IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2271

RANDY SCHOENWETTER

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

This Court summarized the procedural and factual history on direct appeal:

> Randy Schoenwetter was indicted on August 29, 2000, for first-degree murder in the death of Virginia Friskey, first-degree murder in the death of Ronald Friskey, attempted first-degree murder of Haesun Friskey, and armed burglary of a dwelling. Before trial, Schoenwetter filed several pretrial motions, which included a motion to suppress statements and admissions, a motion to suppress evidence, and a motion to disqualify the trial judge. These pretrial motions were all denied. Schoenwetter wrote a letter to the court dated February 17, 2003, confessing his guilt and indicating that he wished to change his plea from not guilty to guilty. The trial court held a status hearing on February 26, 2003, where the defendant, against the advice of his attorneys to remain silent and after the trial court's cautionary instruction, advised the court that he did in fact write the letter and that he did wish to change his plea from not guilty to guilty. The defense attorneys advised the court that they intended to have the defendant evaluated later that week to determine his competency.
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> Prior to the entry of his plea on March 5, 2003, the defense attorneys advised the court that a psychologist had met with the defendant and had determined the defendant was competent. The defense attorneys also announced to the court that, against their advice, the defendant wished to enter a plea to all of the charges. The court conducted a plea colloquy, advising the defendant of the consequences of his pleas and the rights he would give up by entering the pleas. After the State established a factual basis for the pleas, the court found that the defendant entered his pleas knowingly, freely, and voluntarily, and with a full understanding that he could receive two death sentences.
>
> A penalty phase proceeding before a jury was held from September 15, 2003, to September 25, 2003. The State presented testimony from fourteen witnesses, including Theresa Lathrop (daughter and sister of the victims), Haesun Friskey, (the victim of the attempted murder), Dr. Qaiser (medical examiner), Dr. Imani (medical doctor), Ronald Larson

and Denise Fitzgerald (two crime scene technicians), and Thomas House and David Butler (the investigating officers). The defense presented testimony from nine witnesses including Dr. Riebsame (forensic psychologist), Dr. Currie Prichard (neuropsychologist and clinical psychologist), Dr. Joseph Wu (clinical director of Brain Imaging Center), Deborah Roberts (mother of defendant), and Peter Siegel (expert on prison conditions).

The following facts were established during the penalty phase. At the time of the crimes, the Friskey family consisted of five people: the father, Ronald; the mother, Haesun; and the three children, Chad (eighteen years old), Theresa (sixteen years old) and Virginia, (ten years old). The defendant had known the Friskey family from childhood and attended the same karate school with the Friskey children. He was friends with Chad until Chad left for the Air Force a few months before the crime. Throughout his association with the family and before the crimes occurred, the defendant stayed overnight at the Friskey residence on a number of occasions.

On the night of August 11, 2000, Theresa Friskey had dinner with the family and went out until 11 p.m. Ronald, Haesun, and Virginia stayed home and watched television until they all fell asleep on the couch. By the time Theresa came home, they had all retired to their respective bedrooms.

At approximately 3 a.m. on August 12, 2000, the defendant left his apartment, where he lived with his mother. He rode his bicycle to the Krystal's Restaurant, where he was employed. After staying at Krystal's for a short time, he left on his bicycle and rode to the Friskey residence. According to the defendant's letter to the court confessing guilt, he decided to go to the Friskey residence so that he could force one of the Friskey daughters, Theresa, age sixteen, or Virginia, age ten, to have sex with him.

Schoenwetter arrived at the Friskey residence at approximately 5 a.m. He parked his bicycle on the back driveway of the residence and walked up to the back porch. He used a box cutter to cut open the screen and enter the porch. He then managed to push open the sliding glass door from the

porch into the house just enough to slip through. There was a stick in the sliding door which only allowed the door to be opened twelve inches. After entering the house, he walked directly into the kitchen and armed himself with a large serrated kitchen knife from one of the drawers. He then walked down the hallway where the three bedrooms were located.

The first door he approached was to Theresa's bedroom; it was locked. He then peeked inside the bedroom on the opposite side of the hall and saw the parents asleep in their bed. He knew, based upon his previous overnight visits to the Friskey home, that the parents were heavy sleepers. He then entered Virginia's bedroom, which was directly across the hall from the parents' bedroom and next to Theresa's bedroom.

During his taped confession, Schoenwetter said he entered Virginia's room and began looking around. He said he never touched her body. While he was in her room, Virginia woke up and began to shriek. He put his hand over her mouth, threatened her with a knife, and told her to be quiet. She continued to shriek, she then recognized him, and said his name, Randy. He started to leave the room, but the mother came into the room and grabbed him. The father came into the room and tackled him. After struggling with the parents for a short time, he managed to break loose. Instead of leaving the house, he decided to go back to Virginia's bed and kill her because she had recognized him and could identify him. He stabbed her on her bed. After he stabbed her, the father tackled him. He then struggled with both parents until he managed to break loose again. The defendant then left the house the same way he came in, got on his bike, and rode home. After he arrived home, he took a shower, placed his clothes, shoes, the box cutter, and the knife inside a blue plastic bag, placed the blue bag inside a trash bag containing trash from his apartment, and put the trash bag in the dumpster.

According to Haesun Friskey, she awoke when she heard Virginia whining. She walked over to the doorway to her bedroom, where she could see directly into Virginia's room. She saw Virginia lying in her bed with the defendant standing over her, touching her body. The defendant turned and looked at Haesun and then made a stabbing motion toward Virginia. Virginia made a sound like she was taking in air. Haesun could remember her husband struggling with the defendant. However, as a

result of the trauma she suffered, she could not remember anything else that happened.

At some point during the struggle, Theresa Friskey, who was asleep in her locked bedroom, awoke and heard a commotion. She came to her sister's room, where she saw a pile of people on the floor. She heard a man, whom she believed to be her father, tell her to call 911. She went back to her bedroom and called 911. While she was on the phone, she looked out of her bedroom window and saw a man leaving the house covered in blood. She later learned that this man was her father.

After the defendant fled the Friskey residence, Ronald Friskey managed to get up, leave the house, and walk next door to Terry and Julie Blythe's home. He knocked on the window near the front door and called out, "Terry, help me." Julie Blythe called 911 and opened the door. She found Ronald Friskey slumped on the ground covered in blood. He told her that he had been stabbed, that his whole family was dead, and that a white male committed the crimes. He died in her arms as they were waiting for the paramedics to arrive.

When the police arrived at the scene, they observed a trail of blood leading away from the Friskey residence. An officer followed the blood trail and found that it led to an apartment complex at 215 Knox McRae Drive. Later that morning, Detectives House and Butler went to the apartment complex. While there, they spoke with a woman and a young girl who were outside to learn more about the apartment complex. The detectives explained to the woman their reason for being at the apartment complex. The woman identified herself as Deborah Roberts, stated that she knew the Friskey family, and said that her son and daughter were friends with the Friskey children. As they were talking, Schoenwetter left an apartment and walked towards them. One officer indicated that Schoenwetter was walking stiffly, as if he had been in a fight or an accident, and that he had a bandage on his thumb. Mrs. Roberts stated that he was her son, Randy Schoenwetter.

When Schoenwetter learned that the men were detectives, he appeared extremely nervous. The detectives asked Schoenwetter if he had a bicycle. He said that he did and showed Detective Butler his bicycle.

After Schoenwetter left to show Detective Butler the bicycle, Detective House received a telephone call from Sergeant Esposito stating that they had found a size eleven deck or boat shoe print at the scene. Detective House asked Ms. Roberts if her son had any deck or boat shoes. She said Randy had some deck shoes, and she had seen them the day before. When Schoenwetter returned, Detective House asked him where the shoes were. He said that he did not have them anymore because he had ruined them the other day and had thrown them out. The detective asked him if he would come to the police station with them for an interview. Schoenwetter agreed.

During the videotaped interview at the police station, Schoenwetter initially denied any involvement in the crimes. He then indicated how he would have committed the crimes had he been involved. He finally confessed to committing the crimes and gave the detectives a detailed statement.

. . . . [1]

The blood trail from the Friskey house that ended at Schoenwetter's apartment complex was proven by DNA testing to be that of Schoenwetter. His blood DNA was also found in Virginia Friskey's bedroom and in other locations inside the Friskey residence. The bags that Schoenwetter placed in the dumpster at his apartment complex, containing the clothes and shoes he was wearing during the crimes, the box cutter he used to cut the screen to enter the porch, and the knife he used to commit the murders, were subsequently found by law enforcement officers. The trial court noted that the defendant, in order to destroy or hide this evidence, placed these items into one bag, then placed this bag into a second bag, prior to putting it into the apartment complex dumpster. The defendant's shoes, socks, shirt, and shorts were tested for blood, and the blood found matched that of Ronald and Virginia Friskey. The large kitchen knife also tested positive for the blood of Ronald and Virginia Friskey. Schoenwetter's blood DNA was found on the handle of the knife.

[1] This section describes the victims' wounds.

On September 25, 2003, the jury recommended death for the murder of Virginia Friskey by a vote of ten to two. The jury also recommended a sentence of death for the murder of Ronald Friskey by a vote of nine to three. On November 7, 2003, the trial court held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). At the hearing the trial court heard from Jean Dees, Schoenwetter's grandmother, Pastor Dodzweit, and Deborah Rogers, Schoenwetter's mother. In addition, two victim impact statements were read into the record. The trial court, on December 5, 2003, entered its judgments and sentences, noting that the imposition of death is to be reserved for the most aggravated and least mitigated of crimes. n1 After consideration of all evidence presented, argument of counsel, the advisory verdict of the jury, the applicable elements of aggravation and mitigation as provided for by statute, n2 as well as the nonstatutory mitigating circumstances presented by the defense, n3 the court imposed sentences of death for the first-degree murders of Virginia Friskey and Ronald Friskey. The trial court sentenced Schoenwetter to life in prison for the attempted murder of Haesun Friskey, to run concurrent with the sentences for the two murders. A sentence of life in prison was imposed for the armed burglary of a dwelling, to run consecutive with the sentence for the attempted murder.

> n1 The trial court cited to *Taylor v. State*, 855 So. 2d 1, 31 (Fla. 2003), for this proposition.
>
> n2 Cited by the trial court as set forth in section 921.141 (5) & (6), Florida Statutes (2000).
>
> n3 *See Ford v. State*, 802 So. 2d 1121 (Fla. 2001).

In support of the death sentences, the trial court found four aggravators applicable to each of the murders. Three aggravators, prior violent felony; murder committed during a burglary; and murder committed to avoid arrest, were found applicable to both murders. As to the murder of Virginia Friskey, the trial court also found the aggravator that the victim of the murder was less than twelve years old. The fourth aggravator applied to the murder of Ronald Friskey was heinous, atrocious or cruel. In mitigation, the trial court found applicable to both murders four

> statutory mitigators: no prior criminal history; extreme mental or emotional disturbance; lack of capacity to conform his conduct to the requirements of the law; and the defendant's age (eighteen) at the time of the crime. The trial court also considered and weighed eight of the nine nonstatutory mitigators argued by the defendant. n4
>
> > n4 The nonstatutory mitigators considered, weighed or rejected are: (1) the defendant accepted responsibility by pleading guilty; (2) the defendant was bullied, picked on by his peers, from an early age; (3) the defendant was continually gainfully employed as a teenager and helped his mother financially; (4) the defendant will not pose a danger to the general prison population if given a life sentence without parole; (5) as a result of neurological disorders, specifically Asperger's syndrome and Attention Deficit Hyperactivity Disorder (ADHD), the defendant's ability to socially interact has been impaired; (6) the defendant has had a sexual preoccupation from the age of seven; (7) the defendant had a developmental and emotional age of twelve to thirteen at the time of the offense (the court found that this proposed mitigator was not proven by the greater weight of the evidence); (8) the defendant has a close loving relationship with his mother and his younger sister; (9) while in the tenth grade, the defendant and his mother lived with the mother's boyfriend who physically and emotionally abused the defendant.

Schoenwetter v. State, 931 So. 2d 857, 865 (Fla. 2006).

After this Court affirmed the convictions and sentences, Schoenwetter filed a petition for writ of certiorari in the United States Supreme Court. The petition was denied on November 13, 2006. *Schoenwetter v. Florida,* 549 U.S. 1035, 127 S.Ct. 587, 166 L.Ed.2d 437 (2006).

Schoenwetter filed a Rule 3.851 motion to vacate on October 30, 2007.

(R756-848). On November 13, 2007, Schoenwetter filed a Notice of Voluntary Abandonment of Claim III. (R849-850). The State moved to strike certain claims in the motion to vacate and concurrently filed an Answer to the motion to vacate. (R851-57, 858-882). The trial judge entered an Order on the factual sufficiency of Claim IV(D) allowing amendment of that claim. (R888-889). Schoenwetter filed an amended Claim IV(D), and the State responded. (R893-903, 890-92). The trial judge held a case management conference on March 12, 2008, after which he entered an order granting an evidentiary hearing on Claims IV(B), IV(C), IV(D), and IV(E). (R929-933).

An evidentiary hearing was held May 12, 2008. (R172-753).

EVIDENTIARY HEARING FACTS

The Defendant called eleven witnesses: Dr. Henry Dee, psychologist; John Moore and George McCarthy, trial counsel; Laura Blankman, mitigation specialist; Rick Dean, assistant jail chaplain; Pastor Arthur Dodzweit, Bible studies teacher at the jail; Thomas Wood, Senior Chaplain at Brevard county jail; Frederick Shelor, inmate who attended Bible studies with Schoenwetter; Nettie Conner, Schoenwetter's paternal grandmother; and Reese Ingram, Schoenwetter's biological father. The State called Detective Butler, John Moore, and George McCarthy.

Dr. Dee interviewed and evaluated Schoenwetter on August 23, 2007,

September 27, 2007, and April 9, 2008. (R241, 245, 253, 273). He reviewed documents and talked to family members. He recounted incidents in which Schoenwetter was bullied because he wore glasses, eventually took taekwondo classes to defend himself, and had a few close friends. (R277-78). In Dr. Dee's opinion, Schoenwetter never developed "adequate social skills." (R279).

Schoenwetter's full scale IQ score is 123. (R262). In Dr. Dee's opinion, the 11-point difference between the full-scale memory quotient on the Denman test and the full-scale IQ on the WAIS-III indicates mental impairment and reflects cerebral insult, injury or disease. (R265-66). The Categories test, indicating frontal lobe damage, was consistent with Dr. Wu's testing. (R267-68). Dr. Dee reviewed the prior test data of Dr. Krop, who did not testify at the penalty phase. (R291). He also reviewed the data of Dr. Riebsame, Dr. Prichard and Dr. Wu. (R291). Dr. Dee conducted a different Categories test than Dr. Prichard. (R292). Schoenwetter performed poorly on Dr. Dee's test; however, there was no reason to believe Dr. Prichard's test was administered incorrectly. (R294).

Dr. Dee agreed with the experts at trial that Schoenwetter had attention deficit disorder. (R271). Although not an expert in Asperger's syndrome, Dr. Dee felt Schoenwetter's behavior was consistent with Asperger's. (R274). Dr. Dee would defer to Dr. Prichard on the diagnosis of Asperger's because she is the expert. (R300). Both

Dr. Riebsame and Dr. Prichard testified at the penalty phase that Schoenwetter had Asperger's. Dr. Dee accepted that diagnosis. (R312).

According to the DSM-IV-TR,[2] one of the symptoms of Asperger's Syndrome is "fixation." (R298). Schoenwetter told Dr. Dee he was "fixated" on the Friskey girls.[3] (R300-301). Schoenwetter also told Dr. Dee he was fixated on pornography. (R304). He had a "definite strong interest in pornography." (R284). The fact that Virginia was 11 years old and he wanted to have sex with her was not inconsistent with pedophilia. (R306). Schoenwetter described himself as a "creep about sex." (R306).

In Dr. Dee's opinion, Schoenwetter exhibits "chronic brain syndrome with mixed features." His memory functioning and frontal lobe functioning are impaired. (R269). People with frontal lobe damage "have greatly impaired inhibitory controls." (R269). The behavior seen in Asperger's patients is strikingly similar to those patients with frontal lobe disease or injury. (R272). Schoenwetter's ADHD and Asperger's were exacerbated by the chaos of moving and violent environment. (R280).

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[2] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

[3] 11-year-old Virginia Friskey was one of the murdered victims. Sixteen-year-old Theresa Friskey was in her locked bedroom the night of the murders, and thus, unharmed. *Schoenwetter v. State*, 931 So. 2d 857, 862 (Fla. 2006).

Schoenwetter told Dr. Dee he moved numerous times before age 11. As a result, he suffered "significant depression." (R276). He was never well-liked, and was constantly bullied. (R277). Schoenwetter denied physical and sexual abuse at home. (R307).

Dr. Dee said that people with Asperger's Syndrome lack empathetic understanding of others; however, he thought that after his "religious conversion" to Christianity in jail after the murders, Schoenwetter clearly expressed remorse for his crimes. (R286, 302-03).

Schoenwetter told Dr. Dee he had discussed "Satanism" with Dr. Riebsame and Dr. Prichard, but they had "misconstrued" impressions. (R281). Schoenwetter was "interested in witches and magic, which certainly represents a kind of link to Satanism." (R281). Schoenwetter became more interested in Satanism while he was in jail and met a Satanist (R282). Schoenwetter showed Satanist prayers to Dr. Riebsame but thinks the doctor misconstrued his involvement. (R282). Dr. Dee did not believe Satanism was involved in the murder. (R282).

In Dr. Dee's opinion, the age mitigating factor should apply to anyone under 25 because the brain does not mature until age 25. (R288-89). Although Schoenwetter was eighteen at the time of the murders, in Dr. Dee's opinion, he had the social maturity of a twelve-year-old. (R288). He was both behaviorally and physiologically

immature. (R288-89). Further, Dr. Dee believed Schoenwetter was under the influence of an emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired at the time he committed the murders. (R287).[4]

John Moore and George McCarthy, assistant Public Defenders, were Schoenwetter's trial counsel. (R446). Moore has been a lawyer for 26 years and McCarthy, for 34 years. (R333, 464). McCarthy and Moore frequently attend death penalty seminars. (R671, 714). McCarthy conducted the preliminary guilt phase work, and he and Moore discussed trial strategies. (R446-448, 451-452). McCarthy had Schoenwetter complete an interview form which contained school, military, family, and psychological information. (R674, 705). Schoenwetter's mother described family relationships, discipline techniques, sexual behavior among family members, abuse or neglect, and any alcohol problems within the family. (R678, 679). School records, jail records, medical records, and adoption records were obtained and provided to the mental health experts. (R401-02, 406, 686, 688). The attorneys had "a good amount of communication" with Schoenwetter's mother. (R694).

The attorneys met with Schoenwetter a day or two after he was arrested. (R368). They hired Dr. Riebsame shortly thereafter. (R369). They filled out a

[4] The trial judge found four statutory mitigating circumstances; i.e., age, extreme emotional disturbance, substantially impaired, and no significant criminal history. (R796-799).

confidential assessment form with him and later with family members. (R673, 718). The form gives historical information on the defendant, including school, psychological, and family history. (R674). The form is designed to lead to mitigation. (R674). They also spoke with Schoenwetter's mother, Ms. Roberts. She was "verbose" in her writings, and described Schoenwetter's birth, abuse and neglect in the family, schooling, and family relationships. (R678). Roberts also called at least once a week, and Moore always took her calls. (R735).

The attorneys knew Schoenwetter's biological father had gone to prison. (R679-681). Roberts gave the attorneys names of people to contact, and talked about Schoenwetter's frustration with being rejected from the Marines. (R681, 694). They asked Schoenwetter to prioritize the witnesses listed by Roberts. (R695). There were notes on the list of reasons not to use some of the witnesses. (R696). The maternal grandmother was also helpful. (R681).

The attorneys used the Public Defender investigator before Laura Blankman, mitigation investigator, was hired. (R708). The PD investigator tried to find Carl Bomerito, the man Schoenwetter and his mother lived with on the west coast of Florida. (R684). They learned he was dead. (R685).

A total of five experts were consulted by defense counsel: Dr. Riebsame, Dr. Krop, Dr. Danziger, Dr. Prichard and Dr. Weiss. (R687, 718). Dr. Riebsame was the

first expert hired and saw Schoenwetter shortly after his arrest. (R675). After consultation, two experts did not testify because they would not help the case. (R369-70, 373, 458, 675, 687, 719). Dr. Danziger found nothing helpful. Dr. Weiss conducted an MRI and QEEG, with normal results. (R746). The main role of Dr. Krop was to conduct neuropsychological testing for Dr. Prichard. (R386).

The attorneys made strategic decisions to call the experts who could do the most good and the least harm. (R374). They also made strategic decisions on the lay witnesses. (R699-700). They spoke to as many witnesses as possible. If there was a possibility of a witness jeopardizing the case, "[we] kept them away from testifying about those things." (R400). Moore and McCarthy spent "hundreds of hours" preparing for Schoenwetter's case. (R409, 411). The emphasis was to "try to humanize Randy," that he was loved by friends and family, and there were psychological conditions he could not control. (R409).

Dr. Nona Prichard was hired as an expert in Asperger's; not just to confirm Dr. Riebsame's diagnosis, but to go into depth about Asperger's. (R377). She was recommended through the University of Florida and other medical schools. (R370). Moore felt Dr. Prichard's trial testimony was not as strong or authoritative as they felt it would be, given their pre-trial conversations with her. (R378). According to Mr. Moore, "She just didn't seem to be as strong and sure of herself and was more easily

led in cross examination that I would have liked." (R378). Dr. Prichard did, however, testify that Schoenwetter's capacity to conform his conduct to the requirements of the law was substantially impaired. (R334). "Substantially impaired" is an important mitigating factor. (R335). Due to Asperger's, Dr. Prichard opined that Schoenwetter exhibited "straight line behavior" and lacked the ability of "constantly reassessing his plan." (R336).

Mr. McCarthy worked to prepare Dr. Riebsame to testify. He prepared questions to ask Dr. Riebsame. (R340). Dr. Riebsame's testimony conveyed an "irresistible impulse" which was consistent with getting "caught up" in pornography, and not being able to control himself. (R342). The theory was that Schoenwetter:

> had an obsession with pornography and he was so deeply inmeshed in it, so hooked by it, that it was an overwhelming influence, an irresistible influence, and it compelled him to do something that he wouldn't have ordinarily done.

(R351). Dr. Riebsame's testimony about pornography was "part and parcel of the whole profile Dr. Riebsame was going to testify about." (R351). They had to:

> take the bad with the good and try to put a positive spin on the bad to make it look like it was a hook that dragged Randy into doing this.

(R351). It was clear from Dr. Riebsame's interview that Schoenwetter was obsessed with child pornography. "So there's no way to edit it out. I'm not going to tell a witness what to say." (R354). McCarthy was aware Schoenwetter was interested in

child pornography and Satanism. (R450, 456). The attorneys knew from discussions with Dr. Riebsame that there was good and bad and:

> The bad part was the obsession with pornography, which, as I recall, Dr. Riebsame concluded, based on his discussion with Mr. Schoenwetter, was child pornography, and that was the impression that his mother had, which Detective Mutter dispelled, basically.

(R352-53). The attorneys tried to make "lemonade out of a lemon, basically." (R353). They knew Schoenwetter was obsessed with pornography, and Detective Mutter would say it was not child pornography. (R353).

Moore recalled that Dr. Riebsame testified about a letter written by a jail inmate, Willie Jackson, that stated Schoenwetter "was amused by what had occurred." (R349; 449). However, Dr. Riebsame also said, "I don't see any evidence of that type of pleasurable moment or amusement actually occurring in that situation." (R349).

Regarding the fact Dr. Riebsame had not reviewed the videotape of the confession, McCarthy said: "It didn't change his opinion. I believe he minimized the value of having viewed the videotape. He had read the transcript." (R449).

Dr. Riebsame testified Schoenwetter was under extreme emotional disturbance at the time of the offense. (R355-56). He also testified to a "watered down version" of substantially impaired, which Dr. Prichard later established. (R357).

Schoenwetter's remorse was put before the jury. (R339-40). Dr. Riebsame testified that Schoenwetter's desire to plead guilty and to tell the truth to the Court

was consistent with his Christian beliefs. (R339).

There will always be variations among the experts, and there was variation with Dr. Riebsame and Dr. Prichard. However, the attorneys discussed this and decided "it would be best to have two statutory mitigating circumstances, even though they gave [sic] from two witnesses." (R374-75). The attorneys were aware there was no "absolute agreement" between Dr. Riebsame and Dr. Prichard, and they knew about the child pornography. (R456-57). They made a strategic decision to use Dr. Riebsame even though they had to "take the good with the bad." (R457).

Insofar as objecting to the prosecutor's question about whether a "pedophile" is a person interested in young girls, Moore knew "it was out there" because Schoenwetter was interested in child pornography. (R360). Moore testified that he normally would prepare the expert witness for the question and expects the expert to dispel any label of the defendant being a pedophile. (R360).

Insofar as objecting to the prosecutor's statement in opening about the Friskey girls being "targets of his sexual desires," Moore explained that testimony "was going to come in, maybe not all at one place or at one time, but it would have come in." (R381).

Moore and McCarthy had to make strategic decisions in the penalty phase. Schoenwetter disagreed with some of those decisions. (R368). At times Schoenwetter

deferred to his counsel; but it was a "running battle" on the attorneys' efforts to present mitigation. (R391, 461). Schoenwetter wanted to confine the presentation of mitigation only as it related to his conversion to Christianity. (R392, 461). McCarthy said he and Moore discussed how to present the history of abuse Schoenwetter suffered at school and in the family setting. (R460).

The attorneys were preparing to try the guilt phase until Schoenwetter wrote the judge confessing to the crimes and insisting on entering a guilty plea. (R375). In Moore's opinion, the State was entitled to use the letter in which Schoenwetter was "admitting to committing the homicides and giving the reasons for it." (R375-76). There was no question after the letter as to Schoenwetter's motive for entering the Friskey home. (R376). They tried to establish that the motivation was one he could not control. (R376). Schoenwetter established the motive, and the attorneys used Dr. Riebsame to "put the stamp of expertise on it and say that that was in fact an overwhelming urge." Also, that if Schoenwetter "hadn't been caught up in his preoccupation with these sexual matters," the crime may not have occurred. (R377). They had to try to explain Schoenwetter's behavior in a way that would be mitigating to a jury. They felt the best way to do that was to get the experts to say that the sexual impetus was not controllable. (R377).

As the case progressed, Moore and McCarthy hired mitigation expert Laura

Blankman. She interviewed Schoenwetter, his family, and their friends. (R360-61, 387, 458). She was not limited in any way regarding any help she could provide. (R382-83, 460, 721, 741). Blankman prepared an 8-page report on possible mitigation. (R691). The attorneys chose not to present some of the information. (R692). When the PD investigator could not find Ingram, the attorneys sent certified letters all over the state at last-known addresses and still couldn't locate him. (R361). In fact, Moore sent "a half dozen letters certified" to every address the investigators could find. (R382). When they could not find Ingram, they hired Laura Blankman to find him. (R382). The paternal side of the family in Gainesville would not help them, even though they sent numerous letters to them. (R361). The reason they wanted to find Ingram was because they knew from Debbie Roberts he was abusive. "He was just a bad guy. We wanted to cultivate that." (R636). Moore sent Schoenwetter's paternal grandmother a letter requesting information on Reese Ingram. However, "she wasn't going to tell us where he was." (R722, 725). All their efforts to contact the paternal side of the family "were fruitless." (R725-26). Further, Schoenwetter was removed from his father's life and a very early age and his mother protected him from the abuse. (R382, 396).

Blankman sat at counsel table during the trial. (R711). She remained involved in the case even after she had attempted to fulfill the obligation for which she was

hired, i.e., to find Reese Ingram. (R728). Blankman had a good rapport with Schoenwetter and sat through the trial with him even though she was no reimbursed for her time. (R729). Moore did not recall Blankman ever saying that Dr. Riebsame said he wasn't prepared, and Moore "would have remembered that." (R730). Moore would never allow a witness to testify if he thought he was not prepared. (R732). In fact, in this case Dr. Riebsame had not viewed the actual video of Schoenwetter's confession, so they took a recess for the doctor to view it. (R732-33).

Ms. Roberts' boyfriend in Pasco County mainly verbally abused her, and he had died so they could not call him as a witness. (R396). The only evidence they had was a police report Roberts filed for domestic violence. (R397). Ms. Robert testified about the abuse at the penalty phase. (R397). Moore reviewed all the witnesses in police reports and considered them from a mitigation standpoint. (R398-99). They spoke to some of the people who were in the Marine. They thought Schoenwetter was "weird." These same people alleged Schoenwetter had sexual contact with a minor child, which was not something the attorneys wanted to present to a jury. (R400). The attorneys also conducted depositions of students and teachers who knew Schoenwetter (R401).

Blankman told Moore about Pastor Victor Dodzweit, a potential mitigation witness. (R362). There were strategic reasons for not calling Dodzweit to testify.

(R362-365). After interviewing Dodzweit, the attorneys realized that Dodzweit's testimony would be that:

> Because he was saved, he had been forgiven for all of his sins, including what he did to the Friskey family and he was no longer bothered by it. He was at peace with himself.
>
> Pastor Dodzweit was of the same frame of mind. It was, you know, we're past that, Randy's forgiven, the Lords' given [sic] him, it not a problem, that's history.

(R363). Both attorneys were stunned after talking to Dodzweit and thought his testimony would be "Exhibit A" for *lack* of remorse and be very harmful. (R363, 381). They felt this testimony would be offensive to the jury. (R364, 453). In fact, when Dodzweit testified at the *Spencer* hearing he testified that when he first met Schoenwetter, the latter's favorite subject was Satanism. (R463). Schoenwetter's religious conversion was placed before the jury through his letter to the judge stating he had a religious transformation, accepted responsibility for his actions, and wanted to plead guilty. (R469).

At one point, Schoenwetter did not want the attorneys to present any mitigation and was trying to limit what was presented. There was a "running battle." They found people through his mother and investigative work. Schoenwetter may have offered some names, too. They talked to every person mentioned. (R391). They listened to every suggestion Schoenwetter made and called the witnesses they thought would

benefit him. (R395). All Schoenwetter wanted to present was his conversion to Christianity and his new ministry at the jail. (R392).

David Musalo volunteers at the jail teaching Bible studies. (R419-20). After Schoenwetter was incarcerated, he attended Musalo's Bible class for two years. (R421). Musalo attended the penalty phase, but did not speak to the attorneys. (R440). Tom Wood was the person in the jail ministry who organized the volunteers. Rick Dean was another volunteer that Musalo brought into the jail ministry. (R442). Rick had been in Musalo's class until Musalo talked him into taking his own class. (R442). Tom Wood videotaped Schoenwetter for a fundraiser for Good News Jail and Prison Ministry. (R444-45).

Laura Blankman, mitigation expert, specializes in investigating death penalty mitigation. (R472, 474). Although the public defender has investigators, Moore wanted specialized help from Blankman. There were problems with funding, and Moore could only offer $1950, or 30 hours, at Blankman's rate of $65/hour. (R477). "Looking back," Blankman thinks that was not an adequate amount of time for her to work effectively. (R477-78). Blankman was hired to do "a couple of specific issues." (R478). Blankman spent a lot of time with Schoenwetter and Roberts and went over a lot of Schoenwetter's childhood issues. (R480). She felt the public defenders needed to give her more time toward the case so she could explore physical abuse of the

mother and how she was raised. (R480). Blankman knew when she was hired that Moore had already prepared a "significant amount of mitigation investigation in-house" and that she was hired to look into specific issues. (R477-78).

Blankman talked to the attorneys almost daily. (R483). She gave them all the information she gathered. (R499). Included in that information was that Roberts told Blankman she did not want her son exposed to his biological father's family. (R484). Blankman also knew that Schoenwetter grew up poor and moved quite a bit. There were times they had nothing to eat and lived a transient lifestyle. Due to frequent moves and his mother's emotional instability, Schoenwetter "didn't have a lot of time to be a child." (R486). Ingram went to prison when Schoenwetter was about a year old. (R486). Then Roberts married Tom Schoenwetter who adopted Randy. Roberts and Tom Schoenwetter divorced, and Megan moved away with Tom Schoenwetter. (R488). Roberts then lived with Carl Bomerito who physically abused her. (R487,492).

Blankman relayed all the information she had not only to the attorneys but also to Dr. Riebsame and Dr. Prichard. (R490).

Blankman testified that Dr. Riebsame stated before the penalty phase, "I wish I was better prepared." She said she informed Schoenwetter's attorneys. (R491). Blankman denied that she was hired to locate Reese Ingram. (R492). She was given

specific tasks, but was given great leeway. (R492). The attorneys wanted her to talk to Carl Bomerito, but he was dead. (C4, R492). She did what she thought was a priority. (R493). Although Roberts talked to Blankman about physical abuse, Roberts did not give a "complete description" at the penalty phase. (R494). The attorneys knew about the abuse by Schoenwetter's grandfather. (R494). Blankman actually spent at least 100 hours on this case and did not bill much of it. (R501).

Richard Dean, assistant chaplain at Brevard County Jail, met Schoenwetter while he was teaching Bible class. Schoenwetter appeared personable and intelligent, unlike some of the other inmates. (R529). Schoenwetter could find Bible verses quickly. (R530). In Dean's opinion, Schoenwetter was "born again. He got a new life." (R530-31). He was an "informal leader" in the jail. (R532). Schoenwetter admitted his guilt because it was what God "would want him to do." (R534). Schoenwetter had trouble feeling remorse. He asked Dean and Dave Musalo to pray with him because he said "I want to feel this remorse." (R535). Schoenwetter wanted to feel this remorse but he couldn't quite do it." (R536). Dean was not contacted by defense counsel but he attended the penalty phase. (R538). Although he would have testified on Schoenwetter's behalf, it was his impression

> [Randy] was firing his attorneys. He was trying to not make anymore hurt for the victims. He was just doing everything in his power ... to stop the proceedings and to not let anything else happen. I think he would have probably opted out of the whole thing, had he had his druthers.

(R539).

Victor Dodzweit has taught a Bible study class at the Brevard jail since 2000. After meeting Schoenwetter three months after the murders, he brought him to the class. (R541-42). Initially, Schoenwetter wanted a Bible on Satanism, but Dodzweit told him, "If I did what you did, I would want a Bible." (R551). Dodzweit talked to Schoenwetter's attorneys before the penalty phase, but they did not ask him to testify before the jury. (R546). Dodzweit testified at the *Spencer* hearing. (R546). He would have testified the same way at the penalty phase. (R550). After speaking with Moore and McCarthy, he saw "firsthand how they really are defending" their client. (R548). At first, Dodzweit and Moore disagreed about Schoenwetter entering a plea. Dodzweit felt it was important Schoenwetter enter a plea because "he's going to have to face God someday." (R547).

Thomas Wood was chaplain at Brevard County Jail when Schoenwetter was there. Schoenwetter sent a note to the Chaplain's office in 2002. Schoenwetter sought Wood's "Christian counsel" regarding a change in his plea. (R556). Schoenwetter felt that pleading "not guilty" was a lie, and Wood agreed. (R557). Wood baptized Schoenwetter. (R557). On the videotape Wood produced for a fundraiser, Schoenwetter said he used to be a monster, "but he's not that man anymore." (R561).

Frederick Shelor was serving a life sentence in 2001 when he met Schoenwetter

at the Brevard County Jail. (R564). He had been in prison six separate times. (R573). They prayed together and studied the Bible. (R564-65). Schoenwetter studied Greek and Hebrew and enjoyed reading about different subjects. (R566). During their time together at the jail, Schoenwetter never deviated from believing in, and living, a Christian life. (R568). Shelor said Schoenwetter "knew he was going over there to do them things" and admitted his guilt to the Court. (R568). Schoenwetter did not discuss Satanism with him. (R574). Shelor thought Schoenwetter would have a positive effect if he were in general population. (R571).

Nettie Connor,[5] Schoenwetter's paternal grandmother, said Debbie Roberts and Reese Ingram, Schoenwetter's biological parents, "got along pretty good" when they were around her. (R609, 611). They had a marriage "just like everyone else." (R623). Connor first met Schoenwetter when he was nine months old. (R613). She only saw Schoenwetter four times during his life. She was not allowed to talk to him on the phone or visit him. (R613-14). When Schoenwetter was first incarcerated, he wrote to Connor. Then he quit writing. (R614). Prior to the trial, she received a phone call and a letter from Schoenwetter's attorney. (R618, 623). She told him she had not been allowed to have anything to do with Randy. (R619). The last time she had seen Schoenwetter, he was a small boy about 4 or 5 years old. (R615-16, 622). She knew

[5] Ms. Connor and Reese Ingram testified telephonically from Georgia. (R608).

where her son Reese Ingram was, but does not remember the attorney asking for his phone or address. (R620; V5, 635). Connor testified Moore never contacted her about finding Reese. (R632). She said she did not receive a letter in 2002 from Moore asking her for information about Reese Ingram and the paternal side of the family. However, she recognized the address as the one she received her mail. A portion of Moore's letter stated, "It's extremely important to Randy's case that I know as much as I can learn about his relatives on both sides of his family." Further, "Randy's life is literally at stake." (R633-34). Although Connor claimed she did not receive the letter, she wrote back to the Public Defender. (R635).

Reese Ingram is Schoenwetter's biological father. He was sent to prison when Schoenwetter was approximately 1 to 1½ years old. (R643). After his release about 5½ years later, Ingram did not try to make contact with his son. In the meantime, he had relinquished custodial rights and Thomas Schoenwetter adopted the defendant. (R645). Ingram found out his son was arrested in the Fall of 2000. (R650-51). Shortly thereafter, he went to see Schoenwetter in the Brevard jail. (R647, 661). Ingram was living in Lake Butler at the time. (R653). He was not contacted by Schoenwetter's attorneys prior to trial nor did he try to contact them. (R649, 654-55). It never occurred to Ingram to find out details about his son's case. (R656). Ingram's mother did not tell him she had been contacted by Schoenwetter's attorney. (R654).

The State called Det. David Butler, one of the investigating detectives. (R584). Butler observed Schoenwetter's bedroom the day he was arrested. (R585). The room was very dark and had black or dark colored lights. (R586). Det. Butler identified photographs of the room. (R589). Schoenwetter's former girlfriend told Butler that Schoenwetter was a loner, was gothic, and he was "into witchcraft and talked about witchcraft alot." (R590).

The trial judge denied relief on November 7, 2008, in a comprehensive order which included attachments. (R1246-1709).

SUMMARY OF ARGUMENTS

ARGUMENT I: Schoenwetter wrote a letter to the judge admitting guilt. In that letter, Schoenwetter told the judge he wanted to plead guilty. On February 26, 2003, the judge called a hearing to advise the parties of the letter and, over the objection of defense counsel, Schoenwetter told the judge he wrote the letter and why. Schoenwetter pled guilty a week later against the advice of counsel. At the penalty phase, the judge ruled the plea colloquy inadmissible, but allowed the letter into evidence over objection. The trial judge also allowed the court reporter to read two statements Schoenwetter made at the February 26 hearing.

Schoenwetter now claims counsel was ineffective for failing to exclude the letter and February 26 statements because they were offers to plea and made during plea negotiations. The trial judge summarily denied this claim, finding that the letter and statements were not made in the course of plea negotiations and were admissible as admissions. Schoenwetter relies on *Calabro*, a case decided five years after Schoenwetter's penalty phase. This issue did not require an evidentiary hearing or factual development. The record shows that Schoenwetter made a unilateral, unsolicited admission. There was no expectation of plea negotiations with the judge, and Schoenwetter made admissions over the advice of counsel. Counsel was not ineffective for failing to prevent Schoenwetter from confessing and pleading guilty,

and *Calabro* does not apply to this case. Even if *Calabro* did apply, counsel cannot be ineffective for failing to anticipate a change in the law. Schoenwetter established neither deficient performance nor prejudice.

ARGUMENT II: The trial judge did not abuse his discretion in denying an evidentiary hearing on the lethal injection claim. Schoenwetter relied on the same arguments which have been repeatedly rejected by this Court.

ARGUMENT III: Schowenwetter claims counsel was ineffective at the penalty phase for:

> (a) introducing testimony regarding Schoenwetter's obsession with pornography;
>
> (b) failing to object to the prosecutor's statement that the Friskey sisters were the "targets of [Schoenwetter's] sexual desires and sexual fantasies.";
>
> (c) failing to present mitigation about Schoenwetter's background, remorse, and potential influence in prison;
>
> (d) failing to call an expert to "synchronize" the testimony regarding Schoenwetter's background; and
>
> (e) calling experts who contradicted each other.

Trial counsel made a strategic decision to present expert testimony that Schoenwetter had a fixation with pornography as a result of Asperger's Syndrome. Trial counsel made a strategic decision not to object to the prosecutor's comment regarding the Friskey sisters because that fact was coming into evidence. Counsel did not fail to

present relevant mitigation regarding Schoenwetter's background, and any additional testimony presented at the evidentiary hearing was either cumulative or unavailable at the time of trial. Counsel made a strategic decision not to present the testimony regarding Schoenwetter's religious conversion because it negated remorse. Counsel also made a strategic decision to call two experts since each one would establish one statutory mental mitigating circumstance. Schoenwetter established neither deficient performance nor prejudice.

ARGUMENT IV: This issue is procedurally barred and has no merit. *Roper v. Simmons* 543 U.S. 551 (2005) does not preclude the death sentence for a person with a chronological age of 18.

ARGUMENT V: There is no error, individual or cumulative.

ARGUMENT I

COUNSEL WAS NOT INEFFECTIVE AT THE PRE-TRIAL PHASE

Schoenwetter makes a series of allegations of ineffective assistance of counsel. The specific allegations include failure to move to exclude from the penalty phase:

> (a) statements Schoenwetter made at the February 26, 2003, hearing because those statements were inadmissible pursuant to §90.410, Rule 3.172, and *Miranda*[6] (Initial Brief at 57); and
>
> (b) the plea colloquy on March 5, 2003 (Initial Brief at 57);[7]
>
> (c) letter Schoenwetter wrote to the judge confessing to the crime (Initial Brief at 57);

The trial judge held:

> Under Claim I of his Motion to Vacate Judgment of Conviction and Sentence, the Defendant claims that he received ineffective assistance of counsel during the pre-trial phase. Under *Strickland v. Washington*, 466 U.S. 668 (1984), in order to establish a claim of ineffective assistance of counsel, a defendant must show 1) that his counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. Under Claim 1(B), the Defendant claims that he received ineffective assistance of counsel when his attorneys failed to object to the introduction into evidence during the penalty phase of a letter written by the Defendant to the Court prior to the date that he entered his plea. On February 17, 2003, the Defendant wrote a letter to the Court, confessing his guilt and indicating that he wished to change his plea from not guilty to guilty. The Defendant also stated in the letter that his reason for entering the Friskey residence was to force one or both of the Friskey daughters to

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[7] Schoenwetter concedes that this transcript was excluded.

have sex with him. (See Exhibit "G", Defendant's Letter). A status hearing was held on February 26, 2003, the day after the Court received the letter. During this hearing, the Defendant, against the advice of his attorneys
to remain silent and after the Court's cautionary instruction, advised the Court that he did in fact write the letter and that he did wish to change his plea from not guilty to guilty. (See Exhibit "H", February 26, 2003 Hearing-Transcript).

The Defendant's attorneys did object to the admission of the letter on authenticity grounds. After each side argued their position as to whether the State could adequately demonstrate the authenticity of the letter, the Court overruled the objection and ruled that the letter would be allowed into evidence. (See Exhibit "1", Penalty Phase Transcript, pgs. 681-685).

The statements that the Defendant made in his letter and in court were admissions and were admissible under section 90.803(18), Florida Statutes. The defense attorneys had no other grounds to object to the admissibility of the letter other than the authenticity objection that they did make. Therefore, they did not render ineffective assistance of counsel by failing to object to the admissibility of the letter.

The Defendant claims under Ground 1(C) that he received ineffective assistance of counsel when his attorney failed to object to the admissibility at the penalty phase of the statements that the Defendant made at the February 26, 2003 status hearing and the March 5, 2003, p1ea proceeding. The statements that the Defendant made during the March 5, 2003, plea proceeding were not introduced into evidence. (See Exhibit "1", Penalty Phase Transcript, pg. 695). Therefore, there was no reason for the defense attorneys to object to the admissibility of these statements on this ground. Furthermore, the Defendant has cited to no case law which states that a Defendant is entitled to be read his *Miranda* rights prior to making statements at a court proceeding. Nor has the Court through its own research found any case law which stands for this proposition.

It is clear from the transcript of the February 26, 2003, hearing that the Defendant was well aware of his *Miranda* rights at the time he made his

statements. There was no need for the Defendant to be advised of his right to counsel because he was represented by two attorneys who were present in court with him when he made the statements. During the hearing, one of the Defendant's attorneys stated, "Our advice to Mr. Schoenwetter is to maintain his silence." The Defendant then stated, "I'm disregarding that advice." (See Exhibit "H", February 26, 2003 Hearing Transcript: pg. 8). Not only was the Defendant aware of his right to remain silent, he was aware that in his attorneys' expert advice, it was in his best interest to remain silent. Yet, he decided to speak anyway.

The Defendant claims in Ground 1(D) that he received ineffective assistance of counsel when his attorneys failed to file a motion to suppress or a motion *in limine* to exclude from the penalty phase the Defendant's February 17, 2003, letter and the statements that the Defendant made at the February 26, 2003 status hearing. The Defendant claims that under section 90.410, Florida Statutes (2000) and 3.172, Florida Rules of Criminal Procedure, these statements were inadmissible because they were made during an offer to plea guilty.

On September 22, 2008, the Defendant filed a Notice of Supplemental Authority citing to the case of *Calabro v. State*, 33 Fla. L. Weekly S656 (Fla. Sept. 18, 2008). In *Calabro*, during the defendant's arraignment, the defendant stated to the prosecutor and the judge, "I will like to avoid the trial and have some kind of plea agreement set earlier than March or whatever that was." Shortly after this statement, the defendant stated, "1 know this is unusual but unfortunately, I'm guilty of this." The Court held that both of the defendant's statements were inadmissible under section 90.410, Florida Statutes (2007). Under section 90.410:

> Evidence of a plea of guilty, later withdrawn; a plea of *nolo contendere*; or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

In *Richardson v. State*, 706 So. 2d 1349, 1353 (Fla. 1998), the Court held

> that in determining whether a statement is inadmissible under section 90.410, a court should consider a two prong analysis. First, the court must determine "whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion." Next the court must determine whether this expectation was reasonable under the circumstances. "In applying the first prong, the trial court must carefully distinguish between the accused's admissions and the accused's attempts to negotiate a plea bargain." *Id.*
>
> The letter that Schoenwetter sent to the Court and the statements that the Defendant made at the status hearing were not attempts to negotiate a plea bargain. The Defendant stated that he wished to enter a guilty plea. However, he never asked for any type of sentencing concession in return. The Defendant was fully aware that by entering a guilty plea, he was subjecting himself to the possibility that he would receive the maximum penalty for the crime, the death penalty. Yet he wished to enter a guilty plea anyway. The statements that the Defendant made in the February 17, 2003, letter did not demonstrate an expectation to negotiate a plea. Therefore, these statements were not inadmissible under section 90.410. The Defendant's claim that his statements at the status hearing were an attempt to negotiate a plea bargain is meritless.
>
> Under Ground 1(E), the Defendant claims that he received ineffective assistance of counsel when his attorney failed to file a motion to suppress the statements that the Defendant made in his February 17, 2003, letter and at the February 26, 2003, status hearing on "additional grounds." The Defendant does not specify what these additional grounds are. Mere conclusory allegations are insufficient to establish a prima facie case of ineffective assistance of counsel. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). The letter was written by the Defendant and the statements that the Defendant made were not the result of any state action, but rather voluntary acts made by the Defendant himself. The Defendant's actions and statements were often contrary to the advice of his attorneys.

(R1253-1257).

The letter Schoenwetter wrote to the judge was an unsolicited, unilateral

admission, not an offer to negotiate. The letter stated:

> Judge Griesbaum,
> Hello, your Honor. I am writing this to you because I have been too much of a coward to speak out in open court. I want to change my plea from not-guilty to guilty, because the facts are, your Honor, that I am very guilty though not quite as I said in my interrogation. I broke into the Friskies' house with the clear desire to force either one or both of the Friskie daughters to have sex with me. Fortunately that did not happen, however, I did end up killing both Virginia Friskie and her father Ronald Friskie. Also, I nearly killed Haesun Friskie and only by the grace of God did I not do anything to Theresa Friskie.
>
> This is a plain statement of both my reason for being in the house and also what happened while I was in the house. As I said before, your Honor, I am guilty. Therefore, I would very much like my plea changed to the true plea of guilty. Thank you.
> Randy Schoenwetter,
> Feb. 17, 2003

(R1408).[8]

The letter was stamped as received on February 25, 2003. (R1408). The trial judge immediately scheduled a status hearing for February 26, 2003,[9] at which time the letter was filed in open court. (R1413). Defense counsel asked for the letter to be sealed; however, Schoenwetter stated that "I would object to that considering the fact that I wrote the letter with my own hand. . . Both the one that you received and the one

[8] The letter is Exhibit "G" to the trial judge's order denying Rule 3.851 relief. (R1253).

[9] The transcript of the hearing is Exhibit "H" to the trial judge's order denying Rule 3.851 relief. (R1254).

to Pastor Linkous." (R1416). Defense counsel stated on the record that "the hearing be ended until the status conference next week. Our advice to Mr. Schoenwetter is to maintain his silence." Schoenwetter answered:

> I'm disregarding that advice. The purpose that I wrote that letter is I wish to change my plea from not guilty to guilty. Yes, I did it, indeed. Those are the facts that I wrote in that letter and it is the truth. Anything else to try to deny that would be a lie and/or to question my competency as to whether I can even say that I'm guilty or not is pointless, I am quite competent.

(R1417). The trial judge convened the hearing and set a status conference for "next Wednesday morning at 8:30." (R1417).[10]

At the plea hearing on March 5, 2003, defense counsel advised the court that Appellant had seen Dr. Riebsame and was competent. (R1922). Defense counsel advised the court Appellant was entering the plea against his advice. (R1923). The judge took a recess so Schoenwetter could consult with counsel. (R1925). The trial judge conducted a complete plea colloquy. (R1926-58). Defense counsel ensured that the motion to suppress and pre-trial motions were reserved for the purpose of appeal. (R1936). Trial counsel asked that Schoenwetter be allowed to enter a no-contest plea. (R1937). The trial judge would accept only a guilty plea. (R1937). When asked whether anyone had made any promises regarding penalty, Schoenwetter stated:

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[10] According to the perpetual calendar, that date would be March 5, 2003.

"I've known for two years now or over that that it was either natural life or death." (R1940). The trial judge referenced the letter Schoenwetter wrote. Defense counsel objected and advised Schoenwetter not to answer any questions; however, Schoenwetter told the judge "I did write the letter, yes." (R1942). Throughout the plea colloquy, defense counsel advised Schoenwetter not to answer questions regarding his confession, whether the murders were premeditated, and details of the murders. (R1943-45, 1948). At the end of the plea colloquy, Schoenwetter advised the judge "I've had piece [sic] of mind since I mailed you that letter." (R1958).

At the penalty phase, trial counsel objected to admission of Schoenwetter's letter and the transcripts of the status hearing held February 26, 2003, and the plea hearing March 5, 2003. (DOA677-685)[11] The trial judge overruled the objection to the letter and held that the court reporter from the February 26 hearing could read the relevant portions of that transcript in order to admit the letter. The letter was admitted as State Exhibit #77 after the court reporter authenticated it. (DOA702-707). Also read into the record were two excerpts of Schoenwetter's statements from the February 26 hearing that:

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[11] At the Rule 3.851 evidentiary hearing, the trial judge took judicial notice of the record on direct appeal. (R234). Although the judge attached most of the record sections to his order, the complete section is attached as Exhibit "A" and cited as "DOA" followed by the page number of the record on direct appeal.

> (a) I would object to that [the attorney's advice], considering the fact that I wrote the letter with my own hand, and then he continues, both the one that you received and the one to Pastor Linkous (DOA 706); and
>
> (b) I'm disregarding [the attorney's] advice. The purpose that I wrote the letter is I wish to change my plea from not guilty to guilty. Yes, I did it, indeed. Those are the facts that I wrote in that letter and it is the truth. Anything else to try to deny that would be a lie and/or to question my competency as to whether I can even say that I'm guilty or not is pointless, I am quite competent (DOA706).

The judge did not allow the March 5 plea colloquy. (DOA708). The court reporter was asked whether she was present at the plea hearing, and two Court Minute Orders and the indictment were admitted. (DOA708-710; State trial exhibits #78-80).

This issue did not require an evidentiary hearing because the record refutes the allegations. *See Jimenez v. State*, 997 So. 2d 1056, 1072 (Fla. 2008). The record shows that trial counsel repeatedly tried to advise Schoenwetter not to make admissions, but Schoenwetter continued. Schoenwetter not only write a voluntary admission to the judge, but he confirmed that he wrote the letter and the contents were true. The letter and statements were not made for the purpose of negotiation, but because Schoenwetter confessed and wanted to enter a guilty plea. Despite trial counsel's efforts, Schoenwetter did just what he wanted.

Counsel was not deficient for failing to object on the basis of "plea negotiations." In *Stevens v. State*, 419 So. 2d 1058 (Fla.1982), this Court

unanimously adopted the federal test used in *Robertson* as the sole test for determining whether a statement falls under section 90.410 and rule 3.172(i) and is, therefore, inadmissible. Specifically, in *Stevens*, this Court stated:

> To determine whether a statement is made in connection with plea negotiations, a court should use a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir.1978) (en banc). The trial judge correctly determined that Schoenwetter's letter to him was not made with the expectation of negotiating a plea, but was a straight-up admission.

Schoenwetter relies on *Calabro v. State*, 995 So. 2d 307 (Fla. 2008), a case decided five years after Schoenwetter's penalty phase. This Court has "consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law." *Cherry v. State*, 781 So. 2d 1040, 1053 (Fla. 2000). *See also Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008): *Foster v. State*, 929 So. 2d 524, 529 (Fla. 2006).

Even under *Calabro*, Schoenwetter's letter and statements would be admissible. Schoenwetter made no indication that he wanted to negotiate any sentence or that his desire to plead was conditioned on any "governmental concession." *See Calabro*, 995 So.2d at 318. The letter was written to the judge, not the prosecutor or any State agent. Schoenwetter at no time indicated he expected any concession from the State.

Trial counsel did object on the appropriate bases, and the fact they did not object on the basis of plea negotiations does not make their performance unreasonable.

Last, Schoenwetter cannot show prejudice. He made a full confession to the crimes, this is a double murder involving a child, and the trial court found four aggravating circumstances. There is no claim Schoenwetter's plea was not voluntary. To show prejudice, Schoenwetter would have to establish that the evidence was erroneously admitted and he would have received a life sentence if the letter and statements at the February 26 hearing were not admitted into evidence.

ARGUMENT II

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING AN EVIDENTIARY HEARING ON THE LETHAL INJECTION CLAIM

This Court has repeatedly rejected the claim that Florida's lethal injection procedure violates the constitutional prohibition against cruel and unusual punishment. *See Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla.2008); *Power v. State*, 992 So. 2d 218, 221 (Fla.2008); *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla.2008); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007), *cert. denied*, --- U.S. ----, 128 S.Ct. 2486, 171 L.Ed.2d 777 (2008); *Lightbourne v. McCollum*, 969 So. 2d 326, 329-30 (Fla.2007), cert. denied, --- U.S. ----, 128 S.Ct. 2485, 171 L.Ed.2d 777 (2008). Further, with regard to appellant's contention that *Baze v. Rees*, --- U.S. ----, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), requires a different result, this Court recently explained in *Ventura v. State*, 2 So. 3d 194, 200 (Fla. 2009), *cert denied* ---U.S.---, 129 S.Ct. 2839 (June 22, 2009), that "Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court." *See also Henyard v. State*, 992 So. 2d 120, 130 (Fla.) ("We have previously concluded in *Lightbourn*e and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze*."), *cert. denied*, 129 S.Ct. 28, 171 L.Ed.2d 930 (2008); *Reese v. State*, 34 Fla. L. Weekly S296

(Fla. July 2, 2009).

The trial judge in this case held:

> The Defendant claims under Claim lb that lethal injection under the State's procedures violates the constitutional protection against cruel and unusual punishment. In his motion, the Defendant discusses the botched execution of Angel Diaz on December 13, 2006 and claims that the new protocols issued on July 31, 2007 are still deficient. The Supreme Court of Florida has held on numerous occasions that the Florida procedure for implementing lethal injection does not violate the constitutional protection against cruel and unusual punishment. *See Henyard v. State*, 33 Fla. L. Weekly S629 (Fla. Sept. 10, 2008); *Woodel v. State*, 985 So. 2d 524 (Fla. 2008); *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Each of these cases were decided after the new protocols were implemented. In *Baze v. Rees*, 128 S.Ct. 1520 (2008), the Supreme Court of the United States held that Kentucky's lethal injection protocol was constitutional. In the recent case of *Henvard v. State*, 33 Fla. L. Weekly S629 (Fla. Sept. 10, 2008), the Supreme Court of Florida considered Florida's lethal injection protocol in light and found the protocol to be constitutional.

(R1257). Although Schoenwetter claims the trial judge should have allowed an evidentiary hearing on this issue, he presented no argument or allegation which has not already been decided by this Court. *See Schwab*, 969 So. 2d at 325.

ARGUMENT III

COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE.

Schoenwetter claims that trial counsel was ineffective at the penalty phase for:

(a) introducing testimony regarding Schoenwetter's obsession with pornography (Initial Brief at 71);

(b) failing to object to the prosecutor's argument that the Friskey sisters were the "targets of [Schoenwetter's] sexual desires and sexual fantasies." (Initial Brief at 77);

(c) failing to present mitigation about Schoenwetter's background, remorse, and potential influence in prison (Initial Brief at 78); and

(d) failing to call an expert to "synchronize" the testimony regarding Schoenwetter's background (Initial Brief at 85); and

(e) calling experts who contradicted each other (Initial Brief at 87).

The trial judge held:

> The Defendant claims under Claim IV of his motion that he received ineffective assistance of counsel during the penalty phase. Under Claim IV(B), the Defendant claims that he received ineffective assistance of counsel when his attorneys introduced evidence of the Defendant's interests in child pornography, pedophilia, and Satanism. During the penalty phase, the defense introduced the testimony of Dr. William Riebsame, a psychologist, who testified that he met with the Defendant on twelve occasions and spent approximately twenty-five hours with him. (See Exhibit "I", Excerpt of Penalty Phase Proceedings, pg. 728). Dr. Riebsame testified that the Defendant suffered from ADHD and Asperger's Syndrome at the time of the crimes and that the Defendant was under the influence of an extreme mental or emotional disturbance at the time of the crimes. (See Exhibit "I", Penalty Phase Transcript, pgs.

761). Dr. Riebsame defined Asperger's syndrome as a mild form of autism which impairs the ability to socially interact with others, recognize the feelings of others, or recognize the social cues of others, and causes the patient to have an extreme, all encompassing preoccupation with some subject. Dr. Riebsame testified that the Defendant had a preoccupation with sex, Satanism and with having sex with the Friskey girls at the time of the crimes. Dr. Riebsame testified that it was this preoccupation with sex and specifically with having sex with the Friskey girls which caused him to enter the Friskey residence on the night of the crimes. (See Exhibit "I", Penalty Phase Transcript, pgs. 739-752).

On cross examination, Dr. Riebsame testified that he was aware that the Defendant had downloaded child pornographic material on his computer. (See Exhibit "I", Penalty Phase Transcript, pg. 773-774). In order to rebut this testimony, the defense later called Commander Bobby Mutter of the Titusville Police Department. Detective Mutter testified that approximately three years prior to the penalty phase, the Defendant's mother had brought a CD to him with the concern that the Defendant had been downloading child pornography. Detective Mutter testified that he viewed the CD and determined that the females featured on the CD were not underage and that no crime had been committed. (See Exhibit "I", Penalty Phase Transcript, pgs. 1049-1052).

During the evidentiary hearing held on the Defendant's Motion to Vacate Judgment of Conviction and Sentence, J. Randall Moore, one of the two Assistant Public Defenders who represented the Defendant at the Penalty Phase testified as to the strategic reasons for presenting the testimony regarding the Defendant's preoccupation with child pornography and Satanism. Moore testified, "I think our theory was that he had an obsession with pornography and he was so deeply inmeshed in it, so hooked by it, that it was an overwhelming influence, and it compelled him to do something that he wouldn't have ordinarily done." He testified that they believed Dr. Riebsame's testimony to be important to the defense and that they "would take the bad with the good and try to put a positive spin on the bad to make it look like it was a hook that dragged Randy into doing this." (See Exhibit "J", Evidentiary Hearing

Transcript, pg. 125).

George McCarthy, the other Assistant Public Defender who represented the Defendant at the Penalty Phase, testified at the evidentiary hearing that he and Moore believed that Dr. Riebsame would help to establish statutory mitigation. Therefore, they decided to take the good with the bad (See-Exhibit "J"; Evidentiary Hearing Transcript pg. 232).

Moore and McCarthy made a strategic decision to introduce evidence of the Defendant's preoccupation with child pornography and Satanism. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). The Court finds Moore and McCarthy's decision to be reasonable. Because the Defendant wrote a letter to the Court stating he entered the Friskey residence because he wanted to have sex with the two underage Friskey girls, one of whom was only 10 years of age, the jury was well aware that the Defendant was interested in having sex with underage females. Moore and McCarthy made the decision to use the Defendant's interest in child pornography, which the jury would inevitably learn of one way or another, to their advantage. Dr. Riebsame's testimony demonstrated to the jury that the Defendant's obsession with sex and pornography caused him to be unable to resist the urge to enter the Friskey residence.

Furthermore, the defense needed the testimony of Dr. Riebsame to help establish mitigation. Dr. Riebsame helped to establish the statutory mitigator that the Defendant was under an extreme mental or emotional disturbance at the time of the crime. Although, the defense also had the testimony of Dr. Prichard to establish that the Defendant suffered from Asperger's Syndrome, the testimony of the two witnesses was not exactly the same and the testimony of both of these witnesses was certainly more likely to be persuasive than the testimony of just one. The benefits to calling Dr. Riebsame as a witness outweighed the negatives. Therefore, it was reasonable for Moore and McCarthy to "take the good with the bad" and present the testimony of Dr. Riebsame despite his opinion that the Defendant had an obsession with child

pornography and Satanism. The defense attorneys did not render ineffective assistance of counsel in this regard.

The Defendant claims under Claim IV(C) that he received ineffective assistance of counsel when his attorneys failed to object to the State's argument during his opening statement regarding a non-statutory aggravator. Specifically, the Defendant claims that his attorneys should have objected to the following statements made by the Assistant State Attorney during his opening statement of the Penalty Phase: "This relationship that the defendant had with Chad Friskey also gave him an opportunity to become acquainted with Chad's two younger sisters, Theresa and Virginia Friskey. The defendant came to see them as targets of his sexual desires and sexual fantasies." (See Exhibit "I", Penalty Phase Transcript, pg. 39). During the evidentiary hearing, Moore testified that he did not object to this statement because he knew that evidence that the Defendant knew Theresa and Virginia through his friendship with Chad and that they were objects of his sexual fantasies was going to come in during the penalty phase. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 154-155).

The purpose of an opening statement is for counsel to outline what he or she in good faith expects to establish by the evidence, presented at trial. *Jones v. State*, 949 So. 2d 1021, 1032 (Fla. 2006). There was nothing improper in the State making these statements during opening statement. The Assistant State Attorney was simply describing evidence that he expected to be presented to the jury. This evidence was in fact presented to the jury during the penalty phase. The Assistant State Attorney did not argue that this evidence in and of itself established a statutory or non-statutory aggravator. Therefore, the defense attorneys had no grounds for an objection and did not render ineffective assistance of counsel by failing to object.

In the Defendant's Amendment to Claim IV(D), the Defendant, claims that he received ineffective assistance of counsel when his attorneys failed to present all available mitigation during the penalty phase. First, the Defendant claims that his attorneys should have presented evidence of the religious conversion that the Defendant underwent after his arrest.

During the evidentiary hearing, David Musalo, a volunteer with the Good News Jail and Prison Ministries, testified that he taught a Discipleship class at the Brevard County Jail which the Defendant attended regularly. He testified of the Defendant's great ability to learn and understand the scriptures. He also testified that the Defendant never missed the weekly classes and was very faithful. He testified that he talked to the Defendant about his decision to enter a guilty plea and that because of the Defendant's newfound faith, he realized the depth of his crime and was willing to stand up to that. Musalo testified that if he were asked to testify for the Defendant at the penalty phase, he would have done so. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 193-208).

Rick Dean testified that he began teaching a Discipleship' class at the jail after the Defendant had been in jail for a while and that the Defendant attended his class: He testified that the Defendant tried to walk with integrity and live out the things he had leaned since he was born again. He testified that the Defendant pled guilty because pleading not guilty was not what God wanted him to do. He testified that although the Defendant had trouble feeling remorse because of his Asperger's Syndrome, he wanted to feel remorse. Dean testified that he would have been willing to testify at the penalty phase. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 302-314).

Victor Dodzweit testified that he conducted bible study and one on one counseling at the jail. He testified that the Defendant had a positive impact at the jail and that the Defendant pled guilty because to do otherwise would have meant living a lie. He testified that the Defendant's attorneys never asked him to testify before the jury. Dodzweit did testify for the Defendant at the *Spencer* hearing. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 3l6-321).

Tom Wood, the Senior Chaplain at the Jail while the Defendant was incarcerated there testified that the Defendant consulted him about the possibility of entering a guilty plea. He testified that the Defendant said that continuing to plead not guilty would be a lie. He testified that the Defendant was a positive influence at the jail and would be a positive influence in prison. He testified that he would have testified for the

Defendant during the penalty phase if he were asked. (See Exhibit "J", Evidentiary Hearing Transcript, pgs.329-338).

Fredrick Shelor testified that he was the Defendant's cellmate at the jail: He testified that the Defendant was strong in the lord and diligent in his studies of scripture. He testified that he and the Defendant would debate scriptures. He testified that the Defendant was a strong influence at the jail and would be in prison too. He also 'testified that he was available to testify for the Defendant at the penalty phase but he was never asked. On cross examination, Shelor testified that he has been to prison six times and that he is currently serving a life sentence for attempted felony murder. Shelor testified that he became a Christian in 1997 and that he committed some of his crimes after he became a Christian. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 339-350).

During the evidentiary hearing, Moore testified that he and McCarthy made a strategic decision not to call these witnesses. He testified that after speaking with the Defendant and with Pastor Dodzweit, they got the impression that the Defendant believed that because he was saved, he had been forgiven for all of his sins, including his crimes and that the Defendant was at peace with himself. They believed that this would show a lack of remorse. They also believed that the Defendant had a self righteous attitude about his newly found religion which would be offensive to the jury. After discussing the possibility of presenting this evidence to the jury at length, they determined that the harm outweighed the good and they decided against presenting it. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 136-138). McCarthy's testimony at the evidentiary hearing was similar to Moore's testimony on this issue. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 226-228).

The Court finds that Moore and McCarthy considered the possibility of presenting testimony of the Defendant's religion and that their decision not to present this testimony to the jury was reasonable under the norms of professional conduct. It was reasonable for them to believe that the jury might be offended if they heard testimony that the Defendant was now at peace with himself after he killed two people and seriously injured a third. Although this testimony -could have presented some

mitigating evidence, it was reasonable for Moore and McCarthy to believe that the harm would outweigh the good. The testimony of Fredrick Shelor certainly would have been damaging to the Defendant's case as Shelor testified that he continued to commit felonies after he became a Christian. The Defendant tries to make Shelor a role model prisoner who is saved by becoming a Christian. Unfortunately Shelor fell back to his old ways, notwithstanding his conversion to Christianity in 1997. It certainly appears that Mr. Shelor found God so long as he is behind bars, however, he left God back in prison when he was released; again, only to commit new crimes that now returned him to prison for a life sentence. The Court notes that Victor Dodzweit did testify at the *Spencer* hearing. The Defendant did not receive ineffective assistance of counsel when his attorneys failed to present this testimony

The Defendant next claims under Claim IV(D) that he received ineffective assistance of counsel when his attorneys failed to present additional evidence of the Defendant's social background. Specifically, the Defendant claims that his attorneys should have presented the testimony of his biological father, Reece Ingram, and his paternal grandmother, Nettie Conner.

During the penalty phase several witnesses testified as to the Defendant's childhood. Deborah Roberts, the Defendant's mother testified that the Defendant's biological father was physically abusive to her while she was pregnant with the Defendant. She divorced him when the Defendant was one year old. She testified that once the Defendant started school, he had difficulty making friends and the other children would pick on him. He also had difficulty sitting still and paying attention at school. The Defendant began to take Ritalin and his performance in school improved until he stopped taking it in the seventh grade. She testified that the Defendant did not have any friends until he was in the seventh grade. She testified that at some point she married Thomas Schoenwetter who adopted the Defendant. She and Schoenwetter had a daughter together. Eventually she and Schoenwetter were divorced. Roberts testified that when the Defendant was in the tenth grade, they moved to Port St. Richie to live with a boyfriend who she met on the internet. However, eventually the boyfriend began to physically abuse the Defendant and

they moved back to Titusville after a year. She testified that after the tenth grade the Defendant began going to adult education and that he had almost completed it when he was arrested. (See Exhibit "I", Penalty Phase Transcript, pgs. 1056-1076).

Thomas Schoenwetter testified that he met the Defendant when he was four, adopted him when he was six and divorced his mother when he was eleven. He described the Defendant as a loner. He testified that he was close to the Defendant when the as close after the divorce. (See Exhibit "I" Penalty Phase Transcript; pgs: 1043-1046). Other witnesses testified as to the Defendant's difficulty making friends and as to other children picking on the Defendant throughout his childhood.

The Defendant claims that in addition to this testimony, the defense attorneys should have presented the testimony of Reece Ingram and Nettie Conner. During the evidentiary hearing, Reece Ingram testified that he is the Defendant's biological father. He testified that he was arrested when the Defendant was about a year and a half old for aggravated assault and robbery and went to prison for five and a half years. He testified that he wrote letters to the Defendant while he was in prison but they were all sent back to him. He testified that he gave up his parental rights under duress because Roberts told him that if he did not, she would take him to court and have him sent back to prison for back child support. He testified that he was never contacted by the public defender's office and asked about his relationship with his son. He testified that had he been contacted, he would have been willing to cooperate. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 416-425).

Nettie Conner testified at the evidentiary hearing that she is Reece Ingram's mother and the Defendant's grandmother. She testified that she only saw the Defendant four times. She testified that Ingram tried to contact the Defendant when he was a child but that he was not allowed to speak to him on the phone or to visit him. She testified that the last time she saw the Defendant, she and her sister went to a yard sale that Roberts was having with her mother. When Roberts saw Conner, she grabbed the Defendant and ran into the house. She testified that she wanted to have a

relationship with the Defendant and that her family and extended family would have been there for him over the years. She testified that she was contacted by someone from the public defender's office by telephone. She testified that she told him that if her family was allowed contact with the Defendant he would not be in trouble. She testified that she could have told the person from the public defender's office how to contact Ingram if he had asked. Conner testified that she would have been willing to testify for the Defendant at the penalty phase. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 384-397).

Moore testified at the evidentiary hearing that he and the investigator from his office tried to locate Reece Ingram and could not. He testified that he sent numerous letters to the -paternal side of the family, including the paternal grandmother, but the family members would not help. He testified that they eventually hired Laura Blankman, a mitigation specialist, to try to locate Ingram but she was also unable to locate him. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 134-136, 155-157).

The defense attorneys did not render ineffective assistance when they failed to call Reece Ingram as a witness. Moore testified that he, an investigator from his office, and Laura Blankman all tried to locate Ingram and were unable to do so. Clearly, the defense made a strong effort to locate Ingram.

Furthermore, the Defendant was not prejudiced by his attorneys' failure to call Reece Ingram and Nettie Conner as witnesses. The only additional information that these witnesses would have provided was that Deborah Roberts, the Defendant's mother, prevented the Defendant from having any contact with his biological father or his paternal family members. However, it is questionable whether the Defendant would have been better of having a relationship with Ingram considering that the evidence showed that Ingram physically abused the Defendant's mother while she was pregnant with him and then went to prison for aggravated assault and burglary. Had this testimony been presented at the penalty phase, it is unlikely that the jury would have given it much weight. This evidence would not have been enough to overcome the overwhelming aggravation

in this case as described in the Judgment and Sentence Order. (See Exhibit "D", Judgment and Sentence Order).

The Defendant next claims under Claim IV(,D) that he received ineffective assistance of counsel when his attorneys failed to call Laura Blankman as a witness. In 2003, Laura Blankman was in private practice investigating mitigation for death penalty cases. Blankman testified at the evidentiary hearing that on August 27 or 28, 2003, Moore called her and asked her to talk to the Defendant and his family and try to get more mitigation evidence. He stated that he could only get funding to pay her for about 30 hours of work. Blankman testified that she interviewed the Defendant and his mother as well as other family members. She testified that Roberts told her that she was physically abused by her father throughout her childhood. Roberts also told her that she and the Defendant lived with her father when the Defendant was one to four years old and that the Defendant witnessed his grandfather physically abusing his mother. Blankman testified that she believed that this abuse needed to be looked into further; however, they ran out of time. She testified that she told Moore and McCarthy about this abuse. She testified that she did not have enough time to investigate the paternal side of the family, but she believed that Reece Ingram and his family needed to be further examined. She testified that Roberts told her of prenatal problems. She stated that she was abused by Ingram during her pregnancy, she did not have much prenatal care, she was malnourished during her pregnancy, and she had a difficult delivery. Blankman testified that she learned that the Defendant had an unstable childhood. They would move frequently and they were very poor. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 248-267).

Although the Defendant claims in his motion that Blankman should have testified at the penalty phase, it appears from Blankman's testimony at the evidentiary hearing that he was actually claiming that evidence should have been presented at the penalty phase of the additional mitigation that Blankman discovered through her investigation. However, evidence was presented during the penalty phase of much of the mitigation that Blankman testified to at the evidentiary hearing. Roberts testified that she was abused by the Defendant's biological

father during her pregnancy, that she did not receive much prenatal care, and that she was malnourished during her pregnancy. (See Exhibit "I", Penalty Phase Transcript, pgs. 1057-1061). Roberts also testified about the Defendant's unstable childhood, stating that she divorced his father when he was a year old, moved in with her parents, married Thomas Schoenwetter who adopted the Defendant and then divorced him, moved to Port St. Richie to live with a boyfriend she met online, and then moved back to Titusville a year later. (See Exhibit "I", Penalty Phase Transcript, pgs. 1057-1076). In essence, Blankman has little or nothing to offer except to describe her attempts to locate individuals and state who she spoke with regarding the Defendant.

Roberts did not testify at the penalty phase that she was physically abused by her father and that the Defendant witnessed some of this abuse. However, the Defendant was not prejudiced by the fact that this testimony was not presented. While this testimony may have provided some mitigation, it would not have been enough to overcome the overwhelming aggravating circumstances in this case as described in the Judgment and Sentence Order. (See Exhibit "D", Judgment and Sentence Order).

Although not specifically alleged in the Defendant's motion, Blankman testified at the evidentiary hearing that more time should have been spent investigating mitigation in this case and that there were issues that were not completely explored. However, the defense did not present evidence at the evidentiary hearing to show that had these issues been explored further demonstrated that he was prejudiced in this regard. The Court finds that the Defendant did not receive ineffective assistance of counsel by his attorneys' failure to call Laura Blankman as a witness, failure to present all of the evidence discovered by Blankman at the penalty phase, and failure to conduct additional mitigation investigation.

The Defendant next claims under Count IV(D) that he received ineffective assistance of counsel when his attorneys failed to call an expert to integrate all of the evidence that was presented regarding the Defendant's social background, including the Defendant's religious transformation, with the medical testimony that was presented. The

defense presented the testimony of Dr. Henry L. Dee, a Neuropsychologist, at the evidentiary hearing. He testified that he gave the Defendant an IQ test and that the Defendant scored 123. He also tested the Defendant's memory functioning and the Defendant scored 112. Dr. Dee testified that the difference of eleven points indicates brain damage. He also testified that the Defendant failed a frontal lobe functioning test which indicates that the Defendant has some damage to his frontal lobe. Based upon these tests, Dr. Dee testified that the Defendant's memory functioning and frontal lobe functioning were impaired. Dr. Dee described how frontal lobe injury impairs a person's inhibitory controls. He testified that the results of the tests he conducted and his observations of the Defendant were consistent with the evidence presented during the penalty phase that the Defendant had Asperger's Syndrome and ADHD. Dr. Dee testified that-he spoke with the Defendant and his relatives to obtain a social history of the Defendant. He learned that the Defendant had moved ten times during his childhood. Dr. Dee testified that moving is probably the second most depressing event in a person's life because the person loses everyone in their life all at once. He testified that moving often would be even more difficult for a child with Asperger's Syndrome. Dr. Dee testified that had the Defendant had a more stable life, he more likely would have been able to make friends and develop social skills. Dr. Dee testified -that people with the Defendant's conditions have difficulty expressing remorse. Yet, he testified that the Defendant expressed remorse in letters written after his religious conversion. Dr. Dee testified that in his opinion, the Defendant met the criteria for three mitigating factors: that the Defendant was under an extreme mental or emotional disturbance, that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and the Defendant's age at the time of the offense. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 32-63).

The Defendant was not prejudiced by his attorneys' failure to call Dr. Dee as a witness at the penalty phase. For the most part, Dr. Dee's testimony was the same as the testimony that was presented at the penalty phase. Dr. Riebsame testified that his testing indicated that the Defendant had some type of brain injury or an abnormal brain. (See

Exhibit “I”, Penalty Phase Transcript, pg. 732). He also diagnosed the Defendant as having Asperger’s Syndrome and ADHD and described the effect that each had on the Defendant. (See Exhibit “I”, Penalty Phase Transcript, pgs. 737-753). Dr. Pritchard also testified that the Defendant had Asperger’s Syndrome and ADHD and described how these conditions affected the Defendant’s actions on the night of the crimes. (See Exhibit “I”, Penalty Phase Transcript, pgs. 844-855).

Dr. Wu testified that the Defendant’s PET scan indicated that the Defendant’s frontal lobe area and the areas of the temporal cortex were abnormal. He testified that this is consistent with someone who has Asperger’s Syndrome. Dr. Wu’s testimony regarding how having an abnormal frontal lobe would have affected the Defendant on the night of the crimes was similar.

Dr. Dee did add the testimony regarding how the frequent moves affected the Defendant. However, the Defendant was not prejudiced by the absence of this testimony from the penalty phase. The jury did hear about the Defendant’s Asperger’s Syndrome and about how it affected the Defendant’s decision making process while he was committing the crimes. Yet, both the jury and the Court found that this mitigation was not enough to overcome the overwhelming aggravating circumstances in this case. The Court found that the Defendant’s psychological disorders did not explain his conduct because the Defendant made a series of conscious decisions which led him to commit his crimes and then to attempt to cover them up. (See Exhibit “D”, Judgment and Sentence Order). Evidence that the Defendant moved often as a child and that these moves would have been more difficult for a child with Asperger’s Syndrome
than it would be for a child without Asperger’s Syndrome would not have been enough to overcome the aggravation in this case.

The Defendant claims under Claim IV(E) that he received ineffective assistance of counsel when his attorneys presented the testimony of two conflicting expert witnesses. The Defendant claims that Dr. Riebsame and Dr. Pritchard contradicted each other when Dr. Riebsame found that the Defendant was under the influence of an extreme mental or

> emotional disturbance and Dr. Pritchard testified that the Defendant's ability to appreciate the criminality of his conductor to conform his conduct to the requirements of the law was substantially impaired. Each expert found that a separate statutory mitigator existed; they were not contradictory as claimed by the Defendant.
>
> During the evidentiary hearing, Moore testified that generally there is some variation in between experts who testify in a case. He testified that he and McCarthy discussed the variations in Dr. Riebsame and Dr. Pritchard's testimony and decided that it was best to call both witnesses. They decided that by calling both witnesses they could present two statutory mitigators to the jury instead of just one. (See Exhibit "J", Evidentiary Hearing Transcript, pgs. 148-149). The Court finds that Moore and -McCarthy made a strategic decision to present the testimony of both Dr. Riebsame and Dr. Pritchard despite the variations in their testimony. Moore and McCarthy considered different courses of action and decided that presenting the testimony of both expert witnesses would be the best course of action for their client. The Court finds that it was reasonable under the norms of professional conduct to decide to present evidence of two statutory mitigations instead of one despite perceived conflicts in the testimony.

(R1257-1273).

These findings are supported by competent substantial evidence and the trial judge attached every record section supporting his Order. Trial counsel made a strategic decision to present expert testimony that Schoenwetter had a fixation with pornography as a result of Asperger's Syndrome. Trial counsel made a strategic decision not to object to the prosecutor's comment regarding the Friskey sisters because that fact was coming into evidence. Counsel did not fail to present relevant mitigation regarding Schoenwetter's background, and any additional testimony

presented at the evidentiary hearing was either cumulative or unavailable at the time of trial. Counsel made a strategic decision not to present the testimony regarding Schoenwetter's religious conversion because it negated remorse. Counsel also made a strategic decision to call two experts since each one would establish one statutory mental mitigating circumstance. Schoenwetter established neither deficient performance nor prejudice.

ARGUMENT IV

ROPER V. SIMMONS 543 U.S. 551 (2005) DOES NOT PRECLUDE THE DEATH SENTENCE FOR A PERSON WITH A CHRONOLOGICAL AGE OF 18; THIS ISSUE IS PROCEDURALLY BARRED.

This issue is procedurally barred for failure to raise the issue on direct appeal. *See Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006) ("[A] claim that could and should have been raised on direct appeal is procedurally barred.") Further the issue has no merit. Schoenwetter claims that, pursuant to *Roper v. Simmons*, it is unconstitutional to execute a defendant who might have the mental functioning of a person under 18 years of age. This Court has consistently held that *Roper* only prohibits the execution of defendants "whose chronological age is below eighteen" at the time of the capital crime. *Reese v. State,* 34 Fla. L. Weekly S296 (Fla. July 2, 2009); *Evans v. State* 995 So. 2d 933, 954 (Fla. 2008); *Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008); *Farina v. State,* 937 So. 2d 612, 626 n. 7 (Fla. 2006); *Kearse v. State*, 969 So. 2d 976, 992 (Fla. 2007): (denying *Roper* claim where defendant was eighteen years and three months old at the time of the crime and had mental and emotional impairments); *Stephens v. State*, 975 So. 2d 405, 427 (Fla. 2007); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006), *cert. denied*, 546 U.S. 1219, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006).

The trial judge held:

> The Defendant claims under Claim V that his sentence of death is unconstitutional under *Roper v. Simmons*, 543 U.S. 551 (2005). The Defendant's claim could have been raised on direct appeal and therefore, is not cognizable under Rule 3.850. *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008). Furthermore, the Defendant's claim lacks merit. In *Roper v. Simmons*, 543 U.S. 551(2005), the Court held that it is unconstitutional to impose the death penalty upon a person who is under 18 years of age. The Defendant was 18 years of age when he committed his crimes. The Defendant argues that since testimony was presented that he had an emotional age of 11 or 12, *Roper* applies to him. However, the Supreme Court of Florida has held that *Roper* only prohibits the execution of defendants who had a chronological age under 18 at the time they committed their crimes. *Stephens v. State*, 975 So. 2d 405, 427 (Fla. 2007); *Hill v. State*, 921 So.2d 579, 584 (Fla. 2006). Therefore, the Defendant's death sentence is not unconstitutional due to his age.

(R1275-76). The trial court findings are supported by competent, substantial evidence.

This issue was not raised on direct appeal, and Schoenwetter was 18 years of age when he committed the murders.

ARGUMENT V

THERE IS NEITHER INDIVIDUAL NOR CUMULATIVE ERROR.

Until some individual error can be shown, there can be no claim of cumulative error. *See Harvey v. State*, 946 So. 2d 937 (Fla. 2006); *Downs v. State*, 740 So. 2d 506 (Fla. 1999) (where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail). Because Schoenwetter's claims, addressed individually, do not give rise to conclusions of ineffective assistance of counsel or that his constitutional rights were violated, there can be no claim of cumulative error. *See Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit.").

The trial judge held:

> The Defendant's final claim, under Claim VI of his motion, is that the cumulative effect of all of the claims in his motion entitle him to relief. As the Court has found that each of the Defendant's claims lack merit, the Defendant also is not entitled to relief under his cumulative relief claim. To the extent that this Court denied some of the Defendant's claims based upon lack of prejudice to the Defendant, the Court finds that the Defendant also was not prejudiced by the cumulative effect of each of these claims together. Furthermore, it should be noted that the Defendant played a major role in his defense and even countermanded the advice of his attorneys on several occasions. Despite these challenges, Moore and McCarthy did an excellent job of defending their client in this case.

(R1276).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. mail to James Driscoll CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; and Barbara C. Davis, AAG, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118; on this ____ day of August, 2009.

BY:_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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Attorney for Appellee