IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 08-2271

LOWER TRIBUNAL NO. 05-2000-CF-041829

RANDY SCHOENWETTER,
Petitioner,
v.
WALTER MCNEIL,
Secretary,
Florida Department of Corrections,
Respondent,
and
BILL MCCOLLUM,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544
Counsel for Appellant

PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Schoenwetter was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

References made to the record prepared in the direct appeal of Mr. Schoenwetter's conviction and sentence and are of the form, e.g., (Vol. #, R, pg. 123). References to the record of the most recent postconviction record on appeal are in the form, e.g. (Vol. #, PCR, pg. 123).

REQUEST FOR ORAL ARGUMENT

Mr. Schoenwetter has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Schoenwetter.

Table of Contents

Table of Authorities

Page

INTRODUCTION

On Mr. Schoenwetter's direct appeal from the adjudication of guilt and the imposition of the death sentence, appellate counsel failed to raise and argue significant errors. Moreover, some of the issues raised on the direct appeal were ineffectively presented to this Court for appellate review.

Appellate counsel's failure to raise and argue certain issues and failure to present effectively other issues, was clearly deficient and actually prejudiced Mr. Schoenwetter to the extent that the fairness and the correctness of the outcome were undermined.

This petition also presents questions that were raised on direct appeal, but should be reheard under subsequent case law or legal argument to correct errors in the appellate process that denied Mr. Schoenwetter fundamental constitutional rights. This petition will demonstrate that Mr. Schoenwetter is entitled to habeas relief.

PROCEDURAL HISTORY

Shortly after his 18th birthday, Randy Schoenwetter was arrested and charged by indictment with two first degree murders. The grand jury returned an indictment for two counts of first degree murder, one count of attempted murder, and one count of armed burglary. Against his attorneys advice, Mr. Schoenwetter pled 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 court imposed death sentences on both first degree murder charges. This Court affirmed on appeal. *Schoenwetter v. State*, 931 So. 2d 857(Fla. 2006).

On direct appeal, MAAP Services for Autism and Asperger Spectrum filed an amicus brief with this Court, asking that Mr. Schoenwetter's sentences of death be reversed. 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 judge, the Amicus Brief argued that the trial judge 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." *Id.*

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, however, 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 does explain 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 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 the 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).

POSTCONVICTION

Mr. Schoenwetter filed a motion for postconviction relief. Following a case management conference, the lower court set an evidentiary hearing on a Claim IV. The evidentiary hearing was held between May 12, 2008 and May 14, 2008. The court denied all relief by written order dated November 7, 2008. Mr. Schoenwetter appealed and has concurrently filed an Initial Brief with this petition.

GROUNDS FOR HABEAS CORPUS

This is Mr. Schoenwetter's first petition for habeas corpus in this Court. Mr. Schoenwetter asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in the trial court and then affirmed by this Court in violation of Mr. Schoenwetter's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Schoenwetter' death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Schoenwetter' direct appeal. *see, e.g., Smith v. State*, 400 So.2d 956, 960 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Schoenwetter to raise the claims presented herein. *See, e.g., Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Rilyv v. Wainwright*, 517 So.2d 656 (Fla. 1987).

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. *See Dallas v. Wainright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Schoenwetter' claims.

GROUND I

EXECUTION OF MENTALLY ILL INDIVIDUALS SUCH AS MR. SCHOENWETTER VIOLATES THE 8TH AND 14TH AMENDMENTS PROHIBITING CRUEL AND UNUSUAL PUNISHMENT. MR. SCHOENWETTER'S CURRENT DEATH SENTENCES, IMPOSED UPON A PROFOUNDLY MENTALLY ILL INDIVIDUAL, A MERE TEENAGER AT THE TIME OF THE OFFENSE, CONSTITUTES ARBITRARY, CAPRICIOUS, CRUEL, AND UNUSUAL PUNISHMENT UNDER THE 8TH AND 14TH AMENDMENTS.

The United States Supreme Court in the new millennium has banned the execution of the mentally retarded and the execution of juveniles in the cases of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 125 S. Ct. 1183 (2005). Both cases cited to "evolving standards of decency" in today's society as the main factors justifying vacation of those death sentences. In light of the principles announced in *Atkins* and *Simmons*, and in light of the "evolving standards of decency" in today's society, this Court should vacate Mr. Schoenwetter's death sentences.

A watershed ruling in *Roper vs. Simmons* was handed down from the United States Supreme Court since Randy Schoenwetter was sentenced to death. The court that sentenced Mr. Schoenwetter only assigned "little weight" to the statutory age mitigator. Randy 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. This case is not the least of the mitigated of murder cases. Randy Schoenwetter suffers from a major mental disorder: Asperger's syndrome. He was a mere chronological 18 years old at the time of the offense. In light of the *Atkins* and *Simmons* cases, and in light of Mr. Schoenwetter's age and major mental disorders, this Court should reverse the death sentences now imposed.

Randy 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 court imposed two death sentences on Mr.Schoenwetter. The 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 court also found that Mr. Schoenwetter 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 Court disregarded the defense testimony that the defendant functioned at the emotional level of an eleven to twelve year old. (Disregarding Dr. William Riebsame's testimony on this issue found at Vol. XIII R. 762). To the extent that this important mitigating factor was disregarded by the 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), is Court held that the death penalty was either "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), is 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*, 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.[1]

On March 1, 2005, the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when their crimes were committed in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1194-96 (2005). *Roper v. Simmons* is a landmark decision. A sweeping array of organizations including the ABA, leading American medical, religious, and legal institutions, child and victim advocate groups and nearly 50 countries, along with more than 15 Nobel Peace Prize Laureates, including former President Jimmy Carter, former Soviet President Mikhail Gorbachev, former South African President F. W. de Klerk and the Dalai Lama, as well as nine former U.S. Diplomats filed amicus curiae

[1]While the amount of weight accorded mitigating or aggravating circumstances is normally left to the discretion of the sentencing court, the authority cited here shows that there are limitations on that discretion.

briefs calling for an end to the juvenile death penalty. The nation's leading medical organizations, including the American Medical Association, American Psychiatric Association, the American Society of Adolescent Psychiatry and the American Academy of Children and Adolescents, submitted a brief. Additionally, a cross section of more than 420 prominent pediatricians, child and adolescent psychiatrists and neurologists, including such notable physicians as former Surgeon Generals C. Everett Koop and Julius Richmond, and Drs. T. Berry Brazelton and Alvin Poussaint, submitted the Health Professionals' Call to Abolish the Death Penalty to the Court as part of Simmons' brief. Nearly 30 major religious denominations in the United States also submitted a brief, including the U.S. Conference of Catholic Bishops, Greek Orthodox Church, Presbyterian Church, American Baptist Church USA, United Methodist Church, Episcopal Church USA and the American Jewish Committee, saying that because of minors' age and immaturity, they lack the degree of culpability necessary to place them in the category of criminals the Supreme Court has described as deserving of the death penalty.

The Court's decision was recognized as a wastershed ruling. E.g. Christian Science Monitor, March 2, 2005 ("Juvenile justice advocates hail the ruling as a major advance for American society" in "landmark decision"); Washington Post, March 2, 2005 ("In concluding that the death penalty for minors is cruel and unusual

punishment, the court cited a "national consensus" against the practice, along with medical and social-science evidence that teenagers are too immature to be held accountable for their crimes to the same extent as adults"); CNN.com, March 1, 2005 (a ruling that marked a change in "national standards"). *See generally* http://www.abanet.org/crimjust/juvjus/simmons.

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. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The Court counted the states with no death penalty, pointing out that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that

the death penalty is inappropriate for all offenders, including juveniles." 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 indicates 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. . . . the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." . . . The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. . . . As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. ***In 1930 an official committee recommended that the minimum age for execution be***

> ***raised to 21.*** House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence.

Simmons at 1197, 1198-1200 (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); *Williams v. Taylor*, 529 U.S. at 398, 120 S.Ct. 1495(2000) (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 rule announced in *Roper v. Simmons* alters the class of persons eligible for the death penalty and therefore applies retroactively. *Id.*, 543 U.S. at 551, 125 S.Ct. at 1198 ("In holding that the death penalty cannot be imposed upon juvenile offenders, we ... [hold] that *Stanford [v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)] should no longer control in those few pending cases or in those yet to arise."). 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*, the 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*. 418. Randy Schoenwetter should receive the same penalty as in *Urbin.*

The Defendant prays that the Court 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, mental illness, and abuse should be reevaluated in light of the vast mitigation in this case.

The main thrust of this claim is that Mr. Simmons is profoundly mentally ill, too young, and is not a proper candidate for execution. His sentence of death violates the 8th and 14th Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied. This Court

should conduct a new proportionality analysis, convert Mr. Schoenwetter's death sentence to a life sentence in light of the 8th Amendment, or in the alternative, grant a new penalty phase to allow Mr. Schoenwetter to present evidence of his current physical and mental health. Mr. Schoenwetter asks this Court to perform a new proportionality analysis taking into account all of his mitigation including that which was developed and presented in postconviction, and asks that this Court vacate his death sentence.

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY PRESENT THE CLAIM THAT A CONFLICT OF INTEREST EXISTED THAT PREVENTED ANY MEANINGFUL ATTORNEY-CLIENT RELATIONSHIP AT TRIAL

The record in this case reflects that trial counsel basically stopped communicating with Mr. Schoenwetter, and stopped paying attention to him due to a difference of opinion in how to proceed in the case. Mr. Schoenwetter wrote a letter to the trial court professing his guilt. This very unusual move was clearly against the advice of counsel. Mr. Schoenwetter and his attorneys clearly had different agendas. Mr. Schoenwetter adamantly wanted to plead guilty and face a likely death sentence, while trial counsel was attempting to best defend him and save his life. While Mr. Schoenwetter's letter should have served to show remorse and mitigate the offense, the

court actually considered that the letter *negated* important statutory and non-statutory mitigation related to age, immaturity, and severely-stunted emotional development. The sentencing court, reviewing the letter, felt that Mr. Schoenwetter was said to be "mature beyond his years" in light of the contents of the letter. In effect, Mr Schoenwetter worked against his own interests, worked against his attorneys trying to best represent his interests, and damaged his case for life by writing the letter.

On direct appeal in regards to the attorney withdrawal issue, this Court stated as follows:

> Based in part on the trial court's rulings on the victim impact evidence, defense counsel filed a motion to withdraw as counsel for Schoenwetter. [FN 7]. Defense counsel stated they would not have the defense controlled by Schoenwetter. The trial court denied the motion and in so doing noted that the rulings on the victim impact evidence were based on the fact that the evidence as limited was admissible under the statute. Moreover, the trial court attempted to alleviate any concerns by having the defendant evaluated despite the trial court's belief that no additional competency evaluation was necessary.
>
> The trial court properly denied the motion to withdraw. This record does not demonstrate that the attorney-client relationship had deteriorated to the point where counsel could no longer give effective aid in the fair representation of the defense. [citation omitted]. General loss of confidence or trust standing alone will not support withdrawal of counsel. [citation omitted].
>
> [FN7] Counsel also moved to have the defendant evaluated for competency. The trial court initially denied the motion because competency had been determined prior to entry of the pleas and he had not observed any conduct that would lead him to believe that Schoenwetter had become incompetent. However, the defendant was examined by three mental health professionals, and the trial court found

him competent.

[*Schoenwetter* at 870]

In part, in light of new evidence that was presented at the evidentiary hearing, and in light of the continuing "evolving standards of decency" and the related case law, Mr. Schoenwetter asks this Court to revisit the attorney conflict/withdrawal issue that was addressed on direct appeal four years ago. During the evidentiary hearing, trial attorney Randall 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 attorney-client relationship had broken down so much that the attorneys were not even effectively communicating with Randy Schoenwetter, they did not even know his thoughts regarding his reasons for pleading guilty. Ms. Laura Blankman described Mr. Schoenwetter as not having a relationship with his attorneys at the time she became involved in the case. (Vol. IV PCR pg. 489).

Because Mr. Schowenwetter was attempting to thwart defense counsel's efforts to limit or exclude very damaging victim impact evidence, there was indeed a conflict of interest, and defense counsel were unable to do their job. The trial attorneys were working to save Mr. Schoenwetter's life, but their client was engaged in efforts to help

end his own. This issue was not fully raised or addressed on direct appeal, and deserves reconsideration. Appellate counsel was ineffective in failing to effectively raise a crucial and vital issue.

Mr. Schoenwetter was prejudiced as a result of the ineffective assistance of appellate counsel. Had this crucial issue been fully presented on direct appeal, this Court would have reversed the judgment, conviction and sentence of death. As a result, Mr. Schoenwetter was prejudiced as his direct appeal was denied.

CONCLUSION

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States mail to all counsel of record on this 3rd day of June 2009.

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional Counsel - Middle
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
813-740-3544

Copies furnished to:

Barbara Davis
Assistant Attorney General
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118

Randy L. Schoenwetter
DOC# E20773; P2228S
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS of the Appellant was generated in a times new roman 14 point font, pursuant to Fla. R. App. P. 9.210.

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544