IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Petitioner,

v. CASE NO. SC11-1353
L.T. No. 01-CF-2577

KENNETH S. TUCKER,
Secretary, Florida
Department of Corrections, etc.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondents, Kenneth S. Tucker, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds therefore:

FACTS AND PROCEDURAL HISTORY

The following factual history is taken from this Court's opinion from the direct appeal of Simmons' convictions and sentences, Simmons v. State, 934 So. 2d 1100 (Fla. 2006).

> The charges against appellant, Eric Simmons, resulted from the kidnapping, sexual battery, and stabbing and beating of [redacted], who was found dead in a wooded area in Sorrento, Florida. Simmons was tried and found guilty of kidnapping, sexual battery using force likely to cause serious

injury, and first-degree murder. The jury unanimously recommended death as the penalty for the murder. The trial court sentenced Simmons to death on the charge of first-degree murder and life in prison for each of the kidnapping and sexual battery charges respectively.

Prosecution Evidence

The evidence presented at trial indicated that on December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of [redacted] in a large wooded area commonly used for illegal dumping. The body was located some 270 feet from the main road. Crime scene technician Theodore Cushing took pictures of the body, performed a sketch of the area, and found five tire tracks near the body. The crime scene technicians took plaster cast impressions of the three tracks with the most detail for comparison purposes. Mr. Cushing noticed that the tire tracks indicated that a car made a three-point turn close to the body. All-terrain vehicle tracks were present closer to the body, but they appeared older and deteriorated.

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. [redacted] suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately [redacted]'s death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the

neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where [redacted] was found because of the lack of blood and disruption to the area, but stated that the position of [redacted]'s body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from [redacted]'s body during the autopsy. Dr. Jerry Hogsette testified that, based on the temperature in the area of [redacted]'s body and the development of the insect larvae taken from [redacted]'s body, [redacted] had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.

After identifying the body as [redacted]'s, crime scene technicians went to the trailer where [redacted] lived and the laundromat where she worked to conduct Luminol testing. They found [redacted]'s purse at the laundromat and located a birthday list containing the names of Simmons' relatives. There was no evidence of violence in either place.

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the

traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in excess of the speed limit, but was unable to get close to the car and eventually lost track of it. Ms. Renfro thought that the car was a Chevy Corsica, but admitted that she "[did not] really know [her] cars too well." She recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging from the back passenger window. She testified that there was a large spotlight on the side of the Circle K building that illuminated the surrounding area well. Ms. Renfro subsequently identified Simmons' white Ford Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified [redacted] as the woman in the car when shown a photograph of her.

Jose Rodriguez testified that he knew [redacted] from the laundromat, he often saw Simmons and [redacted] together drinking, and he was familiar with Simmons' car. Mr. Rodriguez saw Simmons with [redacted] at the laundromat on the night of December 1, 2001. When he

arrived at the laundromat, he knocked on the glass window to get Simmons' attention and asked him to come outside. While Simmons was exiting, Mr. Rodriguez got [redacted]'s attention and asked if she was okay; she replied that she was. Mr. Rodriguez spoke with Simmons for a few minutes and then talked to his own girlfriend on the pay phone outside. When he finished, Simmons and [redacted] were still inside the closed laundromat.

Mr. Rodriguez was arrested the next day on unrelated charges, and on December 5, 2001, police officers showed Mr. Rodriguez a photopack with about thirty-five pictures in it, but he was unable to identify any as [redacted]'s boyfriend. However, Mr. Rodriguez picked the picture that looked most like Simmons and he drew additional characteristics similar to those of Simmons. On December 7, Mr. Rodriguez positively identified a photograph of Simmons as [redacted]'s boyfriend.

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 [redacted] 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 waived his Miranda rights and stated that he was friends with [redacted] and had tried to help her improve her living conditions. Simmons explained to Detective Perdue that on December 1, 2001, he and [redacted] had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so

[redacted] asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because [redacted] and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with [redacted] on one occasion approximately two weeks before the interview, even though Simmons' semen was found in [redacted]'s vaginal washings during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

Terrell Kingery, a crime lab analyst with the Florida Department of Law Enforcement (FDLE), examined the plaster tire casts from the scene of the crime and compared them to the tires on Simmons' car. The rear tires, which were different brands, were consistent with the three plaster casts. The dimension and general condition of the rear tires were consistent with two of the three casts.

Crime scene technician Ronald Shirley testified that when he performed a presumptive test for blood on a stain on the passenger door of Simmons' car, he obtained a positive result. Luminol testing was positive for blood on the area around the passenger seat cushion, the carpet below the passenger seat in the front and back, and especially the area of the passenger seat where one sits. Mr. Shirley noted that there were containers of partially consumed cleaning materials in the car. Technicians also cut the fabric off the seat cover and noted a large stain on the cushion itself.

Brian Sloan, a forensic DNA analyst, performed a mitochondrial DNA (mtDNA) sequence on the cushion stain and testified that, in his professional opinion, the stain on the cushion was blood. He testified that mtDNA is inherited maternally, and the mitochondrial genome is 16,500 pairs long. Most of these pairs are very similar between individuals, but approximately 610 bases are highly variable between individuals, and these variable bases can be used to differentiate

between people. mtDNA testing differs from the Short Tandem Repeat (STR) technique for DNA profiling because the STR technique is specific to the DNA in the nucleus, or chromosomal DNA. Mr. Sloan testified that mtDNA is the better technique to use on degraded samples because the plasmid circular DNA in mitochondria have thousands of copies in a single cell.

Mr. Sloan compared the mtDNA extracted from the seat cushion to that of Lee Daubanschmide, [redacted]'s mother; determined that each had an anomaly in the same place; and concluded that the two DNA sequences were consistent. After noting the consistency, Mr. Sloan entered the sequence into the FBI database of 4,839 contributors to check for matches, and concluded that the sequence had never been seen in that group. Mr. Sloan also stated that mtDNA is present in several types of human biological fluid or material, such as bones, hair, saliva, semen, diarrhea, sweat, and menstruation. He noted that he did not run statistical calculations to determine the ninety-five percent confidence interval as had Dr. Rick Staub, the director of the lab. Dr. Staub had obtained an upper confidence limit of one in 1600 individuals, but was unable to testify at trial.

Shawn Johnson, a crime laboratory analyst with the FDLE, testified that he performed a presumptive chemical test on the cushion stain, which was positive for blood. He then took three different cuttings from three different areas, combined them into one sample, but did not get any DNA results. Mr. Johnson testified that the lack of DNA results indicated that there was degradation of the DNA. Mr. Johnson swabbed the front passenger door jamb of Simmons' car and obtained a DNA profile that matched [redacted]'s. Mr. Johnson also matched [redacted]'s DNA to other stains on the car trim.

Defense Evidence

The defense called a number of witnesses during its case. Stuart James, a defense witness who is an expert in blood stain pattern analysis, examined blood spatter in photographs of the doorjamb of Simmons' car

> and concluded that it was a limited amount of staining but that it was consistent with the size range found in beatings, stabbings, and sometimes gunshots.
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> Dr. Neal Haskell, a forensic entomologist, testified that he could not determine the time of [redacted]'s death from the insect specimens collected by the LCSO. He also could not determine whether Dr. Hogsette's opinion regarding the time of death was correct, but he opined that some of Dr. Hogsette's conclusions were faulty and that Dr. Hogsette was not qualified as a forensic entomologist.
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> Dr. Terry Melton, an expert in mtDNA analysis, testified that the State's lab results regarding the match with the mtDNA were correct, but its statistical analysis that the mtDNA sequence had never been seen in the FBI database was incorrect. Dr. Melton stated that the State's lab did a search of the DNA bases only on a portion of the DNA they obtained. In Dr. Melton's lab, they compare all 783 of the DNA bases to the known DNA bases. When Dr. Melton ran the data in the database according to her lab's methods, she found a common type sequence in 105 of the 4839 people in the database.
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> Dr. Wilber Frank, a veterinarian and local resident, testified that he encountered a white four-door car driving very slowly at the intersection of State Road 44 and Seminole Springs Road at about 11 a.m. on December 2, 2001, near the area where the victim's body was found. The driver appeared to be an older white male.
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> At the conclusion of the trial's guilt phase, the jury found Simmons guilty of kidnapping, sexual battery using force likely to cause serious injury, and murder in the first degree, all as charged in the indictment.

Simmons v. State, 934 So. 2d 1100, 1105-09 (Fla. 2006) (footnotes omitted). Based on this evidence, the jury convicted Simmons of kidnapping, sexual battery, and first-degree murder.

The jury unanimously recommended the death penalty and the trial court sentenced Simmons to death for the murder of [redacted].

In sentencing Simmons to death, the trial judge found three aggravating factors: (1) Simmons was previously convicted of a felony involving the threat of violence to a person; (2) the crime for which Simmons was to be sentenced was committed during the commission of or attempt to commit sexual battery, kidnapping, or both; and (3) the crime for which Simmons was to be sentenced was especially heinous, atrocious, or cruel (HAC). As this Court noted:

> The court rejected the defense's proposed statutory mitigating circumstance of Simmons' age of twenty-seven because there was no evidence that he functioned at a level below his age in anything but reading. The court also rejected all other statutory mitigating factors, but found a number of nonstatutory mitigating factors: (1) Simmons manifested appropriate courtroom behavior (some weight); (2) Simmons was kind to the victim (some weight); (3) Simmons loves and cares for animals (minimal weight); (4) Simmons was active in his church and a mentor to boys who belonged to the church's Royal Rangers (some weight); (5) Simmons had a good family background and came from a closely knit, caring family (some weight); (6) Simmons was employed (some weight); (7) Simmons has a learning disability (some weight); and (8) Simmons is immature (some weight). The trial court rejected three other proposed mitigating circumstances as either not proven or not mitigating in nature, and imposed the death penalty for the murder.

Simmons, 934 So. 2d at 1110.

On direct appeal to this Court, Simmons raised eleven issues for review: (1) the guilty verdicts on the charges of kidnapping, sexual battery, and murder were not supported by the evidence; (2) the trial court did not have jurisdiction and venue was not proper in Lake County; (3) the trial court erred in denying Simmons' motion to suppress his statement to law enforcement officers and evidence obtained from the search of his vehicle; (4) the trial court erred in allowing the State's expert on mtDNA to testify before the jury; (5) the prosecuting attorney made improper remarks regarding the mtDNA evidence; (6) the trial court erred in excluding the testimony of a defense expert in eyewitness identification; (7) the trial court erred in allowing the State's entomology expert to testify as an expert in the life cycle of flies; (8) the trial court erred in denying Simmons' motion to exclude an in-court identification of Simmons' vehicle; (9) the prosecutor engaged in misconduct that rose to the level of preventing a fair trial; (10) Florida's death penalty statute is unconstitutional; and (11) the trial court erred in imposing aggravators to arrive at the death sentence. On May 11, 2006, this Court affirmed Simmons' convictions and sentences, Simmons v. State, 934 So. 2d 1100 (Fla. 2006), and thereafter, Simmons petitioned the United States Supreme Court for a writ of certiorari. On February 20,

2007, the United States Supreme Court denied Simmons' petition. Simmons v. Florida, 549 U.S. 1209 (2007).

On January 29, 2008, Simmons filed a postconviction motion raising six issues: (1) ineffective assistance of counsel at the pre-trial stage; (2) ineffective assistance of counsel at the guilt phase; (3) alleged Brady and Giglio violations; (4) ineffective assistance of counsel at the penalty phase; (5) a challenge to Florida's lethal injection procedures; and (6) a cumulative error claim. The trial court conducted an evidentiary hearing on all of Simmons' claims with the exception of his constitutional challenge to Florida's lethal injection procedures, and on August 23, 2010, the postconviction court entered an order denying relief. The appeal from the denial of postconviction relief is currently pending before this Court in Simmons v. State, SC10-2035.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). To prevail on a claim of ineffective assistance of

appellate counsel in a habeas petition, a criminal defendant must show (1) specific errors or omissions by appellate counsel that "constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance," and (2) that the "deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Dufour v. State, 905 So. 2d 42, 70 (Fla. 2005) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986)). Moreover, the appellate court must presume that counsel's performance falls within the wide range of reasonable professional assistance. Finally, habeas corpus "is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). In the instant case, a review of the record demonstrates that Simmons has failed to establish deficient performance or prejudice.

GROUND I

MENTAL ILLNESS AS *PER SE* BAR TO EXECUTION

In this first habeas claim, collateral counsel argues that Petitioner, Eric Lee Simmons, is mentally ill and his execution is barred under the Eighth and Fourteenth Amendments to the United States Constitution. This habeas claim is procedurally barred as it was not raised at trial, on direct appeal, or in Simmons' postconviction motion and appeal.

As this Court stated in [Ray Lamar] Johnston v. State, ___ So. 3d ___, 2011 WL 1584583 at *8 (Fla. Apr. 28, 2011), when addressing the identical claim made by the same collateral counsel:

> Johnston first claims that his mental disorders constitutionally bar imposition of the death penalty. Citing Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), Johnston seeks relief based on his mental status. Because Johnston's claim is both procedurally barred and without merit, we deny relief.
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> This Court has repeatedly held that there is no per se bar to imposing the death penalty on individuals with mental illness. See, e.g., Nixon v. State, 2 So. 3d 137, 146 (Fla. 2009); Lawrence v. State, 969 So. 2d 294, 300 n.9 (Fla. 2007). Specifically, this Court has recently considered and rejected the precise arguments that Johnston raises here regarding the evolving standards of decency in death penalty jurisprudence. See Johnston v. State, 27 So. 3d 11, 26–27 (Fla. 2010) (denying David Eugene Johnston's claim, based on the reasoning in Atkins and Roper, that mental illness is a bar to execution),

> cert. denied, ___ U.S. ___, 131 S. Ct. 459, 178 L. Ed. 2d 292 (2010). And this Court has made clear that we "find no reason to depart from these precedents." Id. at 27. Accordingly, we hold that Johnston is not entitled to relief on this claim.

As this Court has repeatedly held in the above cited cases, [Ray Lamar] Johnston, [David Eugene] Johnston, Nixon, and Lawrence, collateral counsel's habeas claim, that alleged mental illness is a *per se* bar to execution, is procedurally barred and also without merit. Accordingly, this Court should reject the instant claim.

GROUND II

INEFFECTIVE ASSISTANCE OF COUNSEL IN ARGUING ISSUES TO THIS COURT ON DIRECT APPEAL

In his second claim, collateral counsel argues that appellate counsel was ineffective in the manner she presented certain claims to this Court on direct appeal. Petitioner first briefly alleges that appellate counsel was ineffective for failing to cite any cases in support of her argument that the evidence was insufficient to support Simmons' conviction and for raising this as her first issue. Although Respondent submits that appellate counsel was not deficient in this regard, especially given her citations to cases in her reply brief regarding the appropriate legal standards, any claim of prejudice is clearly meritless. 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.

Petitioner next asserts that counsel was ineffective in arguing that the circuit court lacked jurisdiction when appellate counsel attempted to "incorporate by reference" arguments made in the motions she filed in the trial court into her appellate brief. Although this Court found that appellate counsel cannot preserve an issue by simply adopting the issues argued below, Simmons, 934 So. 2d at 1112 n.13, this Court nevertheless addressed and rejected counsel's claims regarding jurisdiction on the merits. Thus, Petitioner cannot establish any prejudice based on this alleged deficiency.

The remainder of Petitioner's claim involves his allegations that appellate counsel was ineffective when arguing that the trial court erred in denying his motion to suppress. Collateral counsel improperly attempts to re-litigate this issue under the guise of raising an ineffective assistance of counsel claim. See Taylor v. State, 3 So. 3d 986, 1000 (Fla. 2009) (holding that a petitioner "cannot relitigate the merits of an issue through a habeas petition or use an ineffective assistance claim to argue the merits of claims that either were or should have been raised below"). Petitioner merely repeats the same arguments as appellate counsel, albeit in more detail, which

were rejected by this Court on direct appeal. Thus, this Court should deny the instant claim.

Even if this Court were to address the merits of Petitioner's argument, the record clearly supports the trial court's ruling on his motion to suppress and had appellate counsel presented the factual testimony and arguments contained in the instant habeas, which were all rejected by the trial court, it would not have affected this Court's ruling on appeal. As this Court noted in its opinion,

> Simmons contends that, given the number of officers that surrounded his parents' Pine Lakes residence on December 7, 2001, a reasonable person in his position would not feel that he or she could decline the detectives' invitation to come to the sheriff's office. Further, Simmons contends that the fact that he was handcuffed and transported in the back of a caged, marked police cruiser belies the contention that he went voluntarily.
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> In support of his argument, Simmons cites to Hayes v. Florida, 470 U.S. 811, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985). In Hayes, police approached a burglary-rape suspect on his front porch and asked him to come to the police station for fingerprinting. Id. at 812, 105 S. Ct. 1643. An investigator threatened to arrest the suspect if he did not comply. Id. The United States Supreme Court determined that Hayes' detention was not consensual, and it reversed the conviction and remanded the case because the police did not have probable cause to detain the suspect. Id. at 814, 817–18, 105 S. Ct. 1643.
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> Unlike the defendant in Hayes, the uncontroverted testimony by the officers in this case indicates that Simmons never expressed any reluctance to accompany the detectives to the sheriff's office. The 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.

Although Simmons contends that a "thundering herd" of police officers would render any reasonable person unable to refuse the detectives' invitation, the record shows that most of these officers were not directly involved in any confrontation with Simmons or the conversation between Simmons, Detective Adams, and Detective Purdue. These two detectives were not in uniform and were not armed when they conducted the initial interview at Simmons' parents' home. Moreover, although Simmons was handcuffed and transported in the back of a caged police cruiser, the State presented evidence that these measures were taken for the safety of the police officers involved and that police removed the handcuffs as soon as Simmons reached the sheriff's office. Nothing in the record indicates that Simmons objected to being handcuffed or at any time expressed a desire to terminate the encounter. Our recognition of the propriety of using handcuffs in noncustodial encounters with police is in line with this Court's prior case law. See, e.g., Taylor v. State, 855 So. 2d 1, 18 (Fla. 2003) (holding that the use of handcuffs during a trip from a police cruiser to an interrogation room did not render a detention custodial when the suspect was told that he was not under arrest). Under the totality of the circumstances, we find no error in the trial court's determination that a reasonable person in Simmons' position would have felt free to terminate the encounter with police.

Simmons does not deny that he signed a Miranda waiver before the detectives began to interview him at the sheriff's office, and he never asked to terminate the interview. The two detectives allowed Simmons to use the bathroom when he needed to, and the three even ate dinner together. Moreover, the detectives told Simmons that they would provide a ride home if his family could not come to get him, and they reassured Simmons that he was not under arrest.

Given the significant deference that we give to trial courts' fact-finding on motions to suppress, we conclude that the trial court did not abuse its

discretion when it accepted the evidence presented by the State and determined that Simmons' December 7 interview with detectives was voluntary under the totality of the circumstances.

2. Probable Cause

Even if Simmons was able to successfully argue that his detention was custodial and not voluntary, he would still have to show that the police detained him without probable cause in order to prevail. See Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984) (holding that the trial court properly denied defendant's motion to suppress evidence when there was probable cause to support his de facto arrest). In addition to finding that Simmons' encounter with detectives was voluntary, the trial court determined that the police had probable cause to detain Simmons.

We have stated that "[p]robable cause for arrest exists where an officer 'has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction.'" Chavez v. State, 832 So. 2d 730, 747 (Fla. 2002) (quoting Walker v. State, 707 So. 2d 300, 312 (Fla. 1997)). At the time of the interview, detectives had statements from Simmons' friends and acquaintances that indicated that he was [redacted] boyfriend and that he was the last person seen with [redacted] while she was alive. They also had a statement from Mr. Rodriguez that he saw Simmons with [redacted] between 10:30 p.m. and 10:45 p.m. on December 1, 2001. Moreover, Simmons' car matched the description of the car that two witnesses saw at about midnight on December 1, from which a woman matching the description of [redacted] was attempting to flee. Detectives also had statements from witnesses that Simmons may have beaten [redacted] earlier in the week, and they knew that he had previously been arrested for abusing a prior spouse or girlfriend.

This Court has stated that "[t]he existence of probable cause is not susceptible to formulaic determination. Rather, it is the 'probability, and not a prima facie showing, of criminal activity [that] is the standard of probable cause.'" Doorbal v. State,

> 837 So. 2d 940, 952–53 (Fla. 2003) (citations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). Considering the totality of the circumstances and the evidence presented in this case, we cannot say that the trial court abused its discretion when it found that any custodial detention of Simmons was supported by probable cause.

Simmons, 924 So. 2d at 1113-15.

As this Court properly noted when applying the presumption of correctness to the trial court's factual findings, the totality of the evidence supported the trial court's finding that a reasonable person would have felt free to terminate the encounter with law enforcement. Furthermore, Petitioner could not prevail on his claim because the evidence supported the trial court's finding that law enforcement had probable cause to detain Simmons. Thus, 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. Appellate counsel's argument was not deficient in any manner, and even if it was, Petitioner cannot establish prejudice because the testimony relied on by him was refuted and not credited by the trial court. Accordingly, this Court should deny the instant claim.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by UPS delivery to David D. Hendry, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 10th day of October, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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