IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-2271

RANDY SCHOENWETTER

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____

APPEAL FROM THE DENIAL OF POSTCONVICTION RELIEF
REPLY BRIEF OF THE APPELLANT

_____

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PRELIMINARY STATEMENT

Mr. Schoenwetter denies all of the arguments made in the State's Answer Brief. Based on the arguments contained herein, and in Mr. Schoenwetter's Initial brief, this Court should grant relief. The citations to the record are in the same format detailed in Mr. Schoenwetter's Initial Brief.

REPLY ON ARGUMENT I

MR. SCHOENWETTER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PRE-TRIAL PHASE. THIS VIOLATED MR. SCHOENWETTER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The State's answer failed to explain why the clear language of the following statute and the following rule of criminal procedure do not apply:

Section 90.410, Florida Statutes provides:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal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.

Florida Rule of Criminal Procedure 3.172(g) provides:

> Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendre, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

See Florida Rule of Criminal Procedure 3.172. (Section g is now relettered as i). Nowhere in the above rule is there an exception for Randy Schoenwetter. Trial counsel should have been familiar with the Rules of Criminal Procedure and the Evidence Code at the very minimum and then moved to suppress Mr. Schoenwetter's letter to the court and statements concerning his offer to plead guilty.

Mr. Schoenwetter's statements and the letter were an offer to plead guilty. Neither the rule nor the statute require that Mr. Schoenwetter seek anything in return for his plea of guilty, it was simply enough that he offered to plead guilty. While *Calabro v. State*, 995 So.2d 307 (2008), should be highly persuasive, counsel was ineffective for not knowing the plain language of the rule and statute which have been in effect for roughly the many years which the counsel at issue have been lawyers. In *Calabro*, this Court concluded that regardless of whether it considered Mr. Calabro's statements "under the *Robertson* standard or section 90.410" and the parallel criminal rule "the outcome is the same and the statements are not admissible." *Id*. at 317. Mr. Calabro relied on no new law, just the old law that counsel should have relied upon in the instant case.

The State, after persuading the postconviction court to deny Mr. Schoenwetter his right to an evidentiary hearing on

this claim, argues:

> Last, Schoenwetter cannot show prejudice. He made a full confession to the crimes, this a double murder involving a child, and the 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.

(AB 41). This argument misstates the standard under *Strickland v. Washington*, 466 U.S. 668 (1984), and diminishes the importance and nature of the rights Mr. Schoenwetter has under the United States Constitution.

To prove the deficient performance caused prejudice to the defendant, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. The defendant must show both deficient performance and prejudice to prove that a "conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id*. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant had the assistance necessary to justify reliance on the outcome of the proceeding." *Id*. at 691-92.

A defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693. "When a defendant challenges a death

sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - - including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*. at 696.

The jury in the instant case recommended death by 10-2 for the murder of Virginia Friskey and 9-3 for the murder of Ronald Friskey. *Schoenwetter v. State*, 931 So.2d 857 (2006). Mr. Schoenwetter's letter to the judge interjected a sexual component to his crimes that otherwise would not have been present in this case. This was highly prejudicial.

According to *Strickland*, Mr. Schoenwetter did not have to show that he would have received a life sentence if the letter and statements were not admitted. Mr. Schoenwetter, even without an evidentiary hearing, showed that he suffered great prejudice from counsel's failure to move to suppress the statements and letter under the available grounds addressed in this claim. Any

defense attorney knows that it is far better to argue for a client's life when the jury is not confronted with a sexual type crime. Just 18 years of age, brain damaged and suffering from Asperger's syndrome, Mr. Schoenwetter had compelling mitigation, even with it being limited by counsel's other ineffectiveness. Absent the admission of the letter and statements, there was a reasonable probability that the outcome would have been different.

Three jurors thought that Mr. Schoenwetter should not die for the murder of Ronald Friskey. Two jurors thought that he should not die for the murder of Virginia Friskey. The life-voting jurors disaffirm the State's argument that no matter what evidence the jury heard, whether favorable or not, the result in this case would have been the same. There was never a presumption of death in this case and it never was a foregone conclusion that this would be the outcome.

The rights that everyone is guaranteed in a criminal trial do not depend on the facts of the case. Mr. Schoenwetter had a right to the effective assistance of counsel even if there were bad facts in his case. Implicit in any capital first degree murder charge is an understanding that the facts are bad. This, however, in no way obviated the need for counsel to limit the facts according to the law so that Mr. Schoenwetter would have the best opportunity to avoid a death sentence. Despite the

vast and compelling mitigation in this case, which was presented and could have been presented, Mr. Schoenwetter's chances for a life sentence were greatly diminished by the unnecessary sexual component, prohibited by statute and rule.

The State's reliance on Mr. Schoenwetter's involvement in making statements and writing the letter is erroneous because rights do not depend upon the exercise of sound judgment. Mr. Schoenwetter's impulsivity and lack of social nuance led him to write a letter that any lawyer who could pass the Florida Bar exam would have advised against. This was of no account because the law prevented the admission of Mr. Schoenwetter's statements and letter. Analogous to the instant case, a suspect can foolishly decide to talk to the police when *Miranda* is required, but not read to the suspect. In doing so, a suspect can provide incriminating statements that State would gladly use. This, however, has nothing to do with a court's determination of the admissibility of such statements. Regardless of the suspect's wisdom in confessing, the burden of proof remains where the Constitution puts it, on the State, and the suspect's statements are suppressed.

The sexual component introduced by Mr. Schoenwetter's letter and statements was compounded by counsel's ineffectiveness in putting on false evidence that Mr. Schoenwetter was fixated on "child porn" and the supposed

pedophilia and satanic sexuality developed through Dr. Riebsame and rebutted by Commander Mutter. Because of counsel's ineffectiveness in both regards, Mr. Schoenwetter's statements and letter lent a false credence to the ill-conceived and inaccurate testimony of Dr. Riebsame.

If Mr. Schoenwetter received the evidentiary hearing that Rule 3.851 required, Mr. Schoenwetter would have had the opportunity to show that counsel had no valid strategic reason for failing to move to exclude the letter and statements. If the trial court ignored the plain reading and meaning of the law, counsel simply had to preserve this issue for appeal to this Court. There was no opportunity cost to filing a motion or objecting to this inadmissible evidence. There was no strategy in failing to object, just prejudice to Mr. Schoenwetter.

There is no automatic death penalty in Florida. Indeed, the facts and evidence that the State may put forth in favor of death are highly circumscribed. While certainly there were aggravating factors present in this case, there was a reasonable possibility of a different outcome with the effective assistance of counsel and without the prejudice of Mr. Schoenwetter's statements and letter.

The State's position disregards the powerful impact that a sexual component had in this case and the jurors' promises to consider the mitigation in this case. Mr. Schoenwetter pleads to

this Court to apply the rule and statute at issue, and the Sixth Amendment, and grant Mr. Schoenwetter a new penalty phase or remand for an evidentiary hearing.

REPLY ON ARGUMENT II

THE LOWER COURT'S DENIAL OF AN EVIDENTIARY HEARING AND RELIEF ON CLAIM II WAS CONTRARY TO THE UNITED STATES CONSTITUTION. FLORIDA'S LETHAL INJECTION PROCEDURE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT AND THE DENIAL OF AN INDIVIDUALIZED HEARING VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Recently, there was another victim of lethal injection, although this individual lived. On September 15, 2009, the State of Ohio was unsuccessful in executing Romell Broom. This account was portrayed in the facts section Mr. Broom's "Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction":

> Romell Broom is a death row inmate. He was sentenced to die by lethal injection at the Southern Correctional Facility on September 15, 2009 at 10:00 a.m. Defendants spent "about two hours" attempting to access a vein. Jon Craig, *Botched execution brings reprieve*, Cincinnati Enquirer, Sept. 15 2009. He was struck 18 times in efforts to gain venous access. Alan Johnson, *Effort to kill inmate halted*, Columbus Dispatch, Sept. 16, 2009 at A1. Broom was "clearly frustrated as he leaned back on the gurney, covering his face with his hands and visibly crying." Craig, *Botched execution brings reprieve*. The execution staff moved to place IVs in his legs with Broom grimacing from pain at least four times. Id. "As Broom's anxiety grew, he repeatedly wiped his sweaty forehead with toilet paper." *Id*. Broom said that he was in pain. At one point the execution team members were

> placing needles in areas that were already bruised and swollen. In an attempt to find a vein in his ankle, the execution team member missed and the needle hit his bone. The pain was so severe that it caused him to scream. When the execution team attempted to find a vein in his hands broom's pain was extreme. By that time eighteen attempts to place the needles had been made.
>
> Prior to the execution Broom was denied the right to consult with his counsel privately. During the course of the execution, after it became apparent that the procedure was not proceeding according to Ohio's execution protocol, counsel was denied access to Broom and Broom was denied access to his counsel. Counsel was denied use of the telephone in the death house and was not allowed to have cell phone in the death house. Counsel was required to leave the building in order to make telephone calls to co-counsel and others in order to take legal steps to try and stop the execution-gone-wrong.
>
> After more than two hours of poking and prodding that brought Broom to tears, the State of Ohio was required to abandon its efforts to execute Broom for that day because Ohio Governor Ted Strickland issued a one week reprieve during which time the Ohio Department of Rehabilitation and Correction is required to recommend "appropriate next steps" to be used in Broom's next execution attempt. The Governor's reprieve expires on September 22, 2009, at which time Defendants intend to try and execute Broom.

Broom v. Strickland, Case 2:09-cv-00823-GLF-MRA Document 4 (M.D. OH Sept. 18, 2009) (references to appendices omitted).

This could easily happen here. Given the quality of Mr. Schoenwetter's mitigation and the denial of a fair penalty phase proceeding with effective counsel, it would, however, be much worse. Mr. Schoenwetter had a right to an individualistic determination of this issue. Due process required that Mr.

Schoenwetter be afforded the opportunity to challenge the method of execution as cruel and unusual punishment under the United States Constitution. Despite this Court's decisions listed in the State's Answer, this Court should remand for a hearing.

REPLY ON ARGUMENT III

MR. SCHOENWETTER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE WHICH VIOLATED MR. SCHOENWETTER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Schoenwetter stands by the arguments made in his initial brief. None of these arguments were refuted by the State's Answer Brief. As such, this Court should grant relief.

A. Counsel Was Ineffective for Allowing the Jury to Hear and Consider Harmful and Otherwise Inadmissible Evidence.

In the direct appeal opinion, this Court forecasted one of the main issues in the postconviction claim when the Court stated:

> Further, to the extent Schoenwetter argues that erroneous consideration of his possession of child pornography may have compounded **the error, it appears from the record that introduction of this issue was not attributable to the State but was raised instead by a defense witness, Dr. Riebsame.** The doctor spoke of Schoenwetter's obsession with child pornography. The defense attempted **to rebut** the testimony by introducing evidence from Commander Mutter from the police department. Mutter testified that the images the child's mother brought to the police, images Schoenwetter had downloaded, were not underage women. Because the women were not of underage children, no

charges were filed.

Schoenwetter v. State, 931 So.2d 857, 872 (2006). (Emphasis added). Reasonable counsel rebuts the State witnesses' testimony, not the defense witnesses' testimony. Reasonable counsel prepares for trial by knowing what the defense witnesses are going to testify. Calling Commander Mutter was nothing more than a panicked response after the ill-prepared Dr. Riebsame surprised counsel with a mistaken opinion on what Mr. Schoenwetter was fixated on. That somehow, and in some way, counsel intended to call Commander Mutter all along to contradict the defense's own expert is incredible.

As an initial matter, this Court should understand what the State, the postconviction court, Mr. Schoenwetter's counsel and Dr. Riebsame all apparently failed to understand: There is a tremendous difference between child pornography and pornography. At Mr. Schoenwetter's penalty phase, only Commander Nutter seemed to grasp this important distinction.

Every day on the television news, in newspapers and in all sorts of modern media, the public is repeatedly exposed to stories involving child pornography. There are television shows dedicated solely to the apprehension of pedophiles. Not a week goes by that there is not some story in the newspaper about law enforcement's seizure of a computer hard drive and accompanying arrest. In trial counsel's attempt to present mitigation it was

ineffective to allow Dr. Riebsame to make Mr. Schoenwetter's alleged mitigation one of these stories. It was even worse to do so when the facts were not even true.

More than just the age of the victims of child pornography, understandably, there is a tremendous difference between the public's perceptions of those who view adult pornography and those who view "child pornography." The criminal law and First Amendment jurisprudence make quite a distinction. The media makes a distinction as it is more than certain no newspaper will lead with the story "Nude Women to Appear in this Month's Playboy."

The only person who apparently was an expert in distinguishing between child pornography and legal adult pornography was Commander Bobby Nutter. Certainly, Commander Nutter's expert opinion was far more credible than the opinion of Dr. Riebsame. Dr. Riebsame had no basis to conclude that Mr. Schoenwetter had a fixation with "child pornography."

As if the presentation of Mr. Schoenwetter's false fixation on "child pornography" were not enough, trial counsel put on Dr. Riebsame's testimony that Mr. Schoenwetter was also fixated on Satanism. Short of adding animal cruelty to the mix, there could not have been worse "mitigation" that counsel could have put before the jury. The Satanism mitigation was also not true. Dr. Prichard, an expert in Asperger's syndrome never testified

that Mr. Schoenwetter showed any indications of being fixated on child pornography or Satanism. This was because she spent the time to speak with Mr. Schoenwetter to make her findings based on accurate information.

Mr. Schoenwetter informed Dr. Dee that while Mr. Schoenwetter "'might have had a definite strong interest in pornography . . . it wasn't child porn.'" (Vol. III PCR. 284). The pornography that Mr. Schoenwetter indulged in was legal pornography involving men and women. (Vol. III PCR. 284). Dr. Dee did not find Mr. Schoenwetter's pornography viewing "terribly remarkable in the sense that he's home all day, alone, no one there to supervise him and he's a teenage boy." (Vol. III PCR. 284).

Mr. Schoenwetter explained to Dr. Dee how Dr. Riebsame came to the misconception about Mr. Schoenwetter's Satanism. (Vol. III PCR. 282). When Mr. Schoenwetter was first housed in the county jail a Satanist gave him some satanic prayers. Mr. Schoenwetter showed these to Dr. Riebsame who seemed to misconstrue these "prayers" as those of Mr. Schoenwetter. According to Mr. Schoenwetter's account to Dr. Dee, "Dr. Riebsame believed that he was a devout Satan worshiper, which he maintains he's never been." (Vol. III PCR. 282).

In sum, because of trial counsel's ineffectiveness, the jury was given an inaccurate and prejudicial account of Mr.

Schoenwetter. This led to Mr. Schoenwetter's death sentence and destroyed any pretense of a fair and reliable penalty phase. This Court should reverse.

Besides Presenting Harmful and Inaccurate Information During the Penalty Phase, Counsel Was Ineffective for Failing to Fully Develop and Present the Mitigating Evidence That Was Presented at the Evidentiary Hearing.

Unlike the aforementioned Satanism and child pornography, there was nothing about Mr. Schoenwetter's religious transformation that was offensive or which showed a lack of remorse. Indeed, it was precisely because of Mr. Schoenwetter's religious conversion that he was able to experience remorse despite his numerous conditions.

After Mr. Schoenwetter pleaded guilty his relationship with counsel became strained. This, however, did not absolve counsel from performing in the manner that the Sixth Amendment guaranteed. This breakdown meant that counsel allowed Mr. Schoenwetter to be portrayed before the jury as that which he was not - - fixated on Satan and child porn. Counsel should have been portraying him as what he had become - - a remorseful immature young man who suffered from a number of mental infirmities that were compounded by his background.

All of the jail chaplains were readily available at the time of Mr. Schoenwetter's penalty phase. All of these gentlemen were available and worked in the very jail that Mr. Schoenwetter

was housed. The attorneys could have found these individuals by speaking with Mr. Schoenwetter, Ms. Blankman or from the brief conversation that counsel had with Jail Chaplain Dodzweit. Counsel had significant work to perform in preparing for the penalty phase of their impaired client. This work started with Mr. Schoenwetter, but the relationship deteriorated too far after Mr. Schoenwetter pleaded guilty.

Had counsel acted effectively, Mr. Schoenwetter would have received the same sentence as Brevard County capital defendant Darnell Lewis, based on the similarity of the mitigation in both cases. *See* (Vol. VII PCR. 1087-1107)(sentencing defendant to life based in part on the fact that the "Defendant has Embraced His Religious Faith and Has Become a Teacher and Advisor for Others Seeking to Strengthen their Faith"). Mr. Lewis received a life sentence with far less mitigation, in both scope and depth, than that which was available for Mr. Schoenwetter. The biggest difference was that Mr. Lewis' counsel obviously took the time to develop this mitigation. In a system that purports to not be arbitrary and capricious, such a difference should not determine who lives and who dies.

While counsel may have felt that Victor Dodzweit would not have made the best witness, there were three other chaplains available, including one who baptized Mr. Schoenwetter in the jail, Chaplain Tom Wood. (Vol. IV PCR. 557). Chaplain Wood also

videotaped Mr. Schoenwetter at the jail. (Vol. IV PCR. 580). Either trial counsel knew that this occurred and did not bother to speak with Chaplain Wood or, counsel had such limited interaction with Mr. Schoenwetter because the relationship had deteriorated after Mr. Schoenwetter exercised his right to plead guilty, that counsel did not know of Chaplain Wood. Fellow jail inmate Fred Shelor certainly was able to be located and certainly should have been investigated by counsel.

It was important for counsel to speak with these witnesses as part of any effective representation, and also based on the specific nature of representing Mr. Schoenwetter. As seen at the evidentiary hearing and at even the penalty phase, Mr. Schoenwetter had problems throughout his life forming friendships and social relationships because of his Asperger's syndrome. The Chaplains and Mr. Schoenwetter's friend and roommate, Fred Shelor, had the vantage point of interacting with Mr. Schoenwetter on a daily basis. These witnesses knew Mr. Schoenwetter in a way that other people could not prior to the openness that Mr. Schoenwetter's religious transformation made possible. They should have been called by counsel to tell the jury about this.

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court stated:

A process that accords no significance to relevant

> facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 304. Because of counsel's ineffectiveness the jury was denied the opportunity to know the person that Randy Schoenwetter had become. This Court should reverse.

REPLY ON ARGUMENT IV

IN LIGHT OF *ROPER v. SIMMONS*, MR. SCHOENWETTER'S SENTENCE OF DEATH VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONAL REQUIREMENT OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

On this claim, Mr. Schoenwetter requested an evidentiary hearing under Florida Rule of Criminal Procedure 3.851 for the court which sentenced him to death to consider the application of the death penalty to Mr. Schoenwetter under contemporary standards. Since the time of Mr. Schoenwetter's arrest, the United States Supreme Court has ruled that the execution of the mentally retarded violates the Constitution. *Atkins v. Virginia*, 536 U.S. 304 (2002). Since Mr. Schoenwetter's death sentence the United States Supreme Court has ruled that the execution of child offenders also violates the Constitution. *Roper v. Simmons*, 543 U.S. 551(2005)

In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Stewart found in his concurrence, that the three death sentences at issue were unconstitutional. *Id*. at 314. Presciently, Justice Stewart described the death sentences in *Furman* in terms equally applicable to Mr. Schoenwetter's death sentence: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309. Justice Stewart concluded "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id*. at 310. Without the effective assistance of counsel and considering Mr. Schoenwetter's age, maturity, and mental condition, that is precisely what Mr. Schoenwetter's death sentence was, wantonly and freakishly imposed.

Later, the United States Supreme Court decided *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg* the Court found that Georgia's death penalty scheme, enacted in response to *Furman*, was constitutional because the Georgia Supreme Court "compared each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.* at 198. Similarly, the Court found in *Proffit* that:

> Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "'no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not.' " *Gregg v. Georgia*, 428 U.S., at 188, 96 S.Ct., at 2932, quoting *Furman v. Georgia*, 408 U.S., at 313, 92 S.Ct., at 2764 (White, J, concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman*.

Id. at 254.

The evidence adduced at the evidentiary hearing showed the compelling mitigation that should have been presented and how counsel's ineffectiveness diminished the limited but otherwise compelling evidence that was presented at the penalty phase.

The State argues that Mr. Schoenwetter was procedurally barred from raising this claim because he could have raised this claim on direct appeal. If this claim were solely premised on *Roper v. Simmons*, 543 U.S. 551(2005), it would not be affected by the procedural bar. *Simmons* was decided on March 1, 2005, while this Court did not enter a mandate on the instant case until June 26, 2006.

The United States Supreme Court has held that:

> New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as "watershed" rules of criminal procedure, must be applied in all future trials, all cases pending on

> direct review, and all federal habeas corpus proceedings. All other new rules of criminal procedure must be applied in future trials and in cases pending on direct review, but may not provide the basis for a federal collateral attack on a state-court conviction. This is the substance of the "*Teague* rule" described by Justice O'Connor in her plurality opinion in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Danforth v. Minnesota, 128 S.Ct. 1029, 1032-33 (2008).(Footnote omitted). The Court has also held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

Mr. Schoenwetter argued under this claim that after *Simmons* and *Atkins*, his execution would violate the cruel and unusual punishment clause of the Eighth Amendment because when his mitigation is considered with his age in relation to *Simmons* and *Atkins*, death is not a constitutionally acceptable sentence. Mr. Schoenwetter requested an evidentiary hearing on this claim.

What the trial court grossly neglected in sentencing Mr. Schoenwetter to death, his age, has even greater importance following *Atkins and Simmons*. Mr. Schoenwetter's age, in conjunction with his immaturity, brain damage and other mitigation, should prohibit the State from executing him. Florida Rule of Criminal Procedure 3.851 gave Mr. Schoenwetter

the right to a hearing to show how his constitutional rights were violated. This Court should find that death is not an appropriate sentence in this case. Alternatively, this Court should reverse and allow Mr. Schoenwetter to exercise this right to a hearing.

REPLY ON ARGUMENT V

THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERROR THROUGHOUT ALL THE PROCEEDINGS ALLEGED IN THIS MOTION DENIED MR. SCHOENWETTER'S RIGHTS UNDER FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Individually, each of the errors Mr. Schoenwetter has alleged on appeal should lead this Court to grant relief. When the cumulative effect of all of the error committed at trial and during the postconviction proceedings, this result is even more certain. This Court should grant relief.

CONCLUSION

For the reasons contained in this Reply and in Mr. Schoenwetter's Initial Brief, this Court should reverse.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on Barbara C. Davis, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor Daytona Beach, FL 32118, by U.S. Mail, on this 23rd day of October, 2009.

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I hereby certify that a true copy of the foregoing Reply Brief was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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