ORIGINAL

DOCKET NO. 08-10537

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

GEORGE PORTER, JR.,

Petitioner,

vs.

ATTORNEY GENERAL, State of Florida,

and

SECRETARY, Florida Department of Corrections,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a competency hearing constitutes a critical stage of a capital proceeding when a defendant's competence to stand trial is reasonably in question, thereby mandating that the defendant be represented by counsel until the issue of competency has been resolved?

2. Whether a state court's prejudice determination with regard to ineffective assistance of counsel, which requires that a defendant demonstrate that he was deprived of a reliable penalty phase proceeding "by the greater weight of the evidence", is contrary to the standard set forth in Strickland?

3. Whether a state court's determination is entitled to deference in federal habeas proceedings when the state court's analysis is based on an unreasonable application of clearly established federal law?

4. Whether *de novo* review of a Strickland claim is appropriate where no finding was made by the state court regarding deficient performance?

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Petitioner, **GEORGE PORTER, JR.**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINION BELOW

The Eleventh Circuit's opinion reversing the district court's issuance of the writ of habeas corpus appears as Porter v. Attorney General, Case No. 07-12976 (11th Cir. Dec. 18, 2008), and is Attachment A to this petition. The Eleventh Circuit's Order denying Porter's petition for rehearing en banc and petition for rehearing is Attachment B to this petition. The district court's order granting relief in part is Attachment C to this petition. The district court's order granting additional relief following Porter's motion to alter or amend judgment is Attachment D to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1254(1). The Eleventh Circuit entered its opinion reversing the district court's granting of relief on December 18, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

PROCEDURAL HISTORY

An indictment filed in the circuit court for Brevard County on October 28, 1986, charged Porter with the first degree murders of his ex-lover, Evelyn Williams, and her boyfriend, Walter Burrows (R. 2578-79).

After the trial had commenced, Porter pled guilty to all charges (R. 1522-23). Subsequent to a penalty phase proceeding, the jury recommended death sentences for both murders (R. 2273). On March 4, 1988, the trial court imposed a death sentence for the murder of Williams and a life sentence for the murder of Burrows.

On direct appeal, the Florida Supreme Court struck the circuit court's finding of the heinous, atrocious, and cruel (HAC) aggravator: "[t]his record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful." Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(emphasis in original). Porter challenged the proportionality of his sentence but, because the trial court found no mitigating circumstances, the Florida Supreme Court held that "the death penalty is not disproportionate to other cases decided by this

Court." Porter, 546 So. 2d at 1064-65.[1] This Court denied certiorari on February 19, 1991. Porter v. Florida, 111 S. Ct. 1024 (1991).

On June 22, 1992, Porter filed a Rule 3.850 postconviction motion (PC-R. 21-32). After several amendments, on January 4-5, 1996, the circuit court held a hearing regarding whether trial counsel rendered effective assistance of counsel at the penalty phase. Thereafter, on May 10, 1996, the circuit court denied relief (PC-R2. 1203-15). On appeal, the Florida Supreme Court affirmed the lower court's order. Porter v. State, 788 So. 2d 917 (Fla. 2001). On December 6, 2001, Porter filed a state habeas petition in the Florida Supreme Court. The petition was denied on January 9, 2003, rehearing denied on March 13, 2003. Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

On October 14, 2003, Porter filed a federal habeas corpus petition in the United States District Court for the Middle District of Florida (Doc. 1).[2] On June 18, 2007, the district court issued an order granting penalty phase relief as to Ground III of Porter's amended petition (Doc. 34).[3] On June 21, 2007,

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[1]Two justices dissented on the basis that a proportionality review mandated reversal of the penalty. Id. at 1065 (Barkett, J., concurring in part and dissenting in part with an opinion, in which Kogan, J., concurs.)

[2]In accordance with the district court's order (Doc. 9), Porter filed an amended petition and a memorandum of law on May 20, 2004 (Docs. 13, 15).

[3]Porter had alleged in Ground III of his habeas petition that trial counsel rendered ineffective assistance of counsel during the penalty phase, and that the state court's

(continued...)

the State filed a Notice of Appeal (Doc. 36). Thereafter, on June 28, 2007, Porter filed a motion to alter or amend judgment as to other grounds upon which the district court denied relief (Doc 38). On October 31, 2007, the district court issued an order granting relief as to Ground V in which Porter alleged that he had received ineffective assistance of counsel with regard to his competency determination (Doc. 41). On November 5, 2007, the State filed an Amended Notice of Appeal (Doc. 43).

On November 15, 2007, Porter filed a Notice of Cross-Appeal (Doc. 45). On that same date, Porter filed an Application for a Certificate of Appealability (COA) as to those grounds in which the district court did not grant habeas relief (Doc. 46). On December 10, 2007, the district court denied Porter's application (Doc. 47). Thereafter, Porter filed an application for COA before the Eleventh Circuit, which was denied on April 9, 2008 (Doc 50).

On December 18, 2008, subsequent to briefing and oral argument, the Eleventh Circuit issued an opinion reversing the decision of the district court and entering judgment for the State. Porter v. Attorney General, Case No. 07-12976 (11th Cir. Dec. 18, 2008). Porter's petition for rehearing en banc and petition for rehearing was denied on February 18, 2009.

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[3](...continued)
determination in denying relief was objectively unreasonable.

FACTS RELEVANT TO QUESTIONS PRESENTED

A. Trial proceedings

On March 16, 1987, the public defender assigned to represent Porter filed a motion to withdraw, citing a potential conflict of interest (R. 2616). The motion was granted, and on June 17, 1987, attorney Sam Bardwell entered an appearance as Porter's counsel (R. 2660).

On September 27, 1987, Porter filed a letter requesting that Bardwell withdraw because of a conflict of interest (R. 2716). On November 6, 1987, the State filed a Motion For Appointment Of Psychiatrist to determine Porter's competence to stand trial (App. D). On November 10, 1987, the court appointed experts to determine Porter's competency (R. 2662-64).

No activity appears in the record until a November 20, 1987, hearing at which Porter appeared *pro se* (R. 2506).[4] Thereafter, on November 30, 1987, Porter appeared *pro se* at his Faretta and competency hearings (R. 1568). The court gave Porter copies of the experts' reports and some time to review them (R. 1571-72). The court then noted, "I will probably go through the Faretti

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[4]The record does not contain any proceeding at which Porter initially requested to represent himself. The only pretrial hearings contained in the record are from February 25, 1987 (R. 2473), March 13, 1987 (R. 2495), November 20, 1987 (R. 2506), November 24, 1987 (R. 1544), and November 30, 1987 (R. 1569). At the February and March hearings, Porter was represented by Assistant Public Defender Brian Onek; at the November hearings, Porter appeared *pro se*. No request by him to do so appears in the record.

{sic} inquiry at least one more time even though we've done it several times in the past" (R. 1573).[5] After asking several questions the court found Porter competent to represent himself at trial (R. 1574-82).

The court then held a hearing regarding Porter's competence to stand trial. Porter represented himself at the hearing (R. 1584). The State and Porter stipulated that the experts' reports would be received as evidence in lieu of live testimony (R. 1583-84). The court asked Porter more questions, most of which had yes or no answers; it asked both the State and Porter whether they had questions about Porter's competency; and then it found Porter competent to stand trial (R. 1596-98). Porter then proceeded to trial, representing himself.[6]

On December 5, 1987, four days into the trial, Porter abruptly stopped the trial and announced he wanted to plead guilty to all charges (R. 1469-75). The court accepted the plea, stating that Porter was alert, able, intelligent, and understood the consequences of his plea (R. 1522-23). Hours later, Porter attempted suicide by twice throwing himself head first from the second level of the jail to the concrete floor (R. 1659).

On December 8, 1987, the State again petitioned the court to conduct a competency evaluation because "the defendant's demeanor and conduct cast doubts upon his present mental condition." (R. 2756-57). The trial court granted the motion, and Porter was

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[5]No previous inquiries appear in the record.

[6]Bardwell acted as standby counsel.

examined by the same mental health experts (R. 2758-60, 2800, 2802-03). After cursory examinations, Porter was found competent to stand trial (R. 2803).[7] The case continued on to a penalty phase with Bardwell acting as defense counsel (R. 1654, 1780-83).

During the penalty phase proceedings, Porter's ex-wife, Patricia Porter, testified that Porter loved and behaved appropriately with his son during visitation, and it was difficult to determine whether Porter was intoxicated (R. 2041-46). Bardwell then read the testimony of Lawrence Jury, who testified during the guilt phase. Jury testified that Porter was "not a lush, but he's pretty close to it", he was a mean drunk, he was drunk the night before the murder, and, on occasion, it was difficult to determine whether Porter was intoxicated (R. 2070-84).

At the conclusion of the penalty phase, the jury recommended death sentences for both murders (R. 2273). On March 4, 1988, the trial court imposed a death sentence for the murder of Williams, finding four aggravating circumstances and no mitigating circumstances. However, the court imposed a life sentence for the murder of Burrows, noting that the two aggravating circumstances which applied to that murder were "technical" (R. 2452-53).[8]

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[7]Porter also moved to set aside his guilty pleas, which the trial court denied (R. 1780-81).

[8]The two "technical" aggravators identified by the court were: 1) the contemporaneous conviction of another capital felony and 2) the crime was committed during the commission of a burglary (R. 2436; 2438-39).

B. Postconviction proceedings

During his postconviction evidentiary hearing, Porter presented extensive mitigating evidence which had not been utilized by trial counsel during the penalty phase. For instance, evidence was presented demonstrating the abuse Porter suffered as a child. Porter witnessed his father routinely beat his mother, at times sending her to the hospital (App. A at 10-11). When Porter attempted to protect his mother, he took the brunt of his father's beatings (App. A at 11). According to testimony, the rage exhibited by Porter's father seemed to accompany his daily activity of getting drunk (App. A at 9, 14). While he was violent with all of the members of his family, Porter was more often the target of his father's rage than his other siblings (App. B at 6, 28-29)(App. A at 10, 27).

Evidence was also presented establishing Porter's heroic military service. Porter's military records indicate that he enlisted in the Army at 16 years of age, on August 30, 1949 (D-Ex. 3). Porter was a member of Company B of the First Battalion of the 23rd Regiment of the 2nd Division of the United States Army (D-Ex. 3)(T. 126). At seventeen, Porter fought in two of the most devastating and important battles of the Korean Conflict: Kuni-Ri and Kapyong-Ni.

Lieutenant Colonel Sherman Pratt, who commanded Company B, described the 23rd Regiment's experiences in the Korean Conflict (T. 126). At Kuni-Ri, after having crossed the 38th Parallel, American forces, specifically the Eighth Army, were suddenly attacked by a large Chinese contingent (T. 131). Colonel Pratt

explained that the decision was made to withdraw: "Well, the -- the challenge at that time was to try to save the Eighth Army so it could fight another day -- save it from complete development and perhaps annihilation." (T. 131-32). Colonel Pratt stated that the tactical plan was to leave the 2nd Division, in which Porter was assigned, behind to fight a rear guard action:

> **That division was left behind to be the last unit out.** And whether or not the save -the Eighth Army could be saved depended to a large extent on how long that division could hold the Chinese back long enough to let the rest of the Eighth Army escape.

(T. 132)(emphasis added). The 2nd Division succeeded, but at a ghastly price (T. 132). The division had over 50 percent casualties and was rendered combat ineffective; yet, it stayed in position (T. 132). Colonel Pratt explained that on November 28th, while the rest of the Eighth Army was rapidly deploying southward to and below the 38th Parallel, two of the regiments of the 2nd Division -- the 9th and the 38th Regiments -- finally got their permission to withdraw (T. 132-33). Porter's regiment, the 23rd, continued to stay behind (T. 133).

Colonel Pratt emphasized the significance of the 2nd Division's stand. Because of the rear guard action of the 2nd Division, essentially the whole Eighth Army escaped relatively intact (T. 134-35). As Colonel Pratt explained:

> **[T]he battle at Kunu-Ri that we participated in and held off the rest of the Chinese those precious few hours until the rest of the Eighth Army could withdraw, that was a very decisive thing because if we had not held off for just those few hours, the Chinese very likely would have gotten behind the whole Eighth Army.** And if they had cut the roads behind them, they would

have wound up -- most of the Eighth Army would have wound up so badly devastated that the Korean War, I feel and many historians agree with me, would have been over at that point.

(T. 144)(emphasis added).

Colonel Pratt also testified more specifically about the conditions Porter and the 2nd Division encountered during this stand with the Chinese:

> We went into position there in the bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant -- for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies.
>
> We went into position around midnight, just worn out. And the troops, we occupied -- set up their positions. And my instructions were {sic} that the units to the front were pulling through us and we were to guard their withdrawal and that they -- when they finished withdrawing, we would be notified.
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> * * *
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> Just as dawn -- the first, gray, rosy fingers of dawn were coming through the eastern horizon, **suddenly the Chinese were on us by the hundreds. And there developed for the next hour or so a fierce hand-to-hand fight with the Chinese on our position on top of the hill.**
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> * * *
>
> By late in the day as we were getting more and more antsy, we finally got -- about four o'clock in the afternoon, finally got permission to withdraw ourselves. **It made us the last unit of the Eighth Army to withdraw from North Korea.**

(T. 138-40)(emphasis added).

Colonel Pratt described the next major battle, Kapyong-Ni, in which his battalion and Porter engaged:[9]

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[9]Colonel Pratt verified from his records that Porter was still in his regiment during this battle (T. 143).

. . . At that point, the intelligence reports showed that the Chinese were amassing a tremendous build up of troops to the front just to the north of this regiment -- the 23rd Regiment Combat Team commanded by Colonel Paul Freeman.

At that point, Colonel Freeman began to wire back and say -- radio back and say, boy there's a tremendous build up of enemy troops here, isn't it time for me to start withdrawing and relocating. And to his great surprise, the High Command says, no, you're not going to withdraw. I want you to go into perimeter defense, an all around defense because you're going to be cut off from the rest of the Eighth Army. Dig in deep, lay in ammunition and supplies, and prepare to stand and fight.

* * *

All right. The Battle of Chipyong-ni {sic} developed, as I say, we spent a week or ten days everybody digging in deep, preparing their foxholes, laying in extra grenades, ammunition, preparing their fields of fire.

So the instructions to the regimental command, the regimental combat team, Colonel Freeman, was that not to worry, that you stand and fight . . .

And on the night of February the 13th, 1951, the Chinese began to attack shortly after dark hitting on the northwest corner of that perimeter. Every unit on the front line was under constant fire; but they were dug in well, had their positions well located.

* * *

So they defended themselves effectively for two days and two nights. It was almost unrelenting. Constantly. Air -- air box car came in and resupplied them. As the box cars swooped low and dropped their parachutes and pulled up, the Chinese fired through the bellies of the planes as they pulled away.

* * *

. . . So along about noon, the Baker Company moved out . . . to retake enemy positions.

As you can well imagine, they were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire that you can imagine and they were just dropping like flies as they went along. Baker Company on that occasion lost -- we lost -- I lost all three -- three of the platoon sergeants were

> killed. **All of the -- almost all of the officers were wounded and casualties for the company was over 50 percent.** But we did get back up to the hill and were {sic} hanging on by our fingernails when about that time the airforce came through with some help and they dropped some napalm and by dark we had reoccupied the top positions and had closed the gap there. But that was the -- that was the operation that took place on that day.

(T. 142-51)(emphasis added). Colonel Pratt testified that these events "were very trying, horrifying experiences" (T. 152), and that Porter's experiences would have been even worse since his company "sustained the heaviest casualties of any troops at the Chipyong-ni {sic} Battle" (T. 153).

For his courageous service, Porter was awarded the National Defense Service Medal for enlisting in time of conflict, the United Nations Service Medal for serving with United Nations forces in the Korean conflict, the Korean Service Medal with three Bronze Service Stars,[10] the Combat Infantryman's Badge, and two Purple Hearts (with first cluster) for being wounded in combat; he was also favorably considered for the Good Conduct Medal,[11] he is entitled to receive the Korean Presidential Unit Citation, and the Army gave him an honorable discharge (T. 158-61).

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[10]Porter received one Bronze Star for each campaign in which he participated in combat during the Korean War. See Guide for the Preparation and Submission of Post Traumatic Stress Disorder Research Requests, (P.68)(undated) U.S. Army and Joint Services Environmental Support Group, 1230 K Street, N.W., Washington, D.C. 20006-3868 (hereafter, Guide).

[11]The Good Conduct Medal is awarded for persons whose conduct over a three-year period reflected no major disciplinary problems.

The Combat Infantryman's Badge is a unique award earned only by those who bear the brunt of combat -- the infantry. Porter's DD-214 indicates that he was awarded this badge November 17, 1950 and he therefore met the following requirements:

COMBAT INFANTRY BADGE

a. Eligibility requirements

(1) An individual must be an infantry officer in the grade of colonel or below, or an enlisted man or a warrant officer with infantry MOS, who subsequent to 6 December 1941 has satisfactorily performed duty while assigned or attached as a member of an infantry unit of brigade, regimental, or smaller size during any period such unit was engaged in active ground combat. **Battle participation credit alone is not sufficient; the unit must have been in active ground combat with the enemy during the period. Awards may be made to assigned members of ranger infantry companies assigned or attached to tactical infantry organizations.**[12]

(Emphasis added). Colonel Pratt testified that the Combat Infantryman Badge "is a very prized medal awarded for combat infantrymen who served satisfactorily. They are not issued automatically. He could have only gotten it upon my recommendation as his commanding officer" (T. 159).

Porter's records further indicate that he is "entitled to award of (the) Korean Presidential Unit Citation" as of January 8, 1951 (D-Ex. 3). Following are the reasons for awarding this honor:

UNIT LEVEL DECORATIONS DENOTING COMBAT PARTICIPATION

PRESIDENTIAL UNIT CITATION

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[12]See Guide, pp. 60, 61.

> The Presidential Unit Citation is awarded to units of the Armed Forces of the United States and cobelligerent nations for **extraordinary heroism** in action against an armed enemy occurring on or after 7 December 1941. **The unit must display such gallantry, determination and esprit de corps in accomplishing its mission under extremely difficult and hazardous conditions as to set it apart and above other units participating in the same campaign. The degree of heroism required is the same as that which would warrant award of a Distinguished Service Cross to an individual.**[13]

(Emphasis added). As noted above, the Presidential Unit Citation is compared to the Distinguished Service Cross -- but for an entire unit. The Distinguished Service Cross is second only to the Medal of Honor, and the requirements for the Distinguished Service Cross are as follows:

> * * *
>
> (d)istinguished by extraordinary heroism, not justifying the award of a Medal of Honor; while engaged in an action against an enemy of the United States; while engaged in military operations involving conflict with an opposing/foreign force or engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party. **The act or acts of heroism must have been so notable and have involved risk of life so extraordinary as to set the individual(s) apart from one's comrades.**[14]

(Emphasis added). Porter's regiment received that award for its engagement at Kapyong-Ni (T. 160).

During the postconviction evidentiary hearing, Porter also presented the testimony of Dr. Dee, a clinical psychologist and neuropsychologist. Based on extensive testing of Porter as well as materials documenting Porter's background, Dr. Dee testified that Porter suffers from brain damage and post traumatic stress

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[13]Guide, pp. 69, 70 (emphasis added).

[14]Guide, p. 52 (emphasis added).

disorder (T. 205-7, 209-10, 211-14, 220, 229, 234). A head injury Porter sustained during the Korean Conflict, his severe alcohol abuse, or the abuse he suffered as a child could have caused the brain damage (T. 216, 252). Dr. Dee stated that, "[t]he effects are the same whether it's a concussion or alcohol abuse. Its all going to lead to the same structural and functional impairment and brain function, memory impairment, probably frontal lobe impairment" (T. 216). Because Porter suffers from post traumatic stress disorder and brain damage, Dr. Dee concluded that Porter suffered from extreme mental or emotional disturbance at the time of the crime (T. 233), and his ability to conform his conduct to the requirements of the law was substantially impaired (T. 234).

Also, during the evidentiary hearing, Porter presented evidence regarding his alcohol abuse from Eileen Wireman, Porter's sister, and from James Porter, George Porter's brother. James testified that after Korea, George Porter had a serious drinking problem, stating that, "Whiskey was like water to him", and that "I've seen him put a pint of whiskey to his lips and kill half of it before he brings it down." (App. A at 22-24). James testified that he never saw George Porter without a bottle (App. A at 22-24).

Wireman and James Porter also testified that George Porter's personality changed significantly when he was drinking (App. B at 11-12, 19)(App. A at 18). James also provided specific examples where George Porter would become disoriented and suffer from memory loss while drinking:

A: He'd come to my house and do things he say he didn't do. Fighting, he couldn't remember fighting. He'd be all black and blue, bloody and the next day he'd ask, how did I get like this.

* * *

A: I've known him to drive and call me up, couldn't even remember where he was at, how he got there.

(App. A at 18-20).

THE FEDERAL COURTS' RULINGS

In its order granting Porter a new trial, the district court stated:

> In Claim Five of his Amended Petition for Writ of Habeas (Doc. 13), Porter alleges, *inter alia*, that he received ineffective assistance of counsel at his competency hearing.[2] In denying this claim, the state trial court held that Porter could not claim ineffective assistance of counsel because he had previously waived his right to counsel. App. L-3 at 9-10. The state supreme court, however, did not address the merits of this claim. *See Porter v. State of Florida*, 788 So.2d 917, 926-27 (Fla. 2001).
>
> It is well established that the Sixth Amendment entitles a defendant to the assistance of counsel at every critical stage of a criminal prosecution. *Kirby v. Illinois*, 406 U.S. 682, 690 (1972); *United States v. Gordon*, 4 F.3d 1567, 1571 (10th Cir. 1993). Furthermore, it is undisputed that a competency hearing is a critical stage of criminal prosecution. However, [u]nder the principles announced by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), a *competent* criminal defendant [also] has a Sixth Amendment right to represent himself at trial if he waives his right to counsel, and a trial court cannot deny the defendant's motion to proceed *pro se* on the ground that the defendant lacks sufficient knowledge or understanding of the law.
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> * * *
>
> [W]hen a defendant seeks to waive his right to counsel, before permitting him to do so, *Faretta* requires the court to conduct an inquiry and determine whether his waiver is knowing, voluntary and intelligent. In making this inquiry, the court must necessarily determine whether the defendant is competent.[3] However, it is well established that a

defendant's competency is not an immutable characteristic. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id.* at 181. Thus, whenever the court has a reasonable doubt as to the competency of a criminal defendant, it has a *duty* to investigate further and may *sua sponte* hold a hearing to determine competency. *See Jordan v. Wainwright*, 457 F.2d 338, 339 (5th Cir. 1972).[4]

According to the record, after refusing to cooperate with at least two different attorneys, Porter began representing himself as early as June 4, 1987, with Mr. Bardwell acting as stand-by counsel.[5] App. M at 367-70. However, on November 6, 1987 the State requested a competency hearing to determine if Porter was competent to proceed to trial. (Doc. 1 at App. D). In response to this, the trial court appointed two psychiatrists to examine Porter and report back to the Court within ten days. App. A at 2662, 2671. Despite his competency being in question, Porter continued to represent himself at hearings on November 20 and 24, 1987 where several motions in limine were addressed, and even at his own competency hearing on November 30, 1987. *See* App. M at 821.

5 On June 22, 1987 a stipulation was entered into the record indicating that Bardwell was thereby appointed as Porter's "full counsel." App. A at 2661. This Court cannot decipher from the record what the context of this stipulation was, however, it is clear that at some point between June 22, 1987 and November 6, 1987 Porter again elected to discharge his counsel and proceed *pro se*.

* * *

In this case, it was the State, not the Defendant, that filed a motion for the appointment of psychiatrist(s) to examine Porter because "the Defendant's conduct in acquiring and waiving counsel could be interpreted in such a way as to cast some doubt upon his present mental condition." Doc. 1 at App. D. Finding that this motion had merit, the trial judge immediately appointed two psychiatrists to examine Porter: Dr. Wilder and Dr. Greenblum. When Porter refused to meet with Dr. Greenblum, the trial judge appointed a third psychiatrist, Dr. Kay, to examine him. It appears, therefore, that Porter's competency was reasonably in question as of November 6,

1987, and, until his competency was adjudicated, Porter should have been represented by counsel.[6] However, as noted clearly in the transcript, Porter had no counsel for his competency hearing. Thus, the finding of the state trial court that Porter effectively waived his right to counsel at his competency hearing was clearly contrary to established federal law.

6 Representation at the competency hearing alone would not have been sufficient. Porter was entitled to counsel prior to the hearing to investigate on his behalf and to prepare for the hearing. *See Estelle* v. *Smith*, 451 U.S. 454, 471 (1981).

"The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984). Therefore, because Porter did not have the benefit of counsel at his competency hearing, a critical stage of his criminal proceeding, prejudice is presumed. *See id.* at n.25 ("The [Supreme] Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

Having determined that Porter's Sixth Amendment right to counsel was violated, this Court must direct that the writ of habeas corpus issue and Porter be discharged, unless the State gives him a new trial within ninety (90) days. This disposition is in accordance with the Supreme Court's holding that, due to "the difficulty of retrospectively determining an accused's competence to stand trial", it is inappropriate to simply order a re-hearing on the issue of competency. Pate, 383 U.S. at 386-87 (holding that simply ordering a new hearing on the issue of competency, six years after the trial, is insufficient.

(Doc. 41 at 1-6) (footnotes omitted) (emphasis added).

In its order granting Porter a new penalty phase proceeding, the district court stated:

In this case, penalty-phase counsel did little, if any, investigation of Petitioner's mental health issues, history of being abused as a child, and many years of military service. Furthermore, Petitioner's counsel failed to effectively advocate on behalf of his client

before the jury.[13] *See Porter, 788 So. 2d at 931* (Anstead, J., dissenting).

* * *

The Florida Supreme Court noted that Petitioner instructed his counsel not to investigate his past or speak to his family members, and, therefore, counsel did the best he could with an uncooperative client. This bold conclusion, however, is not supported by the evidence. At the 3.850 evidentiary hearing, Bardwell testified that Petitioner was "fatalistic," that he was "ready to die," and that he did not want Bardwell to present any evidence or call any witnesses on his behalf at the penalty phase of the trial. (App. M-17 at 43.) However, Bardwell's testimony regarding Petitioner's cooperation is inconsistent in many respects. Furthermore, "[t]he duty to investigate exists regardless of the [client's] admissions or statements to the lawyer" no matter how fatalistic they may be. *Rompilla v. Beard, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).*

Bardwell indicated that his only meeting with Petitioner to discuss the penalty phase was very short, and Petitioner stated only that he did not want Bardwell talking to his ten year-old son and that he did not want to testify on his own behalf. (App. M-17 at 76-78.) It appears that Bardwell did nothing after that to act as an advocate for his client. He did no investigation into his background and did not ask him to meet with a mental health professional. Bardwell did testify that he hired an expert on addiction to evaluate Petitioner's alcoholism, but that Petitioner refused to meet with him. (App. M-17 at 71-73.) However, this was done during the guilt phase of the trial, not the penalty phase. Bardwell testified that he felt that any investigation he did would have been futile because nothing could be introduced without Petitioner testifying and admitting that he was at the murder scene that night. (App. M-17 at 94.) This excuse, however, is not even logical because Petitioner's presence at the scene was an established fact and did not need to be verified during the penalty phase. Furthermore, counsel's failure to investigate mitigating evidence due to a mistaken belief about the applicable law "is indisputably below reasonable professional norms." *Hardwick, 320 F.3d at 1163.*

Perhaps the biggest flaw in Bardwell's testimony is his repeated attempt to use Petitioner's spontaneous testimony to excuse his deficient representation. Bardwell testified that, during the penalty phase, Petitioner jumped up without notice and announced he was going to testify. (App. M-17 at 85.) Bardwell

stated that Petitioner's testimony included vulgar comments about Williams' daughter and so tainted the jury against him that it would have far outweighed any mitigating evidence. However, Bardwell eventually admitted that Petitioner's vulgar statements were not made in the presence of the jury.[20] (App. M-17 102-104.) Bardwell admits that he conducted no independent investigation, did not speak to any of Petitioner's family members, and did not even know that Petitioner had been in the military.[21] (App. M-17 at 77, 86, 87.) Bardwell made little effort to discredit the State's witnesses, only argued the existence of two mitigating factors at the sentencing hearing (alcohol use and extreme emotional disturbance) for which he had either offered no evidence or contradictory evidence, and never indicated to the trial court that his client's uncooperative attitude was preventing him from assisting Petitioner effectively.

20 It appears that Bardwell is referring to Petitioner's testimony at the sentencing hearing held before the state trial judge on February 22, 1988. (App. A-14 at 84-106.) However, Petitioner did not jump up and get on the stand as Bardwell claimed at the 3.850 Hearing. Instead, Petitioner indicated to counsel privately that he wanted to testify and met with Bardwell in private for 15 minutes before doing so. (App. A-14 at 47, 82.)

21 This is inexcusable because Petitioner mentioned his military history and service in the Korean War in open court, and in front of Bardwell, at his competency hearing. (App. A-9 at 7). Furthermore, this evidence was contained in Petitioner's pre-sentence investigation report.

Under prevailing professional norms, Bardwell should have met with Petitioner on more than one "short" occasion, and he should have conducted as much investigation as reasonably possible under the circumstances.[22] Counsel did virtually nothing to defend against the death penalty except to make argument regarding proportionality. The only mitigators that Bardwell attempted to support with actual evidence were (1) that Porter had a good relationship with his son and (2) that Porter abused alcohol, however, this evidence was inconsistent and, therefore, ineffective. He failed to explore, investigate, or even consider the possibility that other mitigating evidence might be available.[23] His expressed reason for this was that Petitioner was "fatalistic." Thus, because his client was willing to accept his fate (execution), there was no point in introducing evidence of mitigation. Yet,

this conflicts with Bardwell's own admission that a capital defendant cannot waive a judicial determination imposing the death penalty. (App. M-9 at 45.) Bardwell's acquiescence to Petitioner's fatalistic attitude amounts to a *de facto* waiver. Therefore, by Bardwell's own admission, his assistance was ineffective. After a thorough review of the record, this Court finds that the first *Strickland* factor has been met.

* * *

Effective counsel would have produced various forms of mitigating evidence, both statutory and non-statutory. Evidence of two statutory mitigators was presented at the 3.850 hearing: (1) that Petitioner was suffering from extreme emotional disturbance at the time of the murder and (2) that Petitioner suffered from a mental condition which substantially impaired his ability to comply with the law. Both of these mitigators involve various mental health issues. In this regard, Petitioner called Dr. Henry Dee as a witness during the 3.850 hearing. Dr. Dee, a highly qualified expert in the field of forensic neuropsychology, testified that he reviewed records of Petitioner's history, interviewed him, and administered various accepted psychological tests. He found that Petitioner had a low IQ and limited education and offered a diagnosis of "organic brain syndrome." (App. M-10 at 233.) He stated that this condition could manifest itself as deficient impulse control and violent acting-out and could be caused or aggravated by alcohol abuse. (App. M-10 at 233-34.)

In addition to these statutory mitigators, effective counsel would also have presented other non-statutory mitigating evidence of Petitioner's abuse as a child, military service and alcoholism. The availability of this mitigating evidence was established at the 3.850 hearing.

In the state court collateral proceedings, this evidence was rejected. With respect to Petitioner's mental impairment, *i.e.*, the statutory mitigating evidence, the trial court determined that Dr. Dee's testimony was not credible and dismissed it in reliance on the testimony of Dr. William Riebsame, a forensic psychologist called by the State. Unlike Dr. Dee, Dr. Riebsame never met or examined Petitioner nor did he administer any tests.[26] Although he was critical of some of Dr. Dee's methods,[27] he conceded that the results of the tests administered by Dr. Dee were essentially reliable and that the results were consistent with Dr. Dee's diagnosis. Furthermore, despite disagreeing with Dr. Dee's opinion, he conceded

that he could not render a diagnosis because, "I would be reluctant to diagnose someone I haven't examined."[28] (App. M-10 at 345.) Rather, Dr. Riebsame simply opined that Petitioner met most of the criteria for antisocial personality disorder, but admitted that organic brain damage could not be ruled out and can cause antisocial behavior.[29]

26 Dr. Riebsame spent a total of ten hours preparing for his testimony, and was not provided with a complete record by the State. (App. M-10 at 345, 362.)

27 For example, Dr. Riebsame contends that Dr. Dee should have attempted to administer the MMPI test verbally, to rule out malingering. However, he concedes that there was substantial collateral evidence that Petitioner was not malingering during the testing process. (App. M-10 at 363.) Dr. Dee did attempt to administer the MMPI, but Petitioner left too many answers blank for it to be useful, presumably because he could not read and understand the questions. (App. M-10 at 235-36.) Dr. Dee believed that a second attempt to administer the test verbally would have produced unreliable results. (App. M-10 at 236-37.)

As to non-statutory mitigating evidence, the state courts simply chose not to give it any weight. The child abuse was rejected because Petitioner was 54-years old at the time of trial, and therefore, it was deemed to be too remote in time to be persuasive. *Porter, 788 So. 2d at 924*. His military service was deemed insignificant because he had gone AWOL several times. Finally, the alcoholism was dismissed because the evidence presented by Petitioner on that issue was inconclusive.[30]

30 The trial court found that Petitioner was sober at the time of the murders, *Porter, 788 So. 2d at 924*, but other evidence is to the contrary. In any event, for a fact to be mitigating it does not have to be relevant to the crime -- any of "the diverse frailties of humankind," which might counsel in favor of a sentence less than death are mitigating. *Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)*.

c. *The Balancing Process*

The state courts found no prejudice because the aggravating factors were so convincing that they far outweighed any mitigating evidence that could have been presented. *Porter, 788 So. 2d at 925*. This analysis is

flawed for several reasons. First, two of the aggravating factors are admittedly technical and another is esoteric and weak. Finally, one of the strong aggravators relied on by the trial judge (HAC) was thrown out and must now be disregarded. Thus, the balance has unquestionably shifted away from aggravation.

Second, the state courts failed to properly consider the weight of the mitigating evidence, most importantly in regard to Petitioner's mental health. The Eleventh Circuit has held that "[w]hen there is conflicting testimony by expert witnesses . . . discounting the testimony of one expert constitutes a credibility determination, a finding of fact. A finding of fact made by a state court is presumed to be correct, and a habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence." *Bottoson v. Moore, 234 F.3d 526, 534 (11th Cir. 2000)*. In *Bottoson,* however, the court concluded that the petitioner had failed to rebut the presumptions of correctness with the following statement:

> Because the appropriate analysis laid out by Dr. Kirkland points *strongly* to a conclusion contrary to the opinion of Dr. Phillips, and because Dr. Kirkland *expressly disagreed* with Dr. Phillips's findings, we conclude that there is support in the instant record for the finding of fact of the state court discounting Dr. Phillips's opinions. Accordingly, we conclude that Bottoson has failed to rebut the presumption of correctness by clear and convincing evidence.

234 F.3d at 536 (emphasis added).

Here, Dr. Riebsame did not expressly disagree with Dr. Dee's findings and his analysis does not point strongly to a conclusion contrary to the opinion of Dr. Dee. The trial court's statement that Dr. Riebsame "specifically disagreed with Dr. Dee" is simply wrong. Instead, he declined to offer an expert opinion on Petitioner.

* * *

This Court can find no factual support for the trial court's conclusion that Dr. Dee's testimony was directly challenged or not worthy of consideration. Indeed, it is questionable whether Dr. Riebsame even disagreed with Dr. Dee. Dr. Riebsame simply opined that Porter exhibited some of the criteria for antisocial personality disorder but, as previously noted, he did not render a diagnosis contrary to Dr. Dee's opinion of

organic brain syndrome, and admitted that Porter's antisocial behavior is consistent with organic brain syndrome. Therefore, this Court finds that the state court's determination that Dr. Dee's testimony should be rejected is not entitled to a presumption of correctness under *Bottoson.*[31]

With respect to the non-statutory mitigating evidence, the state court made no credibility findings; rather it simply discounted its significance. Yet, there is no support in the record, for example, that the effects of child abuse diminish over time so as to become insignificant by age 54. Similarly, the fact that Petitioner went AWOL while in the military does not necessarily diminish his honorable and distinguished service.[32] Indeed, the jury might well have been influenced by his military record as summarized by Justice Anstead in his dissenting opinion:

> Lieutenant Colonel Sherman Pratt testified in great detail at the post-conviction evidentiary hearing that Porter provided heroic service during the Korean War and, more importantly for purposes of mitigation, he testified that Porter clearly suffered both physically and mentally, and that his company suffered the heaviest casualties in battle. Porter joined the Army at age sixteen. Porter's service in the war earned him several combat medals, including: three Bronze Stars; the Combat Infantry Badge; and a Purple Heart (with first cluster). Moreover, he was favorably considered for the Good Conduct Medal, was entitled to award of the Korean Presidential Unit Citation, and was subsequently honorably discharged.

Porter, 788 So. 2d at 933 (Anstead, J., dissenting). This evidence cannot simply be ignored because in the view of the state court it may have been subject to impeachment.

32 Petitioner's military record indicated he was AWOL three times; however, on two of those occasions, Petitioner may simply have been "lost." (App. M-9 at 157.) In any event, Petitioner received an honorable discharge regardless of these allegations. (App. M-9 at 156.)

With this background, the Court now must examine the totality of the evidence to determine whether the adjudication of this claim in the state court resulted in a decision that involved an unreasonable application

of *Strickland*'s prejudice prong. First, the state courts erred in failing to consider the entire record on appeal. That is, in determining prejudice, the courts did not consider the evidence presented at trial as well as the evidence presented in the habeas proceedings as required by federal law. *See Williams, 529 U.S. at 397-98* (holding that the Virginia Supreme Court's prejudice determination was "unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding. . ."). The state courts did not specifically consider, in the context of mitigation, evidence that this was a crime of passion, that Petitioner was drinking heavily just hours before the murders, or that Petitioner had a good relationship with his son. Failure to consider all of the mitigating evidence in the record is contrary to established federal law. *Id.*

Furthermore, the state court held Petitioner to an incorrect standard under federal law. The post-conviction court held that "[b]y the greater weight of the evidence, therefore, the Defendant has failed to show that he was deprived of a reliable penalty phase proceeding and no prejudice has been demonstrated." (App. L-4 at 12.) The Court went on to say "this Court is quite convinced that none of the evidence it has reviewed would have altered the outcome of the sentencing proceedings. " (App. L-4 at 13.) However, this holding is contrary to that of *Strickland:*

> We believe that [petitioner] need not show that counsel's conduct more likely than not affected the outcome in the case . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

466 U.S. at 693-94; see also Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (discussing the *Strickland* prejudice standard); *Nix v. Whiteside, 475 U.S. 157, 175, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)* ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"); *Hardwick, 320 F.3d at 1162; McLin v. State, 827 So. 2d 948, 958 (Fla. 2002)* (recognizing that the application of an outcome determinative test is contrary to *Strickland*). Therefore, the state court's holding in *Porter* is contrary to clearly

established federal law. *See Williams, 529 U.S. at 429-32, 120 S. Ct. 1479, 146 L. Ed. 2d 435.*

> At its core, this was a crime of passion; premeditated, but fueled by jealousy, affected by alcohol, and committed by an individual who suffered an abusive childhood and exhibited serious mental health issues at the time of the offense. Weighing the totality of the evidence, it appears that the sentencing court relied upon one aggravator (HAC) which it should not have relied upon, two "technical" aggravators, and an aggravator (heightened premeditation) which is in effect an element of the offense itself. The sentencing court did not have before it evidence of Petitioner's mental health problems or the bulk of the non-statutory mitigation evidence which was available. In light of the fact that two Florida Supreme Court justices voiced strong opinions that a death sentence was not warranted in this case, even without any mitigation, there is certainly a reasonable probability that the presentation of mitigating factors would have influenced the decision of the sentencing court.
>
> > In short, it is obviously difficult, if not impossible, to have confidence in a sentence that was imposed based upon a one-sided presentation, i.e., unchallenged aggravation and no mitigation, when it is later demonstrated that substantial mitigation exists and one of the most serious aggravators was improperly considered and stricken on appeal. To approve of counsel's default . . . is tantamount to holding that the defendant was not entitled to the benefit of counsel at his penalty phase proceeding.
>
> *Porter, 788 So. 2d at 932* (Anstead, J., dissenting). Accordingly, the Court finds that the ineffective assistance of counsel was prejudicial to Petitioner under the second prong of *Strickland.*

(Doc. 34 at 45-55)(footnotes omitted)(emphasis added).

In reversing the district court's order as to the guilt phase, the Eleventh Circuit stated:

> Even if Porter had exhausted the issue, the district court erred by applying, contrary to *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), a new rule of law. "Under *Teague* a new rule of criminal procedure generally may not be applied in a federal habeas proceeding where the judgment in question became

final before the rule was announced." *Schwab v. Crosby*, 451 F.3d 1308, 1323 (11th Cir.2006). A new rule " 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.' " Graham v. Collins, 506 U.S. 461, 467, 113 S.Ct. 892, 897, 122 L.Ed.2d 260 (1993) (citation omitted). According to ADEPA, federal courts operate within the narrow body of precedent of the Supreme Court. 28 U.S.C. § 2254(d)(1). Based on that limitation, if the Supreme Court "has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar." *Williams*, 529 U.S. at 381, 120 S.Ct. at 1506-07; *see, e.g., Dombrowski v. Mingo*, 543 F.3d 1270, 1274 (11th Cir.2008) ("[T]he 'clearly established law' requirement of § 2254(d)(1) does not include the law of the lower federal courts.").

The district court erred by concluding that clearly established federal law entitled Porter to counsel at a second competency hearing. The Supreme Court has not held that a court must appoint counsel for a competency hearing after a defendant had been found competent and waived his right to counsel. The district court based its decision on the decisions in *United States v. Purnett*, 910 F.2d 51 (2d Cir.1990), and *United States v. Klat*, 156 F.3d 1258 (D.C.Cir.1998), neither of which constitutes clearly established federal law. *See Williams*, 529 U.S. at 381, 120 S.Ct. at 1506-07; *Dombrowski*, 543 F.3d at 1274. These decisions are inapposite because the defendants were allowed to proceed without counsel despite the trial courts' doubts about, and before the courts ever determined, the defendants' competency. *Purnett*, 910 F.2d at 54-56; *Klat*, 156 F.3d at 1263. In contrast, Porter's competency was not in question. The trial court revisited the issue of Porter's competency as a precautionary measure, and counsel did not have to be appointed for this second inquiry. *See United States v. Morrison*, 153 F.3d 34, 45 (2d Cir.1998) (distinguishing *Purnett*); *Wise v. Bowersox*, 136 F.3d 1197, 1203 (8th Cir.1998).

Porter has not, and cannot, point to any clearly established federal precedent existing on February 19, 1991, that specifically imposes a duty on standby counsel to advocate for a *pro se* criminal defendant who had been previously found competent to waive the right to counsel. Thus, the district court applied, contrary

to *Teague*, a new rule in granting habeas relief as to Porter's competency hearing claim. We reverse.

Porter, Case No. 07-12976 at 15-17.

In reversing the district court's order as to the penalty phase, the Eleventh Circuit Court stated:

> The district court recognized that its analysis of Porter's penalty phase claim was subject to AEDPA. *Id.* at *26. The court asserted, however, that AEDPA "does not require district courts to uphold a state court decision simply because a reasonable judge could reach that same conclusion." *Id.* The district court found support in Justice Stevens' opinion in *Williams v. Taylor* for rejecting the Florida Supreme Court's balancing of the aggravating and mitigating factors:
>
> > In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody-or, as in this case, his sentence of death-violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.
>
> *Id.* (citing *Williams*, 529 U.S. at 389-90, 120 S.Ct. at 1511 (opinion of Stevens, J.)).
>
> The district court erred by relying on the above excerpt from *Williams* as a basis for rejecting the Florida Supreme Court's application of *Strickland* here for two reasons. First, the district court relies on an interpretation of AEDPA to which a majority of the U.S. Supreme Court has not subscribed.[FN15] Second, the district court overlooks that "an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002) (citing *Williams*, 529 U.S. at 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant

state-court decision applied clearly established federal law erroneously or incorrectly.")).

> FN15. While Justice Stevens wrote one of the two majority opinions in *Williams*, this portion of his opinion was joined only by Justices Souter, Ginsburg, and Breyer. *Williams*, 529 U.S. at 367, 120 S.Ct. at 1499. Justices O'Connor and Kennedy, who composed the rest of Justice Stevens' majority, did not join this part of the opinion. *Id.*

In overlooking that difference, the district court did not properly defer to the Florida Supreme Court's balancing of the aggravating and mitigating factors. The district court took out of context the state trial court's characterization of the previous conviction and burglary aggravating factors. The trial court had indeed called those factors "technical in nature" during Porter's sentencing. But it did so in the context of explaining why it did not impose the death penalty for Burrows' murder.[FN16] The trial court did not try to negate the heavy weight of those aggravating factors under Florida's statutory sentencing scheme.

> FN16. The state trial court found that the previous conviction and burglary aggravating factors applied in Burrows' murder. It found no mitigating factors. If the court had adopted the State's recommended "score card" approach, the "score" would have been 2-0, favoring the death penalty. The court then likely would have imposed the death penalty for Burrows' murder. The trial court noted during sentencing, however, that the Florida Supreme Court disapproved of that approach in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *rev'd on other grounds, State v. Dene*, 533 So.2d 265 (Fla.1988). The *Dixon* court
>
> > emphasized that the procedure to be followed by trial judges and juries is not a mere counting process as an X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Id. at 10. In refusing to apply the score card approach, the trial court imposed a life sentence for Burrows' murder.

The district court also did not properly defer to the Florida Supreme Court's adjudications and findings of fact. First, even if the district court correctly asserted that Porter's sobriety at the time of the murders was not relevant to the balancing of the factors, that does not change Porter's failure to present "clear and convincing evidence" of his alcohol abuse. 28 U.S.C. § 2254(e)(1). Since Porter has not done so, we defer to the Florida Supreme Court's conclusion that the alcohol abuse mitigating factor does not apply here. *See Porter*, 788 So.2d at 924.

Second, the district court noted that the record does not show how the mitigating effect of Porter's abusive childhood had become insignificant by the time of the murders. Nonetheless, the Florida Supreme Court's conclusion to that effect is reasonable, as it follows precedent. *See id.* (citing *Bolender*, 16 F.3d at 1561; *Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir.1990); *Bottoson v. State*, 674 So.2d 621 (Fla.1996) (per curiam)). We have in prior habeas cases deferred to the Florida Supreme Court's conclusion that, in light of the defendant's age at the time of the crime, this mitigating factor "is entitled to little if any, mitigating weight when compared to the aggravating factors." *Bolender*, 16 F.3d at 1561. We decide no differently here.

Third, the district court asserted that Porter's military history "cannot simply be ignored because in the view of the state court it may have been subject to impeachment." *Porter*, 2007 WL 1747316, at *30. In so asserting, the district court implies that the Florida Supreme Court applied *Strickland* incorrectly when it adjudicated Porter's penalty phase claim. Even if the Florida Supreme Court had applied *Strickland* incorrectly, Porter must still show that the court's application was unreasonable or contrary to federal law or that the court made "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). He has not proved that it was unreasonable to conclude that his several periods of desertion would diminish the mitigating effect of military service. Accordingly, we defer to the Florida Supreme Court's conclusion that this mitigating factor would not have made a difference at sentencing. *See Porter*, 788 So.2d at 925.

Finally, the district court erred by not properly deferring to the state post-conviction court's findings as to Porter's emotional and mental health. The expert witness for the state, Dr. Riebsame, testified that the methodology of the defense expert, Dr. Dee, was

> unreliable. The questionable accuracy of the test results and Porter's failure to manifest mental problems during his competency evaluations provided substantial evidence for the trial court to conclude that Porter was not suffering from a mental illness. Based on its factual finding, to which we defer, *see Bottoson*, 234 F.3d at 534, the state court reasonably concluded that counsel had no duty to further investigate Porter's mental health. *See Newland v. Hall*, 527 F.3d 1162, 1213 (11th Cir.2008); *see, e.g., Williams v. Head*, 185 F.3d 1223, 1239-40, 1244 (11th Cir.1999).

Porter, Case No. 07-12976 at 26-30.

REASONS FOR GRANTING THE WRIT

I THIS COURT SHOULD REVIEW WHETHER THE ELEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S GRANT OF GUILT PHASE RELIEF IS BASED ON AN ANALYSIS THAT IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

Porter alleged during his state postconviction proceedings that he received ineffective assistance of counsel during his competency proceedings. After the state court denied this issue, Porter asserted in his federal habeas proceedings that the state court's determination was contrary to and an unreasonable application of clearly established federal law. The district court agreed, finding that the state court's determination was objectively unreasonable when it found no error in the trial court's decision to allow Porter to proceed without counsel during his competency hearing despite the fact that his competence to stand trial was reasonably in question. Relying on this Court's decision in Pate v. Robinson, 383 U.S. 375, 386-87 (1966), regarding "'the difficulty of retrospectively determining an accused's competence to stand trial,'" the district court ordered a new trial (Doc. 41 at 5-6).

In reversing the district court's order, the Eleventh Circuit found that "the district court erred in applying, contrary to *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), a new rule of law." Porter, Case No. 07-12976 at 15. According to the Eleventh Circuit, Porter's competency was not in question and the trial court revisited the issue of Porter's competency as a precautionary measure. Id. The Eleventh Circuit concluded, "Porter has not, and cannot, point to any clearly established federal precedent existing on February 19, 1991, that specifically imposes a duty on standby counsel to advocate for a *pro se* criminal defendant who had been previously found competent to waive the right to counsel." Id. at 17.

Porter submits that the Eleventh Circuit's decision is contrary to this Court's clearly established precedent. In granting relief, the district court determined that where, as here, a defendant's competency is reasonably in question to the point that the State itself requests a competency hearing, and the court agrees and appoints experts for a competency evaluation, then this constitutes a critical stage of the proceedings, thereby necessitating counsel (See Doc. 41 at 4-6). As the district court explained in its order, "[I]t is well established that a defendant's competency is not an immutable characteristic. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975)." (Doc. 41 at 3). Indeed, this Court has cautioned that "even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a

change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181.

Contrary to the Eleventh Circuit's opinion, the remedy afforded by the district court is mandated by this Court's precedent. Since Porter's competency was reasonably in question, and he did not have the benefit of counsel at his competency hearing, a critical stage of his criminal proceeding, prejudice is presumed. United States v. Cronic, 466 U.S. 648, 659 (1984). And this Court has consistently held there should be a new trial if there has been some constitutional defect regarding the defendant's competency. See e.g., Dusky v. United States, 362 U.S. 402, 403 (1960)(vacating the conviction after holding that there were insufficient facts to support the finding that petitioner was competent to stand trial and recognizing the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago").

Moreover, the district court's determination is supported by other federal circuit courts. See e.g., United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998)("[W]here a defendant's competence to stand trial is **reasonably in question**, a court may not allow that defendant to waive her right to counsel and proceed *pro se* until the issue of competency has been resolved. ") (citations omitted)(emphasis added). Additionally, in Appel v. Horn, 250 F.3d 203, 215 (3rd Cir. 2001), the district court granted habeas relief under the AEDPA after determining that Appel's competency hearing was a critical stage of his trial at which the public defender "had the obligation to act as counsel

at Appel's competency hearing by subjecting the state's evidence of competency to 'meaningful adversarial testing.'" The Third Circuit in Appel agreed with the district court's finding that "[T]he record is undisputed that they failed to do so; they did not investigate his background, speak to his family or friends, or obtain his health or employment records." Appel, 250 F.3d at 215. Applying this Court's decision in Cronic, the Third Circuit concluded that the circumstances here "constituted a constructive denial of Appel's *Sixth Amendment* right to counsel." Id. at 217. And, noting that "the Supreme Court has disapproved of retrospective hearings on competency", Id., the Court concluded, "We will therefore affirm not only the District Court's conclusion that Appel's *Sixth Amendment* right was violated but also its determination that the appropriate remedy is to grant a writ of habeas corpus vacating Appel's conviction and sentence and to allow the Commonwealth to provide Appel with a new trial." Id. at 218.

As in Appel, the district court here correctly determined that the state court's finding was objectively unreasonable, and that the required remedy was for a new trial to be ordered. Contrary to the Eleventh Circuit's opinion, Porter submits that the district court's grant of habeas corpus relief was in accordance with this Court's clearly established precedent. Porter further suggests that this Court should grant certiorari in order to resolve the dissension amongst the circuits as to this issue.

II THIS COURT SHOULD REVIEW WHETHER THE ELEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S GRANT OF PENALTY PHASE RELIEF IS BASED ON AN ANALYSIS THAT IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

During his state postconviction proceedings, Porter asserted that trial counsel failed to investigate and present available evidence of Porter's abusive childhood, his heroic military service, his mental health issues and his alcohol abuse. Porter alleged that trial counsel's failure to adequately investigate and prepare resulted in prejudice.

The state circuit court denied Porter's claim, finding that there was no prejudice because the effect of the unpresented mitigation "would have been insignificant". Porter, 788 So. 2d at 929-30.[15] On appeal, the Florida Supreme Court held "the trial court was correct", and affirmed the denial of relief. Id. at 925. In a lengthy dissent, Justice Anstead explained that:

> The present record reflects that there exists too much mitigating evidence that was not presented to now be ignored. This failure to investigate and present mitigation is especially harmful in light of the fact that **this Court was confronted with a trial court finding of no mitigation when we approved the death sentence on Porter, and in light of the divided vote of the justices of this Court on proportionality even without the substantial mitigation that we now know existed. In addition, the harm must be considered in light of the reversal of the HAC finding in this case.**

Id. at 937 (Anstead, J., concurring in part and dissenting in part)(Pariente, J., concurring)(emphasis added).

During his federal habeas proceedings, Porter alleged that the determinations of the state courts were both contrary to and

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[15]The court "decline[d] to make a a determination of the deficiency portion". Id.

unreasonable applications of this Court's precedent.[16] The district court agreed, analyzing the issue in accordance with the AEDPA and the clear precedent of this Court.

In reversing the district court's order, the Eleventh Circuit determined that in evaluating the prejudice prong, the district court "erred by not giving proper AEDPA deference to the Florida Supreme Court's adjudication and findings of fact relating to Porter's penalty phase claim." Porter, Case No. 07-12976 at 31. In doing so, the Eleventh Circuit overlooked the fact that, as the district court noted (Doc. 34 at 50, 52), the state courts failed to properly consider the weight of the mitigating evidence and simply discounted its significance (Doc. 34 at 50, 52).[17]

For instance, the Eleventh Circuit gave deference to the state court's dismissal of Porter's abusive childhood because he was 54 years old at the time of trial, and therefore, it was deemed to be too remote in time to be persuasive. Porter, Case No. 07-12976 at 29. Moreover, the Eleventh Circuit gave deference to the state court's finding that the alcohol abuse mitigating factor did not apply because Porter was sober at the

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[16]Porter also alleged that the state courts' factual findings were rebutted by clear and convincing evidence.

[17]And, the Eleventh Circuit ignored the fact that, as the district court correctly determined, no finding was made by the state courts regarding deficient performance, and thus *de novo* review was appropriate here. See e.g., Wiggins v. Smith, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

time of the murders. Id. And, the Eleventh Circuit gave deference to the state court's finding that Porter's military service was deemed insignificant because he had gone AWOL several times. Id.

Contrary to the Eleventh Circuit's determination, the state courts' findings were objectively unreasonable. In Lockett v. Ohio, 438 U.S. 586, 604 (1978), this Court described mitigation as: "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death." Thus, the circumstances of the defendant, his background and his crime are areas that must be considered for mitigation. See e.g. Tennard v. Dretke, 124 S. Ct. 2562, 2571 (2004), Spaziano v. Florida, 468 U.S. 447, 460 (1984); Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-2 (1982). Here the state courts' analysis was contrary to Lockett and its progeny.

Additionally, the Eleventh Circuit ignored the district court's determination that contrary to Wiggins v. Smith, 539 U.S. 510, 534 (2003), the state court failed to reweigh the evidence in aggravation against the totality of available mitigating evidence. Moreover, the Eleventh Circuit overlooked the district court's finding that the state court utilized an incorrect standard under federal law:

> **Furthermore, the state court held Petitioner to an incorrect standard under federal law.** The post-conviction court held that "[b]y the greater weight of the evidence, therefore, the Defendant has failed to show that he was deprived of a reliable penalty phase proceeding and no prejudice has been demonstrated." (App. L-4 at 12.) The Court went on to say "this Court

is quite convinced that none of the evidence it has reviewed would have altered the outcome of the sentencing proceedings. " (App. L-4 at 13.) However, this holding is contrary to that of *Strickland:*

> We believe that [petitioner] need not show that counsel's conduct more likely than not affected the outcome in the case . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

466 U.S. at 693-94; see also Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (discussing the *Strickland* prejudice standard); *Nix v. Whiteside, 475 U.S. 157, 175, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)* ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"); *Hardwick, 320 F.3d at 1162; McLin v. State, 827 So. 2d 948, 958 (Fla. 2002)* (recognizing that the application of an outcome determinative test is contrary to *Strickland*). Therefore, the state court's holding in *Porter* is contrary to clearly established federal law. *See Williams, 529 U.S. at 429-32, 120 S. Ct. 1479, 146 L. Ed. 2d 435.*

(Doc. 34 at 54)(footnotes omitted) (emphasis added).

Where, as here, the state court's analysis is an unreasonable application of clearly established federal law, the state court's determination is no longer entitled to any deference in federal habeas proceedings. As this Court explained in Panetti v. Quarterman, 127 S. Ct. 2842, 2858-59 (2007):

> Under AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a] claim on the merits . . . resulted in a decision that . . . involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in *§ 2254(d)(1)* is satisfied. **A federal court must then resolve the claim without the deference AEDPA otherwise requires.** *See Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (performing the

> analysis required under *Strickland*'s second prong without deferring to the state court's decision because the state court's resolution of *Strickland*'s first prong involved an unreasonable application of law); *id., at 527-529, 123 S. Ct. 2527, 156 L. Ed. 2d 471* (confirming that the state court's ultimate decision to reject the prisoner's ineffective-assistance-of-counsel claim was based on the first prong and not the second). See also *Williams, supra, at 395-397, 120 S. Ct. 1495, 146 L. Ed. 2d 389; Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam)* (indicating that *§ 2254* does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]").

(Emphasis added). Contrary to the Eleventh Circuit's analysis, the district court did not err in conducting a *de novo* review. Porter submits that under the circumstances of this case, certiorari review is warranted.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Kenneth S. Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 18th day of May, 2009.

Respectfully submitted,

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