providing an extremely pro-retroactivity backdrop for the present issue ("As a rule, judicial decisions apply 'retroactively.' Indeed, a legal system based on precedent has a built-in presumption of retroactivity." 465 U.S. 638, 642 (1984)), provides the following analysis:

> Complete retroactive effect is most appropriate where a new constitutional principle **is designed to enhance the accuracy of criminal trials.** *See Williams v. United States*, 401 U.S. 646, 653 & n. 6, 91 S.Ct. 1148, 1152 & n. 6, 28 L.Ed.2d 388 (1971) (plurality opinion) (citing cases). The *Edwards* rule has only a tangential relation to truthfinding at trial. As we have noted in the past, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson v. New Jersey*, *supra*, 384 U.S., at 728-729, 86 S.Ct., at 1778-1779. The application of the exclusionary rule pursuant to *Edwards* is perhaps not as entirely unrelated to the accuracy of the final result as it is in the Fourth Amendment context. *See United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). Yet the *Edwards* rule cannot be said to be a sine qua non of fair and accurate interrogation.

Id. at 643-44 (emphasis added). That analysis is extremely revealing because it

makes clear that in our precedential judicial system, in which retroactivity is presumed for reasons of fairness, changes to those rights or rules that go to enhance the truth-finding duty at trial are closer to the center of the preference for retroactivity. In other words, the State's precedent, while recognizing that "retroactive application is not compelled, constitutionally . . . ," *id.* at 642 (which is presumably the morsel of legal analysis that the State took away from the case), teaches that truth-seeking rules must be applied consistently and retroactively. And it is axiomatic that the right to effective counsel presenting a comprehensive mitigation case in satisfaction of a defendant's *Lockett* right—that *Porter*-mandated search for a defendant's essential humanity amidst all his many experiences and characteristics packaged into a mitigation case—is the pinnacle of judicial truth-seeking: the need to understand a human being before deciding to end his life. What more critical search for truth could there be?

Beyond the federal constitutional necessity of recognizing *Porter's* impact on this case, Mr. Franqui also requests that this Court revisit its ruling in *Walton* to square Florida's treatment of *Porter* with its significance as a watershed moment in Florida's constitutional jurisprudence. In response, the State again misstates Mr. Franqui's argument. The State asserts that "Defendant suggests that because this Court labeled *Porter* as an 'evolutionary refinement,' its decision not to apply *Porter* retroactive[ly] was standardless." (Answer Brief at 21.) Again, the State

prefers to deal with this issue in the abstract, as a matter of labels and blind reliance on how things used to be, rather than delving perspicaciously into what *Porter* really means in Florida's capital sentencing system and getting to the bottom of the real-life effects its application will have across defendants. It is not this Court's labeling of *Porter* as an evolutionary refinement of *Strickland* that makes it critical to capital sentencing in Florida; it is *Porter's* proven life-or-death impact in capital cases and essentialness to the U.S. Supreme Court's consideration of Florida's capital sentencing scheme.

In the same vein, the State bemoans the difficulty in ferreting out a *Porter/Strickland* violation, as opposed to *Hitchcock* and *Espinosa* errors, which were addressed by this Court retroactively and "required simply examining the jury instructions . . . ." (Answer Brief at 23.) While the effect on the administration of justice is a factor under *Witt*, the State seems to prefer to focus on the easy administration rather than the accurate administration of justice, or to think of its obligations as being to streamlining judicial proceedings rather than ensuring just results in capital cases. It seems to be more concerned with the allocation of the State's budget resources than complying with—not some quixotic conception of absolute justice—but with the very plain mandate from the U.S. Supreme Court that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally

distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460. In other words, treating Mr. Franqui the same as Mr. Porter is the price the State pays, quite literally, for being in the business of deciding whose lives should be terminated for their crimes.

The State asserts, falsely, that Mr. Franqui "does not now, nor has he ever, argued *Porter*, *Hitchcock* and *Espinosa* are alike with regard to [the *Witt* factors of] '(1) the purpose of the new rule, (2) the purported extent of previous reliance on the old rule, and (3) the purported effect that the retroactive application of the new rule would have on the administration of justice.'" (Answer Brief at 22.) Those considerations underlie Mr. Franqui's entire argument and, quite clearly, are its subject and guide. Mr. Franqui has made clear that the purpose of the *Porter* rule is of paramount constitutional significance: to permit meaningful, engaged consideration of mitigating evidence in all cases so that Sixth and Eighth Amendment protections are operative in every capital case in Florida. Mr. Franqui has made clear that this paramount purpose outweighs the expenditure of time and money that is the cost of ending lives as criminal punishment. *Witt* applies to capital and noncapital cases, and surely it can be seen that in the capital context considerations of saving resources are dwarfed by the profound importance of rationally and fairly deciding whose life to end in the name of the People. Further, defendants who wished to raise *Porter* claims have done so and we've seen the

finite and manageable nature of the amount of litigation that extending *Porter* retroactively to capital defendants would have. Finally, the effect on the administration of justice is the quintessence of this entire case and everything Mr. Franqui is arguing for: justice through consistent treatment. It eviscerates the fundamental principle of truth-seeking to choose cost savings over accuracy in capital cases. 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. Franqui how the State can deny him the same constitutional treatment received by other capital defendants based on the argument that reconsideration of his evidence would be too burdensome.

Rather than recognizing the profound importance of *Porter*, the State views *Porter* as having found "nothing more than that this Court had unreasonably applied *Strickland*" (Answer Brief at 24), as if the fact that a capital defendant was nearly executed by the State unconstitutionally after decades of litigation to rightfully recover his right to life was an insignificant affair that should not raise any concerns outside that case. That concern is the basis on which Mr. Franqui pleads for the right to receive the benefit of *Porter*. And as it can only further the ends of justice and truth-seeking, the basis for the State's opposition is less clear.

The State also misconstrues the meaning of provisions of 28 U.S.C. § 2254 and the nature of the U.S. Supreme Court's review of this Court's decisions in

order to argue that *Porter* does not stand for the proposition that there was a problem in this Court's *Strickland* analysis in *Porter*, despite the holding in *Porter* to that very effect. This is an important point and it requires a close look. The State argues as follows:

> As the United States Supreme Court has explained, a state court decision first within the "unreasonable application" provision of 28 U.S.C. § 2254(d)(1) when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). When a state court made an error in the legal standard, its decision is defined as "contrary to" under 28 U.S.C. § 2254(d)(1). *Id.* at 412-13. Thus, by finding that this Court's decision was an unreasonable application of *Strickland*, the Court found that the legal standard this Court applied was correct. It simply found this Court unreasonably applied that correct standard to the facts of the case.

(Answer Brief at 24). Again, the State chooses abstract wordplay over trying to get to the heart of the matter when it comes to *Porter's* true meaning. The State argues that since the U.S. Supreme Court in *Porter* found that this Court's analysis was an unreasonable application of *Strickland* rather than a decision contrary to *Strickland*, this Court's error in *Porter* could not rest in its conception of *Strickland*. (Answer Brief at 24.) That is a misreading of § 2254. It is the correct *identification* of the governing legal principle—*Strickland*—and not the correct *conception and understanding* of that legal principle that distinguishes between the provisions of § 2254(d)(1). The fact that this Court correctly identified *Strickland* as governing Porter's ineffective assistance of counsel claim certainly does not

mean that it conceived of and applied that principle properly in *Porter*. Put simply, the error in the analysis can be in the conception and use of the rule and/or the application of the rule to the facts. There is nothing to suggest it cannot be the former when the rule has been properly identified.

In order to understand where this Court went wrong in *Porter*, one must read the U.S. Supreme Court's opinion while thinking critically about where the true problem lies. Mr. Franqui argues that such a reading results in the inescapable conclusion that the error in *Porter* was in the fundamental conception of how to treat mitigating evidence under *Strickland* and not in the particular mitigation at hand in *Porter*. An effective way to demonstrate the error in the State's reading is to consider the following question: since *Porter* states that mitigating evidence cannot be unreasonably discounted by *Strickland* courts, can it make sense to limit that ruling only to the particular sort of evidence at issue in *Porter*? The obvious answer is *no*, because doing so would be to say that it is constitutionally acceptable to unreasonably discount certain types of evidence. Of course, it is not, so *Porter* is about more than the particular facts of that case. It is about *Strickland* itself; it is about the constitutional analysis itself, because unreasonably discounting mitigation is a failure to understand *Strickland* and its constitutional requirements, not just a failure to appreciate the particular mitigation at hand. According to this Court, the *Strickland* standard as applied in Florida evolved in *Porter*. That

acknowledgment means that Florida's present day *Strickland* analysis is something different than what it was before the decision in *Porter*. The State's argument to the contrary has no moment in a post-*Walton* analysis, because this Court has already acknowledged a change in its *Strickland* jurisprudence resulting from *Porter*.

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 a different result for George Porter, Terrell Johnson and Richard Cooper, and required their death sentences to be overturned. Knowing all that, it cannot be denied that the newly evolved and refined *Strickland* standard that this Court has recognized was announced in *Porter* may require a different result for Mr. Franqui 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. *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. 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?

ARGUMENT II

NEWLY DISCOVERED EVIDENCE OF A *BRADY/GIGLIO* VIOLATION WARRANTS RULE 3.851 RELIEF AND MANIFEST INJUSTICE WARRANTS INVOCATION OF THE COURT'S INHERENT EQUITABLE POWERS AND THE ISSUANCE OF RULE 3.851 RELIEF

An affidavit and postconviction testimony from Mr. Franqui's co-defendant and the key State witness against him in this case, Abreu, demonstrates that the witness is not credible and that the consideration of Mr. Franqui's involvement in the Hialeah case in assessing his culpability in this case was greatly overinflated and based on false testimony.

In response to that fact, the State spends some nine pages wholesale quoting this Court's treatment of the affidavit in the Hialeah case, including two entire pages of this Court stating the governing legal standards. (Answer Brief at 33.) This Court found that Abreu's new information did not create a reasonable probability of a different outcome in that case, relying on the trial court's findings that Abreu's two stories were reconcilable to some extent and thus the new evidence was less weighty. (Answer Brief at 37.) *Franqui*, 59 So. 3d at 101-06.

However, whether the new evidence would probably alter the result of the Hialeah case and whether it would alter the assessment of Mr. Franqui's culpability and death worthiness in this case are separate inquiries. The denial of relief in the Hialeah case does nothing to undermine the impeachability of Abreu in this case for giving divergent statements, and it does not mean that, while the extent to which it undermines Mr. Franqui's conviction and sentence in the Hialeah case is insufficient to merit relief, it cannot, playing a different role here as aggravation, differently affect the assessment of aggravation.

The lower court's finding that Abreu's new testimony and affidavit have no affect at all on the sentencing assessment in this case unconstitutionally discounts that evidence completely.

The State cites many precedents to the effect that defendants are not entitled to attack prior convictions used as aggravation. (Answer Brief at 42.) However, Mr. Franqui need not and does not attempt to establish that the new Abreu evidence necessarily supports reversal of his Hialeah conviction in order to properly argue that it changes Mr. Frainqui's culpability in that offense and the assessment of Abreu's credibility in the instant case. The State attempts to hold Mr. Franqui to a higher standard than is necessary. Mr. Franqui need only show that the new Abreu evidence alters the aggravation/mitigation and credibility assessment here such that confidence is undermined in the outcome of Mr.

Franqui's penalty phase.

Further, the State's precedents in support of this proposition are cited in error. The State cites *Johnson v. United States*, but that case interprets the timeliness provision of 28 U.S.C. § 2255 to determine when a federal habeas petition by an individual convicted in a federal capital case can challenge his sentence based on the vacating of a state conviction used as an aggravator. *See* 544 U.S. 295, 305 (2005). Unless the State is attempting to suggest that this Court should apply federal habeas law in assessing whether Mr. Franqui can pursue his new evidence claim in this case, the bearing of that case on this issue is lost on Mr. Franqui. The State's citation to *Daniels v. United States*, 532 U.S. 374 (2001), also a § 2255 case involving a federal defendant, is similarly irrelevant.

The State's citation to *Taylor v. State*, is misguided because that case involves a situation where a capital defendant made a claim that the prior conviction used as an aggravator against him was invalid because he had waived a jury trial unknowingly and involuntarily. *See* 3 So. 3d 986, 999 (Fla. 2009). Again, that is not the same as the situation in this case. This case involves new evidence that impacts this case independent of the underlying prior conviction and need not completely invalidate or require the reversal of that underlying prior conviction in order to have significance in the sentencing assessment here. Mr. Franqui's culpability can be reduced in the Hialeah case to an extent relevant and material

here without it necessarily requiring a reversal in that case, where a different body of evidence was involved.

Accordingly, the State's argument based on *Lackawana County Dist. Attorney v. Coss*, 532 U.S. 394 (2001) that the finality of the Hialeah case creates a procedural bar to challenging its validity in order to challenge its use as an aggravator is similarly inapplicable.[1] Regardless of whether relief is warranted in the Hialeah case, the fact that Abreu changed his story bears on the assessment of his credibility and the assessment of the aggravating evidence here.

While *Blanco v. Sec'y Dept of Corrs.*, 688 F.3d 1211 (11th Cir. 2012), teaches that the State's failure to disclose its possession of favorable evidence or information regarding a prior conviction that is used to established an aggravating circumstance in a capital case violates *Brady*, the State argues that case should be brushed aside because the Eleventh Circuit found the claim to be meritless in that case. However, the recognition of the legal rule, of course, still serves as authority

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[1] In *Blanco v. Sec'y Dept. of Corrs.*, 688 F.3d 1211 (11th Cir. 2012), the Eleventh Circuit specifically asked the parties to address at oral argument whether under *Lackawana County Dist. Attorney v. Coss*, Blanco's *Brady* claim was procedurally barred. In its opinion denying relief, the Court did not find the claim barred and found that this Court had erred in procedurally barring the claim. Though the Eleventh Circuit denied relief on the merits, it did recognize the validity of a challenge to a death sentence premised upon evidence that would negate the weight of a valid conviction offered by the State to aggravate a capital conviction and justify a death sentence. After the Eleventh Circuit ruled, the State of Florida unsuccessfully sought a rehearing on its conclusion that such a claim was not procedurally barred.

regardless of the conclusion reached by applying the rule to the facts of a particular case. Mr. Franqui is not limited to asserting only precedents were the defendant ultimately prevailed. The fact is, the type of claim asserted by Mr. Franqui here is cognizable and based on a previously recognized use of the *Brady* rule.

The State also argues in its Answer Brief that the claim premised upon the Abreu affidavit was untimely. However for all the reasons set forth in the State's untimeliness argument, Mr. Franqui argues that his court appointed registry attorney, Mary Bonner was ineffective within the meaning of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Indeed, Justice Scalia in his dissent in *Martinez* said:

> There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of "newly discovered" prosecutorial misconduct, for example, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), claims based on "newly discovered" exculpatory evidence or "newly discovered" impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel. The Court's soothing assertion, ante, at 1320, that its holding "addresses only the constitutional claims presented in this case," insults the reader's intelligence.

132 S. Ct. at 1321 (Scalia, J., dissenting). Under *Martinez*, Mr. Franqui's equitable right to effective representation in his initial opportunity to present his newly discovered evidence claim premised upon the Abreu affidavit must defeat the timeliness raised by the State. Ms. Bonner's failure to exercise diligence upon Mr. Franqui's behalf cannot equitably be allowed to foreclose Mr. Franqui from an

opportunity to present the claim.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. FRANQUI'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENTS UNDER ATKINS V. VIRGINIA

Evidence of substantial limitations of present functioning and/or significantly subaverage general intellectual functioning was sufficient for this Court to relinquish for an evidentiary hearing in the Hialeah case. The result of that hearing and the determination of the body of evidence offered in that case has no bearing on whether there is sufficient evidence of mental retardation to require a hearing. Mr. Franqui is entitled to an evidentiary hearing in this case just as he was entitled to an evidentiary hearing in the Hialeah case. The circuit court's summary denial of this claim flies in the face of and is diametrically opposed to this Court's determination in the Hialeah case that evidentiary development is warranted.

In avoidance of that fact, the State constructs a straw man by holding Mr. Franqui to a standard of proving an entitlement to relief under *Atkins v. Virginia*, 536 U.S. 304 (2002) in order be entitled to present evidence to support a claim under *Atkins*. That reasoning is circular and legally erroneous. The record in this case, containing the same information on which a hearing was warranted in the Hialeah case, establishes an entitlement to evidentiary development just as it did in that case. The State's suggestion that Mr. Franqui must satisfy all the requirements

of *Atkins* as a matter of proof before being permitted to present evidence on the point is mistaken.

The claim in the instant case is that the circuit court erred in summarily denying the claim, but the State fails to defend that denial, opting instead to take advantage of the fact that Mr. Franqui has not even had an opportunity to present evidence of mental retardation by arguing that Mr. Franqui has not presented an IQ score on a qualifying test or satisfied the prongs for mental retardation from *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007). However, the record, just as it did in the Hialeah case, sufficiently suggests mental retardation such that a hearing is warranted on this claim and summary denial is inappropriate, just as it was in that case.

CONCLUSION

Mr. Franqui respectfully requests this Court to vacate his sentence of death and grant him a new trial or relinquish for evidentiary development.

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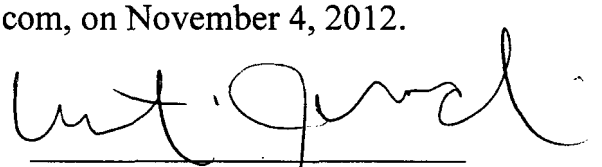
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was furnished by email to Sandra Jaggard, Assistant Attorney General, as her primary email address: capapp@myfloridalegal.com, on November 4, 2012.



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