IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

LOWER TRIBUNAL NO. 01-CF-2577

ERIC LEE SIMMONS,
Petitioner,
v.
EDWIN G. BUSS,
Secretary,
Florida Department of Corrections,
Respondent,
and
PAMELA BONDI,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

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

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

REQUEST FOR ORAL ARGUMENT

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

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INTRODUCTION

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

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

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

PROCEDURAL HISTORY

Eric Lee Simmons was tried and convicted for the kidnapping, sexual assault, and first degree murder of Deborah Tressler and was sentenced to death. One primary piece of incriminating evidence against Mr. Simmons was the following "confession" relayed to the jury: "Well, I guess if you found blood in my car, I must have did it." Vol. XXIV R 2992.

The jury heard the following testimony from Lake County Sheriff's Office Butch Perdue regarding Mr. Simmons' "confession":

> Q: All right, when you got back upstairs, where was Mr. Simmons?
> A: He was still in the interview room with Mr. Adams.
> Q: All right.
> A: They were still talking.
> Q: Tell us, as best as you can recall, we don't have a tape of that at all, what he said and what you said.
> A: I re-entered the interview room, and all the way up I was thinking about how I could, you know, approach Eric with this. When I entered the interview room I just stated, "Eric, I'm tired of messing around." I said, "We've just found blood in your car," and he didn't say anything. He just looked, that's the only time he looked up at me, and he said, "Well, I guess if you found blood in my car, I must have did it."
> Q: Based upon the three or four hours that you've been talking to him up until that point. . . .

Vol. XXIV R 2992

On direct appeal from the murder conviction and death sentence, this Court ruled that Mr. Simmons voluntarily accompanied law enforcement to the sheriff's office under the following circumstances:

> Detective Perdue testified that he and other police officers went to Simmons' parents' home after confirming that Simmons owned a white 1991 Ford Taurus. Detective Perdue and Detective Kenneth Adams approached Simmons and asked him to walk to a group of trees so they could talk. There were some fifteen other police officers at the scene as well as a helicopter flying overhead. Simmons acknowledged that he knew Tressler was dead, and the detectives asked if Simmons would come to the sheriff's office to talk. Simmons consented, and the detectives transported him to the sheriff's office in the back of a police cruiser. The detectives handcuffed Simmons for their protection pursuant to their standard practice, and Simmons did not object. Detectives Perdue and Adams removed the handcuffs upon arrival at the office, and interviewed Simmons in a room equipped with audio and video capabilities, although the videotape was allowed to run out after two hours.

Simmons v. State, 954 So. 2d 1100, 1107 (Fla. 2006)

This petition follows the denial of the Appellant's direct appeal and an order from the circuit court denying his motion for postconviction relief (*see* Order at Vol. IX PCR 1689-1824). Mr. Simmons is concurrently filing an Initial Brief with this Petition.

GROUNDS FOR HABEAS CORPUS

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

States Constitution and the corresponding provisions of the Florida Constitution.

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

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

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

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. *See Dallas v. Wainright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of

its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Simmons' claims.

GROUND I

EXECUTION OF MENTALLY ILL INDIVIDUALS SUCH AS MR. SIMMONS VIOLATES THE 8TH AND 14TH AMENDMENTS PROHIBITING CRUEL AND UNUSUAL PUNISHMENT. MR. SIMMONS' CURRENT DEATH SENTENCES, IMPOSED UPON A PROFOUNDLY MENTALLY ILL INDIVIDUAL CONSTITUTES ARBITRARY, CAPRICIOUS, CRUEL, AND UNUSUAL PUNISHMENT UNDER THE 8TH AND 14TH AMENDMENTS. THE LOWER COURT ERRED IN FAILING TO CONVERT MR. SIMMONS' DEATH SENTENCE TO A LIFE SENTENCE

The United States Supreme Court in the new millennium has banned the execution of the mentally retarded and the execution of juveniles in the cases of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Both cases cited to "evolving standards of decency" in today's society as the main factors justifying vacation of those death sentences. In light of the principles announced in *Atkins* and *Simmons*, and in light of the "evolving standards of decency" in today's society, this Court should vacate Mr. Simmons' death sentences. A watershed ruling in *Roper vs. Simmons* was handed down from the United States Supreme Court since Eric Lee Simmons was sentenced to death. This Court should reevaluate the mitigators in this case in light of a significant change in death penalty law, as well as the vast other mitigation that was presented at both the penalty phase and evidentiary hearing. This case is not the "least mitigated of first-degree murder cases." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998). Eric Lee Simmons suffers from major mental disorders. In light of *Atkins, Simmons, Urbin*, and in light of Mr. Simmons' major mental disorders, this Court should reverse the death sentences now imposed.

The *Roper v. Simmons* Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. The Court

outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the mentally retarded.

Prior to 2002, the Court had refused to categorically exempt mentally retarded persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the mentally retarded is cruel and unusual punishment. *Atkins*, *Id*. at 307. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The Court counted the states with no death penalty, pointing out that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles."

In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the *Roper v. Simmons* Court found it significant that juveniles are vulnerable to influence and susceptible to immature and irresponsible behavior. In light of a juvenile's diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy,

writing for the majority, said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper v. Simmons* at 571.

Mr. Simmons' culpability and blameworthiness *is* diminished in this case. Dr. Wood explained that the thalamus is a "way station on the way to those large areas that are devoted to intelligent thought and behavior control." (Vol. XXVIII PCR 1781). A full discussion of Mr. Simmons' brain damage, and support for the two major statutory mental health mitigators through analysis of the PET scan is located at Vol. XXVIII PCR 1759-Vol. XXIX PCR 1819.

Dr. Wood explained that "the thalamus is the structure in the brain through which essentially all information from the outside world comes." (Vol. XXVIII PCR 1780). Dr. Wood used a number of different measures to evaluate Mr. Simmons' PET scan. (Vol. XXVIII PCR 1782). Dr. Wood performed the first measure by visual inspection of the scan. (Vol. XXVIII PCR 1782). Visual inspection of Mr. Simmons' brain showed that there was a "major asymmetry between the two sides of the thalamus in the amount of activations going on." (Vol. XXVIII PCR 1782).

Dr. Wood next used a measure that involved drawing boundaries around the structures at issue and summing them

together to get a mean. (Vol. XXVIII PCR 1782). Dr. Wood found that there was "an unmistakable abnormal difference between the total metabolic activity expressed as an average or mean of the left thalamus as compared to the right thalamus." (Vol. XXVIII PCR 1782). Finally, Dr. Wood used the most conservative measure which involved simply looking "at the local maximum on each side of the thalamus." (Vol. XXVIII PCR 1782-83). The hypometabolism of Mr. Simmons' left thalamus, "by even the most conservative standard . . . shows this to be outside the normal limits." The measure of the mean showed it to be obviously outside normal limits. (Vol. XXVIII PCR 1783-84). Visual inspection, which Dr. Wood called "the most common way to" conduct such an evaluation "by those experienced in looking at these images" was "unmistakable in showing this asymmetry and showing it to an abnormal extent." (Vol. XXVIII PCR 1784). In Dr. Wood's opinion "this degree of asymmetry and this degree of left thalamic hypometabolism is sufficiently rare among normals as to be unlikely to represent normal." (Vol. XXVIII PCR 1784).

Dr. Wood described what takes place in the part of Mr. Simmons' brain that was being discussed:

> 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. XXVIII 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). Of course, these impulsive actions were corroborated by expert witnesses Heidi Hanlon-Guerra and Dr. Dee.

Dr. Wood was familiar with the mitigating factor that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (Vol. XXVIII PCR 1791). With regard to this mitigating factor Dr. Wood found it to exist in Mr. Simmons' case 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). This condition that Mr. Simmons suffered from was a constant condition. (Vol. XXVIII PCR 1791). This mitigating factor was corroborated by the testimony of Dr. Dee and Heidi Hanlon-Guerra and by Dr. Wood speaking with Mr. Simmons' parents.

Dr. Wood was familiar with 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. (Vol. XXVIII PCR 1792). Dr. Wood's opinion was that Mr. Simmons' met the criteria for this mitigating factor. (Vol. XXVIII PCR 1793). This opinion was not based entirely on the PET Scan but also on Dr. Woods' consultation with Dr. Dee. (Vol. XXVIII PCR 1794). 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." (Vol. XXVIII PCR 1794).

Mr. Simmons' sentence of death violates the 8th and 14th Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied. This Court should conduct a new proportionality analysis, convert Mr. Simmons' death sentence to a life sentence in light of the 8th and 14th Amendments, or in the alternative, grant a new penalty phase to allow Mr. Simmons to present evidence of his current physical and mental health, or grant other appropriate relief. Mr. Simmons asks this Court to perform a new proportionality analysis taking into account all of his mitigation including that which was developed and presented in postconviction, and asks that this Court vacate his death sentence.

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR MISMANAGING THE APPEAL AND FAILING TO CITE AVAILABLE CASE LAW AND AVAILABLE FACTS IN THE INITIAL BRIEF, PRIMARILY CONCERNING THE SUPPRESSION OF THE "CONFESSION," THUS VIOLATING THE PETITIONER'S 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

The issues on appeal were not effectively presented or argued by appellate counsel. On pages 29-32 of the Appellant's brief, at "Argument A," Ms. Orr raised the issue that "The Verdict is Not Supported by the Evidence." Being a sufficiency of the evidence claim, counsel had a duty to cite to any

relevant case law to support this claim. Counsel cited to not one case in this section to support relief. Counsel should have at least cited to *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001) to remind the Court of the correct standard to apply in the analysis ("whether, after viewing the evidence in the light most favorable to the state, a rational trier of fact could have found the existence of the elements of a crime beyond a reasonable doubt."). Because there was a "confession" admitted at trial against the Appellant, it would be difficult to successfully present this claim. As such, this should not have been the first claim presented by appellate counsel in the brief.

On pages 33-35 of the brief, appellate counsel raises the issue of lack of jurisdiction. On page 33, counsel attempts to "incorporate[] by reference" arguments made in motions filed at the lower level. This Court noted at *Simmons, Id.*, 1112 that "[t]his practice [of incorporating by reference] does not preserve an issue for review by an appellate court." Appellate counsel was ineffective for engaging in this practice.

On page 36 appellate counsel raises "Argument C. There was no Probable Cause for the Arrest of the Appellant." Counsel only spends two pages here arguing that the encounter between law enforcement and Mr. Simmons was not consensual or voluntary. Although counsel references at page 36 the "four days of

hearings" on this issue, counsel fails to mention any helpful testimony which supports the issue. As acknowledged by this Court at *Simmons, Id.* at 1107, there were at least seventeen officers who had descended upon and invaded Mr. Simmons' parents' property, a police helicopter was flying overhead, Mr. Simmons was directed by Detectives Perdue and Adams to walk over with them to a group of trees, he was asked about Ms. Tressler's death, then he was handcuffed and transported in the back of caged police cruiser to a small interrogation room.

First of all, appellate counsel's inexplicable and ineffective ***sole*** reliance on *Hayes v. Florida*, 470 U.S. 811 (1985) was deficient. This Court quickly distinguished *Hayes* from the case at bar because "[a]n investigator [in *Hayes*] threatened to arrest the suspect if he did not comply." *Simmons, Id.* at 1113. This Court denied relief because "[t]he officers did not threaten Simmons with an arrest or try to coerce him in any way. These crucial factual differences distinguish *Hayes* from the present case." *Simmons, Id.* at 1113. In light of the circumstances of the encounter in the case at bar, counsel's reliance on *Hayes* is somewhat understandable. But the ***sole*** reliance on this case was deficient. Though there may not have been any verbal threats of arrest in the case at bar, Mr. Simmons was in fact handcuffed and led away from his parents' property by the detectives. To distinguish *Hayes* here,

Hayes did not involve a situation where approximately 20 law enforcement officers stormed the Appellant's parents' property by land and by air.

Though there was no verbal threat of arrest here, there certainly was a grossly offensive show of authority. Trial/appellate counsel failed to cite a Florida Supreme Court case that would have persuaded this Court to grant relief on the basis of mere submission to a show of authority: *Popple v. State*, 626 So. 2d 185 (Fla. 1993).

> Although there is no litmus-paper test for distinguishing a consensual encounter from a seizure, a significant identifying characteristic of a consensual encounter is that the officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries, and the person may not be detained without a well-founded and articulable suspicion of criminal activity. *State v. Simons*, 549 So. 2d 785 (Fla. 2d DCA 1989). This Court has consistently held that a person is seized if, under the circumstances, a reasonable person would conclude that he or she is not free to end the encounter and depart. *Jacobson v. State*, 476 So. 2d 1282 (Fla. 1985). Whether characterized as a request or an order, we conclude that Deputy Wilmoth's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply. [footnote omitted]. *See Dees v. State,* 564 So. 2d 1166 (Fla. 1st DCA 1990).
>
> Therefore we hold that for Fourth Amendment purposes Popple did not consent to exiting his vehicle, but rather was seized by virtue of submitting to Deputy Wilmoth's show of authority. Because Deputy Wilmoth did not have the reasonable suspicion necessary to authorize an investigatory stop, the initial detention was illegal and the resulting acquisition of the

> cocaine and drug paraphernalia was the fruit of an unconstitutional seizure. The trial court erred in denying the motion to suppress. We approve the decisions of *Brown* and *Jackson,* quash the decision below, and remand with directions that the convictions be reversed.

Popple v. State, 626 So. 2d 185, 187-188 (Fla. 1993). If Mr. Popple was only submitting to a show of authority and was seized when the officer asked him to exit his vehicle, obviously Mr. Simmons was only submitting to a show of authority when the S.W.A.T. team (or the Lake County "thundering herd") stormed his parents' property and immediately confronted him about the murder of Ms. Tressler.

If law enforcement's intention was to arrest Mr. Simmons, they should have made application to a judicial magistrate for an arrest warrant for a fair determination of whether there was probable cause sufficient to arrest the Appellant. But they knew that probable cause was lacking, so they obtained "consent" to handcuff him and transport him to the station house. Though the case cited below is a civil case, it relevantly discusses the legal and constitutional requirements for an arrest:

> Probable cause has been defined as "a reasonable ground of suspicion, supported by the circumstances, that the person accused is guilty of the offense charged." [footnotes omitted]. Where it would appear to a "cautious man" that further investigation is justified before instituting a proceeding, liability may attach for failure to do so, especially where the information is readily obtainable, or where the accused points out the sources of the information. A lack of probable cause may be established by proof

> that a criminal proceeding was instituted on facts that could as well be explained innocently. . . . A jury question was therefore presented as to whether probable cause existed for appellant's prosecution and whether malice could be inferred by the jury from the absence of probable cause and the bank's actions, both before and after her arrest. Under these circumstances, summary judgment was not appropriate and should not have been affirmed.

Harris v. Lewis State Bank, 482 So. 2d 1378, 1382-1383 (Fla. 1st DCA 1986).

At the point that law enforcement stormed the Simmons' property, law enforcement had no reasonable or objective evidence tying Mr. Simmons to the murder of Ms. Tressler. Though it was reasonable that law enforcement would want to speak with Mr. Simmons about his relationship with Ms. Tressler, their show of force here was unreasonable, and would obviously suggest to someone in Mr. Simmons' situation that he was not free to leave the scene. This was not a consensual encounter, law enforcement unreasonably seized Mr. Simmons on his parent's property, and they violated the constitution when they handcuffed him, placed him in the back of a marked, caged police cruiser, and offensively threatened him with the death penalty in a small interrogation room. Appellate counsel was ineffective for failing to cite to specific evidence in support of suppression of the statement. As seen from Detective Butch Perdue's testimony from the pretrial motion to suppress

hearings, probable cause was certainly lacking for the arrest of Mr. Simmons:

> Q. At the time that you invited Mr. Simmons to join you at the sheriff's office, what evidence did you have that he had anything to do with this crime?
> A. Witness testimony confirmed by photographs that he was last seen with the victim and the victim had not been seen alive again, at that point. We had confirmed through witness testimony, by photograph, that he was the boyfriend of Debbie Tressler. Witness testimony in the bar that he had spoken to several patrons in the bar that he did have knowledge of the victim, that he had done—
> Q. So you knew that he knew her?
> A. Very well.
> Q. What other evidence did you have?
> A. That's it.

Vol. XI R 301-302.

Appellate counsel erred in failing to direct this Court's attention to the additional testimony available from the hearings on the motion to suppress evidencing the fact that the encounter with law enforcement was not consensual. For example, Detective Mark Brewer confirmed that there were approximately 15 officers at Mr. Simmons' parents' house. Helicopters had been up in the air. Nearby there was a "command center" with more officers working the case. Mr. Simmons was transported in a marked unit because "[t]hat's the sheriff's office policy." When Detective Mark Brewer was asked why Mr. Simmons was not asked to drive over to the sheriff's office on his own, he answered, "We just didn't." Mr. Brewer agreed that "It was a long interview." (Vol. XI R 292-296).

Detective Perdue confirmed there were "Probably [] 15" officers on the scene, "The helicopter was up," and Mr. Simmons "was a suspect in the crime and/or a witness." Vol. XI R 300. He described the initial confrontation with the Appellant:

> Q. [Y]ou and Adams approached him?
> A. We approached him.
> Q. Tell us about that.
> A. We walked him over and sat down under the pine tree, the three of us did, and we asked him, "Do you know this lady?" We showed him a picture. And he said, "Yes", that he knows the lady. And I said, you know, "She's dead. Somebody murdered her." And I said, "We're trying to find out what happened to her. Do you want to come back and talk to us for a little bit? Come back to the sheriff's office and talk to us for a little bit."

Vol. XI R 273. This was obviously no consensual encounter. Appellate counsel failed to bring this vital testimony to the court's attention. Had appellate counsel cited to relevant testimony, and cited to the *Harris* and *Popple* cases, this Court could have been persuaded that relief is appropriate here.

Although Mr. Simmons was not under formal arrest, his liberty was certainly constrained, to the point of being handcuffed and placed in the back of a marked, caged car. This was no consensual encounter. Obviously the Appellant was not free to leave the scene in light of the following testimony of Deputy Blackmon that was not cited by appellate counsel:

> Q. When you got to the vehicle, what did you say to him?

> A. I advised him that I would be transporting him to CIB to speak with detectives regarding to the case that they were working.
> . . . .
> Q. So did you cuff him?
> A. Yes, sir.
> Q. Okay, and did he ride in the car?
> A. In the back.
> Q. So in the back seat, you can't open those doors to get out, right?
> A. Correct.
> Q. So he was basically enclosed within a locked portion of the vehicle where he couldn't get out and his hands were cuffed?
> A. Yes, sir.

Vol. XII R 444. Deputy Blackmon stated that he "walked with him to—upstairs to—CIB," and confirmed that it was on the "third floor of the sheriff's office building [] in Tavares." (Vol. XII R 445). That office was not "open at that time of day to the public." (Vol. XII R 445). The door was "locked to the public," and it "has a key pad on it." (Vol. XII R 446). He confirmed that he "guide[d] him to the place where the detective wanted him to be interviewed." (Vol. XII R 446). At one point the Appellant did ask Deputy Blackmon how he was going to get home, and he was informed "if need be [they] would provide him with a way home." (Vol. XII R 447). Deputy Blackmon's instructions were "to escort him to CIB and to advise him, detectives would speak to him shortly." (Vol. XII R 453). Deputy Blackmon then placed the Appellant "in an interview room." When asked if the door was locked, the deputy answered:

"I don't recall that, either, I don't know. I don't go up there very often." (Vol. XII R 454).

Appellate counsel failed to cite the following additional testimony in her appellate brief in support of relief. Deputy Jones testified: "Deputy Blackman [sic] made contact with him, and asked him to turn around, and asked him that—to put his hands behind his back." (Vol. XII R 456-457).

> Q. How did Mr. Simmons get over to Deputy Blackman's [sic]car?
> A. It was a short distance. He walked over to the vehicle, from what I recall.
> Q. Why? Why would he go to that vehicle?
> A. To be transported.
> Q. Well, who said go over there?
> A. I didn't hear a conversation, but I saw Deputy Perdue wave for him to go over there, but I didn't hear him exactly tell him to.

(Vol. XII R 458). As in *Popple*, Simmons was merely submitting to the authority and commands of law enforcement rather than voluntarily exercising free will. Deputy Jones described that "they were sitting near a tree with a detective on each side, and Mr. Simmons was sitting." (Vol. XII R 458-459). Appellate counsel should have included this testimony in her brief to adequately illustrate that Mr. Simmons was merely acquiescing to authority rather than voluntarily accompanying the officers.

Nowhere in the record is there evidence that law enforcement ever informed Mr. Simmons that he was free to disregard the questions of law enforcement, leave this

oppressive scene and retreat to his parents' home. Instead, on his own parents' property, he was handcuffed and placed in the back of a caged unit, not for officer safety reasons, but because law enforcement wanted to restrict his movement and freedom, and eventually coerce him into falsely confessing to a crime (*see* Argument I of the Petitioner's Initial Brief filed concurrently with this Petition). Deputy Jones confirmed that because this was a "caged unit," "there's no way [] that Mr. Simmons, if he had wanted to, could have gotten his hands on Deputy Blackman [sic]" (Vol. XII R 464) if he was not handcuffed.

Appellate counsel failed to cite the suppression hearing testimony of the Appellant's uncle, Larry Simmons, who observed the Appellant being taken into custody by law enforcement prior to him being taken to CIB:

> Q. [D]id you see the detectives talking to Eric?
> A. Yes. After they got him stopped on the four-wheeler, they got him off it and searched him, and then they took him over, and they's [sic] two or three officers set down with him around the tree. . . .they stood him up, handcuffed him, and escorted him to the car. . . .[Terry Simmons] approached Eric and told him he needed to get his keys from him, and they wouldn't even let him do that. One of the officers took them off of Eric's belt and handed them to him.

Vol. XII R 501-502. Appellate counsel also failed to cite the vital suppression hearing testimony of the Appellant's father,

Terry Simmons, on the issue of custody. Terry Simmons testified as follows:

> Q. Okay. When you were coming back in, could you tell me what you saw?
> A. When we were coming back out of the woods, when I got to the back of my property, I saw police officers all over my place.
> Q. Okay. Approximately how many would you estimate?
> A. Twenty-five, 30.
> Q. [And] what did you do from there?
> A. I proceeded up the side of my fence line. I was on my tractor. Eric was riding his four-wheeler. . . .When we got up alongside my house, the police officers asked me to stop. They were inside my yard. Some of them come across the fence and went over and stood behind Eric, and some approached in the back where I was. . . .Two officers approached me, a b[l]ack uniformed officer and a plain clothes white officer approached me and asked me to come to the side with him, and some other officers took Eric off his four-wheeler.
> Q. Okay. Did they help him off the four-wheeler?
> A. They asked him to get off. . . .They stood him up behind the four-wheeler and frisked him.
> . . . .
> Q. Okay. At some point, did you see that your son was handcuffed?
> A. Yes, ma'am.
> Q. And at what point was that?
> A. When they brought him back from the pine tree, they told him to put his hands on the back of the four-wheeler, they spread his legs apart, frisked him, and put cuffs on him.
> Q. On the back of his own four-wheeler?
> A. Yes, ma'am.
> Q. Okay. And do you know who cuffed him?
> A. I can't swear to exactly who it was, but it was a plain clothes officer. . . .As they started to take him out the gate, he's got the keys to my equipment that we work with, and I asked him for the keys. . . .They wouldn't let him hand them to me. Well, he couldn't, but he tried to turn sideways where I could get them. . . .[he was handcuffed behind his back,] [y]es. . . .I saw them bringing Eric back over to the gate. . . .[Eric was taken to a marked unit].

Vol. XII R 506-510. It was grossly ineffective for appellate counsel to fail to cite this testimony in the initial brief, as this was the strongest claim available on direct appeal. If page limits were an issue, appellate counsel should have moved to enlarge the page limitations, or condensed the first 32 pages of the brief which are largely unnecessary and unpersuasive.

Appellate counsel was ineffective for failing to cite relevant testimony and case law supporting relief for specific claims in this case, especially the suppression issue. On pages 44-48, the section entitled "The Arrest and Ultimate Conviction of the Appellant Was the Result of Police Misconduct," appellate counsel rambles on for five pages about the evidence/lack of evidence in the case without citing to one specific case or authority supporting relief. The Initial Brief was only 64 pages long, therefore an additional 36 pages of space was available to avoid the continued improper attempts to "rel[y] upon [arguments made at the lower level and] incorportate[] [them] by reference." *See* Initial Brief at page 61.

Appellate counsel failed to cite the following testimony from Major Gnann, the person in charge of the Lake County Sheriff's SWAT team:

> Q. [Y]ou went over to his father's home, is that correct?
> A. Yes, ma'am.
> Q. Okay.

A. In a very short period.
Q. Okay. Had you been informed -- were you being kept informed of what the helicopter — you had the helicopter up, correct?
A. And, again, that would have been my focus was -- would be -- I'm also in charge of the SWAT team, and if it were to become necessary to use, then I would want to have those people positioned as well as the helicopter, and certainly that helicopter was being used for surveillance, and I would have been aware of things like that. The particulars in the case, the investigators would have know[n] more about that. Positioning of people just in general would have been something that I would have focused on.
Q. Okay. What did you do as far as placement of people that day?
A. We were really trying to stay ahead of the situation as we gained information where he may be. We were simply trying to have enough deputy sheriffs in the area to locate[] him.
Q. Okay. And did you –
A. And we were spread out. There was-two or three locations where he possibly could be, and that was – that information was coming in in bits and pieces.
Q. Okay. At some point in time, were you advised that the defendant had been seen?
A. Actually, I was at -- I was at his dad's house when he arrived, with several other people.

Vol. XII R 521-522.

The *Popple* case did not refer to a SWAT team charged with apprehending a suspect on his parents' property with helicopter flying overhead, yet Popple was afforded relief because the Court ruled that Popple merely submitted to authority in light of the request to exit his vehicle by law enforcement. Appellate counsel should have cited to the *Popple* case and the revealing testimony cited in this Petition. The State asked the following questions at the suppression hearing of Major Gnann:

> Q. You told Mr. Simmons [] that your purpose for being there was to question his son about a homicide, that somebody that he knew had been killed, right?
> A. Yes, sir.
> Q. In fact, is that what ended up happening, he was taken to Tavares and questioned about that homicide?
> A. Yes, sir.
> Q. Exactly what you said was going to happen, right?
> A. Yes, sir.
> Q. You never saw Eric Simmons cuffed out there at the property?
> A. No, sir, not that I recall.

Vol. XII 530-531.

Though it took some time, it was revealed that the Appellant was in fact handcuffed. He was seized unlawfully on his parents' property contrary to the Fourth Amendment. This was not a voluntary trip to CIB, this was obviously at least the functional equivalent of an arrest. Law enforcement failed to inform Eric Simmons that he had the right to refuse to answer any of their questions, that he had a right to refuse the detectives' directives to accompany them to Tavares for questioning, that he had a right to confer with appointed counsel both before and during the questioning, and/or, that he had a right to ignore them and simply go about his own chosen personal affairs and business. Any alleged waiver of these constitutional rights was not knowing, intelligent or voluntary based on the oppressive show of force here by the SWAT team and the lack of advisement of his rights.

Appellate counsel failed to present the suppression hearing testimony of Deputy Jones who was reminded of and agreed at the suppression hearing that during a previous deposition, he informed that the Appellant was taken into custody and secured, and then was interviewed by the detectives. In light of this testimony obviously Mr. Simmons was not free to leave the scene.

> Q. [Y]ou stated at that time that you had seen Mr. -- or Deputy -- Blackmon handcuffing the defendant,- is that correct?
> A. Yes, ma'am,
> Q. And would you tell me again the sequence of events that occurred, as you recall them?
> A. We responded to an unknown address out in the Pine Lakes area. We made contact with Mr. Simmons, and he was interviewed by the detectives, at which point he was sent over to -- from what I later found out to be, transported to CIB to be interviewed.
> Q. Okay. And where were you physically located during the time -- well, after Mr. Simmons arrived. Well, where were you when Mr. Simmons first arrived on the property?
> A. I believe I was on the south said [sic, side] of the residence when he came out off a wooded area.
> Q. Okay. And where did you go after the detectives were talking to him?
> A. I stood to the side, a few feet away, and just observed.
> Q. A few feet away from whom?
> A. Mr. Simmons and the detectives.
> Q. Okay. And during the time he was being interviewed, he was not in handcuffs, you indicate; is that correct?
> A. Yes, ma'am.
> Q. And when is it that you recall he was handcuffed?
> A. When he made contact with Deputy Blackmon.
> Q. And when was that?
> A. That was after the detectives had finished talking to him.
> Q. And where was it?
> A. At Deputy Blackmon's patrol car.
> Q. And where was the patrol car?

A. I can't recall the exact location, but it was near the road 44.
Q. And how did he get from the tree to the road?
A. He walked.
Q. By himself?
A. That's what I recall.
Q. And when did you actually leave the scene?
A. When Mr. Simmons was placed in the vehicle, and I left prior to Deputy Blackmon leaving.
Q. Okay.
MS. ORR: If I may approach, Your Honor?
THE COURT: Yes.
BY MS. ORR:
Q. Do you recall your deposition being taken by the Public Defender Office last May, sir?
A. Last May?
. . . .
Q. Okay. You see where you stated that once he was taken into custody and secured and interviewing with the detectives, that's when I left?
A. Uh-huh.
Q. Is that what you said at that point?
A. Yes, ma'am.
Q. Okay. How is that you left at that time in May, and now, you didn't leave until he was standing at the vehicle?
A. After words -- underneath it says, "Actually, I left -- excuse me -- when he was being transported -- was to be transported, and I left prior to the actual deputy driving off with him."
Q. Okay. But you said he was secured and in custody with the detectives, is that's correct?
A. Yes, ma'am, that's correct.
Q. But you're saying that's not correct today; is that correct?
A. No. When I was speaking of him being secured, I was speaking that he was with detectives. He was not going anywhere. And the question leading up to it that I was asked, I guess, they took him into custody and then he left.
Q. And you said once he was taken into custody and secured, is that correct?
A. According to that, it is correct.

Vol. XII R 537-540. The highlighted testimony above should be dispositive on the issue of custody. Everything that followed

the Lake County Sheriff's Office SWAT team's storming of Mr. Simmons' parents' property and their "securing" of Mr. Simmons was the beginning of a *custodial* interrogation, not a consensual encounter. Any cooperation provided by Mr. Simmons to law enforcement was simply the avoidance of something he had been convicted of previously in 1996, resisting arrest and fleeing and eluding law enforcement.[1]

This Court recently reminded that one's home should be afforded even extra protections from unreasonable searches and seizures. Although only recently stated by this Court, the bedrock principle here that must be considered is the Fourth Amendment's protections against unreasonable searches and seizures, which is what happened in the instant case:

> We cannot permit the protections of the Fourth Amendment, fragile as they may be, to be decimated piece by piece and little by little until they become mere vestiges of our past. All courts recognize that the home and curtilage of a home are protected and the protection is determined by factors with regard to whether an individual reasonably may expect that the area in question should receive the same status as the home itself. The cracks and crevices around our front doors or windows that may permit air to unintentionally escape are surely in a reasonably free society areas protected by our most cherished document.

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[1] In 1996, when Mr. Simmons left the Circle K in Umatilla late one night and was pursued by law enforcement, there were fewer officers in pursuit of him than were on his parents' property during this incident. Ironically, that 1996 incident was used as an aggravator to support the death penalty in the instant case because a police officer said that Mr. Simmons nearly hit him as he was speeding away from the scene.

Jardines v. State, --So. 3d--, 2011 WL 1405080 (Fla. 2011). Although this may not have been Eric Simmons' actual home and curtilage, this was his parents' home and curtilage where he was born and raised. This was the home where he enjoyed Thanksgiving supper with the victim and his parents a week before the victim was murdered by someone whom the Lake County Sheriff's Office failed to really investigate.

Eric Simmons certainly had Fourth Amendment protections here and standing to challenge the actions of law enforcement the day they unlawfully and unreasonably seized him, and coerced a false confession from him. Appellate counsel was ineffective in this case for failing to draw the Court's attention to suppression hearing testimony that would have persuaded this Court to rule in the Appellant's favor.

As far as probable cause, the simple status as a possible boyfriend who knew the recently deceased does not establish probable cause. If such were the case, the Lake County Sheriff's Office had probable cause to arrest John Yohman because he knew the victim and he was the last person to see her alive. *See* John Yohman's written statement taken by law enforcement at Vol. XIV PCR 3391.[2]

[2] John Yohman's statement 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

Deputy Blackmon's testimony and memory is curiously ambiguous on exactly when Mr. Simmons was handcuffed at his parents' home, apparently due to the influence that lead Detective Perdue might have had on him:

> Q. Prior to your testimony here the last time on February 5th--
> A. Yes, ma'am.
> Q. -- did you discuss what you were going to be saying with anyone else?
> A. Not what I would saying but as to what had occurred.
> Q. Who did you discuss that with?
> A. I spoke with Detective Purdue briefly.
> Q. And when was it that you spoke with Detective Purdue?
> A. I don't recall.
> Q. Was it immediately before the hearing or sometime before that?
> A. Before that.
> Q. Were you on duty at the time?
> A. Yes, ma'am.
> Q. What was it that you indicated to Detective Purdue, if you recall, or did he ask you? What did he ask you?
> A. He asked me about my deposition, and what I had said about Mr. Simmons being handcuffed when I arrived, and he asked me if I was sure about that, and as I thought back on it, I told him, "No, I wasn't."
> Q. Okay. So did go back and look at your deposition testimony?
> A. Yes, ma'am.
> Q. And you did, in fact, say in your deposition that Mr. Simmons was handcuffed when your [sic, you] arrive, is that correct?
> A. Yes, ma'am.
> Q. But you think now that that's not true?
> A. Yes, ma'am.
> Q. It's true that it's not — you're saying it's not true?

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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.

A. That it’s not incorrect. I erred. That it's not correct. I erred.
Q. What makes you thing that you erred then? Why do you thing [sic, think] that that was an error?
A. Because in my mind's eye, I can see -- once I thought back on it, I could see what he was doing.
Q. Could see what who was doing?
A. Mr. Simmons. He was speaking to Detective Perdue and Detective Adams and had his knees drawn up, leaned up against a tree with his arms draped over his legs.
Q. But you didn't recall that in May of last year?
A. No, ma'am.
Q. What made you recall that?
A. Just upon further thought.
Q. So you think your memory is better now than it was last May?
A. No, ma'am.
Q. How did the defendant get to your car?
A. He walked.
Q. By himself?
A. I don't recall who was walking with him, and myself.
Q. Was there someone walking with him?
A. I don't recall exact who.
Q. Someone was walking with him; is that correct?
A. Yes, ma'am.
Q. Was there more than one someone walking with him?
A. I don't know.
Q. Would that someone have been a detective? Was he in plain clothes?
A. Yes, ma'am.
Q. And did he walk with him to your car?
A. I don't recall if he walked all the way or a few feet short of it?
Q. But pretty darn close?
A. Yes, ma'am.

Vol. XII R 554-556. It appears here as if lead Detective Perdue tampered with Deputy Blackmon’s testimony to protect the legality of the coerced false confession he extracted from Mr. Simmons following the “voluntary,” handcuffed, caged transport

to CIB in Tavares. Appellate counsel should have raised these issues in her initial brief.

Candidly, Deputy Perdue admitted that he did not have probable cause to make an arrest of the Appellant:

> Q. Okay. And at the time that you first spoke with the defendant at his father's house, you did not have probable cause for his arrest, is that correct?
> A. That's a good question.
> Q. Well, you've indicated that you did not?
> A. It -- probably wouldn't have, no. But it depends on -- you know, if --
> Q. What did you know at that point aside from the fact he knew her?
> A. Well, we knew at that point that he was --
> MR. GROSS: Judge, I'm going to object. This has been asked and answered. We went through this in detail in the first hearing.
> MS. ORR: And he just changed his testimony, Mr. Gross.
> THE COURT: Well, it has been asked and answered, Ms. Orr.
> MS. ORR: The answer was, he didn't have probable cause.
> THE COURT: Make it quick. Go ahead answer the question.
> THE WITNESS: Yes, sir. After we got back to the office and reviewed our testimonies, had we had that opportunity to do that out there, we probably could have established probable cause for the arrest at that point, but at the time when Kenny and I left, we didn't feel that we had sufficient probable cause. We wanted to talk to Mr. Simmons and to see what he could establish as far as where this investigation should go, what route we should go in. We felt that he being the closest associate, and we believed, at the time, through witness testimony, that he was the last person to be seen with her, that he could provided us with essential information and which route this investigation should have went.
> BY MS. ORR:
> Q. Okay. So you were at that point seeking information?
> A. Yes, ma'am, as we had done all week.

Vol. XII PCR 577-578. Had appellate counsel brought up this testimony to the Court, it is unlikely that this Court would have found alternative to the theory that this might have been a consensual encounter, that law enforcement had probable cause to arrest the Appellant. If the lead detective in this case was not confident about probable cause for arrest at this point, this Court should not feel confident that there was probable cause to overcome the Fourth Amendment's prohibition against unreasonable searches and seizures. This Court should reanalyze its findings on direct appeal regarding the voluntariness of the encounter and the probable cause for arrest based on this vital testimony that was absent from the initial brief on direct appeal.

The Appellant indeed was read his *Miranda* rights prior to the interrogation at CIB, although it is doubtful he would understand those rights given the extent of his brain damage. In any event, such a reading of *Miranda* does not cure the taint of his unlawful detention. The United States Supreme Court has said: "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted." *Brown v. Illinois*, 422 U.S. 590, 602 (1975). Appellate counsel

was ineffective for failing to cite to the available relevant testimony and case law in support of suppression of the "confession" in this case.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to all counsel of record on this 6th day of July, 2011.

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CERTIFICATE OF COMPLIANCE

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

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