IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-2035

ERIC LEE SIMMONS

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____

DIRECT APPEAL FROM A 3.851 DENIAL

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PRELIMINARY STATEMENT

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

The record on appeal is comprised of 30 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. Simmons' appeal of his convictions and sentences are of the form, e.g., (Vol. I R 123).

Eric Simmons, the Appellant now before this Court is referred to as such or by his proper name. Mr. Simmons was represented at trial by Janice Orr and Jeffery Pfister. 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. Simmons' motion for postconviction relief unless otherwise specified. The use of the "term trial" court refers to the court which presided over Mr. Simmons' trial and his postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Simmons 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. Simmons requests oral argument.

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STATEMENT OF THE CASE

Eric Lee Simmons was tried and convicted for the December 2001 murder of Deborah Tressler. This Court affirmed the conviction and death sentence five years ago. *See Simmons v. State*, 934 So. 2d 1100 (Fla. 2006). Mr. Simmons was also concurrently convicted of the kidnapping and sexual battery of Ms. Tressler. These convictions were also affirmed. *Id.* Following denial of a 3.851 Motion, this appeal follows.

The State presented a case based primarily on circumstantial evidence against Mr. Simmons. One piece of direct incriminating evidence Mr. Simmons faced at trial was the "confession" he allegedly made to the interrogating detectives after four hours of denials were rejected by his interrogators. Commenting on the sufficiency of evidence against Mr. Simmons, this Court stated the following on direct appeal about the statements made to law enforcement: "Simmons was acknowledging guilt from his statement that he 'must have did it.'" *Simmons, Id.* at 1111. As discussed extensively at the evidentiary hearing, the entirety of Mr. Simmons alleged statement consisted of the following: "If you found blood in my car, I must have did it." *See* Vol. XXVI PCR 1387.

Shockingly coercive tactics were employed by law enforcement to obtain the above "confession," yet trial counsel never raised the specific issue of coercion in a motion to

suppress the statements. Trial counsel neglected to argue that because law enforcement loudly, offensively, obtrusively, and menacingly threatened Mr. Simmons with the death penalty several times if he did not confess, the incriminating statement should have been suppressed because it was not voluntarily made.

As seen from the partially-videotaped interrogation, **the "electric chair," "lethal injection," and "the IV st[i]ck" were all specifically threatened during law enforcement's interrogation of Mr. Simmons**. Trial counsel failed to argue the involuntary nature of the confession based on law enforcement improperly suggesting that they could possibly get the State to come off the death penalty if Mr. Simmons would just confess. The partially-videotaped interrogation of Mr. Simmons is included in this postconviction record on appeal on DVD. S*ee* (Vol. XIV PCR 3393). The Appellant strongly urges the Court to view the DVD as it analyzes this case (*see* DVD at Vol. XIV PCR 3393 and Vol. XVIII PCR 5988; the most coercive and threatening eight (8) minutes of the interrogation are located at camera counter 23:58:01-00:03:35 and by 00:13:58-00:17:01).

During the interrogation, Mr. Simmons is physically poked, prodded, yelled at by the detectives, told he has no friends, that the detectives are the closest things to friends that he has, that they are trying to help him by getting him to confess, and they could possibly talk to the prosecutors and get him some

leniency if he were to just cooperate, confess, and show remorse. Suggestions are made that perhaps the victim was the initial aggressor, or, perhaps it was an accident. As he repeatedly denies the offense, they threaten him specifically with first degree murder, the electric chair, legal injection, and warn that they will send him up the road with an IV sticking in his arm if he does not confess. They suggest that if he fails to confess he will be executed. (Vol. XXV R 3036-3055).

At the evidentiary hearing, Detective Butch Purdue was asked why he threatened Mr. Simmons during the interrogation. The detective responded as follows: "It is what it is. **I did it that night. It was a mistake to do and I can't take that back. It was probably the biggest error I've ever made**." (Vol. XXVII PCR 1454). Even in the face of this evidence, the lower court failed to grant relief on the claim that trial counsel was ineffective for failing to raise the issue of coercion in a motion to suppress. *See* (Vol. IX PCR 1689-1775).

At trial, the State presented evidence that the Appellant's DNA (his semen) was found in the vaginal washings of the victim. The following stipulation was read to the jury at trial:

> Ladies and gentlemen, the parties have agreed and stipulated, that an analysis of the vaginal washings from Ms. Tressler produced Mr. Simmons's semen in her vagina. This evidence is offered for the sole purpose of establishing that Mr. Simmons and Ms. Tressler had a sexual encounter. It is not relevant to the sexual battery charge herein as that charge involves

> allegations of anal penetration and it is not to be considered by you in any way as to that charge.

(Vol. XXXIII R 2698). What the jury at trial and this Court on direct appeal *did not hear* is that the sexual encounter was completely consensual in nature. Neighbors Edward and Deborah Johnson testified at the evidentiary hearing that they overheard Mr. Simmons and Ms. Tressler engaging in loud, consensual sex some time shortly before Ms. Tressler's disappearance and murder. (*See* Vol. XX PCR 103-128).

The jury and this Court were also unaware that during the time that FDLE DNA analyst John Fitzpatrick was working this case, and during the time that he generated a previously undisclosed, signed report documenting his findings and conclusions on the DNA testing in the Simmons case, he failed and falsified records on a proficiency test. *See i.e.,* testimony of FDLE supervisor Harry Hopkins at Vol. XXV-XXVI PCR 1185-1250.

For his misdeeds, a finding of falsification of records was sustained against John Fitzpatrick by FDLE, and he was given the opportunity to resign in lieu of termination. *See i.e.,* testimony of FDLE regional director Joyce Dawley at Vol. XXIX PCR 1835-1837. Ms. Dawley agreed that this incident would have undermined Mr. Fitzpatrick's credibility. (Vol. XXIX PCR 1837).

The jury and this Court were not made aware that FDLE DNA analyst John Fitzpatrick was taken off casework immediately

following his submission of a signed report on the extensive evidence he tested Simmons. (Vol. XXVI PCR 1224). Mr. Fitzpatrick's signed report in Simmons is located at Vol. XII PCR 2807-2812. The John Fitzpatrick internal affairs report including a sustained finding of falsification of records is located at Vol. X PCR 1917-1968. Quite remarkably, none of this information was ever turned over to trial counsel.

Other evidence related to this issue is a May 2, 2002 letter from FDLE legal advisor Steve Brady to State Attorney Brad King officially informing him of the John Fitzpatrick situation, and opining that the information is "not *Brady* material." (Vol. XVI PCR 4838-4841). Also, prosecutor Bill Gross wrote an April 4, 2002 memo to the Simmons file wherein he talks about a telephone conference he had with FDLE supervisor Hap Hopkins regarding the John Fitzpatrick situation. Mr. Simmons' prosecutor states in the memo that there is "**NO** duty to disclose" the John Fitzpatrick internal affairs information, and states that "John resigned before generating a report." (Vol. XIV PCR 3327-3330). An Order was signed in 2002 *compelling* such information be furnished to trial counsel (Vol. I R 117-119), yet the State *still* refused to forward the available John Fitzpatrick information to the defense.

SUMMARY OF THE ARGUMENTS

ARGUMENT I – A new trial should be awarded because trial counsel

failed to challenge the egregious, outrageous and atrocious conduct of law enforcement in this case. After handcuffing Mr. Simmons and taking him to the police station, law enforcement repeatedly badgered him for four hours, even threatened him with the death penalty if he continued to refuse to confess. Trial counsel was ineffective for failing to raise the issue of coercion in a motion to suppress the statements.

ARGUMENT II – Following the presentation of stipulated evidence that the Appellant's DNA (semen) was found in the victim's vaginal washings, trial counsel was ineffective for failing to present evidence that the Appellant and the victim engaged in *consensual* sexual relations shortly before the discovery of her violated, lifeless body.

ARGUMENT III – The State committed numerous *Brady* violations, even violated a written court order requiring disclosure of documents relating to John Fitzpatrick's involvement in this case. At the same time John Fitzpatrick was working as lead DNA analyst for FDLE on the instant case, he failed a proficiency examination, switched samples, then lied and changed his answers on the test prior to submitting the results. The lower court should have granted relief based on *Brady* and *Giglio* violations, and should have granted default judgment against the State for their repeated, systematic, and willful discovery violations in connection with the John Fitzpatrick information.

ARGUMENT IV – Trial counsel was ineffective for failing to present all available mitigating evidence for the Appellant, including two statutory mental health mitigators and significant brain damage.

ARGUMENT V – The sum of cumulative errors here warrants 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

LAW ENFORCEMENT ACTUALLY THREATENED MR. SIMMONS WITH THE DEATH PENALTY DURING THE INTERROGATION. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE COERCIVE NATURE OF THE INTERROGATION IN A MOTION TO SUPPRESS STATEMENTS. MR. SIMMONS DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WHEN COUNSEL FAILED TO CHALLENGE THE VOLUNTARINESS OF MR. SIMMONS' "CONFESSION."

During his interrogation, Mr. Simmons was specifically threatened with the electric chair, lethal injection, the death penalty, and death. Law enforcement suggested that Mr. Simmons' life could be spared if he would just confess, and following such suggestions he indeed did confess. Commenting on the sufficiency of evidence against Mr. Simmons, this Court stated the following on direct appeal about the statements made to law enforcement: "Simmons was acknowledging guilt from his statement that he 'must have did it.'" *Simmons, Id.* at 1111.

That statement should have been suppressed because it was the product of an extremely coercive interrogation.

Though most of the interrogation was videotaped, Mr. Simmons' final surrendering admission was not recorded because "the videotape was allowed to run out after two hours." *Simmons, Id.* at 1107. The tactics employed by law enforcement in this case to obtain the "confession" were extremely offensive, improper, and certainly likely to produce a false confession. Mr. Simmons shouldered four hours of offensive accusations from two very aggressive, relentless, badgering law enforcement officers in a small room. Mr. Simmons repeatedly made denials until he finally became exasperated and gave the police exactly what they demanded to hear -- a "confession." Mr. Simmons, even with his communicative and intellectual limitations, came to realize that the *only* way he could possibly terminate the oppressive interrogation was to admit guilt notwithstanding his innocence. And it worked.

Due in part to the failures of trial counsel, Mr. Simmons' incriminating admission was admitted at trial.

The Legal Standard

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 conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate

court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*. at 696. Based on the principles of *Strickland,* Mr. Simmons' conviction and sentence should be vacated.

Trial Counsel's Admitted Failure to Challenge Coercion

Trial attorney Janice Orr readily admitted at the evidentiary hearing without hesitation that she failed to challenge a crucial aspect of the interrogation in her motion to suppress, specifically: the voluntariness of the statement based on the very coercive aspects of the interrogation. Trial counsel admitted she "stopped short of what needed to be done on that issue." (Vol. XXVII PCR 1567). Although Ms. Orr filed a motion to suppress the statement based on Fourth Amendment grounds, to wit, whether this was a custodial interrogation, the motion to suppress was grossly inadequate. Given the threats and promises made against Mr. Simmons, the issue of voluntariness of the statements should have been raised by trial counsel. Ms. Orr should have consulted an expert in the area of

coercive police interrogations and false confessions. Such an expert could have assisted with the pre-trial motion to suppress, and could have cast doubt on the reliability of the admission at trial. Ms. Orr admitted:

> Q. Okay. Did you consider moving to suppress the statement based on the Fifth and Fourteenth Amendment considerations of the coercive aspect of the interrogation?
> A. I did not do that and should have done that. I stopped short of what needed to be done on that issue. I stopped with the Fourth Amendment issues. They seemed so egregious to me. . . .I did not take it a step further, which was an error on my part.

(Vol. XXVII PCR 1567-1568).

At the evidentiary hearing, Sergeant Adams admitted that he was attempting to "shock" Mr. Simmons by pounding on the table and lunging forward towards him. (Vol. XXVII PCR 1426). He freely admitted that he was trying to intimidate him. Those type of coercive interrogation methods are the type that can easily lead to false confessions, as explained by Professor Richard Leo at the evidentiary hearing. *See* testimony of Professor Leo at Vol. XXII PCR 483-557. Those types of techniques cause a subsequent confession not to be freely and voluntarily made, not born of free will. Therefore, such statements should be targeted for legal suppression. Sergeant Adams testified as follows at the evidentiary hearing:

> Q. Going back to that portion there on the interrogation. You pounded on the table. I want to ask you, why did you do that?

A. Maybe to shock him.
Q. To shock him?
. . . .
MR. HENDRY: Your Honor, I'm going to conclude this, but I just want to play the beginning of disk 2 and ask that these be introduced as part of our postconviction evidentiary hearing.
THE COURT: Come on up, sir, and make a spot. (Mr. Jimmerson comes forward and plays an inaudible[1] disk on the computer.)
DETECTIVE ADAMS: (Inaudible) – frigging break here.
THE DEFENDANT: You need to get out of my face like that, man, because I ain't did nothing. All I say (inaudible) – no, I'm not.
DETECTIVE ADAMS: What'd you say? What'd you say?
THE DEFENDANT: I said I was on my way to (inaudible) Monday and I seen a helicopter—
DETECTIVE ADAMS: No. That's not what you told us.

(Vol. XXVII PCR 1426, 1427).

Detective Perdue honestly admitted that threatening Mr. Simmons in the interrogation room with the electric chair was perhaps the worst mistake he made in his entire career. He admitted that he should not have made Mr. Simmons feel threatened. (Vol. XXVII PCR 1456). The coercive methods used during this interrogation were outrageous and extreme, rendering Mr. Simmons' statement: "I must have did it," involuntary and inadmissible. Trial counsel was ineffective for failing to raise these obvious and specific issues in the trial court.

In the case of *Brewer v. State*, 386 So. 2d 232 (Fla. 1980), this Court ruled that even an intervening rights advisory

[1]The disk was only partially inaudible as seen in the transcript of the interrogation that follows.

provided at the first appearance court hearing did not cure the taint of a prior coercive police interrogation and oral confession. The Court ruled that a lapse in time and advisory at first appearance was not sufficient to render a subsequent written statement voluntary. In *Brewer*, the trial court ruled the first oral admission in the heat of the coercive interrogation involuntary and inadmissible, but held that the subsequent written confession taken after court was admissible because of a break in the chain of the interrogation and because of the rights advisory in court. This Court reversed, ruling that *both* confessions were inadmissible. Police interrogations riddled with death threats and disingenuous promises are intolerable. The Court noted in *Brewer*, "The officers raised the specter of the electric chair, suggested that they had power to effect leniency, and suggested to the appellant that he would not be given a fair trial. It was under the influence of these threats and promises that the appellant made an oral confession. The appellant's motion to suppress his oral statements made before his first appearance was granted." *Id.* at 235. Mr. Simmons' interrogation included all three coercive elements listed above in *Brewer*. Except, in the case at bar, there *was no* intervening rights advisory, there *was no* written statement, and there *were no* interruptions during the four hour interrogation. This is all the more reason to suppress the

statements based on the coercive aspects of the interrogation.

This Court set Mr. Brewer's conviction aside and remanded the case for a new trial wherein all the statements would be excluded, both oral and written, both pre-and-post first appearance court and rights advisory. In the case at bar, as he was being grilled by law enforcement, no judge, no attorney, nor any such advisor ever entered the interrogation room to inform Mr. Simmons that he had a right to terminate the interrogation and remain silent. More than one time during the interrogation Mr. Simmons had to request: "You better get out of my face." (Vol. XXV R 3056). To this, Sergeant Adams responded as follows: "No, what did you say?" (Vol. XXV R 3056.) As seen in the excerpts from the interrogation transcript below, Mr. Simmons even attempted to exercise his right to remain silent by saying: "Whatever, man, I'm through." (Vol. XXV R 3056-3057). But the detectives kept on interrogating. Although arguably this statement may not have been an unequivocal assertion of his right to remain silent, Mr. Simmons was obviously trying to terminate the interrogation. The fact that the detectives continued on with the interrogation for much longer after Mr. Simmons' attempt to terminate is evidence of the extreme coercion present in this interrogation.

The United States Supreme Court has stated the following:

Our decisions under th[e Due Process Clause of the

> Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is not so because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system--a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

Detective Perdue actually screamed during the interrogation, threatened Mr. Simmons with a lethal injection, and menacingly called him "Hoss." Both Detectives Perdue and Adams were seen on videotape making threatening moves and gestures towards Mr. Simmons, to the point that Mr. Simmons had to tell them to back off and get out of his face more than once. As in *Brewer*, threats of execution were indeed made by law enforcement, suggestions were indeed made to Mr. Simmons that they had the power to effect leniency, and they in fact suggested that Mr. Simmons would not get a fair trial. For Detective Perdue to get into Mr. Simmons' face and threaten to give him a lethal injection was the equivalent of him simply saying, "If you don't confess, we will kill you!" These types of tactics should not be employed by law enforcement or tolerated in our criminal justice system. This Court should remand this case for a new trial and at least allow competent

counsel to re-litigate the interrogation issue. This Court can do so at this juncture without having to actually rule on the merits of a motion to suppress the statements based on Fifth and Fourteenth Amendment considerations raised in these postconviction proceedings. This Court has heard about some of the Fourth Amendment seizure issues raised in this case. But the issues involving the coercive aspects of the interrogation were not previously raised at the trial level. Because there is a reasonable probability that *had* trial counsel raised the issues found in *Brewer* at the trial level, this Court *may* have excluded Mr. Simmons' statement from the trial proceedings, relief should be granted under *Strickland* in this case.

At trial the defense played the portion of the only videotape available of the interrogation to the jury, and it is very revealing as to the coercive tactics used by law enforcement. The detectives actually specifically mention the "electric chair" early on in the tape. Mr. Simmons would remind this Court of the threats of death for not confessing (including the electric chair, lethal injection, and IVs sticking in his arm), promises of leniency for cooperating with law enforcement and confessing (including talks with the prosecutor), and guarantees of an unfair trial (warnings that a jury would never believe his story at trial) that were all caught on the tape during the interview.

The interrogation includes the following coercive acts:

*Mr. Simmons is informed that the Miranda Warning Waiver was “pretty well explanatory.”(Vol. XXV R 3027)

*He is *not* advised that an attorney could be present with him *during* questioning, only “before any questioning.” (Vol. XXV R 3028)

*He is informed by law enforcement that “answers were given freely and voluntarily without making any threats or promises.” (Vol. XXV R 3029)

*He is told that he is “a bright guy,” and they are not “going to play [him] off as stupid.” (Vol. XXV R 3030)

*He is told that they would execute a search warrant on his dad’s house, and “I don’t want to put your mom and dad through this. I really don’t. It’s going to be hard enough on them, but I feel like if you could tell us what she did to piss you off so bad that night to make you want to do this.” Mr. Simmons denies the offense, then continues to deny it again 3 consecutive times. He is told: “Do you want to put your mom and dad through all this, it’s going to happen.” (Vol. XXV R 3032-3033)

*He is told that the charge would be first degree murder, but, “I’m opening a door for you right now, come on.” Mr. Simmons responds, “You just want me to say I killed that lady--” (Vol. XXV R 3034)

*Law enforcement says: “Did you get mad and throw her out, make her get out of the car that night?” (Vol. XXV R 3035)

*He is told: “Then you’re calling your dad a liar.” “Daddy lying.” When Mr. Simmons says his dad must be confused, Mr. Simmons is told, “I think you’re confused.” Law enforcement advises: “You might not believe this right now but we’re the closest thing to friends you’ve got, us two sitting in this room. Believe it or not we’re trying to help you.” (Vol. XXV R 3036)

*Law enforcement claims: “We’re trying to do something

for you." "...go to the State and say, look, this man is remorseful...he just got pissed off." They inform, "I know she was mean to people sometimes, she had a temper herself, we know that." "We're trying to help you. We can't tell if you're remorseful. We can't tell if she did something to you...really got nasty with you." "She pushed your buttons...women have a habit of doing that." "If I say to the state attorney that Eric cooperated with us before we finished with that apartment over there, we might be able to get you some help." **"...first degree murder...electric chair, lethal injection."** Mr. Simmons denies the offense yet again and again: "I didn't kill that lady." (Vol. XXV R 3037-3038)

* "What did she do to make you mad?" Mr. Simmons answers, "[I] tried to help her" and continues his denials. (Vol. XXV R 3039)

*Mr. Simmons says, "You want me to say I killed her or something." Vol. XXV R 3042. Mr. Simmons informs, **"I told you all, and I'm tired of having to repeat and repeat."** (Vol. XXV R 3034)

*Law enforcement suggests that someone else was driving his car, and again asks what she did to make him so mad. Mr. Simmons answers, "I didn't kill that lady." Detective Adams then says, "...(inaudible) prosecutor recommendations to the prosecutor (inaudible) talk to him, tell him you cooperated. You were up front, took responsibility for what you did." (Vol. XXV R 3047)

*Detective Adams states: "(inaudible) [we got all the] the time in the world to sit here with you." "She just pushed you too hard." Detective Perdue warns, "See, things ain't adding up, bro." (Vol. XXV R 3048)

***They threaten: "We're fixing to dissect your parents' house...You're lying to us. I'm going to send you down the road for first degree murder (inaudible) lethal injection." "–now is that what you want?" "I don't want to see you die. Enough people have died." Mr. Simmons answers: "I ain't killed that lady, man."** (Vol. XXV R 3049)

*Detective Perdue counters: "Bull--" "--bull, you know

who did it." Mr. Simmons: "I didn't." Detective Perdue: "I watched the freakin game. You're lying, it's showing you're lying. The witnesses show you're lying, son. We're opening a door for you, the only door you're going to get, come on." They claim, "We are the only friends you got, your only friends." "And you're lying to us." Mr. Simmons responds, "I ain't kill that lady." (Vol. XXV R 3050)

*They ask: "You killed her, Eric, was it accidentally or did you just freakin' panic?" "I'm not saying you planned this thing. I'm not saying you did it intentionally...it was an accident. You lost control. You had a little too much to drink, and you lost control." **"Do you want to die? We don't want to see you die. You're a grown man, why don't you fess up to it."** Mr. Simmons answers: "I didn't kill that lady." (Vol. XXV R 3051)

*Following another denial by Mr. Simmons, Detective Perdue warns, **"That's what you're going to be saying when you're laying there on that table and you got that IV stuck in (inaudible)."** Then Detective Perdue says, "I'll be back." (Vol. XXV R 3052)

*Mr. Simmons says: "I didn't kill (inaudible). What do you want me to say. I killed her when I didn't kill her (inaudible)?" (Vol. XXV R 3053)

*Detective Adams states: "Accident got carried away." (Vol. XXV R 3054)

*Detective Adams states: "(inaudible) have sex, tried to fight her off." Mr. Simmons states, "I didn't kill that lady." (Vol. XXV R 3055)

*Detective Adams states, "...you didn't go out to check to see if she was (inaudible) that's because you already knew she was dead." Mr. Simmons responds, **"Whatever, man, I'm through."** Detective Perdue continues to ask questions, "When did you take her back to Sorrento, where did you take her?" Detective Adams suggests that she was in his car at midnight. Mr. Simmons responds, "No, I did not, dude. My car was home at midnight." (Vol. XXV R 3056-3057)

*Mr. Simmons again denies the offense and Detective

Adams states, “(inaudible) to convince yourself of that (inaudible) jury.” Mr. Simmons responds, “Whatever it is, let the jury decide. You already got me guilty anyway, saying I killed the lady.” (Vol. XXV R 3058-3059)

*Detective Perdue suggests, “...never passed out and woke and been somewhere you don’t remember how you got there?” (Vol. XXV R 3060)

*They ask if he is willing to consent to a search warrant. (Vol. XXV R 3070)

*Detective Adams requests, “Eric, why don’t you put your name in there, it would be, I Eric Simmons...consent to...search the following described property 1306 Stowe Avenue, okay...” “...my consent to search was given freely, voluntarily without any threats or promises, duress...do you understand that? THE DEFENDANT (Nodding head affirmatively).” (Vol. XXV R 3071)

*Law enforcement asks if Mr. Simmons ever finished high school. Mr. Simmons states that he finished “9th [grade], somewhere around there.” They continue to ask him questions about Ms. Tressler. (Vol. XXV R 3072)

*Detective Adams asks if he would give a hair sample, and Detective Perdue states, “Listen to me, okay. . . y**ou’re the prime suspect**, and all these witnesses talk all this trash about you. Physical evidence is taken so we can prove that you weren’t there or to prove you were.” Mr. Simmons informs that she was in his car that night. (Vol. XXV R 3073)

***Mr. Simmons informs: “...I’m scared of needles. Look at my veins, man, you can’t even see them but every time you have to poke them three or four times before they find them.”** (Vol. XXV R 3074)

*Mr. Simmons speaks about a no loitering sign outside the laundromat, “no exceptions,” and informs that “[the victim] said some kids were threatening her, so I would go up there with her sometimes.” (Vol. XXV R 3076)

*Law enforcement asks if the victim ever talked about people threatening her, and Mr. Simmons informs that "she had to run people off." (Vol. XXV R 3084)

*Mr. Simmons states, "...just kids threatening, that's why I started going a lot of nights." (Vol. XXV R 3085)

As illustrated above in the transcript of the interrogation of Mr. Simmons, exactly like in the *Brewer* case, "The officers raised the specter of the electric chair, suggested that they had power to effect leniency, and suggested to the appellant that he would not be given a fair trial. It was under the influence of these threats and promises that the appellant made an oral confession." *Brewer, Id.* at 235. In fact, the detectives not only raised the specter of the electric chair, but actually threatened to administer the lethal injection. Mr. Simmons was informed that if he were to "fess up [like a grown man]," they could advise the prosecutor of the cooperation he provided. They threatened to tear his parents' home apart in efforts to find evidence, and informed him that a jury would not believe his story, suggesting that he would not receive a fair trial. They even continued to interrogate him after he clearly stated that he was "through," and said they "had all the time in the world" to interrogate him, adding an additional layer of coercion and further risk of a false, involuntary confession.

At the evidentiary hearing, Professor Richard Leo not only described the threats and inducements made to Mr. Simmons, but

he also explained that mentally handicapped people, or people with low IQs, or slow thinkers, are more vulnerable to interrogation pressure and are thus more likely to falsely confess if exposed to a coercive interrogation. (Vol. XXII PCR 517). People who are slow-functioning often attempt to mask the stigma. They tend to be acquiescent or submissive. They don't understand the long term consequences of their actions. They don't do well under stressful situations. (Vol. XXII PCR 518). They are easily confused, they might mix up certain dates, they might make things up when details are suggested. (Vol. XXII PCR 519). In light of the *Spencer* Hearing testimony of Dr. McMahon describing Mr. Simmons' "moderate-to-severe learning disability," *Simmons, Id.* at 1110, as well as the evidentiary hearing testimony of witnesses Heidi Hanlon-Guerra, Dr. Henry Dee, Dr. Frank Wood, and Professor Richard Leo, it is clear that the coercive aspects of this interrogation on an individual with such limited intellectual functioning such as Eric Simmons, should render it involuntary and inadmissible.

This completely unreliable, unrecorded statement has no place in a capital murder trial where Mr. Simmons' life is at stake. Death *is* a unique punishment. And before Mr. Simmons is subjected to such a unique, irreversible punishment, his guilt or innocence should be tried fairly and truly without the introduction of some infectious, unconstitutionally-obtained,

coerced remark. At the very least, Mr. Simmons' conviction and death sentence should now be vacated to allow him the opportunity to effectively and properly present these critical issues to the trial court.

The lower court should have afforded relief in this case. In light of *Brewer* and *Rogers,* Mr. Simmons' conviction, death sentence, and incriminating statement should all be set aside in this case. The *Brewer* case is right on point and it should have been utilized by trial counsel to suppress the inculpatory remark in this case. Because trial counsel was deficient in failing to move to suppress the statement based on a coercive interrogation and Mr. Simmons' low intellectual functioning, and because great prejudice ensued, this Court should vacate Mr. Simmons' conviction and death sentence.

The lower court's order

The lower court's order denying relief in this case is prefaced with a clear indication that this case was adjudged unfairly. On page 13 of the order, before denying each and every claim individually, the court states that "it is disingenuous for the Defendant to raise claims of ineffective assistance of counsel after having been explicitly informed by the Court that Ms. Orr was unqualified under the rule to represent him." (Vol. IX PCR 1701). Had postconviction counsel known that the court was laboring under such bias, he would have

strongly suggested to Mr. Simmons that he submit an affidavit and motion for recusal of the court stating that he doubted the court's ability to fairly adjudicate the postconviction issues.

In effect, this court prefaced its denial of relief on Mr. Simmons' ineffective assistance of counsel claims with the following message: "I told you so Mr. Simmons! It should be no surprise that your attorney was ineffective." It seems that the lower court was fundamentally incapable of having its confidence undermined in the verdict. Under the clearly established law of *Strickland v. Washington,* 466 U.S. 668, 694 (1984), "A reasonable probability is a probability that is sufficient to undermine confidence in the outcome."

At the trial level, the lower court warned Mr. Simmons of a possible bad result based on what the court perceived as a poor choice of an under-qualified attorney; the court then viewed Mr. Simmons' claims of ineffective assistance of counsel as "disingenuous." The Appellant never waived his right to effective legal representation. The court showed by its order that it was incapable of fairly judging a "reasonable probability" of a different outcome due to its "I-told-you-your-attorney-was-unqualified" attitude. While another jurist would have found the evidence presented at trial undermined due to the powerful evidence presented in postconviction, the lower court could not follow through with this required analysis because its

confidence in the outcome could never be shaken. The lower court unfairly blamed Mr. Simmons and his family for the errors and omissions of trial counsel. Rather than blame and penalize Mr. Simmons here, quite the opposite, the lower court should have afforded less deference to any alleged "strategic decisions" that were claimed by trial counsel.

The lower court unfairly denied relief on this claim finding that here was no "causal nexus between what [were][2] coercive tactics and the Defendant's confession." (Vol. IX PCR 1709). The lower court further unreasonably found that "the absence of Defendant's testimony regarding his statement is fatal to his claim." (Vol. IX PCR 1709). There is overwhelming evidence in the record here to support the fact that the confession was coerced. Courts would be unreasonable to require a learning-disabled, severely-brain-damaged individual laboring under major communication difficulties to discuss the specifics

[2] The lower court refused to even acknowledge that law enforcement's numerous death threats, pokes, prods, and offensive lunges towards Mr. Simmons during the interrogation were actually coercive. The court in its Order only characterizes law enforcement's outrageous conduct as "alleged coercive activities" and "alleged coercive tactics." (Vol. IX PCR 1710). Even Detective Perdue acknowledged at the evidentiary hearing that his conduct during the interrogation, including his threat of capital punishment, was perhaps the worst mistake of his career. Detective Perdue said that is because he did not want to make Eric Simmons feel threatened. (Vol. XXVII PCR 1456). In light of the lower court's ruling, there are no consequences for Detective Perdue's "worst mistake" of his career, and there is no reason for the Lake County Sheriff's Office to change its coercive interrogation practices.

of his coerced confession at an evidentiary hearing before granting relief on this claim. Criminal defendants have the absolute right to remain silent, a right that obviously should have been unequivocally asserted against these Constitution-offending police officers.

Law enforcement intended to psychologically coerce a confession out of Mr. Simmons, and they apparently succeeded. Had they not employed these coercive tactics, Mr. Simmons would not have "confessed." As far as a causal connection between the coercive techniques employed by law enforcement and Mr. Simmons' statement, the causal connection is clear. Because the videotape was turned off, one cannot even verify that Detective Perdue's approach during the latter part of this four hour interrogation was indeed "fatherly." *See* Vol. IX PCR 1711 where the lower court accepts Detective Perdue's "testimony that the second half of the interview was not as confrontational as the first half. . . .he took a more 'fatherly' approach to the Defendant because the confrontational approach was not producing any results." (Vol. IX PCR 1711). There is videotape evidence here of *the most coercive* of interrogation practices, and the lower court simply ignores it. Had Detective Perdue punched Mr. Simmons in the stomach two hours into the interrogation, certainly there would be a nexus to a confession made two hours later. In about a seven hour period, what began as an

oppressive and illegal arrest on his parents' property became a coercive and threatening interrogation at CIB. A false confession was extracted from Mr. Simmons with no real breaks to feasibly cure the taint of the initial illegal detention and continued coercive interrogation.

Regarding the testimony of expert Richard Leo, the lower court states the following on page 26 of its Order: "had trial counsel attempted to call an expert in false confessions during the guilt phase, this Court would have excluded such testimony." (Vol. IX PCR 1714). The State ***never challenged the admissibility*** of Professor Leo's testimony. Had the State challenged the admissibility of Professor Leo's testimony, the Appellant would have quickly cited to *State v. Sawyer*, 561 So. 2d 278, 288 (Fla. 2d DCA 1990), a case right out of the subject appellate district which upheld the suppression of a confession based in part on the testimony of a false confessions expert Richard Ofshe:

> The tapes reveal that Sawyer was harangued, yelled at, cajoled, urged approximately fifty-five times to confess to an accidental killing, promised assistance with the state attorney's office if he did "tell the truth," threatened with first degree murder and its attendant consequences if he did not cooperate, warned what happened to a fellow policeman in Clearwater who played games during his interrogation and got charged with first degree murder, threatened that he would return to alcohol from remorse if he did not admit the killing, and even threatened with eventual death from excess alcohol consumption.

> The state has the clear burden of proving by a preponderance of the evidence that none of the factors outlined by Dr. Ofshe, in the totality of the circumstances of this interrogation, overcame Sawyer's will so as to render his confession to the killing of Janet Staschak "involuntary."

Id. The lower court erroneously stated at Vol. IX PCR 1711 that "This Court is well aware that the Florida Supreme Court has questioned (without resolving the issue), whether this testimony is ever admissible." Any doubts about the admissibility of such testimony should have been resolved by *Ross v. State*, 45 So. 3d 403, 411 (Fla. 2010)("[Expert Dr. Gregory DeClue] testified that there are factors that increase the likelihood of false confessions, many of which were present in this case [] includ[ing] youth, immaturity, inexperience, low intelligence, mental illness, intoxication, and withdrawal from drugs. Police also use isolation to increase anxiety. Further, the police use certain techniques that increase the risk of a false confession, including escalating the pressure exerted on a suspect and the suspect's anxiety, exaggerating the evidence, providing information about the crime scene, and giving justifications why a person should confess, such as closure.").

Any challenge to the admissibility of Professor Leo's testimony was waived by the State, and should have failed in accordance with established case law. In questioning the admissibility of Professor Leo's testimony, the lower court

ignores *Sawyer* and *Ross.*

This Court should reverse the lower court's Order denying relief and direct that the Mr. Simmons receive a new trial that does not include the following unreliable inculpatory statement made to law enforcement after a coercive four hour interrogation: "If you found blood in my car, I must have did it." The admission of this statement unlawfully deprived Mr. Simmons of a fair trial. Trial counsel is to blame for failing to raise all available challenges to its admissibility.

ARGUMENT II

MR. SIMMONS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE TRIAL. THIS VIOLATED MR. SIMMONS' RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS PRIMARILY INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE THAT THE APPELLANT AND THE VICTIM ENGAGED IN CONSENSUAL SEXUAL RELATIONS SHORTLY BEFORE THE VICTIM WENT MISSING. THIS EVIDENCE WAS CRUCIAL TO A FAIR PRESENTATION OF THE EVIDENCE BECAUSE THE DEFENSE STIPULATED THAT THE APPELLANT'S DNA (SEMEN) WAS FOUND IN THE VAGINAL WASHINGS OF THE VICTIM.

Ineffective Assistance of Counsel for Stipulating to the Introduction of Semen Evidence

The following stipulation was read *twice* to the jury:

> The parties have agreed and stipulated that an analysis of the vaginal washings from Ms. Tressler produced Mr. Simmons' semen in her vagina. This evidence is offered for the sole purpose of establishing that Mr. Simmons and Ms. Tressler had a sexual encounter. It is not relevant to the sexual battery charge herein as that charge involves allegations of anal penetration. And is not to be

considered by you in any way as to that charge.

Trial Transcript, Vol. XXIII R 2698 *and* Vol. XXX R 4134. While absolutely maintaining his innocence of this crime, the Appellant concedes that the victim in this case was badly assaulted. On direct appeal, this Court acknowledged that the medical examiner "Dr. Gulino opined that . . . injuries [to the victim's anus] would. . .not [be] the result of consensual anal intercourse." *Simmons, Id.* at 1105. As such, it would be very important for the defense to inform the jury that the Appellant's DNA evidence inside the victim was the result of consensual sex, not a sexual assault. Simply informing the jury as stipulated that the DNA was the result of a "sexual encounter," the jury was left free to speculate that the sexual encounter was an assault rather than consensual.

Trial counsel was ineffective for stipulating that Mr. Simmons' semen was found in the victim's vagina without presenting evidence that the sexual encounter was consensual. The jury logically would reach the conclusion that such DNA evidence tied Mr. Simmons to the instant kidnapping, sexual assault, and murder of Ms. Tressler. Reasonable trial counsel would not stipulate to such prejudicial and irrelevant evidence without enlightening the jury with credible evidence that there was a recent ***consensual*** sexual encounter between Mr. Simmons and Ms. Tressler. Neighbors Deborah and Edward Johnson very

credibly testified at the evidentiary hearing that they heard Mr. Simmons and the victim having loud, consensual sex on Saturday December 1, 2001 at Mr. Simmons' residence, the day Ms. Tressler was murdered. (Vol. XX PCR 102-127). Jose Rodriguez even testified at the evidentiary hearing that very late on the night of December 1, 2001, Eric Simmons and Deborah Tressler were together, there were no loud screams of terror, and there was nothing at all to indicate that Mr. Simmons was about to kidnap or murder Ms. Tressler. (Vol. XXX PCR 2046-2050). Given the lack of animosity observed between Mr. Simmons and Ms. Tressler, any motive for Mr. Simmons to commit this murder would be negated by the Johnsons' testimony.

Trial counsel really needed to inform the jury of the information supplied to the lower court at the postconviction evidentiary hearing--that the sexual encounter between Eric Simmons and Deborah Tressler was absolutely consensual, and very recent. This was easily accessible and provided through the testimony of Deborah and Edward Johnson. Under *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), it is undeniable that "the favorable evidence [the Johnsons' testimony] could reasonably be taken to put the whole case [the Simmons case] in such a different light as to undermine confidence in the verdict."

Janice Orr did not recall what efforts she made to make the stipulation specifically read: "consensual sexual encounter."

(Vol. XXVII PCR 1573). She conceded that "It certainly should have been [in the stipulation]," and, "That was clearly a mistake and I must say that Justice Pariente pointed that out to me quite strongly almost immediately upon my standing in the Florida Supreme Court." (Vol. XXVII PCR 1573). Ms. Orr had planned on putting Mr. Simmons on the stand to testify that the sex was consensual. She failed to consider having Dr. McMahon testify about Mr. Simmons' short-term memory problems and inability to recall dates. She did not look into that at all. (Vol. XXVII PCR 1575).

Trial counsel was also deprived of critical information regarding John Fitzpatrick which would have prevented the stipulation. Had she known of the full extent of Mr. Fitzpatrick's involvement in the Simmons case and his wrongdoing, she never would have agreed to the stipulation read to the jury twice. "[B]ut I was told [by the State] [John Fitzpatrick] had nothing to do with this [case]. I most certainly would not have stipulated to anything that he did, nor anything—everything would have been different had I known he had anything to do with this case other than what Mr. Gross had told me."[3] (Vol. XXVII PCR 1577).

[3]As will be discussed in further detail later in this brief, FDLE's John Fitzpatrick failed a proficiency test while performing DNA analysis on the Simmons case, he then changed his answers, lied about it, covered it up, had a sustained finding

Mr. Simmons was charged with sexual battery in conjunction with the murder and kidnapping of Ms. Tressler. His trial counsel failed him when the jury was allowed to hear a prejudicial and irrelevant stipulation informing the jury that his semen was found inside the victim's vagina. Allowing this stipulation to be read without informing that the sexual encounter was consensual allowed the jury to consider this evidence of guilt tying him to the murder. If the jury hears that the sex was consensual, now the evidence becomes arguably exculpatory because it negates any motive Mr. Simmons might have had to commit this murder. The defense needed to present evidence that the couple recently had consensual sex to negate any speculation on the jury's part that this was some straightforward rape-murder case with DNA evidence.

If the information in the stipulation was not relevant as conceded by trial counsel, it should not have been placed before the jury. This Court found on direct appeal in part that the semen evidence found in the vaginal washings of the victim supported the sufficiency of the evidence to convict Mr. Simmons. *Simmons v. State,* 934 So. 2d 1100, 1112 (Fla. 2006)("Simmons' semen was found in Tressler's vaginal washings"). At the oral argument held before the Florida Supreme

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of Falsification of Records against him, and took the opportunity to resign rather than be terminated.

Court on April 5, 2005 on this case, the following exchange occurred between the Justices and trial/appellate counsel Janice Orr concerning the insufficiency of the evidence claim:

> Q: And his semen was found in her vaginal washings, whereas he said the last time they had had sex was a couple of weeks before?
>
> A: Which in fact was true, but it was prior to the incident and it was stipulated by the state that that had no bearing on this case.
>
> Q: The semen that was found had no bearing?
>
> A: Correct. That is not the sexual battery.
>
> Q: So he was, that was not his, are you telling us that that was not his semen?
>
> A: It was his semen. The state stipulated during the course of the trial, that the semen found had nothing do with the sexual battery or the homicide or anything. There was no allegation that that, the sexual contact that they had had, had any bearing whatsoever.
>
> Q: So why was it allowed into evidence? What was the relevance of it?
>
> A: In my eyes, it was not relevant.
>
> Q: But you have not raised that as a separate issue, that it was erroneous to introduce his, the fact that they found his semen in her. Is that a separate issue?
>
> A: I did not make that a separate issue.

Florida Supreme Court Oral Argument at 12:07-13:08, held 4/5/05, archived and viewable online.

The issue here is: trial counsel was ineffective for not only failing to object to irrelevant semen evidence at trial, but actually affirmatively joining the State and stipulating to this prejudicial and irrelevant evidence. Trial counsel actually handled the appeal in this case, so we can look to her

comments at the oral argument to analyze her conduct at the trial. Regarding the semen evidence, she informed the Florida Supreme Court that "[the State stipulated that] the semen found had nothing do with the sexual battery or the homicide or anything." The problem is, the stipulation read to the jury informed *only* that the evidence was not to be considered in connection with the sexual battery charge. The jury was *not* informed that the State stipulated that the semen evidence could not be considered to tie Mr. Simmons to the kidnapping and murder of Ms. Tressler. This irrelevant and prejudicial semen stipulation was used by the State to tie Mr. Simmons to the kidnapping and murder, and was considered by the Florida Supreme Court to uphold the sufficiency of the evidence ruling against Mr. Simmons on the three separate charges. Counsel admitted that the evidence was not relevant, and she should have taken steps to exclude the evidence, not affirmatively present the evidence with the State. The introduction of this prejudicial and irrelevant semen DNA evidence against her client led the jury in part to convict Mr. Simmons.

Even if the semen evidence was admissible regardless of the stipulation, trial counsel failed to provide a readily-available, logical and lawful reason why Mr. Simmons' semen was found inside of the victim: they had consensual sex the day of the murder! Mr. Simmons' neighbors were available at the time

of trial to establish this crucial information. This evidence would have obviously persuaded the trier of fact that Mr. Simmons did not rape the victim as alleged by the State. Trial counsel owed a duty to her client to present the information contained in the Johnsons' depositions to the jury. With the testimony of the Johnsons, the semen becomes exculpatory because it shows that Mr. Simmons, unlike an ex-boyfriend or ex-husband of the victim, harbored no ill-will at all towards the victim at the time she was murdered. Jerry Linton's testimony suggests Ms. Tressler was the target of violence of an ex-lover. (Vol. XXIII PCR 684-98). Eric Simmons lacked absolutely any motive for this violent assault and murder. The Johnsons' testimony would have explained the semen evidence and would have further cast doubt in this case due to Mr. Simmons' very amicable relationship with the victim just prior to her assault and murder.

Ms. Orr conceded her omissions, mistakes, and neglect concerning this evidence. Ms. Orr testified that her failure to call the Johnsons at trial was a result of "neglect[]," admitting that this was a "mistake on [her] part." (Vol. XXVII PCR 1592). The lower court simply ignored the evidentiary hearing testimony which clearly establishes ineffective assistance of counsel:

Q. You went into trial–is it a correct understanding

> that I have that you went to trial with the intention of calling Eric Simmons to the stand?
> A. Yes.
> Q: And that decision changed?
> A. Yes.
> Q. Now, when the decision changed, – well, prior to your decision changing, did you have Edward and Debra Johnson on standby ready to testify about the consensual sex in the event that you were going to change your mind about putting Eric on the stand?
> A. No, I did not. As I indicated, I had intended to call Mr. Simmons and **I neglected to make sure that if I did not that I had covered everything that Mr. Simmons would have testified about with other witnesses.**
> Q. **And what do you feel about your failure to have Mr. and Mrs. Johnson standing by to offer testimony about the consensual sex?**
> **A. Well, as I indicated, I believe that it was a mistake on my part to not have those bases covered, of the areas that Mr. Simmons would have testified concerning including the consensual sex.**

(Vol. XXVII PCR 1592). The lower court unfairly refused to acknowledge what Ms. Orr candidly admitted: SHE MADE A MISTAKE AT TRIAL. Despite Ms. Orr's testimony admitting her mistake in failing to have the Johnsons testify, the lower court unreasonably classified this mistake as a strategic decision.

Failure to present the testimony of an expert in the area of false confessions at trial

As discussed in Argument I in connection with the pre-trial motion to suppress the statements in this case, the State presented evidence of a damning "confession" at trial against Mr. Simmons. A confession is perhaps ***the*** most damaging piece of evidence the State can offer against a defendant at trial. As such, trial counsel owed a duty to zealously pursue *every* avenue

to attack the purported "confession" in this case. The "confession" in this case was made to law enforcement only to terminate the coercive and oppressive interrogation. Unfairly, law enforcement was able to deny the tone in which it was made due to the unavailability of the remaining videotape.[4]

This wrongful conviction whose bedrock and death knell was Mr. Simmons' "confession" is absolutely tragic. But this tragedy is reversible. Mr. Simmons prays that this Court serve the ends of justice by the grant of a new and fair trial.

Lacking in the defense case was the necessary expert testimony concerning false confessions to refute the statements used against Mr. Simmons. Due to the egregious conduct of law enforcement during the interrogation of Mr. Simmons, law enforcement caused him to make a conditional statement purporting to inculpate him in order to get them to stop interrogating him after his repeated, disregarded denials. Notwithstanding his learning deficits, within the first five minutes of the four hour interrogation, Eric Simmons realized that his denials were falling on deaf ears, and he hopelessly

[4]Because the videotape of the Appellant's actual incriminating statement is unavailable, one cannot truly know in what tone or context it was made. We only know that it came on the heels of four hours of denials, repeated accusations, false promises, heated confrontations, and multiple death threats. *See e.g.* Iraola, Roberto (2006). "The Electronic Recording of Criminal Interrogations," *University of Richmond Law Review* 40: 463-479.

stated, “You just want me to say I killed that lady.” (Vol. XXV R 3034). He repeated this hopeless mantra throughout the interrogation. That was indeed the case, and Mr. Simmons would have said anything to get the officers to stop firing accusations at him repeatedly for four hours. Had trial counsel called an expert in the area of false confessions such as Professor Leo to inform the jury of the complete unreliability of Mr. Simmons’ statement to the interrogating detectives, the jury would have found the confession to be completely unreliable, disregarded the confession in this case, and acquitted Mr. Simmons.

Professor Leo could have informed the jury that Mr. Simmons was interrogated by detectives who utilized the very same techniques that he has warned other police departments to avoid because of the real possibility and danger of such an interrogation leading to a false confession. *See* Professor Leo’s testimony at (Vol. XXII PCR 483-556). With regard to the seminars that he conducted with the Miami Beach Police Department and Broward County Sheriff’s Office, Professor Leo was asked by these departments to conduct such seminars because there were stories in the press about innocent suspects who had falsely confessed to crimes they did not commit. He instructed the attendees of the seminar to avoid the type of implicit and explicit threats and promises that are seen in the Simmons

interrogation. He informed them of lines they should not cross, what they should avoid, and described actual cases and studies to give them an idea of how and why false confessions occur. (Vol. XXII PCR 505).

The Legal Standard

Under *Strickland*, Mr. Simmons need not show the likelihood of an absolute acquittal if Professor Leo would have testified at trial. Mr. Simmons need only show that there could have been *one juror* influenced by the testimony of Professor Richard Leo regarding the interrogation tactics employed by law enforcement in this case. If Professor Leo had been called by trial counsel, Mr. Simmons could have been convicted of lessers, the deliberations could have been deadlocked, or Mr. Simmons could have been outright acquitted. In any event, certainly a sentence other than death could have been recommended by some apprehensive, perhaps doubting members of the jury who would hear Professor Leo's testimony and take issue with the detective's interrogation techniques. As such, this Court should reverse the lower court's order denying relief.

Failure to Investigate, Discover and Inform the Jury that John Fitzpatrick was Heavily Involved in the DNA Collection and Testing in this Case

Through the ineffective assistance of counsel and/or because of *Brady/Giglio* violations, the jury failed to hear evidence that the primary FDLE analyst who handled most all of

the evidence in the case against Eric Simmons, John Fitzpatrick, was falsifying records at the same time he was handling the evidence in the Simmons case in December of 2001. FDLE analyst John Fitzpatrick actually handled and tested the tubes of the victim's blood that were not used in the subsequent DNA testing allegedly because of the "bad odor" of the blood standard.[5]

Trial counsel was ineffective under *Strickland* for failure to further investigate and inform the jury of Mr. Fitzpatrick's involvement in the Simmons case and the situation with the proficiency test. There indeed was a notation in defense attorney Brenda Smith's files about a fired analyst at FDLE (referenced in the lower court's order at Vol. IX PCR 1720), but that does not mean that the State complied fully with *Brady* and discovery obligations. Without full disclosure of the internal affairs records and the John Fitzpatrick reports (located at Vol. X PCR 1917-1968 and Vol. XII PCR 2807-2812 respectively), defense counsel was not on proper notice of possible areas of challenge to the DNA evidence. *See Polk v. State*, 906 So. 2d 1212, 1215-1216 (Fla. 1st DCA 2005):

In addition to his allegations that the claims were

[5]At Vol. XXII R 2600, FDLE DNA analyst Shawn Johnson provided the jury this alleged reason (the "bad odor of the blood") why he utilized the oral standard rather than the blood standard in his DNA testing. The Appellant submits that the real reason Shawn Johnson used the oral standard rather than the blood standard was to cover up John Fitzpatrick's involvement in this case. This constitutes a *Giglio* violation.

newly discovered, appellant specifically alleged that the evidence, if timely submitted, would have been exculpatory and was of such a nature that it would probably have resulted in a different outcome. As such, he alleged the existence of a violation of [*Brady*], which requires a defendant to demonstrate that "(1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence has been suppressed by the State, either wilfully or inadvertently; and (3) the defendant has been prejudiced by the suppression of this evidence." [citations omitted]. "A defendant is prejudiced by the suppression of exculpatory evidence if it is material, in other words if 'there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.' " [citations omitted].

Case law also establishes that a defendant's knowledge of a discovery request does not mean that he or she did not act with due diligence once defendant actually became aware of the existence of exculpatory evidence. The [S]upreme [C]ourt instructs: "A defendant's knowledge that the State submitted evidence for testing ... does not create a duty to inquire further. *See Hoffman v. State,* 800 So. 2d 174 (Fla. 2001). (noting that the State has the burden 'to disclose to the defendant all information in its possession that is exculpatory')." *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). The court further noted: "The defendant's duty to exercise due diligence in reviewing *Brady* material applies *only* after the State discloses it." *Id.* (emphasis added).

Appellant's claims one through five relate to FDLE reports containing DNA test results, which were unknown to him, and possibly unknown to his attorney, at the time he was persuaded to accept and enter a plea of no contest. Accepting the truth of the facts set forth in the sworn 3.850 motion, we conclude appellant has satisfied the exception set forth in rule 3.850(2)(1) to excuse his failure to abide by the two-year limitation period required for filing a postconviction motion. He alleged he submitted samples for DNA testing, telling his counsel he believed the DNA tests would prove he had not committed the sexual battery of which he was accused, and although he had

> asked his lawyer numerous times about the results of the tests, counsel replied he knew nothing about them. The previously undisclosed evidence, exonerating appellant as a donor of semen, is material in that there is a reasonable probability that the outcome would have been different if the results had been timely disclosed to the defense before appellant entered his plea. Pursuant to *Allen,* appellant had no duty to exercise due diligence in reviewing the DNA test results before the time the state actually furnished them. It is, moreover, impossible to decide from this record whether the state ever divulged the DNA results to appellant or to his counsel. Under the circumstances, we conclude the trial court erred in summarily finding appellant failed to demonstrate a valid exception to the two-year limitation period, and in refusing to consider the merits of the allegations.

Although the *Polk* case involves undisclosed *exculpatory* evidence, the *Brady* and *Giglio* violations in the case at bar are just as significant because this case involves undisclosed, *highly-impeaching* evidence about a fallen analyst and his major involvement in this case at the time he sample-switched, failed, lied, and cheated on a proficiency test. Prosecutor Bill Gross and FDLE legal advisor Steven Brady were incorrect in concluding that the John Fitzpatrick internal affairs information was not *Brady* material (*see* memorandum dated 4/2/02 from prosecutor Bill Gross to the file at Vol. XIV PCR 3327-3330). If there is any dispute about whether the John Fitzpatrick information should have been turned over to the defense, one need only look at the discovery order compelling the production of the records (*see* discovery order at Vol. I R 117-119). Because John Fitzpatrick handled and tested the victim's blood in this case, and because

FDLE sustained a finding during an internal affairs investigation that he falsified records at the same time that he handled the victim's blood in this case, the forensic evidence in this case is unreliable. What the jury did not hear from Shawn Johnson at trial is that he took the case over from fellow analyst John Fitzpatrick, a man he turned in for falsifying records at FDLE at the same time Mr. Fitzpatrick was testing all of the evidence in the Simmons case. FDLE officially sustained a finding that Mr. Fitzpatrick falsified records on the job in the months preceding February 2, 2002, and he resigned his post due to this finding on February 13, 2002. Had the jury heard this evidence, they would have disregarded the DNA evidence and possibly acquitted Mr. Simmons.

Ineffective Assistance of Counsel for Failure to call Terry Simmons

Terry Simmons could have testified at trial that his son did not run when law enforcement initially confronted him on the property, thus indicating that he had no consciousness of guilt. (Vol. XXVIII PCR 1691). Terry Simmons also confirmed that Ms. Tressler was making frequent trips to the restroom for loose bowels at his home on the Thanksgiving before the murder, and that his wife gave her some medicine for her condition. (Vol. XXVIII PCR 1693). He informed that the next time he met her, she was helping Eric unload bougainvillea bushes with "ferocious

thorns" from a trailer. (Vol. XXVIII PCR 1693). His son asked him for band-aids, and informed that Ms. Tressler had scratched her hand or cut her arms. (Vol. XXVIII PCR 1694). She soon thereafter was a passenger in Eric Simmons' vehicle.

Terry Simmons was willing and available to testify at trial. (Vol. XXVIII PCR 1695). The failure to put Terry Simmons on the stand to explain why the victim's blood may have been in his son's car constitutes ineffective assistance of counsel. Had this testimony been presented in this regard, the jury would find little or no inculpatory value in the blood DNA evidence found in the car. With the testimony of Terry Simmons, the confidence in the outcome of this case is shaken; accordingly, relief should be granted under *Strickland*.

Mismanagement of DNA Defense Expert Dr. Edward Blake

Janice Orr testified that she wished that Dr. Blake could have been there at trial to testify live. (Vol. XXVII PCR 1593). If she would have had the reports detailing John Fitzpatrick's misconduct and involvement in the Simmons case, she would have absolutely sent them to Dr. Blake. She admitted that in looking at exhibit 6, photos of the sexual assault kit, she failed to notice that there are two sets of initials and labels for 13 of the 14 items. Had she known the full situation with John Fitzpatrick, she would have looked at these items more closely. (Vol. XXVII PCR 1594). She would have asked Dr. Blake

to look at these items very closely. She never met face-to-face with Dr. Blake. She felt she could have been much more prepared for Dr. Blake's testimony. (Vol. XXVII PCR 1595). It was clear through the evidentiary testimony of Janice Orr that trial counsel failed to adequately prepare Dr. Edward Blake for his testimony, and failed to secure his personal appearance for trial, thus diminishing the possible benefits of his trial testimony.

Dr. Blake admitted on cross-examination that the victim's mother would be a good source of a mitochondrial DNA profile for the victim in this case, thus bolstering the State's case against Mr. Simmons. The following testimony was elicited during the cross examination of Dr. Blake:

> Q: And do you know, and if you don't know, please tell me you don't, whether or not then the mother of the deceased would be a good source to get the known mitochondrial DNA profile for the daughter.
> A: Yes.
> Q: You do know that?
> A: Yes.
> Q: And do you agree with that proposition?
> A: That mitochondrial DNA is naturally inherited such that the mother would be expected to have the same mitochondrial sequence as all of her offspring, including her daughter, yes.

(Vol. XXX R 4107).

By calling an expert who actually supported the State's position that the State's forensic evidence was based on good DNA practices, trial counsel was ineffective and actually

provided evidence that led the jury to convict Mr. Simmons. At the evidentiary hearing, Janice Orr was read the portion of trial testimony from Dr. Blake's testimony, and she admitted she was surprised by his answer when he testified that using someone's mother's DNA to establish a mitochondrial profile of a subject is expected. (Vol. XXVIII PCR 1606). She admitted that such testimony was the result of lack of preparation. Dr. Blake's testimony in that respect ran contrary to what she was trying to argue to the jury. (Vol. XXVIII PCR 1607). She blamed the confusion in the telephone testimony on not having him there live. She never sat down with him and looked at the evidence in this case. She informed that her dealings with Dr. Blake would have been different if she knew about the Fitzpatrick misconduct. (Vol. XXVIII PCR 1610).

Prior to the above trial testimony, trial counsel asked Dr. Blake if he tested certain items of evidence (swabs taken from the defendant's car). The problem is, trial counsel never requested Dr. Blake to test those items of evidence she was inquiring about. What followed was very awkward trial testimony that reflected a complete lack of preparation, mismanagement of the defense expert, and quite possibly indicated to the jury that the defense was hiding something:

> Q: Right. There were also, I believe, some samples, I believe there were some swabs that were sent to you. Was there anything that you could test on those swabs

> to, to check FDLE'as findings?
> A: Would you like to draw my attention to something specific?
> Q: Yes, sir. I believe it was labeled as Q-114 and 116. Let me see if I can find your reference numbers.
> MR. GROSS: 9 and 10.
> MS. ORR: 9 and 10. Mr. Gross says.
> THE WITNESS: You're fading out just a little bit, are you there?
> MS. ORR: Yes. I believe it was your item 9 and 10.
> THE WITNESS: Okay.
> By Ms. Orr:
> Q: Were you able to–I don't think–okay, were you able to test those swabs?
> A: We did not test either of those swabs. Visual observations of the swabs revealed they were partial swabs with no visible blood on them.
> Q: Okay, so there was nothing for you to test on those; is that correct, there–
> A: There's swab material there, I mean I suppose we could have attempted to test something that didn't have any visual indication of blood there, but you didn't ask us to do that and we didn't do that.

(Vol. XXX R 4100-4101). The mismanagement of the defense DNA expert is clear. Ms. Orr fully admitted that she failed to adequately prepare for the direct examination of Dr. Blake. Had the DNA issues in this case been fully explored, the result of the investigation and trial would have been much different.

Mismanagement of Bloodstain Pattern Expert Stewart James

The defense called blood stain pattern analysis expert Stewart James to the stand, but he had very little if nothing to offer for the defense. In reality, he hurt the defense case rather than helped the defense case. Either Mr. James was mismanaged, or he just had nothing to offer in the defense of this case. As such, he should not have been called to testify.

The record indicates that trial counsel was attempting to make points with this expert, but the expert could not offer testimony in support of those points. The record reflects that the state scored more points with this expert than the defense. Trial counsel was ineffective for calling this witness to trial.

Regarding the "blood stains" on the passenger doorjamb of Mr. Simmons' car, Mr. James said that the stains "aren't visible" and that he "[could not] comment on them." (Vol. XXVI R 3392). The uneventful direct examination of the defense expert proceeded as follows:

> Q: Okay. On the doorjamb, can you make any assessment as to what could cause that? Is there any pattern to that that you can see, is there any kind of conclusion you could reach just from looking at spatter?
> A: No. On this?
> Q: No, on the photographs, on the doorjamb piece, just from the photographs.
> A: No, I mean, I would call it spatter. I really can't take it any further. It's certainly in the size range of many mechanisms which don't exclude, you know, beatings or stabbings and even sometimes gunshot, but it's a fairly limited amount of staining. Without having more supportive evidence and more areas of blood, it would be difficult for me to conclude–I wouldn't conclude that such an event took place in proximity to that area

(Vol. XXVI R 3392-3393).

It appears that defense counsel would have preferred that the expert testify that if the victim had been beaten and killed in Mr. Simmons' car, there would have been much more blood in the car. But the expert could not agree with trial counsel. To

this point the defense expert responded, “You can’t say, I mean, every case is different.” (Vol. XXVI R 3397). Trial counsel would have been better off just making this argument in closing rather than calling an expert to state that you could not really say that for sure.

Mr. James admitted that he could not really draw any conclusions from the evidence he viewed in this case. As such, it was ineffective to call him to testify. On cross-examination, he testified as follows:

> Q: But the bloodstain pattern analysis is a valid source of information in addition to the pathologist’s evaluation, right?
> A: Well, certainly.
> Q: Sure.
> A: I think it’s teamwork. I mean you have to have your pathology, your blood pattern analysis, your criminalistics, your DNA. Everything has got to be in a row.
> Q: Of course in this car, you haven’t seen the car, but the photographs of the car, you don’t have enough information to really do that type of analysis in this case, do you?
> A: No.
> Q: All right, so you really can’t say an awful lot about those stains on that post, can you?
> A: I think that’s, that’s what I’ve tried to make clear to the jury.
> Q: Yes.
> A: I can’t draw a lot of scientific conclusions and other mechanisms can’t be excluded.

(Vol. XXVII R. 3442-3443). As illustrated above, the defense expert wanted to make clear to the jury that he could not say much about the blood in the defendant’s vehicle. Trial counsel was ineffective for calling Mr. James, or for failing to prepare

him for his testimony; he was not helpful, he had nothing to inform the jury, and he actually hurt the defendant's case.

Trial counsel did not do a good job prepping Mr. James for his testimony. She candidly admitted at a side bar that the expert was "half asleep" when she spoke to him the night before his testimony when they discussed the issue of canine biological fluids in the defendant's vehicle: "BY MS. ORR: He may have, because I told him last night when he was half asleep." Vol. XXVII R. 3447. During the redirect examination of Mr. James in front of the jury, trial counsel apologizes, "I'm getting tired, so excuse me." (Vol. XXVII R. 3453).

Perhaps the worst example of the ineffectiveness in calling of Mr. James to testify was on redirect examination where Mr. James suggests to Ms. Orr that he has to sometimes tell defense attorneys that just because they don't have blood on them does not mean they are innocent:

> Q: So you can't really know unless you know the angle of each blow where the blood is going to go and all of that sort of thing?
> A: Right, and I think maybe in conclusion to this question the best example I can think of is you get calls, I get calls from, you know, from lawyers, attorneys, my client has no blood on his clothing, therefore he couldn't have committed this horrendous crime. Well, you consider that if the blows are going away from the assailant, the force, the spatter is going to go on the wall down here as counsel, as our State Attorney was demonstrating, and you may not see anything on the assailant's clothing. It depends on the force, you know, that the blow is being directed.

(Vol. XXVII R. 3454-3455).

The defense expert above praises the prosecutor for bringing out the point on cross-examination that a person could still be guilty even though he has no blood on his clothing. Trial counsel was ineffective for mismanaging the defense expert, and for calling him to trial when his position was actually adverse to the defense. In a nutshell, Mr. James testified that the defense theory on blood spatter in this case was mere speculation, and possibly incorrect. He basically informed this jury that just because there was little blood found in Mr. Simmons' vehicle, he still could have committed the murder of Debbie Tressler. This was completely ineffective on counsel's part, and the jury voted to convict Mr. Simmons based in part on the testimony of defense expert Stewart James.

It is clear that Ms. Orr did not spend the time necessary to prepare Stewart James for his trial testimony. *See* (Vol. XXVIII PCR 1611-1614). There is no other explanation for what occurred at trial with this witness than ineffective assistance of counsel. She felt she could have prepared him more for his testimony, even if she sat with him for just a short time. (Vol. XXVIII PCR 1612). And she agreed that a defense attorney should not call an expert to testify who has no opinions or conclusions. (Vol. XXVIII PCR 1613). The lower court's order denying relief should be reversed.

Ineffective Assistance of Counsel for Failure to Investigate, Failure to Call Witnesses with Exculpatory Information, and Failure Thoroughly Question Witnesses to Rebut the State's Theory that Eric Simmons Committed this Murder

Shirley Harness, Carrie Marie Petty, and Jerry Linton

The only reason that Ms. Orr could provide at the evidentiary hearing for not presenting the testimony of vital witnesses Shirley Harness and Carrie Marie Petty was that she and her investigator could not locate them. (Vol. XXVIII PCR 1619). If this was the case, Mr. Orr should have employed the services of a second investigator or a witness locator. In any event, trial counsel was ineffective under *Strickland* for failing to present their testimony at trial.

Shirley Harness would have been an effective witness for the defense for several reasons. Ms. Harness is yet another witness who can establish that there was no animosity between Eric Simmons and Deborah Tressler. *See* testimony at (Vol. XXI PCR 365-397). Ms. Harness further defeats any alleged motive that Mr. Simmons may have to commit this murder. *Absolutely lacking* in the State's case is any motive for Mr. Simmons to commit this murder.

Prior to the Appellant's arrest, much was made during law enforcement's investigation about some mystery boyfriend who had apparently beaten up Ms. Tressler before her murder. Jerry Linton's testimony at the evidentiary hearing suggests that some

abusive ex-boyfriend was lurking across town, he had beaten her up to the point that she limped, and she was on the run from him. *See* testimony at (Vol. XXIII PCR 684-698). Such testimony should have been presented at trial. Jerry Linton provides a real motive for an unknown, abusive ex-boyfriend to commit this murder. Ms. Harness' evidentiary hearing testimony establishes that Eric and Deborah enjoyed one another's company. Ms. Harness observed them watching NASCAR together and she did not observe any arguments between them. This type of friendly interaction is consistent with the friendly interaction between the couple observed by several people in town: Jose Rodriguez, Jerry Linton, the Johnsons, and Terry and Cathy Simmons. Eric Simmons even brought Ms. Tressler to his parents' home for Thanksgiving supper. Terry Simmons saw Ms. Tressler assist his son in the landscaping business. Even on the day and night of the murder, December 1, 2001, no one observed Eric Simmons and Deborah Tressler in an argument, and no one perceived Ms. Tressler to be in danger as they observed Ms. Tressler with Eric Simmons on the porch of his apartment, and later that night at the laundromat.

Ms. Harness also provides a motive for individuals other than Eric Simmons to commit this murder. Specifically, she said that the Rodriguez brothers hated Ms. Tressler, and they threatened to kill Ms. Tressler and her dog, and threatened to

burn down her trailer if she did not stay out of their business. (Vol. XXI PCR 375-376). The Rodriguez brothers were involved in buying and selling drugs, and were obviously using the payphone near the laundromat to conduct their drug business. Ms. Tressler was threatened by the Rodriguez brothers for meddling in their affairs and telling them to leave the premises, according to Ms. Harness. (Vol. XXI PCR 378).

These threats actually corroborate some of Eric Simmons' statements during his interrogation wherein he informed law enforcement that Ms. Tressler was being threatened at the laundromat, and that is why he would accompany her there at night. *See* (Vol. XXV R 3076, 3084, 3085; previously cited under Claim I of this pleading). Not only did Jose Rodriguez have a reputation for violence in the community, but he was known to regularly brawl and combat some very tough individuals in the area; he even whacked one individual upside the head with some type of weapon or a "squeegee." *See* (Vol. XVI PCR 4932-4944). If Ms. Tressler was known around town as the town snitch, per Ms. Harness' testimony, any number of people in town might plot to exact some violent revenge on her, including Jose Rodriguez.

Law enforcement spoke to Ms. Carrie Marie Petty shortly after the murder, and she was attempting to lead the detectives to an individual named John Yohman. Ms. Petty assisted in creating a sketch of the gentleman that she saw frequently with

the victim. John Yohman was the man whom she was attempting to describe as a close associate of the victim, she was positively sure of that. *See* testimony at (Vol. XXII PCR 570-590). Yet, John Yohman denied being a close associate of the victim at the evidentiary hearing. *See* testimony at (Vol. XXII PCR 557-570). Curiously and suspiciously, John Yohman would have been one of the last people to see the victim alive. John Yohman's written statement to law enforcement informed that he saw the victim at approximately midnight on December 1, 2001 mopping the floor of the laundromat. His evidentiary hearing denials of ever having spoken to the victim, followed by Ms. Petty's testimony that Mr. Yohman and Ms. Tressler regularly frequented Robin's Restaurant certainly cause one to wonder why Mr. Yohman was not investigated further by law enforcement.

Carrie Petty would have been a very strong witness for the defense at trial, especially in tandem with John Yohman. At the evidentiary hearing, John Yohman cryptically denied ever having associated with or spoken to the victim. Yet Carrie Petty placed John Yohman and Deborah Tressler together at Robin's restaurant at some time before the murder, and described Ms. Tressler and Mr. Yohman as being very friendly with one another on several occasions. An explanation for Mr. Yohman's suspicious denials of his known relationship with Tressler is that he was hiding something, that perhaps he harbored some consciousness of

guilt. In the minds of some of the jurors, the Carrie Marie Petty-John Yohman tandem that was presented at the evidentiary hearing could have created some reasonable doubt at trial. That presentation undeniably puts this case and the Lake County Sheriff's Office investigation into this case in a different light. Eric Simmons should have been no more a "prime suspect" in this murder investigation than John Yohman, yet John Yohman was hardly investigated at all. John Yohman was allegedly determined by law enforcement to have some kind of alibi, but in reality, he had no alibi. *See* (Vol. XXVII PCR 1444).

Sergeant Perdue stated that John Yohman was known to frequent the bar called the Oasis, and he lived just a few blocks from the Laundromat. He said that John Yohman was not a person of interest because "his alibi was set up." (Vol. XXVII PCR 1441). Sergeant Perdue stated that during the time the victim was missing initially, John Yohman was at work or at home. They were looking at him as a witness, not a suspect. Yohman wrote a statement for them. (Vol. XXVII PCR 1442). Mr. Yohman's statement was introduced at the evidentiary hearing as exhibit 37, and is located at Vol. XIV PCR 3391. Detective Perdue confirmed that Sherri Renfro made a call to 911 at approximately midnight on December 1. Sergeant Perdue did not quite remember the details of Mr. Yohman's alibi. Mr. Yohman's written statement/"alibi" reads as follows:

> On Saturday, 12/1/01, at about 11:45[pm] I was walking by Sorrento Laundry, there was a woman inside. I had been shown a picture. I did not know her name. It was Deborah Tressler. She was mopping the floor. A white car was sitting outside. I didn't see the dog. I have seen the car in the past there.

Sergeant Perdue signed John Yohman's statement at the bottom. In postconviction, Sergeant Perdue offered that John Yohman does not look like the police sketch. (Vol. XXVII PCR 1444). *But*, given Ms. Petty's evidentiary hearing testimony that John Yohman was the close acquaintance of the victim, it would be *intended* that John Yohman look like her sketch rather than Eric Simmons.

As one can clearly see, John Yohman had no alibi. John Yohman was actually at ground zero at the time Ms. Tressler was murdered. There can be no reasonable explanation why defense counsel would not present this evidence at trial. John Yohman testified at the evidentiary hearing that he could see no one else in the laundromat as he watched the victim mopping, and he did not see Eric Simmons there. (Vol. XXII PCR 565, 569). That would place John Yohman *alone* with the victim shortly before she was allegedly seen screaming and being pulled back into a white car at an intersection a short distance across town.

Due to the plethora of reliable postconviction evidence presented at the eight days of evidentiary hearing in this matter, there must be some doubts to shake the confidence one should have in the outcome of this trial.

ARGUMENT III

THE LOWER COURT ERRED IN FAILING TO GRANT RELIEF BASED ON NUMEROUS *BRADY* AND *GIGLIO* VIOLATIONS IN THIS CASE PRIMARILY RELATED TO DNA ANALYST JOHN FITZPATRICK AND FDLE. THE LOWER COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST THE STATE FOR ITS SYSTEMATIC, REPEATED, AND WILFULL FAILURES TO TURN OVER RECORDS RELATED TO JOHN FITZPATRICK. THE STATE FAILED TO DISCLOSE EXCULPATORY OR IMPEACHING EVIDENCE, FAILED TO CORRECT FALSE AND MISLEADING TESTIMONY, AND PRESENTED FALSE EVIDENCE, TESTIMONY AND ARGUMENT TO THE JURY, THUS DEPRIVING MR. SIMMONS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Next to a confession, inculpatory DNA evidence is perhaps the most powerful evidence that can be presented against a defendant at trial. Late 20th and early 21st Century juries are absolutely fascinated, captivated, and persuaded by DNA evidence, and they perceive it to be a flawless, completely objective science. Certainly the withheld John Fitzpatrick evidence is material in that the usual jury fascination, captivation, and acceptance of the DNA evidence would be replaced with skepticism and rejection.

The Simmons case actually includes sample-switching, forgeries, cheating, lying, a replacement rookie analyst, and an instruction in the form of a telephone message from the detective who threatened to kill Mr. Simmons that appears to tell the rookie analyst to plant some DNA evidence in Mr. Simmons' car and apartment. *See* (Vol. XV PCR 3974), a 2/28/02

corrected telephone message from Detective Perdue to Shawn Johnson instructing originally as follows: “Try to get the victim’s DNA in kitchen and/or car then done if found.” Cumulatively, in conjunction with the testimony of the neighbors regarding the consensual sex, and Terry Simmons’ testimony regarding the thorny bushes and band-aids explaining the blood evidence in the car, a jury would no longer place faith in the State’s alleged inculpatory DNA evidence.

John Fitzpatrick was the lead DNA analyst on this case in December of 2001 and January of 2002. He even signed a final report that was later stamped “DRAFT” by an FDLE supervisor who determined, along with prosecutor Bill Gross, that the internal affairs information did not qualify as *Brady* material and could be withheld from the defense. Even after a court order was issued compelling these materials to be furnished to the defense, the information was still withheld from the defense.

In a nutshell, Mr. Fitzpatrick mistakenly switched samples on his proficiency test at the time he was working on this case, causing him to flunk the test. After a review by Shawn Johnson, when Mr. Fitzpatrick became aware that he had flunked the test, he changed the answers surreptitiously on a Thursday evening and Saturday morning when the lab was closed. It was brought to Shawn Johnson’s attention by FDLE analyst Vicki Bellino that John Fitzpatrick had changed his answers on his test. Shawn

Johnson then reported Fitzpatrick to his supervisors. This eventually led to an internal affairs investigation and a sustained finding of falsification of records against Mr. Fitzpatrick. Shawn Johnson took over John Fitzpatrick's work on this case and concealed this information because, he said, "It's just not good, what he did. It's not a good thing as far as what he did. And then he worked in the case." (Vol. XXVI PCR 1322). The prosecutor in the Simmons case even conducted an *ex parte* investigation of John Fitzpatrick, and he did not tell the defense about his investigation because he did not think "it was any of their business." (Vol. XXVII PCR 1486).

The concealment of this information denied the defense knowledge of the extent of Mr. Fitzpatrick's involvement in this case, and, the discovery that he also switched samples in this case. There are at least two documented sample switches or mislabelings in the actual Simmons case by John Fitzpatrick. This was partially revealed during the testimony of Shawn Johnson where the FDLE files reflect that Mr. Fitzpatrick twice mixed up a swab from Mr. Simmons' car (Q121) and Mr. Simmons' blood stain card (Q171). (Vol. XXVI PCR 1312). Revealingly, the sample switch that occurred with proficiency test 01-515 was no isolated incident.

Postconviction DNA expert Candy Zuleger offered the following opinion with regard to the condition of the sexual

assault kit in this case at the evidentiary hearing:

> Honestly, it's been, to me, mass confusion trying to figure out what's been going on with both analysts. Because, in my opinion, you have three Q-31A and Bs now since you have Fitzpatrick also labeling this as Q31A and B. So you have whatever Johnson labeled Q-31A and whatever Fitzpatrick called Q31A and then you have these slide holders that's also Q-31A and B. It's very confusing.

(Vol. XX PCR 183).

If the John Fitzpatrick information was not material, it is doubtful that the State would have sunk to such contumacious and contemptuous depths to actively conceal the information. Seldom in the criminal justice system is the requirement of *Brady* disclosure reinforced by a Court Order on a motion to compel the information at issue (*see* Order at Vol. I R 117-119). The State not only violated *Brady*, it violated a direct court order.

In the case of *Cardona v. State*, 826 So. 2d 968 (Fla. 2002), this Court ordered a new trial because law enforcement failed to furnish reports and information that would have provided additional impeachment information against a witness for the State, the pleading co-defendant. In the case at bar, the State argues that the John Fitzpatrick material is not impeaching simply because John Fitzpatrick did not testify. The issue in this case is not so simple. Such argument fails--the reason John Fitzpatrick did not testify is because the State misled the defense to believe that Mr. Fitzpatrick had only

minor involvement in the DNA testing of the evidence in the Simmons case, and withheld his signed report (*see* the report at Vol. XII PCR 2807-2811). Considering *Brady* obligations and all of the discovery orders in this case, the late disclosure of this report shocks the conscious.

The State wanted to conceal Mr. Fitzpatrick's involvement in this case so that the defense could not cast doubt on the reliability of the DNA evidence. The John Fitzpatrick material, including his signed report in this case and his internal affairs files impeaches not only the fallen analyst, but the entire forensic testing and scientific processes of FDLE. The Appellant had a right to all of the withheld information, and a right to extensively confront Mr. Fitzpatrick and FDLE about the DNA testing in this case, and the problems with the proficiency examination. Instead, the jury never heard the name "John Fitzpatrick" nor did they learn of his sample switching and proficiency test problems. *See Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009) (discussing the right to actually confront forensic witnesses, a right that was denied the Appellant due to the State's non-disclosure of his extensive involvement in this case, as well as its withholding of the internal affairs records).

The State's argument regarding lack of materiality should fail because the lower court *specifically ordered* that the

Fitzpatrick information be furnished to the defense; so whether or not the information is materially impeaching is immaterial for discovery purposes, it was ordered to be furnished. The fact of the matter is, the Fitzpatrick information is not witness-specific impeachment material, it is much more than that: it is impeaching to the entire scientific process by which the DNA testing was conducted by FDLE in this case. As much as the State would like, they cannot, or rather, they should not, be permitted to introduce FDLE's forensic work performed in this case without the accompanying John Fitzpatrick baggage. They cannot pretend that the John Fitzpatrick matter simply did not happen or that it bears no relevance to the Simmons case. The United States Constitution does not permit that. The lower court should have granted relief based on *Cardona*.

> As we explained in Way, "[a] showing of materiality 'does not require demonstration by a preponderance that the disclosure of the suppressed evidence would have ultimately resulted in the defendants acquittal.'" 760 So. 2d at 913 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 [] (1995). Rather, as the United States Supreme Court has explained:
>
> > [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."
>
> *Strickler*, 527 U.S. at 290 [] (quoting *Kyles*, 514 U.S.

at 435 [])(citations omitted).

Cardona, 826 So. 2d at 973. The State obviously suppressed the Fitzpatrick information because his involvement in this case would diminish one's confidence in the DNA evidence. Given the matters revealed at the evidentiary hearing concerning John Fitzpatrick's sustained finding of falsification of records and FDLE's testing of the Simmons evidence, this case has been placed in a completely different light, and confidence in the verdict and death sentence is now certainly lacking.

Regarding the November 5, 2002 Order requiring "any and all reports" to be furnished to the defense, Mr. Fitzpatrick's supervisor at FDLE, Mr. Harry Hopkins, apparently still feels that there would be no duty to furnish to the defense the report that he personally stamped "DRAFT" (*see* Fitzpatrick's report at Vol. XXVI PCR 1243). Mr. Hopkins hides behind his rubber "DRAFT" stamp and cites to a lack of a technical and administrative review of a pivotal report in continuing efforts to justify the State's contumacious nondisclosure. It shockingly took six years for John Fitzpatrick's signed report to reach the defense in this capital case. This report is highly material, and the actions of FDLE are simply unacceptable in this case. Mr. Hopkins was asked:

> Q: Why did it take you six years to turn over [the signed John Fitzpatrick report] to the defense?
> A: Because it's not really a report. It's not a

> released work product of FDLE. It's a draft copy of a report. It was never issued in this case.
> Q: Who stamped that "draft"?
> A: I did.
> Q: When did you stamp that report "draft"?
> A: When it was handed to me by Mr. Fitzpatrick.
> . . . .
> Q: Why is that report not in the main case file?
> A: Because it isn't a work product of FDLE.

(Vol. XXV PCR 1186). The only reason that FDLE was distancing itself from John Fitzpatrick's "not-so-much" work product is because they did not want to reveal his involvement in a capital murder case because such a revelation would have compromised the entire forensic investigation.

Prosecutor William Gross testified that when he issued the investigative subpoena for Mr. Fitzpatrick, he wanted to know what Mr. Fitzpatrick knew about the Simmons case. Mr. Gross testified that he did not tell the defense about his investigation of John Fitzpatrick because he did not think "it was any of their business." (Vol. XXVII PCR 1486). John Fitzpatrick's involvement in the Simmons case *was* the defense's business, or it should have been their business. This was *Brady* business, and the defense had just as much right as the State, if not more of a constitutional right, to attend the Fitzpatrick investigatory deposition (*see* Vol. XIV PCR 3394-3402) and hear everything about the circumstances surrounding his testing of the evidence in this case and the circumstances surrounding the proficiency test. *See Mordenti v. State*, 894 So. 2d 161, 173

(Fla. 2004)("due process and fairness dictate that this information [] revealed to the State should have been provided to both sides.").

The only reasonable and logical explanation for the State's failure to comply with the Court's 2002 Order is that it was intentional. The man who replaced John Fitzpatrick, FDLE analyst Shawn Johnson, attempted to explain why the Fitzpatrick discovery material was not furnished to the defense as follows:

> Q. Okay. Do you remember -- do you have a specific recollection of what you did to respond to this order [compelling the production of FDLE records]?
> A. I believe I wrote a response letter to that. But over the years the way we've handled the discovery orders have changed depending on the availability of a staff assistant or the -- what's being requested of the discovery order. I haven't put my hands on a specific -- I haven't done anything for a discovery order in several years. But then at that -- I believe at this time the analysts were asked to actually write a response to each discovery order.
> Q. Okay. Now, do you remember that -- according to that order you had 30 days to furnish all the information in that order to the defense in this case.
> A. That isn't one of my responsibilities as far as how they were even handled then and now. I typically –even at this time, after the response was written, then the staff assistant or whoever would have access to the documents that are being requested, they would be responsible for that. There's several -- most of those documentations I'm not even -- I couldn't even put my hands on it.
> Q. Do you remember anything about your response to that order?
> A. Not specifically offhand.
> Q. What did Hap Hopkins tell you to do pursuant to that order?
> A. I don't know if he specifically asked me to write the letter or if I just assumed -- took it upon myself to write the letter. But then after I write the

response, then Hap Hopkins would review it to make sure that what I was saying was doable, so to speak.
Q. So you say after you write a letter -- and who are you writing a letter to?
A. Whoever is requesting it. I guess in this case it would be Bill Gross.
Q. Okay. And that is on Composite U3 and U4 on December 4th of 2002. You tell Mr. Gross "the following is in response to a court order for discovery material related to DNA examination conducted in this laboratory in regards to. . . [the Simmons case]." And with regards to Request F, regards to all proficiency test results of any and all analysts that were involved in the case of State versus Eric Simmons, were you responsible for ensuring that the proficiency test situation with Mr. Fitzpatrick was furnished to the defense?
A. No.
Q. Who was responsible?
A. I don't know. I don't know if that would fall -- who that would specifically fall on.
Q. Is the information concerning John Fitzpatrick and his proficiency examination, is that something that should have been furnished to the defense pursuant to this court order?
A. I don't know. It depends on how you -- the fact that there was no data -- finalized data, reported. I don't know what the definition of "involved in the case" would be. I guess that would be an individual's perception.
Q. So to this day, you doubt whether the John Fitzpatrick material should have been furnished to the defense in the Simmons case?
A. It's not for me to say. All I know is what I see. That discovery order, that's the only documentation of any proficiency as far as the letters of passing or failing that I can put my hands on are my own. So other than that – like I said, I don't know who can put their hands on that material, let alone whose responsibility it would be.
Q. Okay. I'm going to -- referring to U4 of this 696-page exhibit. You said specifically, "I only have access to proficiency test material regarding my own" -- "I only have access to proficiency test material regarding myself, these results that we provided." And then you said, "The materials are lengthy and you can come inspect them at the laboratory at a mutually

agreeable time."
A. Correct. That was a generic response as far as – because if you take all the proficiencies that are on file -- if you actually want to look at the data in the actual files there, each one would have a specific file.
Q. And on December 4th, 2002, you had absolute personal knowledge about John Fitzpatrick and the proficiency test problems?
A. Yes, yes.
Q. Why did you not specifically address John Fitzpatrick and his proficiency test problems as you were addressing Request F in the order?
A. Because, like I said, I don't know -- I can't put my hands on those items so I can't promise something -- to be honest with you, I don't know if I can put my own hands on my own stuff, the actual data. I would have to go through the proper channels to do that. As far as what I can have of my own stuff or own paperwork, it's just the certificates or letters of passing or failing. So I would definitely not go into John Fitzpatrick's or anybody's because there's other analysts involved in the case as far as who proofed the file and as far as technically and administratively, who second sized, and so on and so forth. So I'm just addressing my own.
Q. Why did you not say here under request F, I personally know that John Fitzpatrick changed the answers on his proficiency test after I technically and administratively reviewed that proficiency test?
A. I just wouldn't have done it because I had many, many other discover orders and so -- I mean, it's not a – this letter is intended to be just a generic response on what can and cannot be basically provided without them – the individuals coming to the lab. A lot of stuff was – and at that time not on CD and now a lot of things are on CDs. So I'm not specifically even aware what they can get as far as having to come to the lab. So the basis of that is just a generic response.
Q. Okay. So you're talking -- personally you say you don't even have access. Did you go to your supervisor, Mr. Hopkins, and say, Look, regarding all the John Fitzpatrick proficiency test fiasco, can you help me respond to this court order?
A. No. I responded in that fashion, gave it to Hap Hopkins, and he reviewed it. I didn't ask him

specifically anything about John.
Q. So you did, in fact, review this December 4th, 2002, letter to Mr. William Gross. You shared that. You consulted your supervisor in that regard?
A. I just wrote it and then he looks it over just like any document that he would look at before it would go out of the lab to just ensure that there's no mistakes or I'm not -- I'm promising something that we can't give, so just general review of the letter.
Q. Did he tell you -- did he say, wait a minute, Shawn. We have to tell them about the John Fitzpatrick situation?
A. Not to my recollection, no.
Q. Did he tell you, we're going to keep that hush-hush?
A. No. Not that I recall. I don't remember any – like I said, I don't recall any specific mentioning of John. It was just routine. To my recollection -- and there's no reason for me to think any different -- I gave it to him. He reviewed it and I didn't see it again.
Q. Now, Request G involves a complete copy of the personnel files for any and all analysts that performed work in the Eric Simmons case. And you state here in your letter that these will be provided.
A. Yes.
Q. With regards to John Fitzpatrick, did he do work in the Eric Simmons case?
A. He worked on some evidence before I got it, yes.
Q. Was he the primary analyst in the Eric Simmons case for over a month?
A. Yes.
Q. Did you have the responsibility to turn over the John Fitzpatrick internal investigation files to the defense?
A. No.
Q. And why is that?
A. It's not my job. I wouldn't be able to put my hands on those documents.
Q. Whose job would that be?
A. I believe all the permanent records are kept in Tallahassee. And so at that time I don't know whose responsibility that would be.

(Vol. XXVI PCR 1326-1333). Ultimately, the responsibility to furnish all of the John Fitzpatrick information would be on the

state attorney handling the case. The Fitzpatrick information was in the possession of the state attorney's office in May of 2002. It should have been immediately turned over to the defense as *Brady* material on the State's own initiative. In the alternative, it was obviously subject to disclosure pursuant to the Court's November 2002 Order. The prosecutor handling the case had a duty in at least a supervisory capacity, or as an officer of the Court, to ensure full disclosure to the defense. The prosecutor failed in this regard, and he should therefore not be afforded the benefit of retaining the unconstitutional conviction and death sentence in this case.

Even though the prosecutor in this case conducted an *ex parte* investigation into the fraudulent affairs of FDLE's John Fitzpatrick, he claims not to have read the John Fitzpatrick internal affairs files or FDLE's response to the discovery order carefully. Curiously, a handwritten note on the cover of the responsive material reads "BILL-HERES THE FILE YOU REQUESTED." (Vol. X PCR 1917): The prosecutor, Bill Gross, testified as follows at the evidentiary hearing:

> Q: So you're saying that you didn't read Shawn Johnson's December 4th, 2002, letter to you carefully?
> A. I'm saying I probably did not. I may have, but I sure don't remember reading it and I would guess that I did not read it carefully because, again, it was not information that I was really interested in. I don't understand DNA. This would be something I'm sure Bill Stone and James Baxley were the ones seeking the information and wouldn't have looked at either. They

> would have immediately ordered [sic] to their expert. And almost every trial attorney I know would have done the same thing because we're not DNA experts. So no, I wouldn't -- didn't read the letter very carefully and I apparently didn't read the order that carefully either because this is not information that I have any control over. This is FDLE's records that the order was talking about. And yet they're putting the burden on me to cause these things to be released.
> Q. Okay. And did you read Joe Brinson's – the report carefully back in May of 2002? [the Internal Affairs Investigative Report with a Sustained Finding of Falsification of Records at Vol. X PCR 1917-1968]
> A. I doubt it.

(Vol. XXVII PCR 1521). It is unfathomable the prosecutor would fail to review this *Brady* information and fail to furnish it to the defense following a court order compelling its production. It is unconscionable that that the defense would have to wait over 6 years to receive Mr. Fitzpatrick's signed report in this case (*see* report at Vol. XIV PCR 3341-49), and that it would remain hidden in a segregated Fitzpatrick file in Mr. Hopkins' desk drawer for so long. (*see* Mr. Hopkins' testimony at Vol. XXVI PCR 1246-47).

In sum, though required by law and court order, the State failed to disclose records concerning John Fitzpatrick's proficiency test, failed to supply his internal affairs records, and failed to turn over a signed report documenting his extensive involvement in this case. The Appellant's Motion for Entry of Default Judgment filed after the evidentiary hearing should have been granted in this case (*see* Motion at Vol. V PCR

911-919). Instead it was wrongly denied without written order.

Sherry Renfro Lied at Trial, and the State Knew She Lied

Sherry Renfro was a very important witness for the State at trial because she allegedly was able to identify Mr. Simmons' vehicle as the vehicle involved in an alleged kidnapping in progress. But, this Court found as follows on direct appeal: "[W]e agree that showing Ms. Renfro one picture of Tressler and one vehicle was 'unduly suggestive.'" *Simmons, Id.* at 1119. Not only was Renfro's identification the product of unduly suggestive procedures, but it was strongly influenced by her desire to stay out of prison, unbeknownst to the jury. Additionally, the jury did not hear evidence that Sherri Renfro came into possession of the deceased's trailer prior to the trial, sometime in late 2001 or early 2002. (Vol. XXV PCR 1015).

Before providing her eyewitness identification, Sherri Renfro was asked the following preliminary questions at trial by the state:

> Q: All right. Ms. Renfro, are you on probation?
> A: Yes.
> Q: Is that here in Lake County?
> A: Yes.
> Q: Okay, and are you in trouble with your probation officer or anything like that?
> A: No.
> Q: Are you at risk of going to jail or anything like that?
> A: No.

(Vol. XXVI R 3251). Sherri Renfro ***was*** at risk of going to jail

at the time she testified! In the aforementioned September 25, 2003 letter to Judge Boylston (defense exhibit 43), the prosecutor informed the judge that Sherri Renfro was "quite concerned that [he] would issue a capias." (Vol. XIV PCR 3406). The jury never heard that evidence. On July 22, 2003, Judge Boylston gave her a 20 day suspended jail sentence and 90 days to complete the conditions of sentence. She was required to pay court costs and attend a parenting class by September 22, 2003. At the time of her testimony in Simmons in mid-September 2003, she knew that she would not have the conditions imposed by Judge Boylston completed by the September 22, 2003 deadline; and she knew that she faced a 20 day jail sentence for her failure to complete those conditions. For her to answer the prosecutor's question in front of the jury that she was not at risk of going to jail at the time of her testimony was obviously false. She knew it was false, and the prosecutor obviously knew the testimony was false as evidenced by his letter to Judge Boylston concerning her fear of a *capias*.

This constitutes a *Giglio* violation: had the truth been revealed regarding the true motives for her testimony against Simmons, Simmons would possibly have been acquitted. This false testimony definitely affected the jury's deliberations. There is a reasonable likelihood that the false testimony would have affected the judgment of the jury.

Regarding the notion that Sherri Renfro could violate her felony probation and end up in jail, there was candidly little possibility of this happening. But this is only because the prosecutor basically gave her a Get-Out-of-Jail-Free card, and she repeatedly used that card to avoid being violated by her probation officers. *See* her probation file notes, Vol. XIII PCR 2835-2846, reflecting how she perilously came close to violating her probation and going to prison, yet, the prosecutor personally made calls for her and kept her out of trouble.

Failure to Correct Jose Rodriguez's False Testimony, Sponsoring of his False Testimony

Jose Rodriguez was asked the following questions at trial by the State:

> Q: Have the police or myself, the State Attorney's Office, done anything to help you on your case: reduce your sentence, give you any kind of preferential treatment at all?
> A: No.

(Vol. XXIII R 2797). This testimony was false and the State knew it was false. In a taped interview dated December 4, 2001 with Detective John Herrell, Jose Rodriguez informed that he knew where Eric Simmons lived, but first he needed fifty dollars to bond out of jail. He provided the name "Trini" to law enforcement as his bail bondsman. *See* Jose Rodriguez statements at Vol. XVII PCR 5164-5299.

During the taped jail interview, Detective Herrell then

attempted to help Jose Rodriguez bond out by calling his bondsman. Throughout the first part of the interview, Mr. Rodriguez stated several times that he needed fifty dollars. By calling his bail bondsman and assisting in this regard, law enforcement did in fact do something to help in his case, contrary to his trial testimony.

For these reasons, including the State's failure to correct the false testimony of Sherri Renfro, Jose Rodriguez, and Shawn Johnson (regarding the true reason why he failed to use the victim's blood as a standard in his DNA testing), all clear and *Giglio* or *Brady* violations, this Court should grant relief.

ARGUMENT IV

MR. SIMMONS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE ASSISTANCE OF A MENTAL HEALTH EXPERT DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Introduction

When Eric Simmons was just a toddler, he almost died too early. At the evidentiary hearing Eric's father Terry Simmons gave this account of Eric's brush with death:

> I was working night shifts. My wife was working during the day. Eric and I -- I watched him during the day while she worked. And Eric and I had went over to Grandma's house to see my mother. And we were just spending some time with her, hanging out with her. Eric went down for a nap and my mother covered him up with this quilt. And I went into check on him. I guess it was probably an hour later. I think my

> mother had looked in on him a couple of times. And when I walked in, I noticed that the blanket was extremely tight, wrapped around his whole body and his head. I mean, I had a hard time loosening it from around him. I got it from around him and I thought he was dead. He wasn't breathing. I shook him and picked him up and screamed for my mother. She came running in and then she took him from me. She said, "Oh, my God, Terry, let's get the ambulance out here." I said, "No, Momma, I'll take him. Let's go."
>
> At that time I had a '66 Chevelle with 419 horsepower. It ran 11 seconds to a quarter mile. I don't need to explain to you how quick we got to the hospital. Well, we took him and on the way my mother was steadily praying and shaking him and breathing in his mouth and trying to keep him going. And his little old head would just fall to the side. There was no life in him. Every now and then he'd just kind of grunt, kind of like he was trying to get air.
>
> I pulled up to the emergency room entrance and I grabbed him and run. I went into the emergency room there. I told the doctor, "I think my son's dead." They grabbed him and took off with him. They wouldn't let me go any further. They came out, I guess it must have -- it seemed like a long time. It must have been no more than an hour or so, I guess, but it seemed longer than that. They came out and told me that they thought he might be okay. The only thing they were worried about was that he was without oxygen as long as he was and that I needed to follow up through a specialist and make sure that his brain was okay and I told them I would.

(Vol. XXVIII PCR 1699-1701).

In one sense, the blanket has never really been removed from Eric Simmons' neck. Because of the loss of oxygen his brain never fully developed. This caused him to make poor decisions, left him alienated from his peers in school and from the greater world in which he lived as an adult. Tracing

backwards, many of the difficulties he experienced resulted from that blanket. While the blanket forever changed his life, something profoundly the same ties him to the child that went with his dad to see his grandmother that day.

Terry Simmons did not race to the hospital to save young Eric's life so that years later Eric could be executed. Eric's grandmother's prayers were not a petition for Eric to live long enough for the Governor to sign his death warrant. Both knew that young Eric's life was important and worth saving. The jury in this case did not know this when they recommended the death penalty. This was the fault of defense counsel because, when Eric Simmons' life was imperiled by the guilty verdict, just the same as when his life was imperiled by the blanket, counsel failed to act in a decisive and effective manner. Mr. Simmons should receive a new penalty phase where a jury can evaluate all of the mitigation that could be presented, from the blanket to today.

Mr. Simmons' Penalty Phase

Mr. Simmons did not have a real penalty phase, or at least anything approximating the type of determination that Florida's death penalty system requires. The reason for this was that counsel was ineffective in preparing and presenting a case for Mr. Simmons' life. The testimony at the evidentiary hearing proved that there was much more mitigating evidence that could

have been presented had counsel acted effectively in preparing for the penalty phase of Mr. Simmons' trial.

At the penalty phase, counsel presented the testimony of two witnesses; Sergeant Craig Leslie and Mr. Simmons' sister, Ashley Simmons. The testimony of these witnesses did little in support of Mr. Simmons' case for life. Indeed, Mr. Simmons' case for life was actually harmed by counsel's presentation of mitigation because it allowed harmful information to be presented to the jury.

Defense counsel called Sergeant Leslie first. He was the Classification Supervisor for the Lake County Jail during the approximately 21 months Mr. Simmons was incarcerated waiting trial. Through Sergeant Leslie, trial counsel elicited that Mr. Simmons was assigned to maximum security and protective custody. (Vol. XXXII R 4595-97). Sergeant Leslie established that Mr. Simmons had been placed in disciplinary confinement after he was in a fight with another inmate, although, according to Sergeant Leslie, this was not surprising based on the length of time Mr. Simmons was housed in the jail. (Vol. XXXII R 4597). Sergeant Leslie then established that Mr. Simmons asked to be isolated from other inmates after being found guilty because "he wanted to hurt somebody." (Vol. XXXII R 4597-98).

During cross-examination, made possible by calling Sergeant Leslie as a witness in the first place, the State delved into

the fight. (Vol. XXXII R 4598). The State established that Mr. Simmons allegedly would not stop fighting with the other inmate and that correction officers had to take Mr. Simmons to the ground and physically restrain him. (Vol. XXXII R 4599). As the fight was being broken up, Mr. Simmons allegedly threatened to "get" the other inmate. (Vol. XXXII R 4600).

Continuing to present "mitigation," trial counsel called Mr. Simmons' sister Ashley Simmons. (Vol. XXXIII R 4625). Ms. Simmons' testimony described, with little detail or expansion, Eric Simmons' love of animals, the closeness of his family and that Mr. Simmons' dog still looked for him. (Vol. XXXIII R 4629). Without adequate preparation for her testimony, Ms. Simmons proceeded to question the victim's family ties and testify that Eric Simmons' father thought that there was "something kinda funny" about the victim." (Vol. XXXIII R 4630).

The defense rested, ending Mr. Simmons' opportunity to present witnesses in favor of his life. (Vol. XXXIII R 4631). Outside the presence of the jury, defense counsel placed on the record a summation of the evidence that would not be presented in favor of Mr. Simmons: Dr. McMahon's testimony and Mr. Simmons' school and mental health records. (Vol. XXXIII R 4633).

Ms. Orr made the defense closing argument. She argued that Mr. Simmons came from a loving family and then used the rest of

her brief argument to quarrel with the jury about the jury's verdict and apologize for not doing a better job defending Mr. Simmons. (Vol. XXXIII R 4649-50). The jury's recommendation by all 12 jurors was death. (Vol. XXXIII R 4664).

The lower court held a *Spencer* hearing at which psychologist Dr. Elizabeth McMahon testified. (Vol. XXXIII R 4719). Dr. McMahon testified she saw Mr. Simmons on three occasions, the last of which was on September 18, 2003, the day after the trial. (Vol. XXXIII R 4719). Dr. McMahon conducted psychological tests and reviewed documents provided by the Public Defender's Office before Ms. Orr took over the case. (Vol. XXXIII R 4720). Dr. McMahon also interviewed Mr. Simmons and talked briefly with his mother on one occasion. (Vol. XXXIII R 4720). Dr. McMahon did not find that there was the "underlying rage," "repetitive kind of behavior" or "the level of aggression" in Mr. Simmons typically seen in individuals who commit the type of homicide seen in this case. (Vol. XXXIII R 4723). Regarding whether this would be different if Mr. Simmons was under the influence of alcohol or drugs, Dr. McMahon stated: "[A]lcohol in particular and some drugs, are disinhibitors, but they disinhibit one and therefore allow what is under there to come to the surface because we are particularly disinhibiting the frontal lobe controls. But there has to be something under there to surface, and it just wasn't there." (Vol. XXXIII R

4723). Or, at least Dr. McMahon did not find what "was there" because counsel was not fully prepared and informed by counsel.

Dr. McMahon indicated that Mr. Simmons had a lack of emotional maturity and testified that he had a:

> moderate to severe learning disability, and what that means is that he does not process things in terms of language well, he doesn't't process things it the way most of us do. It was a problem for him throughout school and a great frustration for him. So, he is not likely to process a disagreement or a conflict verbally in the same way, or cognitively in the same way that most of us would do.

(Vol. XXXIII R 4723-24). Dr. McMahon discussed that Mr. Simmons experienced frustration while in school and was involved in scuffles in school. (Vol. XXXIII R 4726-28).

Dr. McMahon found that Mr. Simmons was "not verbal. He does not express himself well. His level of - - he is likely to say 'uh-huh' if you ask him does he understand it, and then if you say give it back to me, he can't." (Vol. XXXIII R 4727). Dr. McMahon found that Mr. Simmons could not "recite or write the alphabet accurately. ... [I]f you can't do that, you've got a major problem going on there." (Vol. XXXIII R 4727-28). Indeed, Mr. Simmons was so impaired intellectually that Dr. McMahon could not use the MMPI because she "was afraid that even reading it to him . . . his understanding of what the sentence was and what is in fact meant by the sentence would be two different things." (Vol. XXXIII R 4728).

Dr. McMahon's *Spencer* hearing testimony was a good start to what could have been a fully developed mitigation presentation to the jury. Even if Dr. McMahon's evaluation of Mr. Simmons was all that was presented to the jury there still was a reasonable probability of a different outcome, and with a full presentation of all of the favorable mitigation, as the evidentiary hearing showed, the probability that the outcome would have been different was almost a certainty.

The Compelling Weight of the Postconviction Mitigation.

Mr. Terry Simmons, Eric Simmons' father, speaking truthfully and forthrightly, shared his testimony with the lower court - - testimony that the jury never heard. Terry Simmons testified about when Eric almost suffocated, his and his family's ties to the community, his own personal transformation and his son's character. (Vol. XXVIII PCR 1688-1706).

Terry Simmons' testimony showed that with adequate explanation, his prior conviction was not something that would have hurt Eric Simmons' case for life but would have greatly added to it. Terry Simmons' testimony was available if counsel simply took the time to develop Mr. Simmons as a witness. Indeed, even standing alone, the testimony would have led to a reasonable probability of a different result if counsel had developed it. Mr. Pfister, the procedurally-qualified capital attorney never sat down and talked with Terry Simmons and did

not invite Terry Simmons to come meet with him. (Vol. XXIII PCR 772-74).

The lower court heard the testimony of Dr. Henry Dee, a board-certified Neuropsychologist. Dr. Dee met with Mr. Simmons three times at the Union Correctional Institute. (Vol. XX PCR 73). Dr. Dee conducted comprehensive neuropsychological testing and found that Mr. Simmons exceeded only eight percent of the general population in his general and intellectual functioning. (Vol. XX PCR 73-74).

Dr. Dee found that Eric Simmons' suffocation was the etiology of the problems that showed up later in Eric's "life in terms of his learning and behavioral control." (Vol. XX PCR 76). Based on this traumatic oxygen-deprivation, Dr. Dee recommended that a PET scan be conducted. (Vol. XX PCR. 76). Dr. Wood performed the PET scan on Mr. Simmons, the results of which supported Dr. Dee's neuropsychological opinion. (Vol. XX PCR 76, 80). Mr. Simmons' neuropsychological impairment meant:

> [Y]ears of problems with education. He never learned to adequately read and still isn't a fluent reader. And this sort of impairment obviously contributes to behavioral problems in two ways. There's a primary impairment of behavioral control. The most common symptom of cerebral damage disease or injury is probably increased impulsivity. And in children, hypoactivity or hyperactivity is accompanied by frequent aggressiveness and he certainly showed that in abundance while in school. And this sort of impairment also leads to problems with self regard, which is sort of a secondary source of problems.

> Indeed, when I was interviewing Mr. Simmons, I asked him if he had ever been in any special programs in school and his comment to me, Yes, I was one of those SLD kids, the slow learning dummies. And that was not inconsistent with the way he had referred to himself in school. He always felt that he didn't belong in SLD, that it meant that he was retarded despite being reassured frequently that he wasn't retarded. He tended to interpret that way throughout school.
>
> He told me that this led to problems with his social acceptance. He told me some very poignant stories about having been abandoned by friends and peers when they found that he was in the SLD class. It led to lots of scuffles and fights when other children teased him about it. And it ensured - - he felt that he got in lots of trouble in school because of his reactions to those things and those kinds of teasings from other children.

(Vol. XX PCR 81-82).

Next, Dr. Dee discussed the significance of Mr. Simmons' brain damage as it related to the criminal conduct at issue. (Vol. XX PCR 82). Any sort of brain damage, such as that of Mr. Simmons "results in increased impulsivity." (Vol. XX PCR 82). Dr. Dee thought that it was "kind of obvious what that means in terms of this crime." (Vol. XX PCR 82). It also led to "pervasive maladjustment" on the part of Mr. Simmons, as exhibited by his decision to leave school because he was "so terribly frustrated by his inability to learn new things." (Vol. XX PCR 83).

Dr. Dee found that as a result of these impairments Mr. Simmons developed a borderline personality disorder. (Vol. XX PCR 83). This affected Mr. Simmons' ability to form

relationships and interact with other people and resulted in Mr. Simmons leading an isolated life. (Vol. XX PCR 84). Dr. Dee found that Mr. Simmons also suffered from ADHD but received no treatment. (Vol. XX PCR 85-86).

Mr. Simmons suffered from borderline personality disorder, ADHD and brain damage which led to poor impulse control. Dr. Dee explained that these impairments "potentiate each other." (Vol. XX PCR 86). In other words, each makes the other more enhanced and more powerful. Mr. Simmons never completed high school because of his impairments which limited his occupational opportunities. Mr. Simmons' alcohol and drug abuse, in addition to, and in combination with his other impairments, affected his functioning as an adult to an even greater extent than an individual who did not suffer from these impairments. (Vol. XX PCR 90). "People with brain damage are relatively more sensitive to the effects of alcohol and all other intoxicants." (Vol. XX PCR 90).

For Mr. Simmons, it was "more difficult for him to adjust to any changes in the environment because of his brain damage." (Vol. XX PCR 92). Terry Simmons' incarceration caused Eric Simmons a great deal of embarrassment and rejection. (Vol. XX PCR 92). "[I]t was a very difficult time for him . . . even after his father 'came back' although things were helped greatly by his father's return. . .." (Vol. XX PCR 92).

Dr. Dee found the mitigating factor that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance":

> because of the extensive effects of the brain damage he had in early childhood. It has effects both on his ability to learn and the social factors that are associated with learning and the learning disabilities and the mental limits. And secondly, because it impairs one's ability to adequately control oneself . . . one of the most frequent sequelae of cerebral damage is increased impulsivity and irritability. Those are - - if you go through all the studies of brain trauma, for example, those are the two most common symptoms that are noted.

(Vol. XX PCR 93-94). These conditions were present when Mr. Simmons allegedly committed the offense. (Vol. XX PCR 94). Dr. Dee found that Mr. Simmons' ability "to conform his conduct was substantially impaired" . . . "because of the increased impulsivity in and of itself and the increased irritability." (Vol. XX PCR 94, 95). Even at 27, the age that Mr. Simmons allegedly committed the offense, Mr. Simmons was not "as far along in terms of his intellectual and emotional development as most people his age are." (Vol. XX PCR 95).

Heidi Hanlon-Guerra conducted a psychosocial evaluation of Mr. Simmons with special attention to any substance abuse issues. (Vol. XXI PCR 328). She reviewed a number of materials, met with Mr. Simmons two times and interviewed Mr. Simmons' family. (Vol. XXI PCR 329). Mr. Simmons' family all lived in the Lake County Area. (Vol. XXI PCR 332). Ms. Hanlon-Guerra

described Mr. Simmons' relationship with his father, Terry Simmons, as one in which they both expressed that they loved one another although they butted heads over the years. (Vol. XXI PCR 333). Terry Simmons went to prison for three years when Eric Simmons was 7 years-of-age. (Vol. XXI PCR 333, 334). Ms. Hanlon-Guerra described the effect on Eric Simmons:

> Well, Mr. Simmons told me that he had actually seen his father get arrested, and he said to this day that he remembers it very clearly. It's still upsetting. When I spoke with his mother, she said that he seemed sad after his father was arrested and somewhat down and withdrawn. His Aunt Ruby said the same thing, that Eric had a hard time with it. And his Uncle Larry said that he seemed to miss the male role model in his life. And he also identified it as sad.

(Vol. XXI PCR 334).

Ms. Hanlon-Guerra explained that Mr. Simmons began drinking alcohol from family members' glasses when he ten years old. (Vol. XXI PCR 336). When he was younger he used LSD and mushrooms a few times and he huffed glue once. (Vol. XXI PCR 336). Leading up to his arrest in the instant case, Mr. Simmons would get off of work and drink a 12-pack every day. (Vol. XXI PCR 337). On the weekends he would drink a whole case of beer and smoke marijuana. (Vol. XXI PCR 337). Mr. Simmons' "family members identified that when he was drinking he was somewhat confrontational and argumentative." (Vol. XXI PCR 336). Ms. Hanlon-Guerra related that alcohol "hinders people's ability to respond" and "[i]t slows down the thought process . . .."

(Vol. XXI PCR. 336). It also caused Mr. Simmons to have problems with the legal system. (Vol. XXI PCR 337).

Ms. Hanlon-Guerra obtained positive information about Mr. Simmons' character and relationships during her evaluation. Mr. Simmons helped his Aunt Ruby with chores around Aunt Ruby's house and refused to take any money. (Vol. XXI PCR 338). Mr. Simmons' mother reported to Ms. Hanlon-Guerra that Mr. Simmons was "her little buddy and did everything for her." (Vol. XXI PCR 339). Mr. Simmons lived near his grandmother and helped her with the flower bed. Mr. Simmons would go and see what Great Aunt Mildred needed and take her tea. (Vol. XXI PCR 339). At the evidentiary hearing, this positive mitigation was supported by the testimony of Mr. Simmons' family.

It was ineffective for counsel to not obtain the services of a mitigation specialist such as Ms. Hanlon-Guerra. Mr. Pfister could not say that he ever had a conversation with Ms. Orr about hiring a mitigation specialist to conduct interviews with the family. (Vol. XXIII PCR 781). Mr. Pfister believed "that alcohol was talked about." Mr. Pfister never had an expert discuss Mr. Simmons alcohol problem with him. (Vol. XXIII PCR 782). Mr. Pfister simply did not know the extent of Mr. Simmons' alcohol problem. (Vol. XXIII PCR 782). It was also ineffective for counsel to fail to develop this information themselves. Many of the people Ms. Hanlon-Guerra talked about

were available at the time of the penalty phase and actually testified before the lower court at the evidentiary hearing.

Dr. Wood analyzed the results of Mr. Simmons' PET Scan and was accepted as an expert in neuroscience PET scan and forensic neuropsychology. (Vol. XXVIII PCR 1768). Dr. Wood found that visual inspection of Mr. Simmons' brain showed a "major asymmetry between the two sides of the thalamus in the amount of activations going on." (Vol. XXVIII PCR 1782). Dr. Wood described what takes place in this part of the brain:

> If you imagine the brain as a concrete block building with no windows, then somewhere in the middle of that building there would be a telephone switchboard and there would be television monitors describing -- or displaying what the camera sees is going on in the outside world. Now, to take the analogy fairly far -- although I think it's still reasonable — it's as though we had a building in which people were talking to each other on their desk telephone inside the building and they were talking about any sorts of thing they might imagine going on in the outside world or any sorts of interpretations they might have about what's going on in the outside world, but they're not getting -- at least half their telephone lines from the outside world are not working well.
>
> And as general matter, because the thalamus also produces visual information, they're not able to see all that much of what's going on in the outside world. And because the thalamus drives and intensifies brain activity, it kind of sets the thermostat for brain activity; it's like they're getting low-amplitude signals from the outside world. So that's leaving them to do a lot of talking that's less well informed by what's going on out there. You might say, "Well, we're in a hurricane." "Well, is it safe to go outside?" I don't know. Let's look at the monitor. Well, the monitor is not working too well. I can't really tell from the monitor. That's the analogy I'm giving.

(Vol. XXVIII PCR 1788-89).

Dr. Wood described empathic intelligence: "Empathy means a particular way of reading the outside world, which is understanding other people's feelings." (Vol. XXVIII PCR 1789). "Empathy is a left hemisphere process . . . located in the temporal lobe." (Vol. XXVIII PCR 1789). The temporal lobe "is perhaps the one area that is most sensitively related to the thalamus . . .." (Vol. XXVIII PCR 1789). It can be assumed that Mr. Simmons' "empathic intelligence is reduced because his left thalamic activity is reduced." (Vol. XXVIII PCR 1789). Dr. Wood found that Mr. Simmons was an individual who has "considerable difficulty . . . 'getting it' in a social context or for that matter in an intellectual context." (Vol. IX PCR 1789-90). The scan that Dr. Wood took of Mr. Simmons was the scan "of a person who has real trouble understanding the people or the social context around him." (Vol. XXVIII PCR 1790).

Dr. Wood noted that Mr. Simmons had a history of acting out. (Vol. XXVIII PCR 1790). Dr. Wood explained how the PET scan indications of Mr. Simmons' brain affected this behavior:

> Well, the thalamus is involved in - - it sounds paradoxical, but it energizes the stop system of the brain as well as the go systems. So the thalamus is a structure which, when it gets an emergency message or even kind of an eyebrow - - raising behavior from somebody out in the environment, the thalamus registers, wait a minute, we might be doing something wrong here, hazardous or dangerous or whatever, and we

> need to stop. And the thalamus energizes that stop system and gets it engaged. So it is not at all unexpected that we could expect a history of impulsive acting out in this case. We have to know that it was corroborated, but it would be consistent with these findings.

(Vol. XXVIII PCR 1790-91).

Dr. Wood found the mitigating factor that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and stated:

> In my opinion, the PET scan on that mitigating factor is sufficient to give me a comfortable opinion that he's substantially impaired under the adverse influence of this brain condition that is the mitigator you're describing. In other words, to me, the PET scan, standing alone with no other corroborating data, would tell me that there is that level of impairment. Obviously, I think it's stronger if it's corroborated by the behavioral evidence but I'd be comfortable in saying so on the basis of the scan with respect to that mitigator.

(Vol. XXVIII PCR 1791). Mr. Simmons' condition was a constant condition, (Vol. XXVIII PCR 1791), and well corroborated by the testimony of Dr. Dee and Heidi Hanlon-Guerra and by Dr. Wood speaking with Mr. Simmons' parents. The behavioral evidence Dr. Wood spoke of would have been readily available if there was an effective investigation by trial counsel.

Dr. Wood found the mitigating factor that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" based on the PET Scan and on Dr. Wood's

consultation with Dr. Dee. (Vol. XXVIII PCR 1792-94). Dr. Wood explained that if there was "behavioral and cognitive test score evidence of cognitive disability of the kind that leads to this second mitigator, then in [his] opinion, this PET scan strengthens that evidence, if there is not such evidence," Dr. Wood did not "believe that the PET scan would demonstrate it standing alone." (Vol. XXVIII PCR 1794). Of course there was evidence of Mr. Simmons' well-documented cognitive disability in the findings of Dr. Dee, Heidi Hanlon-Guerra and indeed, those of State postconviction witness Dr. Betty McMahon.

Mr. Simmons Was Denied the Effective Assistance of Counsel During Penalty Phase

In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court found that counsel was ineffective for failing to develop and for failing to present mitigating evidence. In *Williams*, the defendant had a much more severe criminal history than Mr. Simmons. Mr. Williams, apart from the capital offense, had a criminal history that included violent assaults on the elderly, one of which left Mr. Williams' victim "in a 'vegetative state.'" *See Id*. at 368. Mr. Simmons had no comparable criminal past. The State, seeking Mr. Williams' death, presented the fact that Mr. Williams set a fire in jail and presented the testimony of two "experts" that Mr. Williams would pose a serious continuing threat to society. *Id*. at 368-

69. Mr. Simmons had his *own* counsel present evidence that Mr. Simmons had been in a fight and that he asked to be isolated upon being found guilty.

The Court described the mitigation evidence offered by Williams' trial counsel at the sentencing hearing:

> which consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot. The three witnesses briefly described Williams as a "nice boy" and not a violent person. *Id*., at 124. The recorded psychiatrist's testimony did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

Id. at 369-70. More deficiently, Mr. Simmons' counsel did not call either one of Mr. Simmons' parents during the penalty phase and did not even provide a tape recorded statement of a mental health expert to the jury. The one witness that counsel called besides Sgt. Leslie was Ashley Simmons who disparaged the victim and the victim's family.

The most striking similarity between Mr. Simmons and Mr. Williams was that they both have the same level of intellectual functioning. Counsel in *William*s failed to present that Mr. Williams was "borderline mentally retarded" (*Id*. at 396), just as Mr. Simmons' counsel failed to present the same readily available evidence from school records and Dr. McMahon to Mr.

Simmons' jury.

The United States Supreme Court found that Mr. Williams' counsel were deficient despite the potential negative side to the evidence that counsel should have introduced because, "as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Id*. at 396. As seen in postconviction, there was overwhelming mitigation that could have been presented on behalf of Mr. Simmons, without any further development than what was available from Dr. McMahon, and to a greater extent if counsel had acted fully as the counsel the Sixth Amendment requires.

Worse than in *Williams*, in Mr. Simmons' case, Ms. Orr had no discernable strategy except to not put any real mitigation so that Mr. Simmons' could receive the death penalty. Ms. Orr felt that, after Mr. Simmons received the death penalty, he "at least ha[d] the opportunity to be back here with the fine help of CCRC. He would not have had that opportunity had he gotten life." (Vol. XXVIII PCR. 1641). Ms. Orr stated that she "did not have anything to do with the penalty phase to speak of or at least [she] didn't intend to because [she] was really hoping that [they] wouldn't get there. [A]t least with the death penalty he does have the benefits of being able to come back."

(Vol. XXVIII PCR 1641-43). Ms. Orr and her staff's "concern was the guilt phase because that was what was important. The penalty phase [they] were hoping to never get to." (Vol. XXVIII PCR 1643). Mr. Pfister, the procedurally-required first chair, did virtually nothing for Mr. Simmons' penalty phase and failed to withdraw from the case when by his account, no one was listening to him.

Following the Court's decision in *Williams*, Mr. Simmons' death sentence should be vacated because counsel were ineffective. Clearly there was no reasonable strategy employed by counsel in Mr. Simmons' case and thus, counsel's performance was deficient. The idea that Mr. Simmons' would be better off with a death sentence so that he could receive the assistance of CCRC was both absurd and incorrect. Both state collateral review and federal habeas corpus review would have been available if Mr. Simmons was sentenced to life and this Court's statistically few grants of relief hardly justified a course of action that Mr. Simmons was better off sentenced to death.

Rompilla v. Beard, 545 U.S.374 (2005) also compels relief for Mr. Simmons. Rompilla's evidence in mitigation consisted of relatively brief testimony: "five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14–year–old son testified that he loved his father

and would visit him in prison." *Id*. at 378. In Mr. Simmons' case, counsel had one family member testify, Ashley Simmons. No one "beseeched the jury for mercy" but instead, Ms. Orr quarreled with the jury's verdict and Ashley Simmons questioned the victim's family ties in addition to presenting a limited amount of information on Eric Simmons.

On federal habeas review, the district court granted relief because, "the defense lawyers had failed to investigate 'pretty obvious signs' that Rompilla had a troubled childhood and suffered from mental illness and alcoholism, and instead had relied unjustifiably on Rompilla's own description of an unexceptional background." *Id*. at 379. (Citation to district court's opinion omitted). A divided federal appellate court reversed because defense counsel's performance:

> [I]ncluded interviewing Rompilla and certain family members, as well as consultation with three mental health experts. Although the majority noted that the lawyers did not unearth the 'useful information' to be found in Rompilla's 'school, medical, police, and prison records,' it thought the lawyers were justified in failing to hunt through these records when their other efforts gave no reason to believe the search would yield anything helpful.

Id. (Citing opinion the Court reversed).

In Mr. Simmons' case, defense counsel pretty much did not "unearth" any information relative to mitigation. For Ms. Orr, what was important was Mr. Simmons' innocence. This view fails to understand the importance of mitigation in avoiding the

execution of the innocent and guilty alike. To develop the overwhelming mitigation seen at the evidentiary hearing, Ms. Orr certainly could have taken the time to interview all the family members herself, sought funding for a mitigation specialist or asked the family to cooperate with Mr. Pfister because this was indeed important. Mr. Pfister, as the procedurally qualified "first chair" attorney, should have acted as such and asked Ms. Orr to utilize her special relationship with the family to ensure that the mitigation in favor of Mr. Simmons was fully developed and presented.

After Dr. McMahon's initial testing of Mr. Simmons and finding important mitigation concerning Mr. Simmons' intellectual functioning, Ms. Orr should have had Dr. McMahon continue to develop this mental mitigation. This should have included an analysis of Mr. Simmons' frontal-lobe impulsivity on the crime and on all of the decisions in Mr. Simmons' life that may have led up to the events in question. Moreover, if Dr. McMahon's view was that mitigation was only for the guilty and that PET Scans are bad strategy counsel was even more deficient than Mr. Williams' counsel who were found to be ineffective despite "consultation with three mental health experts." *Id*. at 379. Because Mr. Simmons stopped breathing as a toddler, *see* above, this was the least counsel should have done.

Rompilla also shows that Mr. Simmons' seeming lack of

interest in mitigation was of no account - - counsel's, at least Ms. Orr's, lack of interest was. The record in *Rompilla* showed:

> Rompilla's own contributions to any mitigation case were minimal. Counsel found him uninterested in helping, as on their visit to his prison to go over a proposed mitigation strategy, when Rompilla told them he was "bored being here listening" and returned to his cell. App. 668. To questions about childhood and schooling, his answers indicated they had been normal, ibid., save for quitting school in the ninth grade, id., at 677. There were times when Rompilla was even actively obstructive by sending counsel off on false leads. *Id*., at 663–664.

Id. at 381. It is also doubtful that Mr. Simmons, because of his cognitive difficulties, ever sought to send counsel anywhere, let alone whether he ever understood the nature of mitigation.

In *Rompilla*, counsel was deficient for their oversight in failing to review the court file which showed the start of mitigation, then failing to build from there. Counsel's deficiency in the instant case was even worse because through the school records, Dr. McMahon's minimal evaluation and the availability of all of Mr. Simmons' family members, counsel had the beginnings of well-developed mitigation and simply did nothing. In *Rompilla*, the United States Supreme Court concluded:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, . . . It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the

> evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

Mr. Simmons had equal or greater mitigation than what was seen in *Rompilla* and *Williams* which was readily at hand. Trial counsel failed to meet the standards of reasonable attorney performance during the representation and were therefore deficient. Counsel's deficiency during this critical phase of Mr. Simmons' case prejudiced Mr. Simmons 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 reverse.

ARGUMENT V

CUMULATIVE ERROR

Due to the errors that occurred individually and cumulatively in the lower court, this Court should grant relief from this unconstitutional conviction and death sentence, and/or remand for further postconviction proceedings.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Simmons respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. mail to all counsel of record this 6th day of July, 2011.

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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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