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

RANDY SCHOENWETTER

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____

DIRECT APPEAL

_____

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Schoenwetter's postconviction motion filed under Florida Rule of Criminal Procedure 3.851 and 3.850.

The record on appeal is comprised of 23 volumes, initially compiled by the clerk, successively paginated, beginning with page one. References to the record include volume and page number and are of the form, e.g., (Vol. I PCR 123). References to the record on appeal from Mr. Schoenwetter's appeal of his convictions and sentences are of the form, e.g., (Vol. I R. 123).

Randy Schoenwetter, the Appellant now before this Court is referred to as such or by his proper name. Mr. Schoenwetter was represented by J. Randall Moore and George McCarthy. They are sometimes referred to by name or as trial counsel, either separately or together. The phrase "evidentiary hearing" or simply "hearing" refers to the hearing conducted on Mr. Schoenwetter's motion for postconviction relief unless otherwise specified. The use of the term trial court refers to the court in which presided over Mr. Schoenwetter's trial and his postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Schoenwetter has been sentenced to death. The resolution of the issues involved in this appeal will determine whether he lives or dies. Oral argument would allow the full development of the issues before this Court. Accordingly, Mr. Schoenwetter requests oral argument.

TABLE OF CONTENTS **PAGE**

TABLE OF AUTHORITES **PAGE**

STATEMENT OF THE CASE

Introduction

Mr. Schoenwetter pleaded guilty as charged on March 5, 2003. He proceeded to a penalty phase. After the penalty phase, the jury recommended death by a vote of 10-2 for the death Virginia Friskey and by a vote of 9-3 for the death of Ronald Friskey. After a *Spencer* hearing, the lower court imposed death sentences on both first degree murder charges. This Court affirmed on appeal. *Schoenwetter v. State*, 931 So.2d 857 (2006). After a Petition for Writ of Certiorari was denied, Mr. Schoenwetter sought postconviction relief in the circuit court. The circuit court denied relief. This appeal follows.

Mr. Schoenwetter's Arrest

Randy Lamar Ingram Schoenwetter was born on October 27, 1981. Shortly after he turned 18, law enforcement arrested Mr. Schoenwetter. The grand jury returned an indictment for two counts of first degree murder, one count of attempted murder, and one count of armed burglary.

The morning after the homicides in question, law enforcement was investigating the two homicides at issue. Mr. Schoenwetter walked up to the area where law enforcement was speaking with Mr. Schoenwetter's mother, Debbie Roberts. This was the last time that Ms. Roberts would see her son Randy as a free member of society.

Law enforcement took Mr. Schoenwetter to the police station where they interrogated him. The interrogation took place in a small room with a hidden camera. Mr. Schoenwetter confessed to the two murders and was booked into jail. A videotape of this interrogation was played during the penalty phase.

The court appointed the Office of the Public Defender. The Public Defender assigned George McCarthy and J. Randall Moore to represent Mr. Schoenwetter.

Mr. Schoenwetter's Letter and Plea of Guilty

On February 17, 2003, Mr. Schoenwetter wrote a letter to the trial judge admitting guilt under aggravated circumstances. (Vol. IV R. 705-06). The letter was stamped as received on February 25, 2003. (Vol. IV R. 705). The judge scheduled a status hearing for February 26, 2003, at which time he filed the letter. (Vol. II R. 220). At the hearing, Mr. Schoenwetter stated that he wanted to reject the advice of counsel and plead guilty. (Vol. II R. 222). At the plea hearing on March 5, 2003, defense counsel advised the court that Mr. Schoenwetter was competent to proceed. (Vol. II R. 228). Defense counsel next advised the court that Mr. Schoenwetter was entering the plea against the advice of counsel. (Vol. II R. 229). The trial court conducted a plea colloquy and accepted Mr. Schoenwetter's plea of guilty. (Vol. II R. 232-249). The court set the penalty phase for September 15, 2003. (Vol. II R. 264).

At trial, the State sought to admit transcripts of the February 26 status hearing, the March 5 plea hearing, and the letter Mr. Schoenwetter wrote to the Court. (Vol. XIII R.646-47). Defense counsel objected that the letter was not authenticated (Vol. XIII R. 681). The objection was overruled (Vol. XIII R.685). The State asked for a stipulation that Mr. Schoenwetter pleaded to each charge. The defense would not stipulate. The State asked to admit the transcript of the plea colloquy. (Vol. XIII R. 686-87). After discussion, defense counsel indicated they would stipulate that Mr. Schoenwetter pleaded guilty to all four counts (Vol. XIII R. 690).

Ms. Donnelly, the court reporter at the status hearing, authenticated the transcript of the hearing and quoted from the transcript to the jury (Vol. XIII R. 703-11). She relayed what the trial judge stated insofar as receiving a letter from Mr. Schoenwetter (Vol. XIII R. 705). During the February 26 hearing, Mr. Schoenwetter stated on the record that he wrote the letter "with my own hand." He also stated he was disregarding the advice of counsel and pleading guilty. He stated that the facts he wrote in the letter were true. (Vol. XIII R. 706).

When the State offered State Exhibit 77, a copy of the letter Mr. Schoenwetter wrote the trial court, defense counsel again objected that it was not authenticated (Vol. XIII R. 707). The lower court overruled the objection and took judicial notice

of the exhibit which was contained in the court file. (Vol. XIII R. 707). Defense counsel did not object to Ms. Donnelly saying she was present at the hearing on March 5, 2003, when Mr. Schoenwetter pleaded guilty (Vol. XIII R. 708). Defense counsel did not object to the court minutes order of the plea hearing being admitted as Exhibit 78. The trial court took judicial notice of the minutes. (Vol. XIII R. 709).

Aggravating and Mitigating Factors

The trial judge found four aggravating circumstances as to the murder of Ronald Friskey: (1) prior violent felony; (2) during a burglary; (3) avoid arrest; and (4) heinous, atrocious and cruel (Vol. V. R.800-04).

The trial judge found four aggravating circumstances as to the murder of Virginia Friskey: (1) prior violent felony; (2) during a burglary; (3) avoid arrest; and (4) victim less than 12 years old (Vol. V. R. 796-97).

The trial court found applicable to both murders four statutory mitigators: no prior criminal history,(little weight); extreme mental or emotional disturbance, (little weight); lack of capacity to conform his conduct to the requirements of the law,(little weight); and the defendant's age (eighteen) at the time of the crime,(little weight). The trial court also considered and weighed eight of the nine nonstatutory mitigators argued by Mr. Schoenwetter and assigned various weights. (Vol. V

R. 806-18).

The trial court sentenced Mr. Schoenwetter to death. (Vol. V R. 818).

Direct Appeal

Mr. Schoenwetter appealed the death sentences to this Court. *Schoenwetter v. State,* 931 So.2d 857 (Fla. 2006). This Court affirmed the judgments of conviction and death sentences. *Id.* at. 877. This Court found that, under the totality of circumstances the death penalty was proportional to other death cases. *Id.* at 876.

Amicus Brief

This Court accepted an Amicus Brief filed by MAAP Services for Autism and Asperger's Spectrum, Dr. Fred Volkmar and Professor Anthony Bailey. The Amicus Brief detailed the nature of Asperger's Syndrome and how it affected Mr. Schoenwetter and his conduct at issue in this case.

The Amicus Brief detailed four relevant characteristics of Asperger's Syndrome:

A) Emotional and Developmental Immaturity: "Individuals with Asperger's often have an emotional and developmental age significantly lower than their chronological age or intelligence would suggest." (Amicus at 4). "This is true even though people with Asperger's often have normal to above average IQs." (Amicus at 4).

B) Lack of Social Judgment: Asperger's is also "associated with particular deficits in social judgment." This is due in large part to abnormalities in the parts of the brain that control "executive functions." The executive functions of the brain refer to:

> a range of specific neuropsychological abilities, including . . . cognitive flexibility, inhibition of prepotent but irrelevant responses, adjustment of behavior using environmental feedback, extracting rules from experience, selection of essential from nonessential information, and upholding in one's mind both a desired goal and the various steps required to accomplish it . . ..

(Amicus at 5). (Internal citations to expert authorities omitted).

C) Lack of Empathy: In addition, individuals with Asperger's often lack empathy - - the capacity to place themselves in someone else's shoes and deduce the other person's emotional reaction. (Amicus at 6).

D) Poor Impulse Control: Although people with Asperger's are often able intellectually to describe emotions and the difference between right and wrong, researchers have found an inability to integrate this understanding into their behavior. (Amicus at 8). (Internal citations to authority omitted). Asperger's individuals have difficulty generating acceptable solutions to everyday problems, including sexual attraction or being caught doing something wrong, and often impulsively choose

an inferior solution when under stress. (Amicus at 8). (Internal citations to authority omitted).

The Amicus Brief then argued that:

> This Court should reconsider its judgment on the diminished capacity defense in light of the significant medical evidence that individuals with organic conditions such as Asperger's may be able to articulate the difference between right and wrong sufficiently to be considered legally sane, while having abnormal mental processes that may make it unjust to attribute their actions to the sort of conscious, malevolent intent that is required for capital murder.

(Amicus at 11).

The Amicus Brief urged that "at a minimum, evidence of Asperger's must be given substantial weight in capital sentencing." (Amicus at 11-13). The brief based this argument on the close parallels between Asperger's Syndrome and mental retardation as addressed by the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). The brief argued that:

> The similarity between the deficits in Asperger's and in mental retardation highlights the need to treat Asperger's as a substantial mitigating circumstance. It is highly doubtful whether either of the two recognized interests in imposing the death penalty - - retribution and deterrence - - can be served by executing individuals whose wrongful acts are explained in part by Asperger's.

(Amicus at 12-13).

Based on the substantial weight that Asperger's should have received from the trial court, the Amicus Brief argued that the trial court did not give sufficient weight to Mr. Schoenwetter's

Asperger's Syndrome. (Amicus at 13-18).

The Amicus Brief argued that all of the experts called by the defense testified that Mr. Schoenwetter had Asperger's Syndrome. (Amicus at 13-14). Dr. Riebsame found that Mr. Schoenwetter had an "'abnormal brain pathology and temporal cortex metabolism that is frequently seen in psychiatric disorders, such as brain injuries, psychotic disorders, or autistic disorders' and that 'those particular parts of the brain are known to be directly related to decision making.'" (Amicus at 14; citing Vol. XIII R. 732-33). The Amicus Brief noted that Dr. Riebsame and Dr. Wu testified about the impulsivity that affects individuals with Mr. Schoenwetter's conditions. (Amicus at 14). The expert testimony at trial showed that Mr. Schoenwetter suffered from an impaired understanding of other people's feelings, and that his "developmental age was well behind his chronological age." (Amicus at 14-15).

The Amicus Brief detailed how the expert witnesses at trial "described a clear connection between Mr. Schoenwetter's mental condition and his behavior on the night of the murders." The Amicus Brief recounted that Dr. Riebsame "testified that [Mr.] Schoenwetter's Asperger's Syndrome was 'evident . . . when he entered the Friskey household.'" (Amicus at 15; *citing* Vol. XIII R. 738). In Dr. Riebsame's opinion, Mr. Schoenwetter was

"an individual with extreme emotional disturbance at the time of the offense." (Amicus at 15; *citing* Vol. XIII R. 764). The Amicus Brief also recounted that Dr. Prichard offered the expert opinion that Mr. Schoenwetter's actions were not "planned," "calculated" or "premeditated." (Amicus at 15; *citing* Vol. XIV R. 853-55). Indeed, these actions "were typical of 'straight line' behavior found in individuals with Asperger's: Once 'he started, he just kept going . . . rather than thinking." (Amicus at 15; *citing* Vol. XIV R. 853-55).

The Amicus Brief argued that Mr. "Schoenwetter's Asperger's was directly relevant to at least three statutory mitigating circumstances: (1) the defendant's age; (2) that he was operating under extreme emotional and mental distress at the time of the crime; and (3) that he was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.'" (Amicus at 15-16).

The Amicus Brief argued that the trial court should have given Mr. Schoenwetter's emotional and developmental age weight as mitigation rather than apparently treating it as an aggravating factor. (Amicus at 16-17). The trial court dismissed this weighty mitigation because of the trial judge's own observation regarding Mr. Schoenwetter's IQ and purported maturity. This was incorrect because "[a]s the literature on Asperger's demonstrates. . . a high IQ and 'articulateness' are

completely consistent with having a twelve year old's capacity to exercise judgment and control impulses." (Amicus at 17).

The Amicus Brief took issue with the trial court's giving little weight to the mitigating factor of extreme emotional or mental distress. (Amicus at 17). The brief argued that even though the law does not require any further specific nexus between the disturbance and the crime, Mr. Schoenwetter's Asperger's explained his conduct. (Amicus Brief at 17-18). Mr. Schoenwetter's "whole course of conduct is consistent with a focused obsession on finding someone to have sex with, with inappropriate 'problem solving,' with poor impulse control, and with an inability to select appropriate options or to empathize with others." (Amicus at 18; citation omitted).

The Amicus Brief argued that the trial court improperly gave little weight to the statutory mitigating factor that Mr. Schoenwetter "was unable to appreciate the criminality of his conduct or to conform to the requirements of law." (Amicus at 18; *citing* Vol. III R. 360-61). The Amicus Brief pointed out that like the age mitigating factor, which the court essentially used as an aggravating factor, the court did the same in regards to this mitigating factor. (Amicus at 18). The trial court found that Mr. Schoenwetter's lack of criminal record was evidence that he could conform his conduct when he wanted. (Amicus at 18; citing Vol. III R. 361). "In giving this

mitigator little weight, the court disregarded that Schoenwetter's organic brain deficiency is characterized by frontal lobe dysfunction that directly affects the 'executive functions' of the brain." (Amicus at 18).

The Amicus Brief concluded that Mr. Schoenwetter's capital sentence should not be upheld. The Amicus Brief made clear, that in this case, the sentencing court "disregarded substantial, uncontroverted mitigating evidence of Schoenwetter's mental deficiencies, and its conclusions about the weight to be given to proven mitigators [were] not supported by the record." (Amicus at 18). Finally, the Amicus Brief argued that under this Court's proportionality review, Mr. Schoenwetter's death sentence should not stand. (Amicus at 18-19).

Evidentiary Hearing

Following the case management conference, the lower court set an evidentiary hearing on a Claim IV and denied Mr. Schoenwetter the right to be heard on his remaining claims. The evidentiary hearing was held between May 12, 2008 and May 14, 2008. A summary of the evidence put forth by Mr. Schoenwetter is as follows:

Dr. Henry Dee

The first witness that Mr. Schoenwetter called was Dr. Henry Dee (Vol. III PCR. 241). Dr. Dee is a practicing neuropsychologist from Lakeland, Florida. (Vol. III PCR. 241).

Dr. Dee received his PhD in Neuropsychology in 1969. (Vol. III PCR. 241). After receiving his Ph.D., Dr. Dee was a resident in the area of clinical Neuropsychology in the Departments of Neurology and Neurosurgery at the University of Iowa. (Vol. III PCR. 242).

In 1973, Dr. Dee started a private practice. Dr. Dee's practice consists of approximately 50 to 60 percent neuropsychology. (Vol. III PCR. 242). He also conducts evaluations for various state and federal agencies and serves as the supervising psychologist for the Child Protection Team in a *pro bono* capacity. (Vol. III PCR. 243).

Dr. Dee explained the difference between neuropsychology and psychology in general:

> Neuropsychology is that discipline in psychology which relates behavior to the intactness of the human brain. We've constructed and employ many different scientifically constructed empirical tests for brain functioning, or I should say cognitive functioning, which is based on brain function.

(Vol. III PCR. 244).

Dr. Dee had been accepted numerous times as an expert in the State of Florida and in federal court. (Vol. III PCR. 245). The postconviction court received Dr. Dee as an expert in forensic psychology and neuropsychology. (Vol. III PCR. 245).

Dr. Dee indicated that in this case he reviewed a number of documents, some of which were significant, and some of which

were not. (Vol. III PCR. 253). The entirety of the records given to Dr. Dee were admitted into evidence as Defense Exhibit 1.(Vol. III PCR. 252).

Dr. Dee informed the court of the specific tests and results. The first test he discussed was the Wechsler Adult Intelligence Scale, third edition. (Vol. III PCR. 259). Mr. Schoenwetter received a 124 on the verbal scale and a performance scale of 117. Mr. Schoenwetter's full scale intelligence quotient was 123. (Vol. III PCR. 262). Dr. Dee found that there was not a significant difference between his findings from the Wechsler and those of Dr. Krop (a neuropsychologist hired by the defense to conduct testing). (Vol. III PCR. 264). Dr. Dee explained that over time there can be some apparent improvement due to familiarity with the test.

Dr. Dee also used the Denman Neuropsychology Scale. (Vol. III PCR. 264). This is a companion battery of tests given precisely to compare its results with the results of the Wechsler. (Vol. III PCR. 264). The Denman is used to compare memory function to general mental functioning. (Vol. III PCR. 264). Mr. Schoenwetter's test yielded a full scale memory quotient of 112. Dr. Dee compared the full scale memory quotient from the Denman with the Denman's full scale memory. (Vol. III PCR. 265). Dr. Dee found a difference of 11 points, which indicated impairment of general functioning compared to

general cognitive functioning. (Vol. III PCR. 265).

Dr. Dee explained that the difference between Mr. Schoenwetter's Denman scores, "to put it very simply," was indicative of brain damage. (Vol. III PCR. 266). Dr. Dee gave Mr. Schoenwetter two tests of frontal lobe functioning, one of which, the categories test, Mr. Schoenwetter failed. (Vol. III PCR. 267). On the categories test Mr. Schoenwetter made seventy errors. (Vol. III PCR. 267). Dr. Dee explained that no intact individual has ever scored more than fifty errors on the categories test. (Vol. III PCR. 267). With seventy errors, Dr. Dee concluded that Mr. Schoenwetter had frontal lobe damage. (Vol. III PCR. 267).

Dr. Dee's findings were consistent with what Dr. Wu previously found through a PET scan of Mr. Schoenwetter's brain. Dr. Dee recalled that Dr. Wu found that "there was orbital frontal hypo-activity, that is the area right behind the eyes, and there was impairment in metabolic activity in the temporal cortex, but he added to that temporal insular, which means that's a structure that is inferior to the temporal lobe, in the sense that it's inside." (Vol. III PCR. 267). By inferior, Dr. Dee did not mean inferior in quality. (Vol. III PCR. 268).

Dr. Dee testified that he and Dr. Wu found abnormality in the temporal lobes, Dr. Dee through neuropsychological testing, and Dr. Wu through the PET scan. Dr. Dee, because of the

classification for injuries to the brain is imprecise, diagnosed Mr. Schoenwetter with "something like chronic brain syndrome with mixed features." (Vol. III PCR. 269). Dr. Dee found that Mr. Schoenwetter's memory and frontal lobe functioning was impaired. (Vol. III PCR. 269).

Dr. Dee explained the significance of frontal lobe damage relevant to the criminal conduct at issue. (Vol. III PCR. 269). The major effect of frontal impairment has been studied for over 150 years. (Vol. III PCR. 269). As Dr. Dee informed:

> The research is quite consistent in indicating that these unfortunate individuals have greatly impaired inhibitory controls. They do and say things that they may regret immediately after they do them, but they seem to be able to - - unable to control them at the time, whatever the temptation or stimulus is.
>
> In addition, they don't seem to learn from experience in these situations. They keep repeating the same sorts of errors again and again.
>
> They fail to understand the impact they have on other people or the impact that their behavior has on other people . . . They don't seem to be able to change that.

(Vol. III PCR. 270).

While individuals like Mr. Schoenwetter may still have free will, their "inhibitory controls are much weaker...and they don't seem to learn from experience." (Vol. III PCR. 271). For such individuals their ability control their impulses are "[m]uch harder." (Vol. III PCR. 271).

Dr. Dee did not have any disagreement with the diagnosis of

Attention Deficit Disorder which the defense experts presented at trial and which Mr. Schoenwetter still shows clear behavioral evidence today. (Vol. III PCR. 271). Dr. Dee found that this was consistent with the impulsivity Dr. Dee just discussed. (Vol. III PCR. 271-72). Moreover, it was not inconsistent with Asperger's Syndrome because there is no good way to discriminate between the inhibitory control problems present with both Asperger's Syndrome and those which result from frontal lobe damage. (Vol. III PCR. 272).

Dr. Dee not only conducted thorough neuropsychological testing, he also met with Mr. Schoenwetter on a number of occasions. (Vol. III PCR. 273). These meetings took place at Union Correctional Institute where Mr. Schoenwetter is currently an inmate. (Vol. III PCR. 273). Dr. Dee's initial impression of Mr. Schoenwetter was that Mr. Schoenwetter was cooperative. Dr. Dee noted that Mr. Schoenwetter's eye contact with him was inconsistent and "varied from a lot of intense almost staring like behavior to no eye contact at all." (Vol. III PCR. 273-74). This was consistent with Asperger's Syndrome. (Vol. III PCR. 274). Dr. Dee also described "a certain social clumsiness" and that Mr. Schoenwetter "seems to think of something and say it with little intervening time. It doesn't seem to matter how uncomfortable it might make one or anyone to whom he's talking. Once again, it shows a certain lack of awareness of the impact

one is having on others." (Vol. III PCR. 274).

In furtherance of Dr. Dee's review Dr. Dee obtained information about Mr. Schoenwetter's background. (Vol. III PCR. 274). Some of the sources of information were Dr. Dee's personal interviews of Deborah Roberts, Mr. Schoenwetter's mother, and his maternal grandmother Jean Dees. Dr. Dee also looked at sources of information included in the volumes of written material he received. (Vol. III PCR. 274-75). Most of the information came from Ms. Roberts and Ms. Dees because Mr. Schoenwetter was estranged from the paternal side of his family. (Vol. III PCR. 275).

Dr. Dee found that Mr. Schoenwetter's parents divorced when he was around two years of age. (Vol. III PCR. 275). When Mr. Schoenwetter was approximately five years of age, Ms. Roberts married Tom Schoenwetter. (He also adopted Randy Schoenwetter at about this time). (Vol. III PCR. 275).

Dr. Dee determined that one of the more significant aspects of Mr. Schoenwetter's social history was the number of times Mr. Schoenwetter moved residences. (Vol. III PCR. 275). Mr. Schoenwetter related to Dr. Dee that he moved ten times in his eleven years of schooling. (Vol. III PCR. 275). Dr. Dee was asked about the significance of moving for any child. (Vol. III PCR. 275). Dr. Dee responded:

On any person, moving is probably the second most

> depressing event in life. There is evidence from [Mr. Schoenwetter], and everyone who knew him closely at that time, that he in fact did suffer from depression. . . .The reason it's so upsetting to anyone when they move - - I think it's fair to say that the most depressing event in life is when you lose someone you love, someone you're close to, friends.
>
> Moving is distressing because you lose nearly everyone at once. Everyone you know is suddenly gone and you're having to make new relationships, which is particularly hard in an individual who suffers this kind of difficulty in social comfort and social networking, which is certainly true of people with any form of autism, including Asperger's syndrome. .

(Vol. III PCR. 276).

Dr. Dee described what should be done for a child with Mr. Schoenwetter's multiple conditions, which is to: "develop for them a sort of prosthetic environment in which they can be more successful in developing friends and learn appropriate social conduct. (Vol. III PCR. 276). Mr. Schoenwetter did not have such an environment because of the frequent moves and accordingly suffered from a great deal of distress and depression." (Vol. III PCR. 277-78). A prosthetic environment would have had "stability, not all these moves." (Vol. III PCR. 279). "Ideally . . . a stable home life, a great deal of structure, a very predictable environment." (Vol. III PCR. 279).

Dr. Dee thought that Mr. Schoenwetter never really developed adequate social skills to fit into new situations. (Vol. III PCR. 279). If Mr. Schoenwetter had a more stable home

life and residence, and had Mr. Schoenwetter not lacked friendship, it would have helped Mr. Schoenwetter to overcome some of his conditions. (Vol. III PCR. 279). Mr. Schoenwetter's conditions were exacerbated by the "kind of chaos and exposure to violence" Mr. Schoenwetter experienced. (Vol. III PCR. 280).

During Dr. Dee's interviews with Mr. Schoenwetter they discussed Satanism. (Vol. III PCR. 281). Mr. Schoenwetter informed Dr. Dee that the impressions of his Satanism presented by Dr. Riebsame at trial were incorrect. (Vol. III PCR. 281). Mr. Schoenwetter did not know very much about such matters until after his arrest. (Vol. III PCR. 281). While Mr. Schoenwetter had some interest in witches and magic, he had not been exposed to much of it before his arrest. (Vol. III PCR. 281). Mr. Schoenwetter was not, and has never been, a Satan worshiper.

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).

Dr. Dee concluded that he saw no evidence that Satanism or

devil worship were a contributing factor to Mr. Schoenwetter's behavior on the night in question. (Vol. III PCR. 282). In all of Dr. Dee's years of experience he has never testified to a jury that an individual he evaluated was a Satanist or somehow preoccupied with Satanism. (Vol. III PCR. 282). Based on Dr. Dee's understanding of mitigation and how it is perceived, Dr. Dee did not think that a preoccupation with Satan or Satanism would be found to be mitigating. (Vol. III PCR. 282-83). Indeed, Dr. Dee thought that it would be reasonably found to be offensive by a jury. (Vol. III PCR. 283).

In addition to Satanism, at trial, the jury heard about Mr. Schoenwetter's alleged "preoccupation" or "fixation" with child pornography. Dr. Dee was asked about whether he had ever been called upon as an expert to testify whether an individual had a preoccupation with child pornography in a capital case as "a mitigating circumstance." (Vol. III PCR. 283). Dr. Dee responded "[c]ertainly not" and explained that juries would tend to not find this mitigating because "it is offensive . . . to everyone." (Vol. III PCR. 283). Dr. Dee also has never testified about an individual's sexual preoccupation with children in support of mitigation. (Vol. III PCR. 283).

Dr. Dee was aware that Mr. Schoenwetter's mother gave a CD ROM of pornography to the Titusville Police Department. (Vol. III PCR. 283). There was a great deal of discussion of this at

Mr. Schoenwetter's trial and Commander Bobby Mutter testified that, contrary to Mr. Schoenwetter's mother's point of view, the images on the CD ROM were not of children but rather adults. See (Vol. XV R. 1049).

Dr. Dee spoke directly to Mr. Schoenwetter about this subject. (Vol. III PCR. 284). Mr. Schoenwetter informed Dr. Dee that while he "'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 general 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). Dr. Dee was sure that he had "a strong interest in sex." (Vol. III PCR. 285).

Next, Dr. Dee testified that, in his practice after he reports his findings to defense counsel, if his findings are not helpful to the points defense counsel are putting forth, defense counsel simply do not call him as a witness. (Vol. III PCR. 285). Dr. Dee also agreed that he has been called upon to give just a neuropsychological opinion based on just his testing. (Vol. III PCR. 285). Dr. Dee also agreed that it was not uncommon to limit the areas in which an expert would testify. (Vol. III PCR. 285).

Dr. Dee found that Mr. Schoenwetter's ability to express and experience remorse was impaired by his mental conditions. (Vol. III PCR. 285). Despite this impairment, which Dr. Dee saw through letters Mr. Schoenwetter wrote, Mr. Schoenwetter frequently showed remorse after his religious conversion. Dr. Dee agreed that it was harder for a person with Mr. Schoenwetter's conditions to experience emotions like remorse and regret but, despite this handicap, Mr. Schoenwetter was able to do this in the letter that Dr. Dee read. (Vol. III PCR. 286).

Dr. Dee found that Mr. Schoenwetter's embracing Christianity would enable him to have more positive interaction in the prison environment despite his impairments, "especially as compared to the way he was beforehand." (Vol. III PCR. 286). It could also help him avoid conflicts in a prison environment. (Vol. III PCR. 286).

Dr. Dee was familiar with the mitigating factor that the capital crime was committed while the defendant was under extreme mental or emotional disturbance. (Vol. III PCR. 287). Dr. Dee found that Mr. Schoenwetter met the criteria for this mitigating factor based on "the kinds of neuropsychological and neurological impairments that he show[ed]."

Dr. Dee was familiar with the mitigating factor that the capacity of the defendant to appreciate the criminality of his

conduct or conform his conduct to the requirements of law was substantially impaired." (Vol. III PCR. 287). Dr. Dee found that this mitigating factor applied "particularly in the area of [Mr. Schoenwetter's] ability to conform his conduct because of the frontal lobe." (Vol. III PCR. 287).

Dr. Dee was familiar with the mitigating factor regarding the defendant's age at the time of the offense. (Vol. III PCR. 287). Dr. Dee found that Mr. Schoenwetter met the criteria for this mitigating factor. (Vol. III PCR. 288). Dr. Dee discussed what is known as the "two-thirds rule." (Vol. III PCR. 288). According to the two-thirds rule, in calculating the social maturity of individuals with ADHD such as Mr. Schoenwetter, one-third of the chronological age is subtracted. (Vol. III PCR. 288). In Mr. Schoenwetter's case, this resulted in "the social maturity of a twelve or thirteen year old, perhaps." (Vol. III PCR. 288).

Based on Dr. Dee's knowledge of how the brain develops, Dr. Dee explained the human brain is finally mature "[r]oughly around the age of twenty-five." (Vol. III PCR. 288). Dr. Dee explained that this is the age "when the median for brain function and the connections of the frontal lobe are finally completed. The myelinization of the fibers is completed around twenty-four, twenty-five." (Vol. III PCR. 288). Dr. Dee explained further that "it's commonplace to describe individuals

in this age group as immature. We now know what underlies that. It's the lack of connections between the frontal lobe, which controls inhibition, and other areas, so they are physiologically and behaviorally immature. That's the reason for it as a matter of fact." (Vol. III PCR. 289).

John Randall Moore

Mr. Moore was one of Mr. Schoenwetter's trial attorneys. (Vol. III PCR 333). He is employed with the Public Defender's office for the Eighteenth Circuit. At the postconviction hearing he was called as a witness by both Mr. Schoenwetter and the State. *See* (Vol. III PCR. 333; Vol. V. 713).

Mr. Moore was asked about the testimony of Dr. Nona Currie Prichard. (Vol. III PCR. 333). Mr. Moore explained that the purpose for calling Dr. Prichard was to develop mitigating circumstances related to Asperger's Syndrome. (Vol. III PCR. 333-34). At trial, Dr. Prichard found that Mr. Schoenwetter's capacity to conform his conduct to the requirements of law was substantially impaired. (Vol. III PCR.334; Vol. XIV R. 854). Mr. Moore asked Dr. Prichard about "what part of the behavior would have been affected by the Asperger's Syndrome, the neurological disorders that he had, the ADHD?" (Vol. III PCR. 336; Vol. XIV R. 852-53). Dr. Prichard discounted ADHD as a factor in Mr. Schoenwetter's behavior. *See* (Vol. III PCR. 336; Vol. XIV R. 852-53). Mr. Moore did not know whether there was a

strategic reason for asking Dr. Prichard about ADHD if Dr. Prichard was going to discount it. (Vol. III PCR. 337). Mr. Moore did not recall whether Dr. Prichard changed her opinion from the time Mr. Moore prepared with Dr. Prichard. (Vol. III PCR. 337). Since Mr. Moore developed Mr. Schoenwetter's ADHD with Dr. Riebsame, there was no strategic reason for not limiting Dr. Prichard to the area of Asperger's Syndrome. (Vol. III PCR. 337).

At trial, Mr. Moore asked Dr. Riebsame about Mr. Schoenwetter's reasons for entering guilty pleas. (Vol. III PCR. 339). Dr. Riebsame responded that:

> [Mr. Schoenwetter] told me that he was guilty of the crime. He wanted to tell the truth to the court. That would have been consistent with his Christian beliefs at that point in time, so he went ahead and contacted the Court and pled guilty to the crime.

(Vol. III PCR. 339). Mr. Moore agreed that at trial he was trying to show Mr. Schoenwetter's remorse through the testimony of Dr. Riebsame and that this was important mitigation. (Vol. III PCR. 337). Mr. Moore stated that if he did not ask this question during his first direct examination the only reason was that he "overlooked it," although he would take any opportunity "to get mitigation before the jury." (Vol. III PCR. 341).

Mr. Moore agreed that his office was responsible for providing information to the different experts to assist in their evaluation of Mr. Schoenwetter. (Vol. III PCR. 341). Mr.

Moore could think of no reason why Dr. Prichard was not informed "of Dr. Riebsame's apparent finding that as . . . part of the Asperger's syndrome, Mr. Schoenwetter was allegedly preoccupied with child pornography, sex and Satanism." (Vol. III PCR. 341-42). At trial the State asked Dr. Prichard to describe Mr. Schoenwetter's preoccupations. (Vol. III PCR. 343; *citing* Vol. XIV R. 863). Without mentioning pornography or Satanism, Dr. Prichard described the preoccupations with Japanese animation and drawing. (Vol. III PCR. 343; *citing* Vol. XIV R. 863).

Dr. Riebsame did not receive the videotape of Mr. Schoenwetter's confession before trial and had to be recalled after viewing it. *See* (Vol.XIV R. 993). Mr. Moore did not think that there was a strategic reason for not providing Dr. Riebsame with a copy of the tape before the trial. (Vol. III PCR. 346). While Mr. Moore could not speak for the jury regarding the effect of having to recall Dr. Riebsame, he did agree that credibility was important in a criminal case and that it is important in the information that is provided to an expert. (Vol. III PCR. 346).

Mr. Moore was asked next about the testimony of Dr. Riebsame that an inmate had said that Mr. Schoenwetter was "amused" by his crimes. *See* (Vol. III PCR. 348-49; Vol. XIII R. 763). Mr. Moore could not think of any reason for Dr. Riebsame to discuss with the jury that some inmate claimed that Mr.

Schoenwetter claimed to be amused by his crimes. *See* (Vol. III PCR. 349).

For Mr. Moore, another important source of information was Mr. Schoenwetter's mother Debbie Roberts. (Vol. III PCR. 350). Mr. Moore recalled that Ms. Roberts, prior to Mr. Schoenwetter's arrest in the instant case, handed over a CD-ROM containing pornography she found on the household's computer. (Vol. III PCR. 350). Mr. Moore agreed that Ms. Roberts was not an expert in what constituted child pornography. (Vol. III PCR. 350). Mr. Moore did not believe that he could edit out the child pornography to which Dr. Riebsame testified. (Vol. III PCR. 352-53). He agreed that he could have not called a particular witness, limited the questions he asked a witness and he could have informed Dr. Riebsame what Commander Mutter would later inform the jury. (Vol. III PCR. 354).

Mr. Moore did not recall whether it was his intention to place before the jury that Mr. Schoenwetter was preoccupied with Satanism. (Vol. III PCR. 355). If there were any specifics about this area, Mr. Moore stated that he would have presented this to the jury if he was going forward with that as a mitigating factor. (Vol. III PCR. 355).

Mr. Moore then discussed the questions that he asked Dr. Riebsame in reference to the statutory mitigating factors of extreme mental or emotional disturbance and whether Mr.

Schoenwetter's ability to appreciate the criminality of his conduct was impaired. (Vol. III PCR. 355-56). Dr. Riebsame clearly found there was extreme emotional disturbance. *See* (Vol. III PCR. 356). Mr. Schoenwetter's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was another matter. Mr. Moore was asked about the following exchange which occurred before the jury:

> **Mr. Moore:** What would be your estimation as to the capacity of Mr. Schoenwetter to appreciate the criminality of his conduct or to conform his conduct to the requirements of law?
> **Dr. Riebsame:** He recognized that his behavior was wrong.
> **Mr. Moore:** Would it have been impaired?
> **Dr. Riebsame:** There would have been some impairment, given his preoccupation with satanic and sexual matters, but he realized that his actions were criminal.

(Vol. XIII R. 356). Mr. Moore stated that he knew he was not going to get a complete opinion on this mitigating factor from Dr. Riebsame but the defense got half a one." (Vol. III PCR. 357). Mr. Moore agreed that the defense received this mitigating factor from Dr. Prichard. (Vol. III PCR. 357).

Mr. Moore agreed that as the attorney who questioned Dr. Riebsame it was his responsibility to object to any questions asked by the State. (Vol. III PCR. 357-58). At trial, the State asked Dr. Riebsame:

> Well, when all of you folks get together and agree on something, that's what we end up with. A pedophile that has – would you say - - how would you differentiate a pedophile from this defendant, who has an interest in children, girls; is that not abnormal;

is it not focused?

(Vol. XIII R. 791-92). After a recitation of this question Mr. Moore was asked whether it is permissible for an attorney to state a personal opinion during a question, to which he answered, "no." (Vol. III PCR. 357-58). He also agreed that it is not permissible for the State to provide editorial comments and denigrate the defense. (Vol. III PCR. 359).

When asked about the second part of the question, the alleged pedophilia, Mr. Moore agreed that the State is prohibited from presenting non-statutory aggravating factors. (Vol. III PCR. 359). Mr. Moore did not recall whether Dr. Riebsame testified on direct examination that Mr. Schoenwetter was diagnostically a pedophile, but he thought that Dr. Riebsame did not so testify. (Vol. III PCR. 359). Mr. Moore's thoughts were correct.

Mr. Moore was asked, "if the record indicates that this was the first time that the term pedophile was used,[was] there a strategic reason for not objecting to the prosecutor's use of the term pedophile?" (Vol. III PCR. 360). Mr. Moore responded:

> Well, you know, it was out there. If he's interested in pornography, child pornography, the jury's going to be thinking in those terms.
>
> I'm thinking - - of course, I don't remember what the answer was, but I'm thinking, in preparing as I normally would, I would have gone over that with the witness and expected him to dispel any label of Mr. Schoenwetter being a pedophile.

> So let him answer the question and let Dr. Riebsame say he's not a pedophile.

(Vol. III PCR. 360).

Mr. Moore admitted that he obtained the services of Laura Blankman to conduct a bio-social assessment and to aid in dealing with Mr. Schoenwetter. (Vol. III PCR. 360). Mr. Moore hired Ms. Blankman closer to the end than the beginning of the preparation of Mr. Schoenwetter's defense. (Vol. III PCR. 360).

Mr. Moore did not feel that jail chaplain Victor Dodzweit should have been called as a witness because his testimony would have shown a lack of remorse on the part of Mr. Schoenwetter. (Vol. III PCR. 363). While Mr. Moore thought that Mr. Schoenwetter being saved was "good," the fact that Mr. Schoenwetter was at peace and forgiven would have been "very harmful and show a true lack of remorse." Mr. Moore did not see a difference between not feeling remorseful and forgiven for one's sins. (Vol. III PCR. 363). Mr. Moore claimed that defense went around and around about calling Chaplain Dodzweit even for a limited purpose. (Vol. III PCR. 364).

Mr. Moore's perception of Mr. Schoenwetter, was that Mr. Schoenwetter "would become very, well, self righteous . . . in his newly found religion and that would be offensive to the jury." (Vol. III PCR. 364). Mr. Moore was asked, "Well, at all times he did not feel that he shouldn't be punished for having

committed that crime. He felt that - - in fact, that's why he pled guilty; would that be correct?" (Vol. III PCR. 364). Mr. Moore candidly answered, "I don't know what his thinking was." (Vol. III PCR. 364).

The State cross-examined Mr. Moore and called him during its case-in-chief. (Vol. V PCR. 713-41). Mr. Moore was asked about different experts who had different sorts of involvement in this case. The State also admitted some documents through Mr. Moore. On cross-examination, Mr. Moore continued to claim that Ms. Blankman was hired to locate witnesses and if she could find mitigation along the way, "great." (Vol. V PCR. 741).

David Musalo

Mr. Musalo was called as a witness by Mr. Schoenwetter. (Vol. III PCR. 419). Mr. Musalo was involved in the prison ministry through Good News Jail and Prison Ministries between 1998 and 2006. (Vol. III PCR. 419). Good News Jail and Prison Ministry does work in jails and prisons throughout the United States and throughout the world. He is currently involved in a ministry called "Families of Inmates." This ministry reaches out to the families of those incarcerated. (Vol. III PCR. 420).

When Mr. Musalo first met Mr. Schoenwetter, Mr. Musalo was teaching a Discipleship class in which Mr. Schoenwetter was a student. (Vol. III PCR. 420-21). Mr. Schoenwetter stuck out to Mr. Musalo because Mr. Schoenwetter was so young. (Vol. III

PCR. 420-21). Mr. Schoenwetter was "very quiet at first" but soon showed an aptitude for learning scriptures. (Vol. III PCR. 421). Sometimes Mr. Schoenwetter even helped Mr. Musalo when he could not find a particular verse of the Bible. (Vol. III PCR. 421). In Mr. Musalo's opinion, over the course of Mr. Schoenwetter's time in the Discipleship class, there "absolutely" was a change in Mr. Schoenwetter. (Vol. III PCR. 422). Mr. Musalo did not remember Mr. Schoenwetter ever missing a class. (Vol. III PCR. 422).

Mr. Musalo remembered Fred Shelor, an inmate in the Brevard County Jail and a classmate of Mr. Schoenwetter in the Discipleship class. (Vol. III PCR. 424). Mr. Shelor and Mr. Schoenwetter would challenge each other with scriptures. (Vol. III PCR. 424). Mr. Musalo explained that, "When you have a desire for God's word, you're going to find other people who have the same desire and you're going to spend time together." (Vol. III PCR. 424). Mr. Musalo offered his opinion, based on the Discipleship class that Mr. Schoenwetter "was certainly a positive setting in the class." (Vol. III PCR. 424).

Mr. Musalo recounted the time that he and Rick Dean had a conversation with Mr. Schoenwetter informed them that he had decided to plead guilty. (Vol. III PCR. 425). Mr. Musalo interpreted that conversation that because of Mr. Schoenwetter's "study of God's word and it becoming part of him, he was willing

to do whatever that meant. . . [I]n other words, he wasn't going to look for a way out." (Vol. III PCR. 425). Mr. Musalo thought that Mr. Schoenwetter "realized the depth of his crime and was willing to stand up to that...." (Vol. IV PCR. 433).

Mr. Musalo did not remember attorneys or investigators contacting him to discuss Mr. Schoenwetter. (Vol. IV PCR. 433). Had Mr. Musalo been contacted by anyone from the defense team he would have been willing to testify on Mr. Schoenwetter's behalf. (Vol. IV PCR. 434).

The State's cross-examination adduced from Mr. Musalo that he worked with and was familiar with Victor Dodzweit, Thomas Wood and Rick Dean, all of who served in the ministry at the jail with Mr. Musalo.(Vol. IV PCR. 440-42). Mr. Musalo was aware that Mr. Wood had videotaped an interview with Mr. Schoenwetter which was used to raise funds for the ongoing work of the prison ministry. (Vol. IV PCR. 445). Mr. Musalo also informed the court that he was present at Mr. Schoenwetter's trial. (Vol. IV PCR. 439-40). Mr. Musalo did not believe that he had spoken to the two individuals who were Mr. Schoenwetter's defense attorneys. (Vol. IV PCR. 440). Like he did for Mr. Schoenwetter, Mr. Musalo had attended "a lot of hearings for the guys in his class" and had testified "two or three times." (Vol. IV PCR. 440).

George McCarthy

George McCarthy was co-counsel with Mr. Moore. (Vol. III PCR. 447). Mr. McCarthy was working more on the guilt phase until Mr. Schoenwetter changed his plea to guilty. (Vol. III PCR. 447).

At the evidentiary hearing, Mr. McCarthy was asked about Dr. Riebsame's review of the videotape of Mr. Schoenwetter's law enforcement interrogation. (Vol. III PCR. 449). Mr. McCarthy expressed that Dr. Riebsame did not review the videotape before his direct examination during the defense's case-in-chief and only read the transcript. (Vol. III PCR. 449). Mr. McCarthy recalled that the viewing of the videotape did not change Dr. Riebsame's opinion, and Dr. Riebsame minimized the importance of the videotape. (Vol. III PCR. 449).

Willie Jackson was a jailhouse informant who supposedly heard Mr. Schoenwetter say that he was amused the instant crimes. (Vol. III PCR. 449). Mr. McCarthy did not remember a strategic reason for sending this type jailhouse informant reports to an expert or for the jury to hear about it. (Vol. III PCR. 450).

Mr. McCarthy recalled that Dr. Riebsame testified that one of Mr. Schoenwetter's so-called preoccupations was child pornography. (Vol. III PCR. 450). Mr. McCarthy never encouraged Dr. Riebsame to testify about child pornography and he did not recall whether he was aware that Dr. Riebsame was going to do so

at the time Dr. Riebsame took the stand. (Vol. III PCR. 451). Mr. McCarthy testified that Commander Bobby Mutter was a longtime member of the Titusville Police Department called to refute what Dr. Riebsame testified to earlier in Mr. Schoenwetter's trial. (Vol. III PCR. 451-52).

Victor Dodzweit, discussed *infra*, testified at the *Spence*r hearing. Mr. McCarthy stated that even though Dr. Riebsame had told the jury that Mr. Schoenwetter was preoccupied with Satanism and child pornography, he and Mr. Moore were not comfortable with the way testimony about the profound changes Mr. Schoenwetter experienced because of his religious transformation "would play in front of the jury." (Vol. III PCR. 452-53). Mr. McCarthy did not believe the defense could have limited the questions asked of Mr. Dodzweit. (Vol. III PCR. 452). Mr. McCarthy did not know whether he spoke with any other religious workers in the jail about Mr. Schoenwetter. (Vol. III PCR. 451-52).

Mr. McCarthy agreed that it would be mitigating that Mr. Schoenwetter could be a productive member of, and have a positive impact on, the general prison population. (Vol. III PCR. 453).

The State recalled Mr. McCarthy as a witness during its case (Vol. V. PCR 669-711). The State introduced some evidence and Mr. McCarthy was subject to cross-examination.

Laura Blankman

Laura Blankman is currently a staff investigator with the Federal Public Defender's Office. (Vol. IV PCR. 473). Ms. Blankman has been doing mitigation work since 1987 and was in private practice when she was retained in this case. (Vol. IV PCR. 473). When Ms. Blankman was in private practice she would provide death penalty mitigation workups. (Vol. IV PCR. 473). Ms. Blankman has worked on about 100 death penalty cases, of which, about half were for trial and half for postconviction. (Vol. IV PCR. 473).

When doing this work, Ms. Blankman considered a background investigation part of her duties. (Vol. IV PCR. 474). Ms. Blankman found it important to meet with the client and do "an entire psychosocial history, talking to every family member that is available, gathering every record that's ever been generated on the client." (Vol. IV PCR. 474). This work usually took her around 400 hours for just a penalty phase, or about a year. (Vol. IV PCR. 474). Ms. Blankman explained the reason for the number of hours and length of time it took was that, "it takes that long to earn the trust of the family, to develop the mitigation, find witnesses, to work it up." (Vol. IV PCR. 475-76).

Ms. Blankman discussed the particular circumstances that led to her involvement in this case. Ms. Blankman was not hired

to find Reese Ingram, Mr. Schoenwetter's biological father. (Vol. IV PCR. 492). Mr. Moore contacted Ms. Blankman by telephone on a number of different occasions. (Vol. IV PCR. 476-77). Mr. Moore obtained funding for 30 hours and asked Ms. Blankman to "'at least go and speak to [Mr. Schoenwetter] and his mother because there's things here that [the public defender's office] has not been able to surface.'" (Vol. IV PCR. 477).

Ms. Blankman "went ahead and started working on the case." (Vol. IV PCR. 477). "Looking back, that was not necessarily a good decision." (Vol. IV PCR. 477). Ms. Blankman explained that there: "wasn't enough time to effectively work the case up." (Vol. IV PCR. 478). By the time Ms. Blankman met Mr. Schoenwetter and his mother there wasn't much time left. (Vol. IV PCR. 478). Ms. Blankman was actually hired at the end of August of 2003. (Vol. IV PCR. 478). Mr. Schoenwetter's penalty phase began on September 17, 2003.

Based on her skills and experience, part of the services that Ms. Blankman can provide is to work closely with the retained experts and to connect the experts with witnesses. (Vol. IV PCR. 479). In this case, Ms. Blankman did not hire the experts and had very little contact with the experts in this case. (Vol. IV PCR. 479).

Ms. Blankman spent a lot of time with Mr. Schoenwetter and

his mother. (Vol. IV PCR. 479). With Mr. Schoenwetter's mother, Ms. Blankman "spent a good bit of time trying . . .to get down to the issues of his childhood that" Ms. Blankman felt had not been explored by the investigators at the Public Defender's office. Ms. Blankman was not able to complete a full mitigation background on Mr. Schoenwetter. (Vol. IV PCR. 480). She was only able to touch on some issues that were very important involving Mr. Schoenwetter's family. (Vol. IV PCR. 480-85).

Ms. Blankman described her understanding of the lack of stability in Mr. Schoenwetter's life during his developmental years. (Vol. IV PCR. 485). Mr. Schoenwetter's family moved frequently and was poor. (Vol. IV PCR. 485-86). Mr. Schoenwetter "never really had a place where he could establish roots and make friends." (Vol. IV PCR. 485-86). Ms. Blankman also wanted to develop the "strong mitigator" that Mr. Schoenwetter lost so many people in his life through his transiency. (Vol. IV PCR. 488).

Mr. Schoenwetter mentioned a pastor by the name of Victor (Dodzweit). She passed this name on to Mr. Schoenwetter's trial attorneys. Ms. Blankman described Mr. Schoenwetter as not having a relationship with his attorneys at the time she became involved with his case. (Vol. IV PCR. 489).

Ms. Blankman described her interaction with Dr. Riebsame. On one occasion Ms. Blankman spoke with Dr. Riebsame and Dr.

Prichard together. (Vol. IV PCR. 490). At a break during the penalty phase, Ms. Blankman spoke to Dr. Riebsame. (Vol. IV PCR. 490). Dr. Riebsame informed Ms. Blankman that Dr. Riebsame did not feel that he was prepared to testify. (Vol. IV PCR. 491). Ms. Blankman told Mr. Schoenwetter's attorneys about this. (Vol. IV PCR. 491).

Ms. Blankman provided all of the information she was able to gather during the limited time she was involved in the case to the defense. (Vol. IV PCR. 491-92).

Richard Thomas Dean

Richard Thomas Dean teaches the Discipleship class at the Brevard County Jail. Mr. Dean is an Assistant Chaplain. As part of this work Mr. Dean teaches the Discipleship class at the Brevard County Jail. Mr. Dean explained that the class was to teach men who participated to "make better choices . . . that would be pleasing to God." (Vol. IV PCR. 527). Mr. Dean met Mr. Schoenwetter when he sat in as an observer of the Discipleship class taught by Mr. Musalo. (Vol. IV PCR. 527-28). Mr. Dean saw that Mr. Schoenwetter seemed to be out of place amongst the "rough looking guys in there." (Vol. IV PCR. 528-29).

At that first meeting, Mr. Dean was impressed with Mr. Schoenwetter's ability to quickly find scriptures and his knowledge of the Bible. Mr. Schoenwetter "seemed very bright .

. .personable and . . . highly intelligent." (Vol. IV PCR. 529). Mr. Dean began teaching at the jail about this time. (Vol. IV PCR 530). Regarding Mr. Schoenwetter in the class and in the jail, Mr. Dean observed:

> [Mr. Schoenwetter] was always very cooperative. He was pretty talkative, always had an opinion on the Bible and where to find things and why things were the way they were.
>
> He seemed to, at least in his own eyes, try to walk with integrity. I couldn't always agree or disagree with all of his stances, as I can't with anyone else anyway, but I would say he was trying to walk in integrity and trying to live out the things he learned since he got born again. He got a new life.

(Vol. IV PCR. 530-31).

Fred Shelor was an inmate at the Brevard County Jail during the period Mr. Schoenwetter was housed there. He was later called as a witness during the evidentiary hearing. Mr. Dean described Mr. Schoenwetter's interaction with Fred Shelor in the class:

> They had their opinions, very strong opinions. They, honestly, didn't get along terribly good. The thing that was so impressive, a while before, I think - - I don't remember which one left first, but anyway, Randy was really trying to make things right with Fred. Fred is - -
>
> You know, he's got his own opinions on things. They're very strong. They both love God and they both are trying to live out Christianity the best way they know how.
>
> I can say that for sure. Near the end there, before whoever got transferred first, they reconciled together, which is very impressive, because they both

had strong opinions.

> I don't remember if Randy - - I'm thinking maybe Randy instigated the reconciliation, but I'm not sure. I think he did.

(Vol. IV PCR. 531-32).

Mr. Dean considered Mr. Schoenwetter to be a positive influence in the jail setting. (Vol. IV PCR. 532). "He was, in some ways," Mr. Dean thought "an informal leader. People would turn to him . . . for answers and things." (Vol. IV PCR. 532).

Mr. Dean explained that during a recent jail conversation, Mr. Schoenwetter discussed why he had pleaded guilty:

> He said, you know, "I did it." I think in his Christian walk, to say the he was not guilty or try to defend himself was contradictory to what the Bible would want him to do, honestly, to what God, in his deepest heart would want him to do. He'd want him to be honest.
>
> He wouldn't want to put the family through things. He did everything he could, I could see, to stop putting the family through, the victims through anymore hurt. He was willing to lay down his life.
>
> To me, you know, I was asked about remorse. Well, did he show remorse? For me, for a man to lay down his life for somebody and not put the through pain is the greatest show of remorse I can imagine.

(Vol. IV PCR. 533-34).

Mr. Dean, along with Mr. Musalo, had a meeting with Mr. Schoenwetter in the recreation yard of the jail. (Vol. IV PCR 535). Before these gentlemen left Mr. Schoenwetter asked them to pray with him about something; he asked them to pray that he

felt remorse. (Vol. IV PCR. 535). Mr. Dean thought that Mr. Schoenwetter's ability "to feel remorse and have the same reactions and feelings that a lot of people would normally have that didn't have Asperger's and didn't have the frontal lobe issue" was making it difficult for Mr. Schoenwetter to feel and show remorse. (Vol. IV PCR. 536). Mr. Dean explained that:

> A person without Asperger's might take a detour if they couldn't complete a thought process through to completion. They might take a side detour and say this isn't going to work out, this is not a good idea.
>
> A person with Asperger's, my understanding is they get obsessed on things and they get focused and they can't see another way, other than through that situation, to follow their course of thinking all the way through.
>
> That's kind of the pertinent part of Asperger's that I've learned, if that is correct.

(Vol. IV PCR. 536-37). In contradiction to the evidence that the defense presented at the penalty phase, Mr. Dean never observed that Mr. Schoenwetter was amused by these crimes. (Vol. IV PCR. 538). Mr. Dean was never contacted by anyone at the Public Defender's office, or anyone else who wanted to talk to him about Mr. Schoenwetter. Mr. Dean actually attended the trial and would have been willing and available to testify at Mr. Schoenwetter's penalty phase. (Vol. IV PCR. 538).

Arthur Victor Dodzweit

Since 2000, Mr. Dodzweit has been holding Bible study and counseling inmates at the Brevard County Jail. (Vol. IV PCR.

541). Mr. Dodzweit decided to drop by and see Mr. Schoenwetter after reading about his case in the newspaper. (Vol. IV PCR 542). Mr. Dodzweit brought Mr. Schoenwetter a Bible of which Mr. Schoenwetter became quite knowledgeable. (Vol. IV PCR. 542). Mr. Schoenwetter "eventually turned his life over to the Lord and has been growing in the knowledge of the Word and the grace of God ever since." (Vol. IV PCR. 542).

Mr. Dodzweit considered Mr. Schoenwetter to be a positive influence in the incarcerative setting of the jail. (Vol. IV PCR. 542-43). Mr. Schoenwetter's "goal became to try and help [the other inmates] become real and get them off their phoniness and hypocrisy and get them to face up to the realities of scripture." (Vol. IV PCR. 543).

Mr. Schoenwetter provided Mr. Dodzweit with the reasons behind his plea of guilty as charged. (Vol. IV PCR. 544). Mr. Dodzweit explained that the:

> [T]he more he studied the Bible, the more he became convicted of absolute truth. He finally realized he had to face up to what the truth was and he knew he realized he could no longer hide behind something that was not honest. . ..
>
> [He] couldn't say that he was not guilty if he knew he was guilty.

(Vol. IV PCR. 541).

Mr. Dodzweit testified at the *Spencer* Hearing. (Vol. IV PCR. 545). Mr. Schoenwetter's trial attorneys never discussed

with Mr. Dodzweit his testifying before the jury. (Vol. IV PCR. 545-46).

Thomas Wood

Thomas Wood was the Senior Chaplain at the Brevard County Jail where Mr. Schoenwetter was housed pending trial. (Vol. IV PCR 554). While serving in this capacity he "maintained oversight over the ministry, conducted Bible studies, dealt with volunteers, counseled with inmates or staff. (Vol. IV PCR 554).

Mr. Wood met Mr. Schoenwetter after Mr. Wood responded to Mr. Schoenwetter's request for chaplaincy services. (Vol. IV PCR 556). Mr. Schoenwetter "wanted to know about changing his plea as a Christian." (Vol. IV PCR 556-57). Mr. Wood felt that Mr. Schoenwetter was right to believe that he could not maintain his not guilty plea, knowing that it was a lie. (Vol. IV PCR. 557). Mr. Wood found that "[v]ery few people come up with that conclusion." (Vol. IV PCR. 557)

Mr. Wood considered Mr. Schoenwetter to be a positive influence in the Brevard County Jail and that he would continue to be one if he entered the general population in Florida State Prison "if everything was the way it was when he left the jail, absolutely." (Vol. IV PCR. 558). While in the jail people would say that Mr. Schoenwetter "was one of the few general articles . . . a true believer." (Vol. IV PCR. 558).

Mr. Wood produced a video of Mr. Schoenwetter to support

the work of the prison ministry. (Vol. IV PCR. 560). Mr. Schoenwetter expressed in the interview that he was a "monster" and that he wished that Mr. Friskey had a gun at the time he entered the Friskey home. (Vol. IV PCR. 562).

Mr. Wood was never contacted by any members of the Public Defender's office and interviewed regarding his interaction with Mr. Schoenwetter. (Vol. IV PCR. 562). Mr. Wood was available to be contacted by the Public Defender's office while he was serving as Senior Chaplain at the jail. (Vol. IV PCR. 562). Mr. Wood would have been willing and available to testify at the penalty phase if he was requested to do so. (Vol. IV PCR. 563).

Fredrick Shelor

Frederick Shelor is serving life in prison at Gulf C.I.. (Vol. IV PCR. 565). Prior to resolving his cases he was housed in the Brevard County Jail with Mr. Schoenwetter. (Vol. IV PCR. 565). The two of them got to know each other through religious activities such as praying together, reading and studying the Bible and attending classes together. The two of them shared a cell for a while and they made and passed out candy to the other inmates. (Vol. IV PCR. 565).

Mr. Shelor described a spiritual rebirth as, "when someone has given their life over to Jesus Christ and he's become their Lord and Savior and God will regenerate the spirit and renew the life within the person." (Vol. IV PCR. 565). Mr. Shelor stated

that Mr. Schoenwetter is in the process of this spiritual rebirth. (Vol. IV PCR. 565-66).

While in the jail, Mr. Shelor described Mr. Schoenwetter's faith:

> He's strong in the Lord. He believes very much in Jesus Christ as his Lord and Savior. He's very diligent in his studies, especially in his prayer. I've actually seen Randy under his bed praying in his secret closet to the Lord and was very inspirational to me. He was very good with Greek and the studies of that extent, which would be - - how can I say it? Well, not a lot of people do that, study Greek and Hebrew in the county jail like he does.
>
> It's very encouraging for us to be as diligent as he was in that type of activity.

(Vol. IV PCR. 566).

Mr. Shelor found that Mr. Schoenwetter did not deviate from the Christian life; "He stayed very faithful, always into the scripture, always showing people the character of Jesus Christ that he saw within the Bible, all that, all the classes that we went to, the singing songs that we do. He did everything that a person in Jesus Christ should do." (Vol. IV PCR. 568).

Mr. Shelor also witnessed good deeds and kind acts done by Mr. Schoenwetter. If Mr. Schoenwetter received money he would purchase cookies and such and distribute them, "two by two to every inmate in the whole quad." (Vol. IV PCR. 569). Along with Mr. Shelor, Mr. Schoenwetter would make cookies and cakes and give everyone a piece. (Vol. IV PCR. 565). If new inmates

came to the quad, Mr. Schoenwetter would give his brand new socks to them. (Vol. IV PCR. 570).

Mr. Shelor was asked whether Mr. Schoenwetter was a positive impact on the Brevard County Jail and if he could continue to have a positive influence in prison. Regarding the Brevard County Jail Mr. Shelor recounted a recent conversation with inmates in the county jail. He said that there were three inmates in the quad with him now who were in the jail at the time Mr. Schoenwetter was housed there. One was back on an appeal and one for a sentencing. These inmates remembered Mr. Schoenwetter positively. (Vol. IV PCR. 570).

Regarding the prison system, Mr. Shelor testified that someone like Mr. Schoenwetter:

> With his ability to think and memorize and keep uplifted spirit that he does is what a lot of people need in there, because a lot of people get discouraged because of the chastisement from the officers and the way that you just get moody because of not being able to see people or so far from your people or something like that.
>
> Randy can be someone who can encourage people in that.

(Vol. IV PCR. 570). He also agreed that Mr. Schoenwetter could have a calming effect on inmates housed in the prison who might otherwise act out against the corrections officers. (Vol. IV PCR. 570).

Mr. Shelor described for the court some of the programs he was aware of in the prison system. Mr. Shelor explained that

"every prison is a little different," but where he is incarcerated there is:

> EE One on One, which is Evangelist Explosion, which is about evangelizing people. We have Master Life.
>
> We got people that come in from all different type of programs. They're all different type of programs. They're all there, the Yota family, and we have different types of families that come in there, too. The greatest experience that we have is when the families come in to us. We see there's a family who has a man who has his whole life in order, which is very biblical.
>
> That's an example to us, what we could be like if we had another chance on the outside. There's people who gather in the rec yard.
>
> We preach to some of the guys out there in the rec yard about Christ. There's other programs, like educational programs that people could use tutors or people can teach people. Randy would be very good for that, for teaching people.

(Vol. IV PCR. 571-72).

Mr. Schoenwetter never discussed Satanism with Mr. Shelor. (Vol. IV PCR. 573). Mr. Shelor did not observe Mr. Schoenwetter to be involved with any sort of satanic ritual or satanic drawings. (Vol. IV PCR. 573-74). Mr. Shelor recounted that Mr. Schoenwetter liked to draw angels. Mr. Schoenwetter never appeared to be amused by his crimes. (Vol. IV PCR. 574). Mr. Shelor was available to testify at Mr. Schoenwetter's penalty phase but no one from Mr. Schoenwetter's defense team ever interviewed him. (Vol. IV PCR. 574-75).

Dave Butler

Mr. Butler was employed by the Titusville Police Department and was one of the investigating detectives assigned to this case. (Vol. IV PCR. 584). At the evidentiary hearing the State admitted photographs of Mr. Schoenwetter's bedroom. (Vol. IV PCR. 586). Detective Butler described Mr. Schoenwetter's bedroom as "a dark room." (Vol. IV PCR. 586). Mr. Schoenwetter "had different stuff on the walls, dirty, messy, a typical bedroom." (Vol. IV PCR. 586). Detective Butler answered numerous questions on cross-examination about Mr. Schoenwetter's "typical bedroom."

Nettie Connor

Nettie Connor is Mr. Schoenwetter's biological maternal grandmother. (Vol. IV PCR. 610-11). Ms. Connor was 79 years old and living in Chatsworth, Georgia at the time she testified at the evidentiary hearing. (Vol. IV PCR. 611). Ms. Connor's son Reese Ingram was Mr. Schoenwetter's biological father and married to his mother Debbie Roberts. (Vol. IV PCR. 611). Ms. Connor only saw Mr. Schoenwetter four times. (Vol. IV PCR. 613).

Ms. Connor had five children, seven grandchildren and seventeen great-grandchildren. (Vol. IV PCR. 617). Ms. Connor wanted to foster a relationship with her grandson Randy. (Vol. IV PCR. 617). Ms. Connor and her side of the family were denied the opportunity to have a relationship with Ms. Connor's side of

the family. (Vol. IV PCR. 617). These family members would have loved Mr. Schoenwetter had they been given a chance. (Vol. IV PCR. 618). Ms. Connor wanted to have a relationship with her grandson in 2003. (Vol. IV PCR. 621).

The Public Defender's Office contacted Ms. Connor once before the 2003 trial. (Vol. IV PCR. 618). Ms. Connor could not remember the name of the individual who contacted her. (Vol. IV PCR. 618). Ms. Connor informed the individual that had Mr. Schoenwetter had more contact with her side of the family Mr. Schoenwetter would not have gotten into the trouble that he did. (Vol. IV PCR. 619). Ms. Conner could easily have put the individual from the Public Defender's Office in contact with her son Reese Ingram. (Vol. IV PCR. 620).

In 2003, Ms. Connor was available and would have testified for Mr. Schoenwetter. (Vol. IV PCR. 621-22).

Reese Ingram

Reese Ingram was Nettie Connor's son and Randy Schoenwetter's biological father. He lived in Chatsworth Georgia at the time he testified at this hearing. (Vol. V PCR. 642). Mr. Ingram was disabled and on worker's compensation because of two wrecks and a brain aneurysm. (Vol. V PCR. 642). Mr. Schoenwetter was approximately a year or a year-and-half old when Mr. Ingram was sent to prison for five and-a-half years on charges of aggravated assault and simple robbery. (Vol. V PCR.

642-43).

When Mr. Ingram was in prison he tried to contact his son Randy by letter but all of the letters were sent back to him. (Vol. V PCR. 644). Mr. Ingram surrendered his parental rights because he was afraid that if he did not he would be sent back to prison for five years. He was also told that if he tried to see Mr. Schoenwetter he would be arrested. (Vol. V PCR. 644-45). Mr. Ingram, however, was able to insist upon Mr. Schoenwetter keeping Ingram in his name so that his full name was Randy Lamar Ingram Schoenwetter. (Vol. V PCR. 646).

Mr. Ingram expressed that he had five brothers and sisters with children of their own. (Vol. V PCR. 646).

The Circuit Court's Orders

Prior to the evidentiary hearing the lower court held a case management conference. In the order that followed, the court only granted an evidentiary hearing on Claim IV. The court found that the other claims did not require an evidentiary hearing. On November 7, 2008, the lower court denied all relief. (Vol. IX PCR. 1246).

SUMMARY OF ARGUMENT

Randy Schoenwetter should not have received a death sentence. In light of the postconviction proceedings, this Court should grant a new penalty phase or simply find that the execution of Randy Schoenwetter should not occur.

Under Argument I, Mr. Schoenwetter submits that the lower court erred in denying Mr. Schoenwetter a hearing on Claim I of the Rule 3.851 motion at issue. This claim put forth that Mr. Schoenwetter's statements made during a plea of guilty were used against Mr. Schoenwetter in violation of the United States Constitution, the Florida Constitution and Florida law. These statements were inadmissible and should have been the subject of a motion to exclude these statements from Mr. Schoenwetter's penalty phase. Counsel's failure to so move was ineffective, contrary to the Sixth and Fourteenth Amendments to the United States Constitution. Mr. Schoenwetter had a right to a hearing on this claim. This Court should reverse.

Under Argument II, Mr. Schoenwetter submits that he was entitled to a hearing on Claim II of his postconviction motion. Mr. Schoenwetter was sentenced to death. The State's method of execution may be general but its application to Mr. Schoenwetter is unique to him. Accordingly, Mr. Schoenwetter should have been afforded an individualized proceeding to show that the State's death penalty procedures violate Mr. Schoenwetter's rights under the United States and Florida Constitutions.

After Mr. Schoenwetter amended Section D of Claim IV, the lower court granted Mr. Schoenwetter an evidentiary hearing on the entirety of this claim. The lower court denied relief. Under Argument III, Mr. Schoenwetter argues that he proved that

trial counsel was ineffective during the penalty phase. In combination with the mitigation presented during the penalty phase, and with the errors of trial counsel removed, there is a reasonable probability that Mr. Schoenwetter would have received a life sentence. This Court should grant Mr. Schoenwetter new penalty phase or find that death is not a permissible penalty.

In Argument IV, Mr. Schoenwetter argues that any decision by this Court on the propriety of the death penalty in Mr. Schoenwetter's case should be made with due consideration to the *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1194-96 (2005). Whether as a distinct basis for relief or as the underlying support for more general relief, this Court should not let Mr. Schoenwetter's death sentence stand.

In Argument V, Mr. Schoenwetter concludes that under the cumulative effect of all of the error in this case, this Court should grant relief.

STANDARD OF REVIEW

This Court should apply *de novo* review as per *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000).

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.

A.Introduction:

Contrary to the advice of counsel, Mr. Schoenwetter pleaded guilty as charged to the indictment against him. *See* (Vol. II R. 232-49). Following this advice, counsel failed to adequately deal with the ramifications of Mr. Schoenwetter's plea and the statements that he made in pleading guilty. This violated the Fifth, Sixth and Fourteenth Amendments the United States Constitution, the corresponding provisions of the Florida Constitution, and Florida law.

Mr. Schoenwetter alleged in Claim I of his postconviction motion that trial counsel were ineffective for failing to move to exclude the statements Mr. Schoenwetter made during his offer to plead guilty and the plea colloquy and the State's use of the information obtained. Trial counsel clearly should have moved under Section 90.410, Florida Statutes, and Florida Rule of Criminal Procedure 3.172, both of which prohibit the use of statements made during an offer to plead guilty or while pleading guilty. Moreover, counsel could have moved to suppress these statements under *Miranda v. Arizona*, 384 U.S. 436(1966).

The lower court first denied Mr. Schoenwetter the right to present evidence on this claim and the underlying issues. *See* (Vol. VI PCR. 930-31). After Mr. Schoenwetter was forbidden from developing facts in support of this claim, the lower court denied relief based on the court's interpretation of the events

in question despite Mr. Schoenwetter not having the opportunity to prove otherwise. (Vol. IX.PCR. 1253-56).

The lower court, despite the text of the statute and rule in question, found that Mr. Schoenwetter's claim "that his statements were an attempt to negotiate a plea bargain is meritless." (Vol. IX PCR. 1256). As seen below, this finding misapprehended Florida law and the facts of Mr. Schoenwetter's plea. Moreover there was an exchange for Mr. Schoenwetter's plea because the trial court would not accept a no contest plea. (Vol. II R. 243). The court also found that *Miranda* did not apply to the in-court statements. (Vol. IX PCR. 1253).

Under Florida Rule of Criminal Procedure 3.851, Mr. Schoenwetter clearly should have been granted a hearing, although from the record, it is clear that counsel were ineffective in these regards. This Court should remand for a hearing or simply reverse the lower court and grant Mr. Schoenwetter a new penalty phase.

B. Mr. Schoenwetter's Letter and Plea

Mr. Schoenwetter's plea began with a letter to the trial court. In the letter, without the aid of counsel, Mr. Schoenwetter proceeded to harm his case for life. The letter opened the door for a sexual component that would not be available for the State to use to prejudice the jury against Mr. Schoenwetter and to overcome the mitigation that trial counsel

could offer to save Mr. Schoenwetter's very life.

In the letter, Mr. Schoenwetter 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 although not quite as I said in my interrogation. I broke into the Friskie's house with the clear desire to force either one of 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 Teresa 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
> /S/Randy Schoenwetter

(Vol. IV R. 705).

Following receipt of the letter, the trial court set a hearing on February 26, 2003. (Vol. II R. 216). During this hearing, Mr. Schoenwetter confirmed that he was the author of the letter the trial court received on February 25, 2003. The entire hearing was unnecessary; either Mr. Schoenwetter wanted to plead guilty or he did not.

On March 5, 2003, the trial court accepted Mr. Schoenwetter's plea of guilty. During the plea colloquy there

was much discussion between the State, the trial court and trial counsel about what facts Mr. Schoenwetter was pleading. Defense counsel argued vehemently that Mr. Schoenwetter was pleading to the indictment as it read. Mr. Schoenwetter answered further questions that were unnecessary to the issue of whether his plea was knowing, intelligent and voluntary. The trial court made very clear that it would not accept a plea of no contest. (Vol. II R. 243).

At the penalty phase, the State introduced Mr. Schoenwetter's letter and had the court reporter read back to the jury portions of the February status hearing transcript. (Vol. XIII R. 703-11). Before its admission, trial counsel objected that the letter was not authenticated (Vol. XIII R. 681). The objection was overruled (Vol. XIII R.685). Trial counsel did not object to the admission of the statements Mr. Schoenwetter made in court or in the letter on the grounds that they were made during a plea or an offer to plead guilty.

During the penalty phase, the State also moved to introduce into evidence a transcript of the March 5, 2003, plea colloquy and discussion surrounding the plea. The trial court excluded the transcript of this hearing from evidence and instead decided to take judicial notice that Mr. Schoenwetter pleaded guilty to the indictment.

C. Counsel Was Ineffective for Failing to Move to Exclude

Mr. Schoenwetter's Statements and Letter under Florida Law.

The information that the State obtained from Mr. Schoenwetter's plea and offer to plead guilty, and which the State presented to the jury, was highly prejudicial in a number of areas. By going into detail concerning his sexual motive for entering the house, Mr. Schoenwetter's statements interjected a clear sexual component for the crimes which the State was seeking his death. Mr. Schoenwetter made no statements in his confession to law enforcement that indicated that his desire for entering the residence was to have sex with the younger women in the house, even though law enforcement told him that they would be able to obtain fingerprints from the genital area of the victim.

While the prejudice Mr. Schoenwetter suffered before the jury was great it did not end there. The trial court used the fact that Mr. Schoenwetter pleaded guilty to give virtually no weight to the statutory mitigating factor of Mr. Schoenwetter's age at the time of the offense.

Counsel was ineffective for failing to file a motion to exclude statements Mr. Schoenwetter made during his offer to plead guilty and the plea colloquy and the use of information obtained from these statements. The use of these statements at trial clearly violated Section 90.410, Florida Statutes, and Florida Rule of Criminal Procedure 3.172, which prohibit the use

of statements made during an offer plead guilty. These provisions grant use immunity to individuals such as Mr. Schoenwetter who make statements during plea negotiations despite their Fifth Amendment right to remain silent.

Counsel was ineffective for failing to raise these grounds when the State sought to admit Mr. Schoenwetter's letter and statements. The use of these statements at Mr. Schoenwetter's trial violated his right to remain silent under the Fifth Amendment and his right to due process under the Fourteenth Amendment because the State used Mr. Schoenwetter's statements, which he could not be compelled to make, and which Mr. Schoenwetter made under the protection of this grant of immunity. Counsel should have defended Mr. Schoenwetter's rights by filing and litigating a motion to suppress or a motion in limine.

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(h) 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.

This Court considered the application of this grant of immunity in *Richardson v. State*, 706 So.2d 1349, 1353 (Fla. 1998). There, this Court relied on *U.S. v. Robertson*, 582 F. 2d 1356 (5th Cir. 1978). *Id*. The two-tiered analysis of *Robertson* requires the court to first determine "'whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion . . ..'" *Id*. at 1353; *citing Robertson*. Second, the trial court must discern "'whether the accused's expectation was reasonable given the totality of the circumstances.'" *Id*.

In *Donaldson v. State*, 722 So. 2d 177 (Fla. 1998), this Court clearly held that "offers to plead guilty are not admissible in either criminal or civil cases." *Id*. at 188; *citing* Section 90.410, Fla. Stat. (1993); *Reese v. State*, 694 So. 2d 678, 684 (Fla. 1997)(holding offers to plead are not admissible by defense even where State opens the door to such issue); *Bottoson v. State*, 443 So.2d 962, 965 (Fla.1983).

If the trial court denied such a motion, the error of admitting this evidence would not have been found harmless on appeal. *See Landrum v. State*, 430 So.2d 549 (Fla. 2d DCA 1983)(holding that admitting evidence of statements made by defendant in connection with guilty plea proceeding could not be

deemed harmless because that would have the effect of approving admission of such evidence).

In *Calabro v. State*, 995 So.2d 307 (Fla. 2008), this Court considered the exact factual scenario at issue here. *Id*. at 309. The relevant statements by Mr. Calabro in open court were:

> MR. CALABRO: Is there any possible way I can get an earlier date? I just want to get this over with as soon as possible. I know what I'm saying. I'm very coherent, my mind is a proven perspective. I'll just like to avoid trial and get sentenced on this.
>
> *****
>
> You should have talked to me three weeks ago, I haven't had no representation since I've been in jail, for three weeks. Where have you been? I will like to avoid the trial and have some kind of plea agreement set earlier than March or whatever that was.
>
> *****
>
> I know this is unusual but unfortunately, I'm guilty of this. And the police up there, what they say up there is; this is what you are getting. And you are getting the truth, maybe I'm catching some people off guard here.
>
> But if an attorney came to see me within its past three weeks, maybe they'll have an idea of where my mind is at *but right now I'm guilty. I'm not proud of it, but.*

Id. at 309-10.

Mr. Calabro filed motion to exclude his "statements relating to his admissions of guilt, alleging that the statements were offers to plead guilty or made in connection with plea negotiations and thus, inadmissible under section 90.410 of the Florida Statutes and Florida Rule of Criminal Procedure 3.172(h)." *Id.* at 310. The trial court excluded both

statements based on these provisions. *Id*. The State appealed and challenged the exclusion of Mr. Calabro's second statement only. *Id*. The lower appellate court reversed. *Id*. at 310-11.

This Court reversed the lower appellate court. *Id*. at 318 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. Schoenwetter's statements and letter are properly seen as plea negotiations and an offer to plead guilty. All of these statements were inadmissible. Reasonable counsel would have relied upon Section 90.410, Florida Statutes and Florida Rule of Criminal Procedure 3.172(h), both of which are cited above. By motion to suppress or in limine, counsel should have moved to exclude Mr. Schoenwetter's statements from the penalty phase because they were made as part of an offer to plead guilty. Counsel's omission in this regard was deficient and prejudiced Mr. Schoenwetter. Mr. Schoenwetter was denied the effective assistance of counsel.

The fact that Mr. Schoenwetter was not read his *Miranda* rights prior to making incriminating statements to the court also established a separate ground for moving to suppress Mr. Schoenwetter's statements. Mr. Schoenwetter was in custody when he made statements at both the February and March hearing. He

was asked questions and gave responses. Much like the presumed innocent defendant at arraignment, Mr. Schoenwetter could not be forced to answer questions in court or by police. A prerequisite before any custodial interrogation takes place is that an individual be informed that whatever he or she says, in the wording of the *Miranda* warnings "can and will be used against" them.

Mr. Schoenwetter was not informed that the statements that he made could and would be used by the State and the court to secure his death. The obvious reason was that under the United States Constitution and the Florida Rules of Criminal Procedure, Mr. Schoenwetter's statements before the court and by letter were inadmissible. It was hardly necessary to invoke *Miranda* to exclude the statements considering that Mr. Schoenwetter made these statements while pleading guilty. Nevertheless, here and before the trial court, this was a viable alternative basis for excluding the information at issue that was so prejudicial.

Mr. Schoenwetter's letter offering to plead guilty and his statements indicating a willingness to do so during the plea hearing were permitted and perhaps admirable. It was not an opportunity for the State to illicitly gain evidence it was not entitled to under Florida law.

Conclusion

Mr. Schoenwetter had a right to the protections of Florida

law and *Miranda*. He also had the right to the effective assistance of counsel to ensure that he was not prejudiced by a violation of these rights. *See* discussion of *Strickland*, *infra*. An evidentiary hearing would have shown that trial counsel never even considered what was apparent in Section 90.410, Florida Statutes, Florida Rule of Criminal Procedure 3.172 and the decisions of the Florida courts - - that the Mr. Schoenwetter's highly prejudicial statements at issue, could not be used by the State to ensure a death sentence. Had counsel acted reasonably in this regard there is a reasonable probability that the outcome of this case would have been different. This Court should remand for an evidentiary hearing or simply grant Mr. Schoenwetter a new penalty phase that comports with the law.

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.

Mr. Schoenwetter properly raised the following claim as Claim II of his postconviction motion:

THE LETHAL INJECTION OF MR. SCHOENWETTER UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL

INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

In support of this claim Mr. Schoenwetter argued that the lethal injection as carried out by the State of Florida was cruel and unusual punishment. He also argued that the revised protocols that came in the wake of the tortuous execution of Angel Diaz were still inadequate to ensure that Mr. Schoenwetter is not subjected to cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution and under the corresponding provisions of the Florida Constitution. Mr. Schoenwetter's motion sought to prove this by the evidentiary hearing that he is guaranteed under Florida Rule of Criminal Procedure 3.851.

The lower court's case management order denied Mr. Schoenwetter his right to present evidence at a postconviction hearing. The court found, despite Mr. Schoenwetter's request to produce evidence in support of this claim, that this "claim involved solely a legal determination and does not require the Court to make any factual determinations. Therefore, there is no need for an evidentiary hearing." (Vol. VI PCR. 932).

In the order denying Mr. Schoenwetter's postconviction motion, the lower court listed a number of cases in which this Court upheld lethal injection and the United States Supreme Court decision in *Baze v. Kentucky*, 128 S.Ct. 1520 (2008). (Vol. IX PCR. 1257). The Court did not mention that in at least

some of the cases the lower court listed, *see Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007) and *Baze*, there was evidentiary fact development, the very right that the lower court denied Mr. Schoenwetter.

On this claim, there was a need for factual determination and thus the need for a hearing. While this Court and the United States Supreme Court have ruled against claims involving lethal injection, Mr. Schoenwetter has a right to an individualized determination of his claims under the Due Process Clause of the United States and Florida Constitutions. Indeed, it is not the cruel and unusual execution of Mr. Lightbourne or Mr. Baze that Mr. Schoenwetter contests, but his cruel and unusual execution. That he does not suffer this can only be guaranteed if this Court remands and allows Mr. Schoenwetter to present the facts necessary to prove this claim.

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.

A. Introduction

Mr. Schoenwetter should not be sentenced to death; he should not be executed. In postconviction, Mr. Schoenwetter raised issues concerning ineffective assistance of counsel he

received during his penalty phase. Mr. Schoenwetter did not receive relief, although after the evidentiary hearing, the lower court should have vacated Mr. Schoenwetter's death sentences.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the United States Supreme Court stated:

> In *Lockett v. Ohio*, 438 U.S 586 (1978), Chief Justice BURGER, writing for the plurality, stated the rule that we apply today:
>
> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, (emphasis in original).
>
> *****
>
> Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. Thus, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the principal opinion held that the danger of an arbitrary and capricious death penalty could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Id., at 195, 96 S.Ct., at 2935. By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to "the characteristics of the person who committed the crime...." *Id*., at 197, 96 S.Ct., at 2936.
>
> Similarly, in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the plurality

> held that mandatory death sentencing was not a permissible response to the problem of arbitrary jury discretion. As the history of capital punishment had shown, such an approach to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304, 96 S.Ct., at 2991. *See Roberts (Harry) v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).
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> Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia*, *supra*, at 197, 96 S.Ct., at 2936, the rule in *Lockett* recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.
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Id. at 110-116.

In Mr. Schoenwetter's case, it was trial counsel who denied the relevant sentencers the opportunity to consider all of the mitigation in favor of Mr. Schoenwetter's case for life. Mr. Schoenwetter had the right to the effective assistance of

counsel at every stage of the proceedings against him. Claim IV addressed counsel's failures during the penalty phase trial and sentencing stage which led to a breakdown of the adversarial process undermining the results in this case. Mr. Schoenwetter alleged that counsel's performance during this stage was deficient and prejudicial because there is a reasonable probability that had Mr. Schoenwetter received the effective assistance of counsel he would not have been sentenced to death.

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove deficient performance the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id*. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. at 688. 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.

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 sentence- -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.

Applying *Strickland*, *supra*, this Court should find that counsel was ineffective at this stage of performance and vacate Mr. Schoenwetter's conviction, sentence, or both. If this Court fails to grant relief on this claim alone, this Court should grant such relief based on the totality of counsel's ineffectiveness in relation to the evidence against Mr.

Schoenwetter.

Mr. Schoenwetter was denied the effective assistance of counsel during the penalty and sentencing phase of his trial. As discussed specifically below, under *Strickland*, trial counsel was ineffective during the penalty phase. This Court should vacate his death sentence and grant Mr. Schoenwetter a new penalty phase.

B. Trial Counsel Was Ineffective for Introducing Child Pornography, Pedophilia and Satanism into the Penalty Phase Proceedings and Failing to Object to the State's Questioning in These Areas.

Mr. Schoenwetter raised the issue that trial counsel were ineffective for introducing evidence of child pornography, pedophilia and Satanism during Mr. Schoenwetter's case for life, and for failing to object to the State's questioning in these areas. The lower court denied relief. (Vol. IX PCR. 1259). The lower court found that somehow the introduction of this evidence was a "strategic decision" and as such did not constitute ineffective assistance of counsel because "'alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.'" (Vol. IX PCR. 1259); *citing Occichone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). This Court should reverse because counsel acted unreasonably and well outside of professional norms.

In the critical area of expert testimony, trial counsel failed Mr. Schoenwetter. The first witness trial counsel called was psychologist Dr. William Riebsame. On direct examination by Mr. Schoenwetter's trial counsel, Dr. Riebsame testified that Mr. Schoenwetter had a preoccupation with "satanic and sexual matter." (Vol. XIII R. 739). Trial counsel's questions further elicited a response suggesting "other pornographic sexual matters as well." (Vol. XIII R. 739).

At the penalty phase, Mr. Schoenwetter's counsel introduced affirmative evidence that the Mr. Schoenwetter possessed alleged child pornography, and that his mother took a child pornography disk to the police and informed the police that her son had been looking at these illegal images on the computer. This was not mitigating evidence, and therefore this constituted ineffective assistance of counsel under *Strickland*.

Trial counsel should have moved to exclude any evidence that Mr. Schoenwetter was looking at child pornography on the computer. This Court discussed this area in the direct appeal opinion:

> 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).

The sexual theme introduced by Mr. Schoenwetter's counsel continued. Dr. Riebsame also testified that Mr. Schoenwetter was viewing "pornographic and satanic web sites at an early teenage age, as well as downloading **child pornographic** images." (Vol. XIII R. 739-40)(Emphasis supplied). He testified shortly after these revelations about "...the fuel being provided by the pornographic materials..." (Vol. XIII R.741)

Returning to the theme, on cross-examination by the State, Dr. Riebsame volunteered the phrase "computer child pornographic materials." (Vol. XIII R.773). Without defense objection, the State questioned him further about whether or not "...possessing child pornography...(was a) significant criminal activity." Dr. Riebsame agreed that possessing child pornography is indeed a substantial criminal activity. (Vol. XIII R.773-74).

The State asked Dr. Riebsame how he could differentiate a pedophile from Mr. Schoenwetter. (Vol. XIII R. 791-92). The answer was that "he's interrupted in his efforts to accomplish forcing this girl to have sex and the killing results there from." (Vol. XIII R. 792). The next question tried to get Dr.

Riebsame to label Mr. Schoenwetter a pedophile and the following two questions contain the word "pedophile." (Vol. XIII R. 792-93). The State finished the image by introducing a loaded phrase by asking if Mr. Schoenwetter was still focused on "sexual Satanism" even though this phrase had never been testified about before. (Vol. XIII R. 793). Again, this was all without defense objection. This type of evidence and questioning by the State was clearly inadmissible, greatly prejudicial and should have been objected to by trial counsel. *See Hitchcock v. State*, 673 So.2d 859, 861-63 (Fla. 1996).

Trial counsel tried to redeem this situation by calling Commander Bobby Mutter, the Titusville police officer that Mr. Schoenwetter's mother contacted about the pornography on the family computer. He was an officer experienced in investigating computer/child pornography crime. Mr. Schoenwetter's mother claimed to the police officer that it contained child pornography. Commander Mutter testified that, contrary to Mr. Schoenwetter's mother's assumption, he did not believe the images on the disc were of underage females. He testified that they were between 18 and 19 years of age. While the State's cross-examination brought out that Mr. Schoenwetter thought they were 17 years of age, Commander Mutter did not think so and did not think any crime had been committed. (Vol. XIII R. 1049-55).

The calling of Commander Mutter towards the close of

evidence showed that having Dr. Riebsame discuss "child pornography," Satanism and the subjects that flowed from this was not strategy. Commander Mutter was a last minute witness called to rebut Dr. Riebsame's unanticipated testimony. Calling Commander Mutter was damage-control which flowed from not effectively preparing Dr. Riebsame. Moreover, as the evidentiary hearing showed, Dr. Riebsame's testimony was not true.

The jury and the judge were saturated with the discussion of pornography, Satanism and child pornography. All were either uncharged crimes or non-statutory aggravating factors that the State could not have introduced in their case-in-chief. The defense was ineffective for allowing this to occur. No curative instruction could have alleviated this prejudice.

Prejudicing Mr. Schoenwetter further, trial counsel asked Dr. Riebsame whether Mr. Schoenwetter experienced any pleasure or enjoyment in the killing or suffering of the victims. (Vol. XIII R. 763). Dr. Riebsame answered that he had read a letter from another inmate in the jail that said that the defendant had told him that he (Mr. Schoenwetter) was "amused" by what had occurred. (Vol. XIII R. 763). Such a cold and calculating statement had a devastating effect on those who were deciding whether Mr. Schoenwetter should live or die. Mr. Moore did not provide any reason for Dr. Riebsame to discuss with the jury

that some inmate claimed that Mr. Schoenwetter claimed to be amused by his crimes. *See* (Vol. III PCR. 349).

Reasonable counsel would have prepared Dr. Riebsame so that he would not open these highly prejudicial areas before the jury. Additionally, reasonable counsel would have objected to the highly inflammatory and prejudicial questions and answers, asked by the State, and answered by Dr. Riebsame.

Dr. Dee's evidentiary hearing testimony showed that not only was trial counsel's strategy unreasonable, it was also well beyond the norms of professional conduct. Dr. Dee, like Commander Mutter, made clear that Mr. Schoenwetter was not interested in child pornography. (Vol. III PCR. 284). This was indeed something conceived by the ill-prepared and misinformed Dr. Riebsame. (Vol. III PCR. 282). Similarly, Dr. Dee's testimony showed that Mr. Schoenwetter was not involved in Satanism, devil worship or anything other than a passing interest in witches and magic. (Vol. III PCR. 282).

If trial counsel was intentionally trying to produce evidence from Dr. Riebsame about Satanism and Mr. Schoenwetter's lack of remorse, like with the child pornography, counsel should have called witnesses, such as the jail chaplains discussed below, to refute these aggravating factors masquerading as mitigation.

Trial counsel failed to meet the standards of reasonable

attorney performance during the representation and was therefore deficient. Counsel's deficiency during this critical phase of Mr. Schoenwetter's case prejudiced Mr. Schoenwetter and led to his improper death sentence. Had counsel not been ineffective there was a reasonable probability that the sentencing jury would not have recommended his death and the trial court would not have sentenced him to death. This Court should vacate Mr. Schoenwetter's death sentence.

C. Ineffective Assistance of Counsel for Failure to Object to the State Arguing and Offering a Non-Statutory Aggravator of Attempted Sexual Battery

In its opening statement, the State argued that "This relationship that the defendant had with Chad Friskey also gave him the 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." (Vol. X R. 39). This statement and argument failed to produce an objection from the defense. This constituted ineffective assistance of counsel. The State is prohibited from arguing non-statutory aggravators at a penalty phase, and by doing so the jury improperly considered that the murder was committed during the course of an attempted capital sexual battery.

The only aggravator available for the State relevant to this issue was that the murder was committed during the course of the felony charge of a burglary of a dwelling. The defendant

was not charged with sexual battery, and he did not sexually batter the girls. And he was not charged with attempted sexual battery for that matter. Trial counsel was ineffective for failing to object to the above-listed argument and request a mistrial.

D. Ineffective Assistance of Counsel for failing to present available mitigation about the effect of Mr. Schoenwetter's background and conditions, how Mr. Schoenwetter overcame these factors to experience remorse and how Mr. Schoenwetter could be a positive influence in prison.

The evidentiary hearing showed that the relevant sentencers in this case, the judge and the jury, were denied a complete understanding of who Mr. Schoenwetter was, who he became, and what influenced him. Trial counsel could have developed these areas if counsel had conducted a full investigation into the mitigation that was available in this case. This was deficient performance and as a result Mr. Schoenwetter was prejudiced because he was sentenced to death by a jury which knew little about him and decided his sentence under false impressions. Had counsel acted effectively, Mr. Schoenwetter would have received the same sentence as 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”).

Trial counsel failed to present available evidence of Mr. Schoenwetter’s good deeds, religious transformation and the benefits to society that he could provide to society if he was sentenced to life in the general prison population. Chaplain Arthur Victor Dodzweit was called at the *Spencer* Hearing but not before the jury. (Vol. II R. 272). The lower court did not make reference to Mr. Dodzweit in the Court’s sentencing order.

Mr. Dodzweit testified in the form of a narrative. He discussed Mr. Schoenwetter becoming interested in the Bible and subsequent decision to “get real with God.” Mr. Dodzweit also testified that after Mr. Schoenwetter found faith in God he was able to understand “the delicate balance between liberty and legalism.” (Vol. II R. 273).

At the *Spencer* hearing, Mr. Dodzweit went on to state that the Florida State Prison system really needed men like Randy because “true Christianity is a very difficult balancing act.” Because of his religious conversion, Mr. Schoenwetter experienced a profound and eternal transformation in his character, and ultimately, his soul. Because of this transformation Mr. Schoenwetter is essentially a “new creation” which should not be sent “to his heavenly home early.” After becoming a new creation, and if his life was spared, Mr. Schoenwetter could follow the tenets of his new faith and care

for and counsel his fellow inmates in prison. (Vol. II R. 274).

The testimony of Mr. Dodzweit on these matters should have been presented to the jury for the jury's consideration of whether Mr. Schoenwetter would live or die. Counsel's failure to call Mr. Dodzweit as a witness before the jury was deficient. As a result of this deficiency, the jury was denied important information about Mr. Schoenwetter's character which resulted in prejudice to Mr. Schoenwetter. Had testimony on these matters been presented to the jury, along with the other mitigation counsel failed to present, there is a reasonable probability the outcome would have been different.

Contrary to the opinions of trial counsel at the hearing there was nothing offensive about Mr. Schoenwetter's transformation or the testimony that Mr. Dodzweit presented at the *Spencer* hearing. All of this could have been presented at to the jury through specific questions following proper witness preparation. Even if counsel decided not to call Mr. Dodzweit counsel should have spent the time with Mr. Schoenwetter, after his plea, to develop mitigation based on who Mr. Schoenwetter truly had become.

Had counsel used the time they spent with Mr. Schoenwetter effectively, counsel would have discovered Rick Dean, Thomas Wood, David Musalo and Fredrick Shelor. These witnesses, all of whom testified compellingly at the evidentiary hearing, could

have been prepared to answer specific questions about Mr. Schoenwetter before the jury. These witnesses were all available and willing to testify for Mr. Schoenwetter.

What powerful testimony it would have been. Mr. Musalo could have testified, as he did at the evidentiary hearing, about Mr. Schoenwetter's participation and interaction in his Discipleship class. Mr. Musalo could have testified that there "absolutely" was a change in Mr. Schoenwetter. (Vol. III PCR. 422). While Mr. Schoenwetter may have justly spent the rest of his life in prison, he could do so as a contributing member of the prison community.

Richard Dean also could have testified about the change in Mr. Schoenwetter. Mr. Dean could have told the jury about Mr. Schoenwetter's ability to understand the Bible. He could have described to the jury how Mr. Schoenwetter interacted with fellow inmate Fred Shelor and how Mr. Schoenwetter facilitated reconciliation amongst the two. (Vol. IV PCR. 531-32). Mr. Dean could have described to the jury how Mr. Schoenwetter "was trying to walk in integrity and trying to live out the things he learned since he got born again." (Vol. IV PCR. 530-31). The jury should have known that Mr. Schoenwetter could have continued to walk in integrity even if it was walking through the prison yard while serving a life sentence.

The jury should have also heard from Senior Chaplain Thomas

Wood. Mr. Wood considered Mr. Schoenwetter to be a positive influence in the Brevard County Jail and that he would continue to be one if he entered the general population in Florida State Prison "if everything was the way it was when he left the jail, absolutely." (Vol. IV PCR. 558). While in the jail people would say that Mr. Schoenwetter was "one of the few general articles . . . a true believer." (Vol. IV PCR. 558).

By speaking with Fredrick Shelor, trial counsel could have presented testimony about the programs that are available in prison. Moreover, Mr. Shelor could offer testimony about how Mr. Schoenwetter interacted with the other inmates and the kindness that Mr. Schoenwetter to his fellow inmates through sharing. To this day, inmates remember Mr. Schoenwetter from his impact on his fellow inmates while he was awaiting trial in the Brevard County Jail. (Vol. IV PCR. 570). Mr. Schoenwetter could "encourage" his fellow inmates in Florida State Prison. (Vol. IV PCR. 570).

Dr. Dee found that Mr. Schoenwetter's embracing Christianity would enable him to have more positive interaction in the prison environment despite his impairments, "especially as compared to the way he was beforehand." (Vol. III PCR. 286). It could also help him avoid conflicts in a prison environment. (Vol. III PCR. 286).

These witnesses showed that while Mr. Schoenwetter remained

a convicted murderer, he became a man which could have a positive impact on the prison community. The jury certainly would have found that that a life of service in prison where Mr. Schoenwetter could help others was preferable to a death from which no one would benefit. The evidentiary hearing showed that had counsel spoken with Mr. Schoenwetter, counsel could have easily developed this testimony and presented this through specific questions. The failure to do so was deficient and the prejudice was great because the jury simply did not know the person for whom they were recommending the death penalty.

Contrary to trial counsel's evidentiary hearing testimony, with Mr. Schoenwetter's new faith also came an understanding of the nature of his crimes and a great and profound remorse for his actions. Had counsel been effective, counsel would have called these witnesses before the jury. Also, counsel could have presented the information through one or more of the mental health experts counsel retained and called at the penalty phase, or any other mental health expert that was available.

Mr. Schoenwetter entered a plea of guilty as charged. This was because he believed that his Christian beliefs did not allow him to maintain his plea of not guilty. Mr. Schoenwetter, as the evidentiary testimony showed, never had a lack of remorse or amusement over his crimes. Effective counsel would have known this had counsel taken the time to know Mr. Schoenwetter.

Both Mr. Musalo and Mr. Dean remembered how Mr. Schoenwetter asked them to pray with him so that he could feel remorse. Mr. Dean, along with Mr. Musalo, had a meeting with Mr. Schoenwetter in the recreation yard of the jail. (Vol. IV PCR 535). Before these gentlemen left Mr. Schoenwetter asked them to pray with him about something; he asked them to pray that he felt remorse. (Vol. IV PCR. 535). Mr. Dean thought that Mr. Schoenwetter's ability "to feel remorse and have the same reactions and feelings that a lot of people would normally have that didn't have Asperger's and didn't have the frontal lobe issue" was making it difficult for Mr. Schoenwetter to feel and show remorse. (Vol. IV PCR. 536).

At the evidentiary hearing, Mr. Musalo recounted the time that he and Rick Dean had a conversation with Mr. Schoenwetter when Mr. Schoenwetter stated that he had decided to plead guilty. (Vol. III PCR. 425). Mr. Musalo interpreted that because of Mr. Schoenwetter's "study of God's word and it becoming part of him, he was willing to do whatever that meant. . . .[I]n other words, he wasn't going to look for a way out." (Vol. III PCR. 425). Mr. Musalo thought that Mr. Schoenwetter "realized the depth of his crime and was willing to stand up to that . . .." (Vol. IV PCR. 433).

Mr. Schoenwetter did not have a lack of remorse and he was certainly not amused by his crimes. Mr. Schoenwetter was

impaired in his ability to initially understand remorse and in his ability to express remorse. The chaplains from the jail showed that he was willing to work to overcome these impairments and that Mr. Schoenwetter did indeed feel remorse. Dr. Dee explained that even though it was difficult for him, Mr. Schoenwetter did in fact experience remorse. (Vol. III PCR. 286).

In addition to recounting information about Mr. Schoenwetter's finding faith and remorse, a mental health expert could have addressed the impact of Mr. Schoenwetter's transformation in relation to the mental and emotional infirmities presented to the jury during penalty phase. A properly-informed mental health expert could have informed the jury about the additional struggles that an individual with Mr. Schoenwetter's conditions would have to overcome in order to experience a transformation and to feel the profound sense of remorse that Mr. Schoenwetter did come to feel.

While there was testimony concerning some of Mr. Schoenwetter's social background, counsel failed to synchronize the testimony through the experts and present the same to the jury. The jurors should have heard in great detail about how Mr. Schoenwetter's background and experiences interacted with his familial, mental, medical, biological, social, and environmental factors. Rather than isolated incidents, Mr.

Schoenwetter's childhood home and environment presented on-going and persistent difficulties.

Dr. Dee's testimony showed that Mr. Schoenwetter was raised in a home that failed to provide structure, stability and the support that a child who suffered from the impairments of Asperger's Syndrome, ADHD and organic brain impairment needed to overcome, or at least cope with, these difficulties on the path to adulthood. A lack of consistency, led to a lack of regularity in how Mr. Schoenwetter perceived the world around him and thus how he should interact.

Mr. Schoenwetter's biological father, Reece Ingram, could have testified as to the instability of his early childhood home and his interactions with Mr. Schoenwetter's mother. Mr. Schoenwetter's paternal Grandmother, Nettie Conner, could have also testified in these areas.

While Mr. Schoenwetter's background would have had a profound effect on the development of any young person, the effects on Mr. Schoenwetter, because of his conditions, were exacerbated. Likewise, Mr. Schoenwetter's conditions and their concordant effects on his decision making and personal development, were negatively affected by this background. Despite all of these impairments, if Mr. Schoenwetter had more structure and stability during his formative years, he would have had a greater opportunity to grow into adulthood and avoid

the criminal conduct at issue in this case. He simply never had the "prosthetic environment" that Dr. Dee testified to and which Mr. Schoenwetter so desperately needed. See (Vol. III PCR. 275-80).

Counsel could have called a mitigation specialist, such as Laura Blankman, who was hired by the defense, to present further information about Mr. Schoenwetter. Based on Ms. Blankman's experience and abilities, if Ms. Blankman had been given the time and the resources to develop this information she could have developed greater mitigation about Mr. Schoenwetter's bio-social history. Counsel was deficient for failing to use this available information as part of a coherent mitigation presentation. As a result, Mr. Schoenwetter was denied the opportunity for the jury to hear the complete case for life that should have been presented.

E. Trial Counsel Was Ineffective for Calling Experts Which Contradicted One Another, Thus Denying Mr. Schoenwetter a Consistent Case for Life and for Failing to Stress the Importance of Mr. Schoenwetter's Impulse Control over His Preoccupation with Sexual Matters.

At the penalty phase, counsel called three experts, Dr. Prichard, Dr. Riebsame and Dr. Wu.

Dr. Riebsame testified in a number of areas. As seen above, to the prejudice of Mr. Schoenwetter, Dr. Riebsame dwelt needlessly and incorrectly on Mr. Schoenwetter's sexual and satanic preoccupation. Dr. Riebsame found that the mitigating

factor, that based on Mr. Schoenwetter's Asperger's Syndrome, along with the PET scan and the circumstances of the offense, the crime was committed while he was under the influence of extreme mental or emotional disturbance. Trial counsel argued this in closing but referred to this as an "aggravator." (Vol. XVI 1271-72).

Trial counsel then acknowledged that Dr. Prichard did not find this mitigating factor. Instead, in contradiction of Dr. Riebsame, who could not use the word substantial, Dr. Prichard found the mitigating factor that Mr. Schoenwetter's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." (Vol. XVI R. 1272). Contradictory experts did not aid Mr. Schoenwetter's case for life.

Counsel's performance was deficient under *Strickland* for failing to produce cohesive expert testimony between the experts. If these experts could not be reconciled, trial counsel should have chosen one or the other. Under *Strickland* Mr. Schoenwetter was prejudiced because the jury perceived that Mr. Schoenwetter's case for life presented by the defense experts as fractured.

Counsel's performance was also deficient for failing to provide Dr. Prichard and Dr. Riebsame with a copy of the videotape of Mr. Schoenwetter's confession before these experts

testified. Because of the counsel's deficiencies in these regards the State was able, in spite of recalling Dr. Riebsame after he viewed the video tape, Mr. Schoenwetter was prejudiced. Through the State's questions, the jury was led to believe that these experts did not perform a complete analysis of Mr. Schoenwetter, thus defeating his case for life.

Dr. Wu testified concerning his analysis of Mr. Schoenwetter's PET scan. Dr. Wu confirmed that Mr. Schoenwetter suffered from Asperger's Syndrome and frontal lobe impairment. The frontal lobe controls impulse control and led to the commission of the instant offense. An impaired frontal lobe supported both statutory mental health mitigators. Relying on Dr. Wu's testimony, counsel should have specifically argued in closing that these two weighty statutory mitigating factors were supported by Dr. Wu's testimony.

Instead, counsel simply made vague reference to Mr. Schoenwetter's impulsivity and never tied this to the crime. Dr. Dee's testimony at the evidentiary hearing showed that Mr. Schoenwetter's impulsivity caused by frontal lobe damage gave rise to three important statutory mitigating factors. Based on Mr. Schoenwetter's neuropsychological and psychological condition Dr. Dee, like any well-prepared mental health expert found:

1. That Mr. Schoenwetter's crime was committed while the

he was under extreme mental or emotional disturbance. (Vol. III PCR. 287). This finding was based on Mr. Schoenwetter's neuropsychological and neurological impairments.

2. Mr. Schoenwetter's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired." (Vol. III PCR. 287). Dr. Dee found that this mitigating factor applied "particularly in the area of [Mr. Schoenwetter's] ability to conform his conduct because of the frontal lobe." (Vol. III PCR. 287).

3. Mr. Schoenwetter's age at the time of the offense. (Vol. III PCR. 287). Dr. Dee found that Mr. Schoenwetter met the criteria for this mitigating factor based on the "two-thirds rule." (Vol. III PCR. 288). According to the two-thirds rule, in calculating the social maturity of individuals with ADHD such as Mr. Schoenwetter, one-third of the chronological age is subtracted. (Vol. III PCR. 288). In Mr. Schoenwetter's case, this resulted in "the social maturity of a twelve or thirteen year old, perhaps." (Vol. III PCR. 288).

Based on how the brain develops, Dr. Dee explained the human brain is finally mature at "[r]oughly around the age of twenty-five." (Vol. III PCR. 288). Dr. Dee explained that this is the age "when the median for brain function and the connections of the frontal lobe are finally completed. The

myelinization of the fibers is completed around twenty-four, twenty-five." (Vol. III PCR. 288). Dr. Dee explained further that "it's commonplace to describe individuals in this age group as immature. We now know what underlies that. It's the lack of connections between the frontal lobe, which controls inhibition, and other areas, so they are physiologically and behaviorally immature. That's the reason for it as a matter of fact." (Vol. III PCR. 289).

4. All of the non-statutory mitigation that was presented at the penalty phase and the evidence presented at the evidentiary hearing should have been presented at the penalty phase if counsel were not ineffective.

Counsel was deficient for failing to argue the importance of the impulsivity as it related to the crime and instead dwelling mostly on Mr. Schoenwetter's incorrectly assumed preoccupation with sexual matters and Satanism. Once Mr. Schoenwetter's real preoccupations took over, because of his lack of impulse control he could not stop himself from committing the crime in the manner which someone without his level of neuropsychological impairment. The jury was denied this key understanding about Mr. Schoenwetter and the crime he committed. As a result Mr. Schoenwetter was denied a fair penalty phase.

F. Conclusion

As a result of all of the ineffectiveness presented above, the jury that recommended Mr. Schoenwetter's execution was denied a complete and accurate understanding of Mr. Schoenwetter and the crimes he committed. Mr. Schoenwetter was thus denied a fair penalty phase.

Trial counsel, on each sub-claim above, acted deficiently. Either standing alone, or together, Mr. Schoenwetter was prejudiced because he was sentenced to death by a jury that did not understand the full scope, or had a diminished understanding, of the mitigation that applied to Mr. Schoenwetter.

Had counsel not been ineffective during the penalty phase there is reasonable probability the outcome of the penalty phase would have been different. Based on *Strickland*, supra, this Court should reverse.

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.

In the order denying relief, the lower court found that this claim somehow could have been raised on direct appeal and that it was without merit because this Court "has held that *Roper* [Simmons] only prohibits the execution of defendants who had a chronological age under 18 at the time they committed

their crimes." (Vol. IX PCR. 1275-76).

Roper v. Simmons, 543 U.S. 551 (2005) was handed down from the United States Supreme Court after Mr. Schoenwetter was sentenced to death. Mr. Schoenwetter was sentenced to death by a jury and a judge that did not know or consider that Mr. Schoenwetter was merely 9 months away from death not being a constitutionally-permissible penalty for him. *Simmons* is very significant law, and very significant facts regarding age were presented at both the penalty phase and at the evidentiary hearing in Mr. Schoenwetter's case. The lower court should have found more than "little weight" on the statutory age mitigator in light of *Simmons*. Mr. Schoenwetter was only the functional emotional equivalent of an 11-12 year old at the time of the offense. This Court should reevaluate the age-related mitigators in this case in light of a significant change in death penalty law, as well as the vast other mitigation that was presented at both the penalty phase and evidentiary hearing.

Mr. Schoenwetter's date of birth is October 27, 1981. His age at the time of the instant offense, August 12, 2000, was about eighteen years and nine months. On December 5, 2003, the lower court imposed two death sentences on Mr. Schoenwetter. The lower court found Mr. Schoenwetter's age of eighteen at the time of the crime as a statutory mitigating circumstance, and accorded it "little weight." The lower court also found that the

defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, and accorded these mental mitigators "little weight." As for nonstatutory mitigating circumstances, the lower court disregarded the defense testimony that the defendant functioned at the emotional level of an eleven to twelve year old. *See* (Vol. XIII R. 762). To the extent that this important mitigating factor was disregarded by the lower court, trial counsel was ineffective for failing to present competent evidence in support of this factor.

In *Allen v. State*, 636 So.2d 494, 497 (Fla. 1994), this Court held that the death penalty was "cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution." The *Allen* court relied heavily on *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which the United States Supreme Court held that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of first-degree murder committed when he was fifteen years old.

In *Urbin v. State*, 714 So.2d 411 (Fla.1998), this Court held that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes. Urbin was seventeen years old at

the time of his offense, and yet he was afforded relief from his death sentence based on statutory and nonstatutory mitigation related to age and maturity issues even though he was above the age of maturity at which execution was constitutionally barred. The *Urbin* court said that, "Here the defendant is seventeen, below the age of majority, although above the constitutional line for the death penalty. . . . [C]onsidering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age . . . the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes." *Id*. 418.

Following *Allen*, the this Court held in *Brennan v. State*, 754 So.2d 1 (Fla.1999), that "our decision in *Allen* interpreting the Florida Constitution compels the finding that the death penalty is cruel or unusual if imposed on a defendant under the age of seventeen." In *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), this Court held that the trial court abused its discretion in assigning "little weight" to the defendant's age at the time of offense (he was 17 years, 1 month old). Both *Brennan* and *Ramirez* were issued on the same day: July 8, 1999.

In *Simmons*, the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 at the time of offense. *Id*. This was a landmark decision.

The *Simmons* Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. The Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the mentally retarded. Prior to 2002, the Court had refused to categorically exempt mentally retarded persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the mentally retarded is cruel and unusual punishment. In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the Court found significant that juveniles are vulnerable to influence, and susceptible to immature and irresponsible behavior. In light of juveniles' diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."

Simmons indicated that even eighteen-year-olds may not possess the adequate maturity level to have imposed upon them the ultimate penalty:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. **The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.**

Id. at 574. (Emphasis added). The evolving standards of decency in society prohibit the cruel and unusual execution of an individual who was the functional emotional equivalent of an 11-12-year-old at the time of the offense.

The aggravating and mitigating circumstances in this case must be reweighed in light of *Simmons*, considering whether the instant case was, inter alia, the "least mitigated of the mitigated." *Stringer v. Black*, 503 U.S. 222, 229-232, 112 S.Ct. 1130, 1136-1137, 117 L.Ed.2d 367 (1992); *Terry Williams v. Taylor*, 529 U.S. at 398, 120 S.Ct. 1495 (faulting the court for "fail[ing] to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation"). The age mitigating factor in this case must be afforded additional weight in light of *Simmons* and *Urbin*.

Given the overwhelming mitigation in this case, including four statutory mitigating factors and at least ten non-statutory mitigating factors, the imposition of the death penalty would

violate the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. In *Urbin*, this Court concluded, "that this tragic killing, while sufficient to result in the seventeen-year-old defendant's imprisonment for the rest of his life without the possibility of parole, does not belong in the category of the most aggravated and least mitigated of first-degree murders that merit the imposition of the death penalty." *Id*. at 418. Randy Schoenwetter should receive the same penalty as in *Urbin*.

This Court should vacate the sentence of death in the case at bar in light of the *Simmons* and *Urbin* decisions, reevaluate the vast mitigation in this case, impose a life sentence, or grant a new penalty phase. The statutory and non-statutory mitigators related to age, maturity, and abuse should be reevaluated in light all of the mitigation that has been presented in this case.

ARGUMENT V AND CONCLUSION

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

Mr. Schoenwetter respectfully submits that his death sentence should have been reversed on direct appeal. When all of the error in this case is considered, this result is even more necessary.

Mr. Schoenwetter's age, in conjunction with his Asperger's Syndrome, frontal lobe damage, ADHD and his social history, remove him from the class of individuals that can be executed. All of the mitigation that could be presented in favour of Mr. Schoenwetter's case for life was not presented, and that which was presented was not presented effectively. Evidence which had no place in a fair trial was used by the State without proper objection by Mr. Schoenwetter's counsel. The death sentence in this case happened because of the ineffective assistance of counsel. It must not stand.

Long ago, the United States Supreme Court allowed Florida to begin executing its citizens based on the promise that only those most deserving of death, those who commit the most aggravated murders with the least mitigation, would be executed. *Proffitt v. Florida*, 428 U.S. 242 (1976). While Mr. Schoenwetter's crime was a horrible one, he was not at the time of offense, and certainly not now, one of the most deserving of the death penalty.

This Court should reverse and either grant a new penalty phase, or simply follow through on the promise of *Proffitt* and find that the death penalty should not apply to Mr. Schoenwetter.

CERTIFICATE OF SERVICE

I certify that a copy hereof 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 3rd day of June, 2009.

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CERTIFICATE OF COMPLIANCE

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

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