IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1353

LOWER TRIBUNAL NO. 01-CF-2577

ERIC LEE SIMMONS,
Petitioner,
v.
KENNETH S. TUCKER,
Secretary,
Florida Department of Corrections,
Respondent,
and
PAMELA JO BONDI,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS–REPLY TO THE STATE

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FACTS AND PROCEDURAL BACKGROUND–REPLY

On pages 1-9 of its Response, the State simply block quotes portions from this Court's direct appeal opinion in *Simmons v State*, 934 So. 2d 1100 (2006). The Petitioner does not dispute this Court's *2006* understanding of the facts of this case. But, there have been significant postconviction factual developments in the past five years in this case, and the factual landscape has changed significantly.

GROUND I-REPLY
(MENTAL ILLNESS)

On pages 13 of its Response, the State finally addresses the claim that the Petitioner should not be executed because of his mental illness, the 8th and 14th Amendments, and the evolving standards of decency. The State should not be able to avail itself of a procedural shield to enable them to violate the dictates of the United States Constitution. The 8th Amendment bars the execution of the Petitioner in light of his mental illnesses and neuropsychological deficits. *See Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005).

On pages 13-14 of the Response, the State simply block quotes this Court's opinion from *Ray Lamar Johnston v. State*, 70 So. 3d 472 (Fla. 2011). The Petitioner asks that this Court reconsider these very similar issues and grant relief based on the Petitioner's current and past mental status in light of the evolving standards of decency. The law and society's tolerance for the execution of certain classes of citizens in this nation is continually evolving. Last year the United States Supreme Court granted relief from a *life sentence* imposed on a 16-year-old who was sentenced to life without the possibility of parole for a non-homicidal offense. *Graham v. Florida*, 130 S. Ct. 2011 (2010). To permit the State the use of the procedural bar to defeat the Petitioner's claim is to defeat Justice Blackmun's fleeting and dissenting hope that "Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme." *Callins v. Collins*, 510 U.S. 1141, 1159 (1994). Due in part to the mental illnesses and neuropsychological deficits that he is laboring under, the Petitioner is one of the most mitigated of mitigated human beings housed on Florida's death row.

GROUND II–REPLY
(IAC ON DIRECT APPEAL)

On page 14, while addressing appellate counsel's failure to cite to any case law in her brief regarding insufficiency of the evidence, the State assures: "Respondent is convinced that this Court was well aware of the applicable law to

apply to this claim when addressing the sufficiency of the evidence, even without guidance from Petitioner's appellate counsel." This Court should be concerned that appellate counsel was unaware of the "applicable law to apply to this claim," especially in light of her further failures to cite to relevant, crucial, and applicable evidence from the lower court in support of the claims on direct appeal.

On pages 15-16, while addressing appellate counsel's failure to cite to specific evidence and testimony from the Motion to Suppress hearings which would have supported relief on the illegal seizure issue, the State asserts that "Petitioner merely repeats the same arguments as appellate counsel, albeit in more detail, which were rejected on direct appeal." The detail is the issue here. Appellate counsel was ineffective for failing to provide the details. Appellate counsel failed to supply the available testimony from the hearings which would have supported relief. Had the details been provided in the briefs, this claim would not have been rejected on direct appeal.

On pages 16-19 of the response, the State simply cites to a large block quote from this Court's 2006 direct appeal opinion. Again, because of appellate counsel's failure to cite to the relevant testimony from the suppression hearings, this Court was unaware of many facts which would have factually and legally supported suppression of the statements the Petitioner made to law enforcement.

Contrary to the State's argument at page 19, **NO** "reasonable person would have felt free to terminate the encounter with law enforcement" under the specific circumstances described in detail in Mr. Simmons' habeas petition. The State continues at page 19: "although appellate counsel did not argue the testimony from the suppression hearing in as much detail as collateral counsel, this does not equate to a finding of ineffectiveness." Simply stated, appellate counsel provided little to no detail of the relevant testimony which supports a different result from the decision on direct appeal, just like trial/appellate counsel failed to raise the issue of the involuntariness of the statements made during the threat-ladened interrogation.

CONCLUSION–REPLY

Contrary to the State's conclusion at page 20, this Court should GRANT the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY has been furnished by United States mail to all counsel of record on this 9th day of December, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing REPLY of the Petitioner was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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