IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-955

RANDY SCHOENWETTER

Petitioner,

v.

WALTER McNEIL, Secretary,
Florida Department of Corrections, and
BILL McCOLLUM, Attorney General,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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

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RESPONSE TO INTRODUCTION

The "Introduction" found on page 1 of the petition is argumentative and denied.

RESPONSE TO GROUNDS FOR RELIEF

No error occurred in Schoenwetter's case, and he is not entitled to relief.

RESPONSE TO PROCEDURAL HISTORY

The procedural history contained in the Petition is selective. The Respondent relies upon the following factual and procedural history of this case:

> Randy Schoenwetter was indicted on August 29, 2000, for first-degree murder in the death of Virginia Friskey, first-degree murder in the death of Ronald Friskey, attempted first-degree murder of Haesun Friskey, and armed burglary of a dwelling. Before trial, Schoenwetter filed several pretrial motions, which included a motion to suppress statements and admissions, a motion to suppress evidence, and a motion to disqualify the trial judge. These pretrial motions were all denied. Schoenwetter wrote a letter to the court dated February 17, 2003, confessing his guilt and indicating that he wished to change his plea from not guilty to guilty. The trial court held a status hearing on February 26, 2003, where the defendant, against the advice of his attorneys to remain silent and after the trial court's cautionary instruction, advised the court that he did in fact write the letter and that he did wish to change his plea from not guilty to guilty. The defense attorneys advised the court that they intended to have the defendant evaluated later that week to determine his competency.
>
> Prior to the entry of his plea on March 5, 2003, the defense attorneys advised the court that a psychologist had met with the defendant and had determined the defendant was competent. The defense attorneys also announced to the court that, against their advice, the defendant wished to

enter a plea to all of the charges. The court conducted a plea colloquy, advising the defendant of the consequences of his pleas and the rights he would give up by entering the pleas. After the State established a factual basis for the pleas, the court found that the defendant entered his pleas knowingly, freely, and voluntarily, and with a full understanding that he could receive two death sentences.

A penalty phase proceeding before a jury was held from September 15, 2003, to September 25, 2003. The State presented testimony from fourteen witnesses, including Theresa Lathrop (daughter and sister of the victims), Haesun Friskey, (the victim of the attempted murder), Dr. Qaiser (medical examiner), Dr. Imani (medical doctor), Ronald Larson and Denise Fitzgerald (two crime scene technicians), and Thomas House and David Butler (the investigating officers). The defense presented testimony from nine witnesses including Dr. Riebsame (forensic psychologist), Dr. Currie Prichard (neuropsychologist and clinical psychologist), Dr. Joseph Wu (clinical director of Brain Imaging Center), Deborah Roberts (mother of defendant), and Peter Siegel (expert on prison conditions).

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

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

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

Schoenwetter arrived at the Friskey residence at approximately 5 a.m. He parked his bicycle on the back driveway of the residence and walked up to the back porch. He used a box cutter to cut open the screen and enter the porch. He then managed to push open the sliding glass door from the porch into the house just enough to slip through. There was a stick in the sliding door which only allowed the door to be opened twelve inches. After entering the house, he walked directly into the kitchen and armed himself with a large serrated kitchen knife from one of the drawers. He then walked down the hallway where the three bedrooms were located.

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

During his taped confession, Schoenwetter said he entered Virginia's room and began looking around. He said he never touched her body. While he was in her room, Virginia woke up and began to shriek. He put his hand over her mouth, threatened her with a knife, and told her to be quiet. She continued to shriek, she then recognized him, and said his name, Randy. He started to leave the room, but the mother came into the room and grabbed him. The father came into the room and tackled him. After struggling with the parents for a short time, he managed to break loose. Instead of leaving the house, he decided to go back to Virginia's bed and kill her because she had recognized him and could identify him. He stabbed her on her bed. After he stabbed her, the father tackled him.

He then struggled with both parents until he managed to break loose again. The defendant then left the house the same way he came in, got on his bike, and rode home. After he arrived home, he took a shower, placed his clothes, shoes, the box cutter, and the knife inside a blue plastic bag, placed the blue bag inside a trash bag containing trash from his apartment, and put the trash bag in the dumpster.

According to Haesun Friskey, she awoke when she heard Virginia whining. She walked over to the doorway to her bedroom, where she could see directly into Virginia's room. She saw Virginia lying in her bed with the defendant standing over her, touching her body. The defendant turned and looked at Haesun and then made a stabbing motion toward Virginia. Virginia made a sound like she was taking in air. Haesun could remember her husband struggling with the defendant. However, as a result of the trauma she suffered, she could not remember anything else that happened.

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

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

When the police arrived at the scene, they observed a trail of blood leading away from the Friskey residence. An officer followed the blood trail and found that it led to an apartment complex at 215 Knox McRae

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

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

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

. . . . [1]

The blood trail from the Friskey house that ended at Schoenwetter's

[1] This section describes the victims' wounds.

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

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

n1 The trial court cited to *Taylor v. State*, 855 So. 2d 1, 31 (Fla. 2003), for this proposition.

n2 Cited by the trial court as set forth in section 921.141 (5) & (6), Florida Statutes (2000).

n3 *See Ford v. State*, 802 So. 2d 1121 (Fla. 2001).

In support of the death sentences, the trial court found four aggravators applicable to each of the murders. Three aggravators, prior violent felony; murder committed during a burglary; and murder committed to avoid arrest, were found applicable to both murders. As to the murder of Virginia Friskey, the trial court also found the aggravator that the victim of the murder was less than twelve years old. The fourth aggravator applied to the murder of Ronald Friskey was heinous, atrocious or cruel. In mitigation, the trial court found applicable to both murders four statutory mitigators: no prior criminal history; extreme mental or emotional disturbance; lack of capacity to conform his conduct to the requirements of the law; and the defendant's age (eighteen) at the time of the crime. The trial court also considered and weighed eight of the nine nonstatutory mitigators argued by the defendant. n4

n4 The nonstatutory mitigators considered, weighed or rejected are: (1) the defendant accepted responsibility by pleading guilty; (2) the defendant was bullied, picked on by his peers, from an early age; (3) the defendant was continually gainfully employed as a teenager and helped his mother financially; (4) the defendant will not pose a danger to the general prison population if given a life sentence without parole; (5) as a result of neurological disorders, specifically Asperger's syndrome and Attention Deficit Hyperactivity Disorder (ADHD), the defendant's ability to socially interact has been impaired; (6) the defendant has had a sexual preoccupation from the age of seven; (7) the defendant had a developmental and emotional age of twelve to thirteen at the time of the offense (the court found that

> this proposed mitigator was not proven by the greater weight of the evidence); (8) the defendant has a close loving relationship with his mother and his younger sister; (9) while in the tenth grade, the defendant and his mother lived with the mother's boyfriend who physically and emotionally abused the defendant.

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

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

Schoenwetter filed a Rule 3.851 motion to vacate on October 30, 2007. An evidentiary hearing was held May 12, 2008. The trial judge denied relief on November 7, 2008. The appeal from that denial is pending before this Court. Case No. SC08-2271.

GROUND I

SCHOENWETTER WAS 18 YEARS OLD AT THE TIME OF THE MURDERS AND IS NOT MENTALLY RETARDED; NEITHER *ATKINS* NOR *ROPER* APPLIES TO THIS CASE.

Schoenwetter launches a combined *Atkins/Roper*[2] claim. He claims that he is the emotional equivalent of 11-12 years of age, thus *Roper* precludes his execution. He makes no allegations in support of his *Atkins* claim, and this claim is waived for purposes of appeal. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla.1990); *see also Coolen v. State*, 696 So. 2d 738, 742 n. 2 (Fla.1997) (stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"). Even if this claim were not waived, *Atkins* does not apply to Schoenwetter. There is no allegation that Schoenwetter is mentally retarded, and the holding of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), is that it is unconstitutional to execute a person who is mentally retarded. The fact that Schoenwetter may point to some mental defect is not entitled to the same consideration as mental retardation. *See Lawrence v. State*, 969 So. 2d 294, 300 n. 9 (Fla.2007); *see also Connor v. State*, 979 So. 2d 852, 867 (Fla.2007).

The *Roper* claim is raised in the appeal from the denial of Schoenwetter's Rule

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

3.851 Motion to Vacate. Case No. SC09-2271. Habeas corpus is not to be used for additional appeals of issues that could have been or were raised on appeal or in other postconviction motions. *Green v. State*, 975 So. 2d 1090, 1115 (Fla. 2008). This issue was procedurally barred in the Rule 3.851 proceeding because it was not raised on direct appeal, and is likewise barred in this proceeding. *Id.* Further, this claim has no merit. This Court has consistently held that *Roper* only prohibits the execution of defendants "whose chronological age is below eighteen" at the time of the capital crime. *Reese v. State*, 34 Fla. L. Weekly S296 (Fla. July 2, 2009); *Evans v. State* 995 So. 2d 933, 954 (Fla. 2008); *Morton v. State*, 995 So. 2d 233, 245 (Fla.2008); *Farina v. State*, 937 So. 2d 612, 626 n. 7 (Fla.2006); *Kearse v. State*, 969 So. 2d 976, 992 (Fla.2007) (denying Roper claim where defendant was eighteen years and three months old at the time of the crime and had mental and emotional impairments); *Stephens v. State*, 975 So. 2d 405, 427 (Fla.2007); *Hill v. State*, 921 So. 2d 579, 584 (Fla.), *cert. denied*, 546 U.S. 1219, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006).

GROUND II

APPELLATE COUNSEL WAS NOT INEFFECTIVE

Schoenwetter acknowledges that appellate counsel raised the withdrawal-of-counsel/conflict issue on direct appeal, but claims that testimony from the Rule 3.851

evidentiary hearing sheds new light on the issue. (Petition at 21). Schoenwetter fails to explain how appellate counsel can be ineffective for failing to include testimony which did not exist at the time. Neither does Schoenwetter explain how testimony from a 3.851 evidentiary hearing can be bootstrapped into a state habeas petition. Further, appellate counsel did raise the issue on direct appeal and this Court denied relief. Habeas is not to be used to relitigate issues that have been determined in a prior appeal. *Orme v. State/Crosby*, 896 So. 2d 725, 740 (Fla. 2005); *Porter v. State*, 788 So. 2d 917, 921 (Fla.2001). Nor may a defendant use a different argument to relitigate the same issue. *Smith v. State/McDonough*, 931 So. 2d 790, 805 (Fla. 2006). This claim is procedurally barred because it was on direct appeal and/or should have been brought in the 3.851 motion. *See Wright v. State*, 857 So. 2d 861, 874 (Fla. 2003) (holding that habeas claims regarding issues raised on direct appeal could have been presented on direct appeal or in 3.850 proceedings and "cannot be reconsidered in a petition for writ of habeas corpus"); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) (noting that "[h]abeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been ... or were raised on direct appeal"); *see also Jones v. Moore*, 794 So.2d 579, 586 (Fla.2001) ("This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue.").

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. mail to David Hendry, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 on this ____ day of August, 2009.

BY:_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____

Attorney for Appellee