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

ERIC LEE SIMMONS

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE AND FACTS--REPLY

Pages 1-9 of the State's "Statement of the Case and Facts" simply block quotes portions from this Court's direct appeal opinion in *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006). The Appellant does not dispute that this was the Court's understanding of the facts of this case in 2006. But there have been significant developments since that time, and the factual and procedural landscape of this case has become more complex in this postconviction posture.

For example, in 2006, this Court was unaware that law enforcement had threatened the Appellant with death if he did not confess. The Court was also unaware that FDLE covered up an incompetent, lying, cheating analyst who performed crucial initial DNA collection, testing, and analysis in this case. This Court was unaware that the State violated a Court Order following a Motion to Compel information about the DNA testing and analysts involved in this case. This Court was unaware of the extensive mitigation in this case, including Eric Simmons' severe brain damage. This Court and the jury who evaluated the significance and reliability of the DNA evidence in this case at trial was unaware of testimony establishing amicable, consensual sexual relations between the Appellant and the victim shortly before her disappearance and murder. This Court was also unaware that "eyewitness" Sherri Renfro was in real danger of

having her probation violated, contrary to her trial testimony, and that she received the victim's trailer in this case.

The Appellant does not dispute page 10 where the State acknowledges the postconviction presentation of "voluminous testimony from a multitude of witnesses relating to FDLE's forensic work in the instant case." But rather than simply providing descriptions of the "forensic work" performed in this case, FDLE's top brass and other front line laboratory employees sheepishly revealed what was covered up at trial: John Fitzpatrick's extensive involvement in this case, his failing, lying, cheating ways, the sustained finding of falsification of records during an internal affairs investigation, and finally, his termination. FDLE witnesses and the assistant attorney who prosecuted this case (Bill Gross) conceded at the evidentiary hearing how the internal affairs information that was actually Court-ordered to be furnished to the defense, was withheld.

SUMMARY OF THE ARGUMENTS—REPLY

As to Issue I, on page 11 of its Answer Brief, the State argues the following:

> Collateral counsel claimed that Simmons' statement was a false confession that was the result of a coercive interrogation and that trial counsel was ineffective for failing to move to suppress the statement on those grounds. The postconviction court properly concluded that Simmons failed to establish both deficient performance and prejudice as there was never any evidence that Simmons "confessed" as a result of the detectives' interrogation methods. In fact, the

> evidence indicated that trial counsel, after consulting with Simmons, made the strategic decision to argue to the jury that the "confession," was really a sarcastic, flippant remark by Simmons.

This mischaracterized argument fails to acknowledge the obvious devastating impact that confessions have against defendants in criminal trials. The failure to challenge the coercive aspect of the interrogation was extremely far from "strategic." Trial counsel Janice Orr, when asked at the evidentiary hearing why she did not raise this particular issue, stated in no uncertain terms that she failed to even consider the coercive aspect of the interrogation, and that she should have challenged the coercive aspect of the interrogation.

As previously illustrated at pages 10-11 of the Initial Brief under the heading "*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).

The State argues at pages 11-12 that "the court noted that Simmons could not establish prejudice because, even had trial counsel moved to suppress the statement on these grounds, the motion would not have been successful." Such a motion *should have been successful* based on established precedent that says it is not OK to threaten a defendant with the death penalty during an interrogation, and it is highly improper to suggest that the death penalty can be avoided by confessing. Such tactics render a subsequent confession involuntary and inadmissible.

As to Issue II, the State argues on page 12 that trial counsel "was not deficient for making the strategic decision to

stipulate to the semen evidence given that it was clearly admissible and relevant." Trial counsel, misled by the State with deceptive efforts to downplay and conceal the John Fitzpatrick issues in this case, failed to consider important areas of challenge to the semen evidence. First of all, Janice Orr stated that she never would have stipulated to the DNA evidence had she known about the extent of John Fitzpatrick's involvement and wrongdoing. She stated: "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." (Vol. XXVII PCR 1577).

The State further argues on page 12 that "Likewise, trial counsel was not deficient for failing to consult an expert in false confessions as the expert's testimony would not have been admissible at trial." As previously cited and argued in part by the Appellant in the motion for rehearing filed in the lower court following postconviction denial of relief, "Any doubts about the admissibility of such testimony should have been resolved by *Ross v. State*, 45 So. 3d 403 (Fla. 2010).

The Appellant also relied on *State v. Sawyer*, 561 So. 2d 278 (Fla. 2d DCA 1990), a case right out of the lower court's appellate district which upheld the suppression of a confession

based in part on the testimony of a false confessions expert:

> 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."

Sawyer, Id. at 288. Contrary to suggestions on page 12 that it was a strategic decision to forgo the challenge to the coercive nature of the interrogation, it was pure oversight and neglect.

At page 12, the State mischaracterizes the John Fitzatrick scandal as a "collateral matter." The Appellant submits that the fact that the primary DNA analyst in a capital murder case failed, lied, cheated, and later falsified records on a proficiency test while performing work in the principal case is much more than a collateral mater. This situation is direct evidence relevant to impeach the DNA analyst, the subsequent DNA analyst, and the integrity and reliability of FDLE's work, the laboratory's internal procedures and controls. The State erroneously claims that "trial counsel *was* aware of this

information." That simply is not the case. The State conceded that the internal affairs information on John Fitzpatrick was not furnished to the defense. Without this information, and without full disclosure of the extent of John Fitzpatrick's involvement in this case (including the withholding of his signed forensic report), trial counsel was by and large unaware of this information and its significance to this case. Even *if* the DNA evidence could be characterized as reliable in this case after all that has been discovered, trial counsel was ineffective for failing to provide innocent explanations for its presence by way of the testimony of Debra and Edward Johnson and Terry Simmons (the consensual sex and bougainvillea testimony).

On page 13, the State argues that witnesses Shirley Harness and Carrie Petty "were unavailable and could not be located by trial counsel." These witnesses were *not* unavailable. Trial counsel just did not look hard enough them (*see* Motion for Rehearing at PC ROA Vol. IX, 1852-1877, and attached affidavits from Ms. Orr and Mr. Bernhard, wherein they describe the minimal search efforts made to locate these witnesses, and how they conceded: "certainly more could have been done to locate these witnesses." (PC ROA Vol. IX, 1871 and 1874)). Mere minimal efforts put into a capital case should not excuse the failure to call vital witnesses to trial.

Regarding Issue III, on page 13, the State argues that

"Trial counsel was aware that FDLE analyst John Fitzpatrick had worked on forensic evidence in this case and had left FDLE after he allegedly cheated on a proficiency test." There is no "allegedly" here. Trial counsel was not informed that there was a sustained finding against John Fitzpatrick of falsification of records following the administration of a proficiency test. Trial counsel was provided extremely limited information regarding John Fitzpatrick's involvement in this case. His wrongdoing was extremely minimized by the State in discussions with trial counsel. Though the defense team might have been told that Mr. Fitzpatrick failed a test, they certainly were not informed that he falsified records while working at FDLE. The fact is, the State violated a court-ordered motion to compel and willfully withheld internal affairs records and a signed report on this case from John Fitzpatrick.

And contrary to the State's assertions at page 13, the State *did* know that witnesses Sherri Renfro and Jose Rodriguez were testifying falsely.

Regarding the penalty phase issues, at page 14, the State argues that "Trial counsel was severely limited in their ability to investigate and present mitigating evidence in this case because Simmons and his family did not want to cooperate and air their 'dirty laundry' to the jury." The State is wrong to blame the Appellant and his family for trial counsel's failure to

investigate and present available mitigation. And this argument runs contrary to the dictates of *Rompilla v. Beard*, 545 U.S.374 (2005) where relief was granted. 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.

Available for presentation at trial was a wealth of mitigating evidence, including statutory and non-statutory mental health mitigation. Had a PET Scan been performed, profound brain damage would have been uncovered and been available for presentation.

ARGUMENT I (IAC SUPPRESSION/COERCION)—REPLY

The State mischaracterizes Issue I on page 15 as simply a "hindsight claim that trial counsel should have argued that his confession was involuntary based on his intellectual functioning and the alleged coercive nature of the interrogation." When law enforcement threatens the suspect with the death penalty during an interrogation, trial counsel has a duty under *Strickland* to challenge the voluntariness of the fruits of such an interrogation. Trial counsel failed to do so in this case, and

therefore was ineffective at the trial level for failing to raise the issue of coercion which would have rendered Mr. Simmons' statements inadmissible.

Pages 17-27 of the State's Answer Brief simply block quotes large portions from the lower court's order denying relief. Though the lower court's order was detailed, it was erroneous.

At footnote 4 at page 28, the State cites argument and transcript from the Case Management Conference regarding the admissibility of expert testimony concerning false confessions. (PC ROA Vol. XIX, 6080-6090). Upon review of this transcript, it indeed was the lower court who *sua sponte* first questioned counsel about the admissibility of such testimony. The State never filed specific objections to Professor Leo's testimony. The lower court acknowledged at the Case Management Conference that "we're not really here to argue the merits of the issue," and the court seemed to contemplate some type of specific objection and future *Frye* hearing on the matter: "I understand we might have another hearing about this." (PC ROA Vol. XIX, 6084). But because the State never filed a motion *in limine* to exclude Professor Leo's testimony prior to the evidentiary hearing, such a hearing never took place. And the State did not verbally object to Professor Leo's testimony during the evidentiary hearing. The State concluded the Case Management Hearing on this issue arguing that "it's incumbent upon counsel

here to bring in a case, some law that tells us that this is legally admissible evidence today to establish that it would have been admissible." (PC ROA Vol. XIX, 6088).

Following the Case Management hearing, the Appellant cited many cases supporting the admissibility of Professor Leo's testimony, and the lower court ignored them all. Any doubts about the admissibility of such testimony should have been resolved by *Ross, Id.*

> 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.

Ross, Id. at 411. (*See also Sawyer*, *Id.*, upholding suppression of confession based on expert testimony).

The State's failure to acknowledge or distinguish these cases in its Answer Brief speaks volumes. This type testimony was admissible at trial, it was necessary at trial, and trial counsel was ineffective under *Strickland* for failure to raise the coercion issue and present the testimony of an expert like Professor Leo. Professor Leo could have testified to support a motion to suppress the confession based on coercion, and if the

motion would have failed, he could have explained to the jury the unreliability of the confession. Based on his education, training, and experience, the type of methods employed by law enforcement during the interrogation were likely to produce a false confession because a suspect will confess just to terminate this type of interrogation.

At page 31, the State quotes the lower court's order, and argues that "The record clearly supports the court's findings that 'there is no testimony from the Defendant that he felt coerced by the detectives into making the statement' and 'it is mere speculation that Defendant made the statement as a response to police coercion.' (PCR V9:1706)." Even during a *lawful* interrogation where the suspect is not threatened with the death penalty, the United States Supreme Court has stated that "in-custody interrogation is inherently coercive." *Miranda v. Arizona*, 384 U.S. 436, 533 (1966). This was not just in-custody interrogation. In the case at bar, two law enforcement officers threatened him with the death penalty, repeatedly scoffed at his denials, pounded on the table in front of his face, lunged at him, repeatedly confronted him with allegedly incriminating evidence, and repeatedly ensured him that the interrogation would not cease until he confessed: "[We got all the] time in the world to sit here with you." (Vol. XXV R 3049).

A brain-damaged, severely communicatively-challenged

litigant should not be required to describe how he was coerced by law enforcement when the videotape evidence so clearly illustrates the improper and coercive interrogation methods employed. If the videotape evidence is not enough, one need only acknowledge the testimony of Professor Richard Leo. This Court should consider the evidence that the lower court ignored.

In cases where relief was granted based on coercive interrogation methods, there has never been a mandate that a defendant take the stand and confirm that he was coerced. The videotape evidence here shows very clearly that law enforcement was attempting to coerce Mr. Simmons into confessing.

The State suggests on page 31 that because trial counsel personally felt that the Appellant's statement was sarcastic, it was sound strategy not to challenge the coercive nature of the interrogation. Trial counsel's feeling that the statement was sarcastic should not relieve her of the duty under *Strickland* to raise the issue in a motion to suppress that the Constitution prohibits law enforcement from threatening a suspect with the death penalty during an interrogation. If trial counsel was free to simply argue that the statement was sarcastic and move on, one would wonder why she filed a motion to suppress at all. If it were truly strategy to simply argue sarcasm to the jury and not challenge the admissibility of the statement, the seizure of the Appellant at his parents' property would not have

been raised, litigated and discussed on direct appeal. Trial counsel acknowledged that she fell short of what was required by failing to raise the coercion issue in her motion to suppress.

At page 32, the State discusses the lower court's order finding that the Appellant "failed to establish any nexus between the alleged coercive tactics and his subsequent confession." There is an inherent nexus between coercive interrogations and unreliable confessions. Case law does not require the defendant to take the stand and affirm the nexus. If coercive methods are employed, and a statement is extracted, such a statement is a product of the coercive interrogation. Fifty years ago this principle was discussed by the United States Supreme Court:

> 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). The statements introduced against Eric Simmons offend underlying principles in the enforcement of our criminal laws. Even Detective Perdue acknowledged at the evidentiary hearing that threatening the

Appellant during the interrogation was one of the worst mistakes he has ever made. (Vol. XXVII PCR 1454). That mistake should have consequences like the ones mandated by *Rogers*.

Contrary to suggestions at page 32, there is no second-half "fatherly" exception to the rule that the fruits of coercive interrogations be suppressed. Although law enforcement claims that the second half of the interrogation was "fatherly," that portion of the videotape is unavailable. Such a claim that the ***un***recorded, latter portion of the interrogation was "fatherly" should not act to cure the taint of the oppressive first half of the interrogation seen on videotape. On tape, the Appellant is seen being threatened, screamed and lunged at, with inducements made. Table pounding and attempted "shock[ing]" were included.

The incriminating statement held by this Court to be direct evidence of guilt is characterized at page 33 as "the brief statement at issue." What the State minimizes here as "the brief statement at issue" was perhaps one of the most damaging pieces of evidence against Mr. Simmons in this circumstantial case. "The brief statement at issue" was cited by the State as the reason why the Appellant's Motion for Judgment of Acquittal should be denied following the State's weak case-in-chief.

The State's reliance on *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) is misplaced. *Connelly* simply adds a requirement of coercive police conduct before a statement from a mentally

unsound person can be suppressed. If a defendant of unsound mind confesses, such a confession is typically admissible unless the defendant can show coercive police conduct. C*onnelly* did not discuss the consequences of law enforcement threatening to kill the suspect during the interrogation. *Had* that happened in *Connelly*, the result of the case would have been different. Severe mental illness coupled with coercive police interrogation practices will result in suppression. Actually, coercive police interrogation practices by themselves, like the ones found in this case, result in suppression under the law even absent mental illness. *Connelly* doesn't help the State given these particular facts and circumstances. Law enforcement in *Connelly* did not admit to having threatened the defendant, then concede that it might have been the worst mistake of their career.

At page 35, the State attempts to distinguish the *Brewer* case, but fails. The State argues, "Although the detectives in the instant case discussed lethal injection, the detectives did not suggest they had the power to affect leniency or that Simmons would not be given a fair trial." That argument is refuted by these portions of the interrogation:

> *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)

*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)

*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)

As seen from the recorded portions of the interrogation above, law enforcement certainly ***did suggest*** that they had the power to affect leniency. And they suggested that he would not receive a

fair trial because the jury would not believe his denials.

The State argues on page 35 that the "brief inculpatory statement" was "clearly not connected to any alleged coercive conduct by the detectives." Because the latter part of the interrogation was not recorded, this suggestion is *not* clear. To the contrary, if techniques were utilized like the ones seen on tape, these detectives probably continued to get in Mr. Simmons' face, scream about blood being in his car, while invoking threats about the electric chair and lethal injection again, which could be avoided if he confessed. The "brief inculpatory statement" here, aka "the confession," carried extreme weight with the jury in its deliberations. The incriminating statements extracted through these outrageously coercive methods should be suppressed, and a new trial awarded.

On page 35, the State cites to *Blake v State*, 972 So. 2d 839 (Fla. 2007) to support denial of relief. At least four things distinguish *Blake* from the instant case: 1) The interrogation in the instant case *was* coercive; 2) The police conduct in the instant case *was* outrageous; 3) The videotape here *did* in fact reveal coercive conduct; 4) And unlike Mr. Blake, Mr. Simmons never acknowledged that he was treated well and that he told the truth because it was the right thing to do.

> Asking for consent to tape a subsequent recitation of the same facts is not coercive or outrageous police conduct. . . a review of the videotape reveals nothing

> in the demeanor of either Blake or of the detectives that suggests coercive conduct. Blake acknowledged that he had been treated well and that he told the truth because it was the right thing to do.

Blake, Id. at 845. In contrast, Mr. Simmons had to ask the detectives to get out of his face, and, the interrogation continued even after he informed, "Whatever man, I'm through."

On page 36, the State cites to *Walker v. State*, 707 So. 2d 300 (Fla. 1997) to support denial of relief. At least two things distinguish *Walker* from the instant case: 1) Unlike Mr. Walker, Mr. Simmons ***was*** specifically **threatened** with the **"electric chair," "lethal injection," an "IV st[i]ck,"** and he was told that he should just "fess up" so that he wouldn't **"die"**; 2) Unlike *Walker*, law enforcement made ***many*** **promises** and **inducements** in the instant case (as described by Professor Leo); for example, a promise of lesser charges in exchange for a confession; law enforcement informed 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). Mr. Simmons was told he could actually avoid the death penalty if he would just confess.

> Walker was never threatened with the "electric chair," or promised anything other than that Detective Everett would inform the prosecutor that Walker had cooperated in the investigation.

Walker, Id. at 311. In *Walker*, lacking was any discussion of how the suspect informed law enforcement during the

interrogation that his veins were small and possibly unsuitable for lethal injection. Such discussions render any subsequent confession unreliable. *Walker* suggests that if the "electric chair" is specifically mentioned by police, the interrogation becomes coercive and any statements should be suppressed. As discussed previously, the *Brewer* case stands for this legal principle as well. *Blake* and *Walker* are clearly distinguishable and actually support suppression in the case at bar.

At page 36, the State suggests lack of prejudice, arguing that even if the confession would have been suppressed the outcome of the case would not be affected because of other incriminating evidence. The circumstantial evidence in this case is extremely weak, and was largely refuted at the evidentiary hearing. The DNA semen evidence in this case is now discredited because of John Fitzpatrick's major involvement. And even if one could argue that the DNA evidence in the vaginal washings is still reliable, the testimony of the Johnsons (the neighbors) about consensual sex between the Appellant and victim the day of the murder innocently explains its presence. The DNA evidence in the car is explained by nausea and bougainvillea thorns. The suggestively-induced "eyewitness testimony" was so weak that violation-prone probationer Sherri Renfro did not know if the driver of the generic-looking white vehicle on the night in question was male or female; and there was no mention made of

the flag on the car to law enforcement when descriptions were provided (and this Court found that the single vehicle/single photo identification exercise at the sheriff's sallie port was unduly suggestive). *Simmons, Id.* at 1119. The jury did not know that Ms. Renfro lied at trial about her probation jeopardy. The jury did not hear evidence that the last person to see the victim in the Laundromat prior to the murder was John Yohman, who denied ever spending any time with the victim socially, completely contrary to the evidentiary hearing testimony of Carrie Marie Petty. When Mr. Simmons was seen with the victim that night, there was nothing at all to suggest there was an argument or any animosity between them. The evidence here is insufficient for conviction.

In any event, the confession in this case is quite significant, and relief should be granted because trial counsel failed to move to suppress the statement based on extreme coercion. There can be no more damaging evidence in a criminal trial than a defendant's confession. The State's argument here regarding materiality of the statement introduced at trial is woefully unpersuasive.

The State repeats itself, concluding on page 37 with a footnote about the statement: "It should further be noted again that trial counsel argued to the jury that Simmons' statement was not a confession, but was a sarcastic, flippant remark. (DAR

V31: 4284-85)." Obviously the jury was not persuaded by that argument. Had trial counsel filed an adequate motion to suppress citing coercion and involuntariness, she would not have been in the position of having to make the argument that the statement was simply sarcastic.

ARGUMENT II (IAC CONSENSUAL SEX/DNA SEMEN EVIDENCE)—REPLY

Ironically, on page 39, after spending many pages on Claim I trying to convince this Court that the statements to law enforcement lacked materiality, it begins Claim II citing to the inculpatory nature of certain statements to law enforcement (i.e. "Simmons gave false statements to law enforcement regarding the last time he had sexual intercourse with the victim."). Here the State also argues that it was a "strategic decision to stipulate to the DNA evidence because it was the least harmful way for the evidence to come in. (PCR V27:1575)."

First of all, in connection with the DNA evidence here, the State violated *Brady* and deprived the defense of access to FDLE records which would have cast doubt on its reliability. Consequently, trial counsel was denied the ability to make any true informed judgments about the DNA evidence and whether a stipulation should be reached. Trial counsel testified that she ***never*** would have stipulated to the DNA evidence had she known about Mr. Fitzpatrick's major involvement in this case and his internal affairs situation. Trial counsel explained: "[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." (Vol. XXVII PCR 1577).

The State reliance on "(PCR V27:1575)" to characterize the DNA stipulation as strategic fails to acknowledge Ms. Orr's testimony at Vol. XXVII PCR 1577. If defense counsel was seeking the "least harmful" introduction of DNA semen evidence, logically and reasonably, competent counsel would seek to present evidence that the semen is innocently explained by recent consensual sex. It makes no sense that trial counsel would seek the jeopardy of putting Mr. Simmons on the stand to explain the DNA rather than the Johnsons. Though she might have had the original intention to do so, trial counsel did not put Mr. Simmons on the stand. Trial counsel admitted that she made a **"mistake"** in failing to have the Johnsons on reserve to testify about the consensual sex (Vol. XXVII PCR 1592). And, Ms. Orr testified that she never considered putting Dr. McMahon on to testify about Mr. Simmons' memory problems and his inability to recall dates. (Vol. XXVII PCR 1575). The failure to present testimony of recent consensual sex to explain the DNA semen evidence constitutes deficient, prejudicial performance.

In footnote 9 at page 40, regarding the DNA semen evidence,

the State claims that collateral counsel is attempting to "mislead this Court." Collateral counsel is not attempting to mislead anyone here. The Johnsons' postconviction testimony is the Johnsons' testimony, and it has not been misquoted. And unlike the Appellant, these witnesses do not appear to suffer neuropsychological brain damage and memory lapses. It is the State who misled the jury at trial to believe that the DNA was incriminating in this case, not the defense. And it is the State who misled the defense to believe that John Fitzpatrick's involvement in this case was minimal, and that his competency examination problems were minor. Contrary to the State's suggestion at page 41, the Johnsons were very credible and would have made excellent witnesses at trial.

In footnote 10 at page 42, the State argues that trial counsel "reluctantly conceded that she was aware of Fitzpatrick's involvement in this case." In this case, the State has reluctantly conceded that they failed to turn over the John Fitzpatrick documents when specifically court-ordered to do so during the transition of public defender representation to private counsel representation. The Appellant submits that a simple notation in trial counsel's files about a "fired analyst" does not show that the State complied with its *Brady* and discovery obligations. A view of the State's production following a court-order confirms *Brady* and discovery violations.

The fact that there was a notation in the trial files about an analyst being "fired" actually evidences that the defense did not have all of the information concerning John Fitzpatrick.

Ineffective Assistance of Counsel Regarding the Statements

Revisiting the Professor Leo testimony, the State argues at page 45 that Professor Leo "did not opine that the incriminating statement was false." But Professor Leo *did* testify that the coercive methods employed by law enforcement were likely to produce a false confession. At pages 45-46, the State repeats the tired refrain that "trial counsel argued to the jury that Simmons' incriminating statement was flippant and sarcastic." The bottom line of this issue is, when we have videotaped evidence of law enforcement threatening the Appellant: **"I'm going to send you down the road for [] lethal injection!"** (Vol. XXV R 3049) if he does not confess, our courts cannot sustain a conviction where the State introduced evidence of a subsequent statement born from such a coercive interrogation.

Failure to Call Witnesses Shirley Harness and Carrie Marie Petty

At pages 55-57, regarding witnesses Shirley Harness, Carrie Marie Petty, and their alleged unavailability at trial, the State fails to acknowledge that trial counsel admitted that efforts to locate these witnesses were minimal. Just because defense counsel may have made a half-hearted effort to locate these witnesses, that does not mean she was effective at trial.

Effective trial counsel had a duty to preset their testimony.

For all these reasons stated above, trial counsel was ineffective and relief should be granted.

ARGUMENT III (BRADY/GIGLIO/FDLE, RENFRO & RODRIGUEZ)—REPLY

Finally, at the bottom of page 61 and top of page 62 (and continuing in a footnote), the State reluctantly concedes that the internal affairs documentation concerning John Fitzpatrick was never turned over to trial counsel following a motion and order to compel. But again, the State argues that trial counsel "was aware" of this information. Informally telling defense counsel off the record that an analyst was "fired" does not satisfy *Brady* and discovery obligations, especially considering the findings contained in the Internal Affairs reports.

On page 64, the State argues the following: "Despite presenting extensive evidence surrounding FDLE analyst Fitzpatrick's proficiency test issues, Simmons failed to establish how *any* of this evidence would have been admissible at trial or beneficial to his defense." The State here forgets how FDLE's own legal advisor acknowledged the admissibility of such evidence in a May 3, 2002 letter to all State Attorneys, including The Honorable Brad King: "prosecutors [] may still feel they have an obligation to share this information with the defense for purposes of impeachment [] [or they could] bring it up in the State's case-in-chief. This would preclude

impeachment and/or disclosure from becoming an issue." (Vol. XVI PCR 4838). Even though this letter contemplated the disclosure of John Fitzparick documents at least upon specific request, even after a specific request in this case, and even after a specific court order following a motion to compel, the documents were not turned over to the defense. This is not a simple *Brady* violation. The aggravated, knowing and willful *non*-production of the John Fitzpatrick documents actually rises to the level of contempt of court, and remains uncured. And contrary to the State's assertions, the State *did* knowingly present the false testimony of Sherri Renfro and Jose Rodriguez, violating *Giglio*.

ARGUMENT IV (IAC PENALTY PHASE)--REPLY

The State has alleged that Mr. Simmons "fail[ed] to acknowledge the evidence and the lower court's factual findings refuting his allegations and further ignores in its entirety the lower court's order denying his claim." (AB at 72). Mr. Simmons does indeed decline to accept these findings because to do so would accept that which is false, contrary to the law, and a miscarriage of justice. The postconviction court ignored the weight of the mitigation that Mr. Simmons was denied because of trial counsel's ineffectiveness -- this Court should not.

It is important to recognize that Janice Orr and Jeffrey Pfister were Mr. Simmons' attorneys at trial, and regardless of earlier counsel's work, Mr. Simmons had the right to the

effective assistance of counsel. The attorneys who were ineffective were Janice Orr and Jeffrey Pfister because they assumed the representation of Mr. Simmons before the trial and continued the representation through trial.

During the year that public defenders William Stone and James Baxley had the case they may well not have fulfilled the significant duties of counsel in a death case. Indeed they still could have acted diligently and provided the effective representation to Mr. Simmons at both phases of the trial because there was still at least some time left to do so.

Former counsel's work consisted of asking Mr. Simmons some questions to which he responded to the extent that he could. The questionnaire was the most basic of tools that is used in capital litigation; virtually every court-appointed attorney and every public defender's office uses such a form. Once complete, such a form is the very first step in developing the full mitigation that the Sixth and Eighth Amendments require. The State's argument about the questionnaire is a ruse. The core issue here is: no one bothered to develop Mr. Simmons' mitigation so that he could make an informed decision if in fact he truly wanted to waive the mitigation.

The same is true with Dr. McMahon. Original counsel hired Dr. McMahon and "obtained a medical waiver release [] so that they could obtain his medical records." (AB at 76). This was

hardly proof of the prior counsel acting effectively and certainly did not guarantee that trial counsel performed the significant duties of counsel in a death case. Mr. Simmons had the right to the effective trial counsel from the time that counsel were appointed until the time that he was sentenced. Dr. McMahon was not counsel and accordingly, whether she thought her evaluation produced any mitigation is beside the point; obvious mitigation of the kind that Dr. McMahon presented at the *Spencer* hearing should have been presented to the jury before they returned a 12-0 recommendation for death.

Contrary to the State's argument, Dr. McMahon was not presented during the penalty phase because of a "tactical decision," at least not a valid one. (See AB at 77; citing PCR 758-62, 792). The misuse of the word tactical in the transcript cited by the State is an inaccurate use of the word. Relevant to this discussion, and aside from the word's military uses, Merriam-Webster's Dictionary defines tactical as:

> 2 *a*: of or relating to tactics: as *(1)*: of or relating to small-scale actions serving a larger purpose *(2)*: made or carried out with only a limited or immediate end in view *b*: adroit in planning or maneuvering to accomplish a purpose.

Mr. Simmons is borderline mentally retarded. He certainly did trust Ms. Orr. Ms. Orr made the decisions. In order for Ms. Orr to make a tactical decision, she would have had to have made the decision (a small scale-action) to not present compelling

mitigation to the jury in order to affect a greater purpose. There was no greater purpose in failing to present the available mitigation. Even if Mr. Simmons felt uncomfortable about having his lack of intelligence presented to the jury, obviously this discomfort subsided by the time of the *Spencer* hearing, which of course was open to the public. All Ms. Orr had to do was tell Eric Simmons that the defense needed to present Dr. McMahon and that would have been the end of the matter. That would have happened if Mr. Pfister insisted upon it. Shockingly, Ms. Orr's greater purpose for the penalty phase was at best not to care about it and at worst, to allow Mr. Simmons to receive death so that he would have CCRC represent him during postconviction. 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).

When Mr. Simmons did find himself in a penalty phase, the defense never called Dr. McMahon for the purpose of presenting his low intellectual functioning and school-age difficulties to the jury. Certainly, it was reasonably probable that even Dr. McMahon's limited testimony and underinformed opinion could have led to the jury hearing such mitigation to recommend a life sentence. This, however, was only the very beginning.

Trial counsel should have developed from the hints of mitigation seen in the public defender questionnaire and Dr. McMahon's opinion a number of areas of mitigation. Counsel should have insisted that Dr. McMahon have more than a brief discussion with Mr. Simmons' mother. Dr. McMahon, or another expert, should have spoken with Mr. Simmons' father Terry Simmons. Such discussions would have shown the close relationship between father and son, and thematically developed the bond between all family members. Most importantly, a mental health expert could have informed the jury that for a period of minutes, at a very young age when the human brain is just beginning to grow into its potential, Eric Simmons' brain was denied the very oxygen to grow into its potential.

This oxygen deprivation led to Eric experiencing humiliating and ostracizing placement in special classes. (Vol. XX PCR 81-82). Dr. Dee reported that, any sort of brain damage such as this "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" as exhibited by Mr. Simmons' decision to leave school because he was "so terribly frustrated by his inability to learn new things." (Vol. XX PCR 83).

Counsel should have demanded as comprehensive of an evaluation as Dr. Dee provided. Such a demand would have led to a request for a PET Scan. Contrary to Dr. McMahon's "strategic reasons" for not getting a PET Scan, there was no risk to Mr. Simmons in getting a PET Scan, and much to gain beyond the establishment of a learning disability. *See* (AB 84). Mr. Simmons was more than learning-disabled, he was borderline mentally retarded and brain damaged. Part of his brain that was damaged was the frontal lobe which controls impulsivity. Moreover, the PET Scan showed that Mr Simmons' thalamus was not performing as it should. Dr. Wood explained the implications of this impairment as:

> 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).

The work and opinions of Dr. Dee and Dr. Wood, who like Dr. McMahon, were neuropsychologists, was not only different from Dr. McMahon's limited contribution because the former produced more favorable opinions. The postconviction experts' opinions were more accurate, more comprehensive and more abiding of the role of mitigation in Florida's death penalty scheme. They produced such opinions because they were given the mandate to exhaust the possibilities of mitigation and the information to do so. This mandate came, not just from postconviction, but from the gravity of the process. The postconviction experts were not simply more favorable; based on their comprehensive evaluations, they were almost a different kind of expert than Dr. McMahon.

Had counsel consulted with experts such as Dr. Wood and Dr. Dee, and obtained a PET Scan, the result would have been that the jury would have found two statutory mental health mitigating factors; if counsel developed witness testimony by more than speaking with Mr. Simmons' sister Ashley, and by consulting a mitigation specialist to develop Mr. Simmons' background and drug and alcohol history, significant nonstatutory mitigation was available to Mr. Simmons' case for life and reasonably, the outcome would have been different. This Court should reverse.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by U.S. mail to all counsel of record this 9th day of December, 2011.

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

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