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.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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REPLY TO THE STATE'S PROCEDURAL HISTORY

The State reproduced all but three sentences of this Court's "Procedural and Factual History" in the State's "Response to Procedural History," word for word, footnote for footnote. *See Schoenwetter v. State*, 931 So.2d 857, 861-65 (Fla. 2006). The problem with the State's reliance on this Court's procedural and factual history and reproducing it verbatim is that this Court produced its "Procedural and Factual History" from a record that does not have the reliability that comes from a full adversarial testing by effective counsel. Accordingly, this Court cannot overlook the strong evidence in support of Mr. Schoenwetter's case for life developed at Mr. Schoenwetter's 3.851 evidentiary hearing.

REPLY ON GROUND I

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

The State's response to Ground I misconstrues the argument. Mr. Schoenwetter does not make an *Atkins* claim and does not make *Roper* claim. Mr. Schoenwetter makes a Schoenwetter claim.

Not too long ago, we lived in a society that the courts allowed the execution of the mentally retarded. We lived in a

society that the courts allowed the execution of child offenders. If Mr. Atkins' counsel did not raise the issue of his retardation there was nothing to stop the state from executing him despite the society's evolving standards of decency which disdains the execution of the mentally retarded. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court recognized that the execution of the mentally retarded violates the United States Constitution. *Id*. at 321. The Court considered the value of retribution and deterrence against the cost of executing the mentally retarded. *Id.* at 318-19. The Court found that the execution of the mentally retarded had little value as retribution or deterrence, thus it did not justify the death of the mentally retarded. *Id*. at 321. Nevertheless, a number of mentally retarded individuals were executed before society and then the courts embraced the principal that the mentally retarded should not be executed.

Not too long ago, we lived in a society that allowed the execution of children who committed a capital offense before the age in which society was willing to afford to the full rights and responsibilities of adulthood. In *Roper v. Simmons*, the 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. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct.

1183, 1194-96 (2005). Before the United States Supreme Court's decision in *Simmons*, this Court held in *Urbin v. State*, 714 So.2d 411 (Fla. 1998), that "***the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes.***" *Id.* at 418. Nevertheless, a number of individuals were executed before society and then the courts, embraced the principal that those who commit crimes as children should not be executed.

For those who were mentally retarded and executed, *Atkins* provided no relief and *Simmons* provided no relief for those who were executed for crimes committed while these individuals were children. Mr. Schoenwetter raises this claim under this Court habeas jurisdiction because equivalent concerns of cruel and unusual punishment would be implicated by his execution.

Suffering from Asperger's syndrome, impaired impulse control occasioned by frontal lobe impairment and because of his young age, Mr. Schoenwetter's conditions do not differ in quality from those present in *Simmons* or *Atkins*. As such, the United States Supreme Court's determination that the stated goals of deterrence and retribution, *see Atkins* at 318-19, were not advanced by the execution of the mentally retarded or the execution of child offenders, is equally applicable to the instant case.

There can be no deterrence to those with similar conditions

who ponder a similar crime to Mr. Schoenwetter because of the age of such an offender. Within the 9 months from the death penalty applying, to it not being a permissible punishment, not much changes. Those, like Mr. Schoenwetter, who barely meet the age requirement for execution would not suddenly become invested with an understanding of the consequences of such actions because of Mr. Schoenwetter's death. Even more so, those individuals who suffer impairments like Mr. Schoenwetter would be even less deterred from an impulsive and ill-conceived crime as that which as issue here. Similarly situated individuals who suffer from Asperger's syndrome or a similar ailment, by nature of the ailment, do not see their actions in a greater relationship between their individual selves and the rest of the world. In other words, the execution of Mr. Schoenwetter would not save one life but would allow one life to be taken.

The goal of retribution addressed by the Court in *Atkins* is likewise not present in this case. Mr. Schoenwetter, because of his conditions was not able to feel remorse until after he was in jail and had spent time with the jail chaplains. The person who is to be executed is far different from the individual that committed the offenses. The transformation that Mr. Schoenwetter underwent means that the person he is now is not the same person he was when he committed the offense. Through a constant struggle, Mr. Schoenwetter is today someone

who completely recognizes the wrongfulness of his actions. He was not such a person when he committed the offense because his conditions hindered his understanding and his impulsivity impaired his appreciation of the consequences of his actions. Death serves no greater retributive purpose than life imprisonment in the instant case.

Simmons was decided on March 1, 2005; this Court did not enter a mandate on the instant case until June 26, 2006. Appellate counsel was ineffective for not filing *Simmons* as supplemental authority and for not otherwise raising the effect of *Simmons* on Mr. Schoenwetter's case. Nevertheless, while Mr. Schoenwetter is entitled to relief based on the ineffective assistance of appellate counsel, he is also entitled to relief because his case was not final when *Simmons* was issued. See *Danforth v. Minnesota*, 128 S.Ct. 1029, 1032-33 (2008); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

This Court should grant Mr. Schoenwetter a new penalty phase or simply vacate his death sentence.

REPLY ON 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 THUS VIOLATING HIS 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

Mr. Schoenwetter had a right to the effective assistance of appellate counsel. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963) "recognized that the principles of *Griffin* [*v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956)], required a State that afforded a right of appeal to make that appeal more than a 'meaningless ritual' by supplying an indigent appellant in a criminal case with an attorney." *Evitts v. Lucey*, 469 U.S. 387, 393-94, 105 S.Ct. 830, 834-35(1985); *citing Douglas* at 817. Thus, a "first appeal of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Lucey*, at 396, 105 S.Ct., at 836. As the United States Supreme Court stated in *Lucey*, "the promise of *Douglas* that a criminal defendant has the right to counsel on appeal - - like the promise of Gideon that a criminal defendant has the right to counsel at trial would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id*. at 397, 105 S.Ct., at 836-37.

On direct appeal to this Court, appellate counsel argued:

POINT II

APPELLANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WAS VIOLATED WHERE THE TRIAL COURT DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW AND BASED RULINGS ON THE APPELLANT'S PERSONAL WISHES.

Against his lawyers' advice and over their strenuous objections, Randy Schoenwetter pleaded guilty as

charged to all counts throughout the proceedings below, the trial court gave great deference to Randy Schoenwetter's personal wishes. Appellant's wishes frequently conflicted with his lawyers' objections, legal argument, and strategy. It is abundantly clear from the record that the trial court based several of its rulings, at least in part, on Randy Schoenwetter's personal wishes rather than on appellant's lawyers' argument.

One particular bone of contention between Schoenwetter and his lawyers was the state's presentation of victim impact evidence. The lawyers had filed pretrial motions challenging the process. (IV 658-73) When the time came to proffer the victim impact evidence, appellant's lawyers argued strenuously against its admission. (XI 272-77, 281, 307-8) Schoenwetter repeatedly interrupted his lawyers during their argument. Over the defense lawyers' objections, the trial court talked to Randy Schoenwetter to ascertain Randy's personal wishes about the state's presentation of victim impact evidence. (XI 285-90, 302-304, 308-12) The trial court ultimately allowed most of the victim impact testimony over defense counsel's continuing objection. (XII 426-41) The trial court clearly based its ruling admitting the evidence, at least in part, on Randy Schoenwetter's personal wishes that the testimony be heard by the jury. The trial court harped on a constant theme, namely the trial court's assessment of Randy Schoenwetter as a intelligent, articulate, and mature young man.

The issue became such a point of contention that defense counsel ultimately moved to withdraw from any further representation of Schoenwetter based on the continuing conflicts. (XI 312) Defense counsel pointed out that normally when a represented defendant files a pleading or seeks to represent himself in any way, the trial court points out to the defendant that he is represented by counsel. Any filings or argument by the client will normally be treated a nullity. The trial court pointed out that Florida law allows the waiver of mitigating evidence and reiterated his belief that Randy is a bright and articulate young man. (XI 314-19) Defense counsel pointed out that the waiver of mitigating evidence was distinguishable. Objections to inflammatory and inadmissible evidence is a tactical

trial decision. (XI 314, 317-19) When the trial court denied trial counsel's motion to withdraw (XI 314),appellant's lawyers moved for a competency evaluation of Mr. Schoenwetter. (XI318-19) Although the trial court appeared ready to press on (XI 319-21, 328-29), the prosecutors suggested that a competency evaluation might be in order. (XI328-29) Following examinations and a hearing, the trial court found Schoenwetter competent to proceed and the penalty phase continued. (XI 355-99; XII 409-14)

The record reflects that the trial court viewed the role of defense counsel as that of captive counsel, duty bound not to exercise independent judgment. In effect, the view seems to have been that appellant had a constitutional right to ineffective assistance of counsel. There is no such right: "the assistance of counsel must be effective assistance of counsel. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L. Ed. 2d 987 (1983)." *Dagostino v. State*, 675 So.2d 194, 195 (Fla. 4th DCA 1996). In *Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983), the Supreme Court noted (partial emphasis added): The ABA Model Rules of Professional Conduct provide: "A lawyer shall abide by a client's decisions concerning the objectives of representation... and shall consult with the client as to the means by which they are to be pursued... In a criminal case, the lawyer shall abide by the 27 Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make. See ABA Project on Standards for Criminal Justice, The Prosecution Function and Defense Functions. 5.2, pp. 237-238 (App. Draft 1971). client's decision, ... as to a plea to be entered, whether to waive jury trial and whether the client will testify." Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added). With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.

Likewise, the Chief Justice wrote in his concurrence in *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring): "Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the

> immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.27 The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds."
>
> Once again, the trial court misapprehended the legal standard to apply. The trial court was operating under the erroneous conclusion that Randy Schoenwetter should have a personal say in the day-to-day tactical decisions which were clearly the domain of his trial lawyers. Whether to object to the introduction of victim impact evidence was Schoenwetter's lawyers' decision, not his. He could have dismissed his lawyers and represented himself, but chose not to do so. The lawyers' objections to at least some of the victim impact evidence were based on legal grounds that the evidence did not comply with the statute and case law. (*See, e.g., XI 281*) Since the trial court based his rulings, at least in part, on a misapprehension of the law, a new penalty phase is warranted. *See Price v. Gray*, 111 Fla. 1, 3,-4, 149 So. 804, 805 (Fla. 1933).

Initial Brief at 43-47.

Trial counsel was in a precarious position when they moved to withdraw from representing Mr. Schoenwetter. Since it was counsel who was moving to withdraw, and not Mr. Schoenwetter who was moving to have different counsel appointed or to represent himself, counsel still had a duty to protect the confidential communications between themselves and Mr. Schoenwetter. Counsel would have hardly been justified, under the Rules of Professional Responsibility, in arguing negative information

about Mr. Schoenwetter that could prejudice Mr. Schoenwetter but that in fact showed the conflict. Counsel, at least in this regard, performed correctly, but, were rendered ineffective by the trial court's denial of counsel's motion to withdraw.

Once the attorney-client privilege was waived by Mr. Schoenwetter, the facts that showed that counsel had a conflict of interest emerged. 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. 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). Apart from the ineffectiveness of trial counsel, this showed that counsel could not be effective because of the conflict which was a result of the trial court not allowing counsel to withdraw.

Because the attorney-client relationship had deteriorated so far, counsel simply did not "know what his thinking was." *See*

(Vol. III PCR. 364). This Court and the trial court that denied counsels' motion to withdraw did not know this. Mr. Schoenwetter had a right to conflict-free counsel under the Sixth Amendment to the United States Constitution. The trial court's denial of counsel's motion to withdraw denied Mr. Schoenwetter this right. Appellate counsel lacked the crucial facts necessary to fully raise this issue on appeal and should have moved to remand this case to the trial court for a full determination of the conflict issue. This Court should grant the writ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States mail to all counsel of record on this 23rd day of October, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing REPLY PETITION FOR WRIT OFHABEAS CORPUS of the Appellant was generated in courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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