IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC08-1544
Lower Tribunal No. 93-159-CF
Active Death Warrant

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

On February 16, 1993, the grand jury in and for Lake County, Florida returned an indictment charging Appellant, Richard Henyard, with three counts of armed kidnapping, one count of sexual battery with the use of a firearm, one count of attempted first-degree murder, one count of robbery with a firearm, and two counts of first-degree murder. Appellant proceeded to jury trial on May 23, 1994, with the Honorable Mark J. Hill, presiding.

The following factual summary is taken from this Court's opinion affirming Henyard's conviction and sentence on direct appeal:

> The record reflects that one evening in January, 1993, eighteen-year-old Richard Henyard stayed at the home of a family friend, Luther Reed. While Reed was making dinner, Henyard went into his bedroom and took a gun that belonged to Reed. Later that month, on Friday, January 29, Dikeysha Johnson, a long-time acquaintance of Henyard, saw him in Eustis, Florida. While they were talking, Henyard lifted his shirt and displayed the butt of a gun in the front of his pants. Shenise Hayes also saw Henyard that same evening. Henyard told her he was going to a night club in Orlando and to see his father in South Florida. He showed Shenise a small black gun and said that, in order to make his trip, he would steal a car, kill the owner, and put the victim in the trunk.
>
> William Pew also saw Henyard with a gun during the last week in January and Henyard tried to persuade Pew to participate in a robbery with him. Later that day, Pew saw Henyard with Alfonza Smalls, a fourteen-year-old friend of Henyard's. Henyard again displayed the gun, telling Pew that he needed a car and that he

intended to commit a robbery at either the hospital or the Winn Dixie.

Around 10 p.m. on January 30, Lynette Tschida went to the Winn Dixie store in Eustis. She saw Henyard and a younger man sitting on a bench near the entrance of the store. When she left, Henyard and his companion got up from the bench; one of them walked ahead of her and the other behind her. As she approached her car, the one ahead of her went to the end of the bumper, turned around, and stood. Ms. Tschida quickly got into the car and locked the doors. As she drove away, she saw Henyard and the younger man walking back towards the store.

At the same time, the eventual survivor and victims in this case, Ms. Lewis and her daughters, Jasmine, age 3, and Jamilya, age 7, drove to the Winn Dixie store. Ms. Lewis noticed a few people sitting on a bench near the doors as she and her daughters entered the store. When Ms. Lewis left the store, she went to her car and put her daughters in the front passenger seat. As she walked behind the car to the driver's side, Ms. Lewis noticed Alfonza Smalls coming towards her. As Smalls approached, he pulled up his shirt and revealed a gun in his waistband. Smalls ordered Ms. Lewis and her daughters into the back seat of the car, and then called to Henyard. Henyard drove the Lewis car out of town as Smalls gave him directions.

The Lewis girls were crying and upset, and Smalls repeatedly demanded that Ms. Lewis "shut the girls up." As they continued to drive out of town, Ms. Lewis beseeched Jesus for help, to which Henyard replied, "this ain't Jesus, this is Satan." Later, Henyard stopped the car at a deserted location and ordered Ms. Lewis out of the car. Henyard raped Ms. Lewis on the trunk of the car while her daughters remained in the back seat. Ms. Lewis attempted to reach for the gun that was lying nearby on the trunk. Smalls grabbed the gun from her and shouted, "you're not going to get the gun, bitch." Smalls also raped Ms. Lewis on the trunk of the car. Henyard then ordered her to sit on the ground near the edge of the road. When she hesitated, Henyard pushed her to the ground and shot her in the leg. Henyard shot her at

close range three more times, wounding her in the neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Ms. Lewis's unconscious body off to the side of the road, and got back into the car. The last thing Ms. Lewis remembers before losing consciousness is a gun aimed at her face. Miraculously, Ms. Lewis survived and, upon regaining consciousness a few hours later, made her way to a nearby house for help. The occupants called the police and Ms. Lewis, who was covered in blood, collapsed on the front porch and waited for the officers to arrive.

As Henyard and Smalls drove the Lewis girls away from the scene where their mother had been shot and abandoned, Jasmine and Jamilya continued to cry and plead: "I want my Mommy," "Mommy," "Mommy." Shortly thereafter, Henyard stopped the car on the side of the road, got out, and lifted Jasmine out of the back seat while Jamilya got out on her own. The Lewis girls were then taken into a grassy area along the roadside where they were each killed by a single bullet fired into the head. Henyard and Smalls threw the bodies of Jasmine and Jamilya Lewis over a nearby fence into some underbrush.

Later that evening, Bryant Smith, a friend of Smalls, was at his home when Smalls, Henyard, and another individual appeared in a blue car. Henyard bragged about the rape, showed the gun to Smith, and said he had to "burn the bitch" because she tried to go for his gun. Shortly before midnight, Henyard also stopped at the Smalls' house. While he was there, Colinda Smalls, Alfonza's sister, noticed blood on his hands. When she asked Henyard about the blood, he explained that he had cut himself with a knife. The following morning, Sunday, January 31, Henyard had his "auntie," Linda Miller, drive him to the Smalls' home because he wanted to talk with Alfonza Smalls. Colinda Smalls saw Henyard shaking his finger at Smalls while they spoke, but she did not overhear their conversation.

That same Sunday, Henyard went to the Eustis Police Department and asked to talk to the police about the Lewis case. He indicated that he was present at the

> scene and knew what happened. Initially, Henyard told a story implicating Alfonza Smalls and another individual, Emmanuel Yon. However, after one of the officers noticed blood stains on his socks, Henyard eventually admitted that he helped abduct Ms. Lewis and her children, raped and shot her, and was present when the children were killed. Henyard continuously denied, however, that he shot the Lewis girls. After being implicated by Henyard, Smalls was also taken into custody. The gun used to shoot Ms. Lewis, Jasmine and Jamilya was discovered during a subsequent search of Smalls' bedroom.
>
> The autopsies of Jasmine and Jamilya Lewis showed that they both died of gunshot wounds to the head and were shot at very close range. Powder stippling around Jasmine's left eye, the sight of her mortal wound, indicated that her eye was open when she was shot. One of the blood spots discovered on Henyard's socks matched the blood of Jasmine Lewis. "High speed" or "high velocity" blood splatters found on Henyard's jacket matched the blood of Jamilya Lewis and showed that Henyard was less than four feet from her when she was killed. Smalls' trousers had "splashed" or "dropped blood" on them consistent with dragging a body. DNA evidence was also presented at trial indicating that Henyard raped Ms. Lewis.

Henyard v. State, 689 So. 2d 239, 242-45 (Fla. 1996) (footnote omitted), cert. denied, 522 U.S. 846 (1997).

Based on this evidence, the jury found Appellant guilty as charged. After conducting a penalty phase proceeding, the jury returned an advisory recommendation by unanimous vote that Henyard be sentenced to death for the murder of the two young girls.

In his written findings in support of the death sentences, the trial judge found in aggravation: (1) Appellant had been

convicted of a prior violent felony; (2) the murders were committed in the course of a felony; (3) the murders were committed for pecuniary gain; and (4) the murders were especially heinous, atrocious or cruel. The trial court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, and accorded it "some weight." The trial court found that Appellant was acting under an emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, and accorded these mental mitigators "very little weight." Additionally, the trial court found the following mitigating circumstances but accorded them "little weight": (1) Appellant functions at the emotional level of a thirteen-year-old and is of low intelligence; (2) Appellant had an impoverished upbringing; (3) Appellant was born into a dysfunctional family; (4) Appellant can adjust to prison life; (5) Appellant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial judge accorded some weight to the nonstatutory mitigating circumstance that Henyard's codefendant, Alfonza Smalls, could not receive the death penalty as a matter of law due to his age of fourteen years. The court concluded that the mitigating circumstances did not offset the aggravating circumstances and sentenced Henyard to death for the two murders.

On December 19, 1996, this Court issued its opinion affirming Henyard's convictions and sentences on direct appeal. Henyard v. State, 689 So. 2d 239 (Fla. 1996), cert. denied, 522 U.S. 846 (1997).

On May 11, 1999, Henyard filed an amended motion for postconviction relief and raised nine claims. On October 14, 1999, the trial court conducted an evidentiary hearing and both the defense and the State presented witnesses. Subsequently, the trial court entered an order denying postconviction relief.

On appeal, this Court affirmed the trial court's denial of postconviction relief and also denied Henyard's contemporaneously-filed Petition for Writ of Habeas Corpus. Henyard v. State/Crosby, 883 So. 2d 753 (Fla. 2004).

Following denial of all relief in the state courts, on December 20, 2004, Henyard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. On April 14, 2005, during the pendency of his federal habeas proceedings, Henyard filed a successive postconviction motion in state court alleging, in part, that his death sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment in light of the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005). Henyard contemporaneously filed a motion in the

district court to hold his federal habeas proceedings in abeyance until he exhausted his state remedies. On April 26, 2005, the district court denied Appellant's request to hold his federal habeas proceedings in abeyance. On June 27, 2005, the state trial court denied Appellant's successive postconviction motion. Henyard appealed to this Court which denied relief *per curiam* on April 11, 2006. Henyard v. State, 929 So. 2d 1052 (Fla. 2006).

On August 2, 2005, the federal district court issued an order denying Henyard's habeas petition with prejudice and entered judgment for Respondents on August 3, 2005. On January 3, 2006, the Eleventh Circuit Court of Appeals granted Henyard's renewed application for Certificate of Appealability as to three issues. On August 11, 2006, the Eleventh Circuit Court of Appeals issued its opinion affirming the district court's denial of habeas corpus relief. Henyard v. McDonough, 459 F.3d 1217, rehr'g en banc denied, 213 Fed. Appx. 973 (11th Cir. 2006). Appellant filed a petition for writ of certiorari in the United States Supreme Court on January 2, 2007. The United States Supreme Court denied certiorari review on March 19, 2007. Henyard v. McDonough, 127 S. Ct. 1818 (2007).

On October 18, 2007, Henyard filed a second successive motion for postconviction relief raising four claims relating to

Florida's lethal injection procedure. The trial court summarily denied the motion on January 8, 2008. Henyard filed a notice of appeal on February 5, 2008. On or about April 23, 2008, Henyard filed in the circuit court a Motion for Leave to Amend Successive Motion for Postconviction Relief. Because this Court had jurisdiction over the case, the State moved the circuit court to dismiss the motion for leave to amend. After conducting a hearing on this motion on May 13, 2008, the trial court reserved ruling so that Henyard's collateral counsel could file a motion to relinquish with this Court. On May 22, 2008, Henyard filed a Motion to Relinquish Jurisdiction in this Court. On July 3, 2008, Henyard filed his Initial Brief in the Florida Supreme Court. On July 9, 2008, Governor Charlie Crist signed a death warrant and Henyard's execution is scheduled for September 23, 2008, at 6:00 p.m. The following day, this Court issued an Order denying Henyard's motion to relinquish jurisdiction, but noted that because of the scheduled execution, the trial court had jurisdiction "to consider any successive motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851."

On August 4, 2008, Appellant filed a Motion to Vacate Sentence and for Stay of Execution with the trial court. Appellant raised three new issues in his motion and also renewed

his lethal injection issues which were the subject of his earlier successive postconviction motion. The court conducted a case management conference, and on August 14, 2008, issued an order summarily denying Appellant's claims. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Henyard's newly discovered evidence claim. Henyard claimed that codefendant Alfonza Smalls' statements to another inmate in 1993-94 would have supported the statutory mitigating circumstance that Henyard was an accomplice to the instant murders and his involvement was relatively minor. The trial court summarily denied the claim because Henyard failed to establish that the newly discovered evidence would probably result in a life sentence. The trial court properly rejected Henyard's arguments and found that, even if the evidence was newly discovered, there was no scenario that Henyard's involvement in these capital felonies could ever be considered "relatively minor." Furthermore, Henyard's claim regarding an alleged Brady violation is not properly before this Court as it was not raised below. Even if this Court were to address this issue, the claim lacks merit.

Henyard's claim that his pending execution is unconstitutional because he is "emotionally retarded" is procedurally barred and without merit. Although Henyard acknowledges that his IQ scores of 85 and 88 preclude a finding of mental retardation, he argues that his intellectual difficulties are identical to mental retardation, and given the United States Supreme Court's decision in Atkins v. Virginia,

536 U.S. 304 (2002) prohibiting the execution of mentally retarded defendants, Henyard argues that the Atkins rationale should be extended to his situation. The trial court properly found this claim procedurally barred as it was not timely raised, was not based on newly discovered evidence, and was also a variation of a claim that Henyard had unsuccessfully raised in his 2005 successive postconviction motion. Additionally, the court denied the claim because it lacked merit. The trial court considered Henyard's emotional and mental deficits as mitigating circumstances, and as the lower court correctly noted, this Court has repeatedly rejected attempts to extend Atkins to cases where the defendant is not insane or mentally retarded.

Similar to his previous claim, Henyard argues that a recent psychological evaluation establishes that he has a major mental illness which precludes his execution. Like claim two, the trial court noted that the psychologist's self-serving evaluation was not "new evidence," and rejected this "virtually indistinguishable" claim as procedurally barred. Additionally, the court noted that the claim was without merit based on this Court's precedent.

As argued in Henyard v. State, SC08-222, the court properly denied Henyard's constitutional attacks to Florida's procedures for judicial execution by lethal injection. The court applied

binding precedent to reject this claim. Henyard's claim that an incorrect standard was applied is refuted by the case law. Additionally, the lower court properly found that Henyard's challenges to the constitutionality of Florida Statutes, sections 945.10 and 27.702 are procedurally barred and without merit.

Appellant's final claim regarding this Court's actions in affirming summary denials of successive postconviction motions is barred from review because Henyard failed to raise the claim below. Furthermore, the claim is based on inaccurate assertions and is legally without merit.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED HENYARD'S CLAIM THAT NEWLY DISCOVERED EVIDENCE RENDERED HIS DEATH SENTENCE UNCONSTITUTIONAL.

In his first claim, Henyard asserts that newly discovered evidence renders his death sentence constitutionally unreliable. Specifically, Henyard based his successive postconviction claim on an affidavit executed by Jason Nawara on July 24, 2008. Mr. Nawara stated in his affidavit that, while he was housed in the Lake County Jail awaiting trial in 1993-94, he heard Henyard's codefendant, Alfonza Smalls, state on several occasions that "I'm a killa, you just a car thief," and "I've killed before and I'll kill again." (V2:303-05). Mr. Nawara further stated that Smalls "never denied killing nor did he say or insinuate that the killings were done by his codefendant." (V2:303-05).

In order to obtain relief on a claim of "newly discovered evidence," the defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such a nature that it would produce an acquittal on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998);

Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007). In the case of a defendant seeking to vacate his death sentence,[1] the second prong of the Jones analysis requires that the newly discovered evidence would probably produce a life sentence. See Ventura v. State, 794 So. 2d 553, 571 (Fla. 2001); Jones v. State, 591 So. 2d 911, 915 (Fla. 1991); see also Trepal v. State, 846 So. 2d 405, 438 (Fla. 2003) (noting that the test for prejudice under a newly discovered evidence claim is the most difficult standard for a defendant to meet) (Pariente, J., concurring).

The State submits that the trial court properly summarily denied the instant claim based on Henyard's failure to meet the Jones criteria. This Court has previously held that a successive postconviction motion can be summarily denied if "the motion, files and record of the case conclusively show that the movant is entitled to no relief." Diaz v. State, 945 So. 2d 1136, 1145 (Fla. 2006). Because the trial court denied the motion solely on the basis of the pleadings, this Court reviews the court's ruling *de novo*. Van Poyck v. State, 961 So. 2d 220, 224 (Fla. 2007).

In denying Henyard's newly discovered evidence claim, the trial court first questioned whether Henyard had met his burden

[1] Henyard's instant postconviction motion was directed solely at his death sentence and did not attack his underlying convictions. (V3:499).

of establishing that the evidence was "newly discovered." (V3:539-42). The State argued in its response to the motion that Henyard had not met the threshold question of establishing that Jason Nawara's affidavit was "newly discovered evidence." Henyard claimed in his motion that he met the first prong of Jones because his counsel could not have known of Nawara's testimony at the time of Henyard's trial in 1994 because Nawara's murder case was pending at the time and he was represented by counsel, thereby allegedly preventing Henyard's trial attorneys from speaking with him.[2]

At the case management hearing, collateral counsel attempted to explain how Nawara's information was obtained, but counsel never offered an explanation as to why this information was not previously available at some point during the past fourteen (14) years. Collateral counsel stated that they discovered Nawara by "go[ing] back over" the records they possessed.[3] (V3:494). Because Henyard's counsel could have

[2] Florida Rules Regulating the Florida Bar 4-4.2 would not have prohibited Henyard's trial counsel from communicating with Nawara regarding Alfonza Smalls' statements.

[3] Collateral counsel disclosed for the first time at the case management conference that they discovered Nawara's name through an unrelated transcribed interview of another inmate, Jimmy Kennedy, taken by Assistant State Attorney William Gross on March 22, 1994. (V3:493-98). Collateral counsel stated that he was "frankly not real sure" how Nawara's information came about

obtained Nawara's information earlier with the exercise of due diligence, the trial court could have properly denied the instant claim on that ground alone. Nevertheless, the trial court assumed for the sake of its analysis that the evidence was in fact "newly discovered."

The trial court found, however, that Henyard had failed to meet the second prong of Jones because he failed to establish that Nawara's testimony would probably result in a life sentence. The court first noted that Nawara's testimony would not have been admissible at the penalty phase proceedings.

> To begin with, even if this court were to find the evidence is newly discovered, it would have to be admissible at the penalty phase proceedings. The hearsay statements offered by Mr. Nawara do not indicate whom Mr. Smalls is admitting he killed. The defense indicated the statements would be admissible under the hearsay exception commonly referred to as statement against interest. To be admissible under section 90.804, Fla. Stat., the declarant must be unavailable, and when the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused, the statement is inadmissible unless corroborating circumstances show the trustworthiness of the statement. Herein, the statements were made by a fourteen year old boy in jail facing a charge of murder. The forensic evidence at the trial tended to show Henyard was the killer. The defense even alleged in its instant motion that Smalls had made another statement that he raped a white woman. In fact, Ms. Lewis is African American. The Defense has not demonstrated that the statements would be admissible.

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and it "may well have come through some very recent records." (V3:495).

(V3:542). The trial court properly found that Nawara's hearsay statements would not be admissible at Henyard's penalty phase proceedings because they lacked corroborating circumstances to demonstrate their trustworthiness. See Sims v. State, 754 So. 2d 657, 660 (Fla. 2000) (stating that even if the defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible); § 90.804(2)(c), Fla. Stat. (2008) (stating that an exception to the hearsay rule exists when (1) the declarant is unavailable as a witness, (2) the statement tends to subject the declarant to criminal liability so that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement). Because Henyard is unable to establish the requirements for admissibility of Florida Statutes, section 90.804(2)(c), the trial court properly found that this evidence would not be admissible.

Even assuming for the sake of argument that Nawara's evidence was newly discovered and admissible, Henyard still failed to demonstrate that he would probably receive a life sentence. Nawara's testimony would not have changed the jury's

unanimous recommendation[4] or the trial court's finding that the aggravating circumstances substantially outweighed the mitigating circumstances.

According to Nawara's affidavit, codefendant Smalls stated that he was a "killa" and had killed before and would kill again. Notably, however, Nawara's affidavit does not claim that Smalls confessed to being the triggerman in the murders of Jasmine and Jamilya Lewis.[5] Contrary to Appellant's assertions in his brief at page 11, it was not a "fact" that Smalls shot the children. As the trial court noted when sentencing Henyard, and again when denying the instant postconviction claim, the evidence in this case does not support the theory that Smalls was the triggerman. Although Henyard claimed that Nawara's testimony would support the statutory mitigating circumstance argued at trial that he "was an accomplice in the capital felony committed by another person and his participation was relatively minor," the trial court properly rejected this claim. The court

[4] Henyard asserts that the jury "was at odds" regarding their vote because the verdict form reflects that someone scratched out a number, but the verdict form reflects that the jury ultimately unanimously recommended death and the jurors were polled after the fact and affirmed their recommendation. (DAR V7:1345-46; V21:2553-57).

[5] Because Smalls' hearsay statements do not reference the crimes in this case, the relevance of the testimony is dubious at best.

noted that Henyard's reasoning on this claim was "structured like a house of cards:"

> However, if the court found the statements were newly discovered, and that the statements would be admissible, and for purposes of this analysis accepts that Mr. Nawara's testimony would mirror his affidavit, the court would then have to find that Henyard's participation in the capital felonies was "relatively minor." It is this last card that brings the house tumbling down. **Mr. Henyard took the gun. Mr. Henyard hatched the diabolical plan. Mr. Henyard bragged about his intentions days before the event. Mr. Henyard chose the location to carry out his malignant plan. Mr. Henyard drove the car with the abducted family. Mr. Henyard was the first to rape Ms. Lewis. Mr. Henyard shot Ms. Lewis repeatedly, leaving her for dead. Mr. Henyard continued to drive the car and then pulled over and lifted the three year old out of the car. Mr. Henyard was four feet from the victims when bullets entered their bodies. In no reasonable interpretation of the phrase could Mr. Henyard ever be considered a "relatively minor participant" in these capital felonies.**

(V3:542-43) (emphasis added).

At Henyard's trial and penalty phase, the State introduced evidence to rebut Henyard's assertion that Smalls was the triggerman and Henyard's participation in the murder was "relatively minor." In addition to the above-quoted evidence summarized by the trial court in its order, the State also presented evidence from Florida Department of Law Enforcement blood stain expert LeRoy Parker at the penalty phase regarding the blood stains found on Henyard's and Smalls' clothing. This physical evidence established that "high velocity" or "high speed" blood spatter was found ***only*** on Henyard's clothing,

indicating that he was standing within four feet of the victims when they were shot; as opposed to "splashed" or "dropped" blood spatter found on Alfonzo Smalls' clothing, which was consistent with his participation in assisting Henyard in throwing the two children's bodies over a fence. As this Court found when sentencing Henyard to death for the two murders, the evidence introduced during Henyard's trial "strongly indicates" that the defendant fired the fatal bullets which killed Jamilya and Jasmine Lewis, and any assertion that Smalls was the triggerman would not have established that Henyard was only a "minor participant" in this case. (DAR V8:1504, 1512).

The instant case is similar to numerous other death penalty cases where the defendant produces allegedly newly discovered evidence during warrant proceedings. See Sims v. State, 754 So. 2d 657 (Fla. 2000) (affirming lower court's summary denial of newly discovered evidence claim based on affidavits of witnesses claiming that defendant was not responsible for murder); Rutherford v. State, 940 So. 2d 1112 (Fla. 2006) (newly discovered evidence showing female friend's involvement in murder did not reduce the defendant's culpability and would not result in the imposition of a life sentence); Diaz v. State, 945 So. 2d 1136 (Fla. 2006) (affirming trial court's summary denial of postconviction newly discovered evidence claim because trial

witness' recent affidavit did not recant his trial testimony on the issue of Diaz's act of shooting the victim); see also Van Poyck v. State, 961 So. 2d 220 (Fla. 2007) (holding that newly discovered evidence of affidavit from inmate claiming that codefendant was the triggerman was insufficient to meet Jones standard because, even if defendant was not triggerman, the imposition of the death penalty was fair and proportional); Tompkins v. State, 980 So. 2d 451 (Fla. 2007) (affirming trial court's summary denial of newly discovered evidence claim based on witness' affidavit).

As in all of these above-cited cases, this Court should affirm the lower court's summary denial of the instant claim because Henyard has failed to show that he has newly discovered evidence that would probably produce a life sentence. Henyard has failed to produce any newly discovered evidence that refutes or weakens the State's case that Henyard was the triggerman in the instant case. However, even assuming that Nawara's vague assertions supported the theory that Smalls was the triggerman, this would not result in a life sentence for Henyard because the jury and the trial court would have still rejected the statutory "relatively minor participant" mitigating circumstance given Henyard's major participation in the murders. Furthermore, Nawara's evidence would not have otherwise influenced the

weighing of the aggravating and mitigating circumstances or this Court's proportionality review. As in Van Poyck, even if Henyard was not the triggerman, his sentences are still fair and proportional. As this Court stated when conducting its proportionality review, Henyard's death sentences were proportionate and Smalls' life sentences were irrelevant because Smalls was ineligible for death due to his age. See Henyard v. State, 689 So. 2d 239, 254-55 (Fla. 1996). Accordingly, this Court should affirm the trial court's summary denial of the instant claim.

Henyard next asserts that he orally modified his instant claim at the case management conference and raised it as a Brady or Giglio violation. The State submits that this is not an accurate representation. In fact, as the trial court properly noted in its order, "[a]lthough defense counsel bantered Brady and Giglio claims ***might be*** appropriate, . . . [t]he defense ***did not ask for leave to amend their pleadings***, and this court is confident that ***if the defense had a good faith basis for pleading such a claim, they would have done so***." (V3:541). The trial court did not address an alleged Brady or Giglio claim because one was never alleged below. As such, Henyard's instant sub-claim should be rejected as it was never presented to the trial court. See Thompson v. State, 796 So. 2d 511, 514, n.5

(Fla. 2001) (stating that issue which was not raised in postconviction motion but presented for the first time on appeal is barred); see generally Doorbal v. State, 983 So. 2d 464 (Fla. 2007) (reminding attorneys who represent capital defendants of the importance of compliance with minimal pleading requirements to allege a valid claim).

As previously noted in footnote 3, supra, collateral counsel stated at the case management conference that they discovered Jason Nawara's name through a transcript of a 1994 interview between Assistant State Attorney William Gross and another inmate, Jimmy Kennedy. Counsel erroneously states that he "orally modified" his pleadings to include a Brady or Giglio claim and further erroneously asserts that he is entitled to a presumption that his allegations are true because this claim was summarily denied. As a review of the entire transcript of the case management conference makes clear, collateral counsel never sought leave to amend his pleadings and include such a claim. In fact, as the trial court pointed out, collateral counsel vaguely bantered around the possibility of raising such a claim in the future, and after telling counsel to "spit it out," collateral counsel stated that he would raise such a claim "if it turns out the prosecutor concealed evidence." (V3:505-06). Collateral counsel never raised this issue in his postconviction

motion despite being fully aware of the Kennedy transcript and never sought leave to amend his claim as required by Florida Rule of Criminal Procedure 3.851(f)(4) . Thus, counsel cannot now raise this issue for the first time on appeal. Furthermore, contrary to his assertions in his brief, Henyard is certainly not entitled to a presumption that the Kennedy transcript was withheld because the trial court summarily denied his newly discovered evidence claim.

Even if this Court were to address Henyard's Brady claim,[6] the State submits that it lacks merit. The Brady standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. Under Brady, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667 (1985). A criminal defendant alleging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Strickler v. Greene, 527 U.S. 263, 281 n.20 (1999).

[6] Henyard argues in his brief that this issue more appropriately falls under Brady v. Maryland, 373 U.S. 83 (1963), rather than Giglio v. United States, 405 U.S. 150 (1972).

In the instant case, there has been no showing that the Kennedy transcript was ever withheld from the defense. In fact, collateral counsel has never revealed when, or how, they discovered this transcript. Even assuming that the Kennedy transcript was withheld from defense counsel, Henyard is still not entitled to relief under Brady because there is no reasonable probability that the result of the penalty phase would have been different had defense counsel been aware of the transcript.

The statements attributed to codefendant Smalls contained in the Kennedy transcript are not exculpatory or impeachment evidence. According to the transcript, Smalls stated that "we" kidnapped these people, we raped them, we killed them. The prosecutor apparently asked Kennedy if Smalls ever admitted to being the triggerman, and Kennedy replied that he just said "we." (V3:531). As the State argued at Henyard's trial and the penalty phase, ***both*** Henyard and Smalls were responsible for these crimes. The State never argued during the guilt phase that Henyard acted alone or that he was the triggerman.[7] Rather,

[7] At the conclusion of the guilt phase, defense counsel requested that the court find that death was not an appropriate sentence based on Tyson v. Arizona, 481 U.S. 137 (1987) and Edmund v. Florida, 458 U.S. 782 (1982), and argued that the State had not established that Henyard was the killer of the two children. (DAR V19:2069-72). The trial court rejected this argument

in the penalty phase as rebuttal to defense counsel's argument that Henyard was a relatively minor participant, the State introduced evidence indicating that Henyard shot Dorothy Lewis multiple times in the face minutes before the children were shot and also introduced the high speed blood stain evidence that indicated Henyard was within four feet of the victims when they were shot. (DAR V19:2085-97; 2154-2200).

Obviously, the fact that Smalls told fellow inmate Kennedy that he and Henyard committed these crimes was not exculpatory to Henyard, nor would it have served as impeachment evidence. Furthermore, there is no reasonable probability that the result of the proceedings would have been any different had Henyard presented such evidence at the penalty phase. Accordingly, although a Brady claim is not properly before this Court, the record establishes that any such claim would lack merit.

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because Henyard was a major participant in the crimes and demonstrated reckless indifference to human life.

ISSUE II

HENYARD'S CLAIM THAT HIS MENTAL AND EMOTIONAL DEFICITS ESTABLISH A BAR TO HIS EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IS PROCEDURALLY BARRED AND WITHOUT MERIT.

In his second postconviction claim, Henyard argued below that his mental and emotional deficits established a constitutional bar to his execution under the Eighth and Fourteenth Amendments to the United States Constitution.[8] Although Henyard never claimed that he is mentally retarded,[9] he urged the trial court to extend the holding in Atkins v.

[8] Once again, collateral counsel now asserts on appeal for the first time a claim that is different than what was raised below. Henyard asserts in his brief to this Court that the instant claim is based on "newly discovered evidence." Initial Brief at 26. Although Henyard attached copies to his postconviction motion of recent studies, a review of his claim and argument at the case management conference establishes that he was not making a "newly discovered evidence" claim, but rather, arguing that the court should extend United States Supreme Court precedent and find that his mental and emotional conditions operated as a bar to an execution. (V2:238-427; V3:500-05). Because a newly discovered evidence claim was never presented below, this Court should reject Appellant's attempts to change his argument while on appeal. Thompson v. State, 796 So. 2d 511, 514, n.5 (Fla. 2001).

[9] Henyard concedes that his IQ scores did not fall below two standard deviations as required by Florida Statutes, section 921.137(1). At the penalty phase, Dr. Toomer testified that Henyard had an IQ of 85 (DAR V20:2310), and at the postconviction evidentiary hearing, Dr. Bauer testified that his IQ was 88 (PCR V6:1075). Obviously, these scores preclude Henyard from asserting a valid mental retardation claim. See Phillips v. State, 984 So. 2d 503 (Fla. 2008) (noting that this Court has consistently interpreted [the statutory] definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below).

Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibition against cruel and unusual punishment bars executions for individuals who are mentally retarded), to exclude the death penalty as a possible punishment for defendants who suffer from emotional and mental disabilities. As the trial court properly found, Henyard's claim is procedurally barred and without merit.

As previously noted, this Court reviews the trial court's summary denial of this claim *de novo*. Van Poyck v. State, 961 So. 2d 220, 224 (Fla. 2007). The trial court found Henyard's "emotional retardation" claim procedurally barred for two different reasons. (V3:544-48). First, the court properly noted that the claim is barred as it was not timely raised and it was not based on any new evidence.[10] See Hill v. State, 921 So. 2d 579 (Fla. 2007) (finding claim based on Atkins procedurally barred under Florida Rule of Criminal Procedure 3.851(e)(2)(B) because it was not timely raised). As the trial court noted in its order, Henyard had previously raised a similar postconviction claim in 2005 (three years after Atkins). In that motion, Henyard argued that because of his mental and

[10] Henyard attached numerous articles and studies to his motion in an attempt to demonstrate that recent research supports his attempt to extend the Atkins Court's rationale. However, as this Court has recently noted, "new research studies" and scientific articles do not constitute "newly discovered evidence." See Schwab v. State, 969 So. 2d 318, 326-26 (Fla. 2007) (rejecting claim that recent scientific articles on brain anatomy constituted newly discovered evidence).

emotional deficits, he was functionally a juvenile and it would be unconstitutional to execute him pursuant to Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth Amendment precludes the imposition of the death penalty on juvenile offenders under the age of eighteen). The trial court rejected that claim on the merits[11] and this Court affirmed the decision. Henyard v. State, 929 So. 2d 1052 (Fla. 2006).

In addition to finding the claim procedurally barred for failing to timely file it, the trial court further found the claim barred because it was merely a variation of a claim previously rejected. See Mills v. State, 684 So. 2d 801, 805 (Fla. 1996) (holding that Brady claim was procedurally barred where it was merely a variation of a prior postconviction issue). As previously noted, Henyard filed his first successive postconviction motion in 2005 asserting that his death sentence was unconstitutional under Roper because he had a mental age of a thirteen-year-old. In his instant motion, Henyard relies on

[11] Henyard states in his brief on multiple occasions that Florida Rule of Criminal Procedure 3.851(e)(2) is "very specific" in that previously raised claims have to be decided on the merits, and Henyard further alleges that his previous Roper claim was not decided on the merits. Initial Brief of Appellant at 25, 32. These assertions are incorrect for two reasons. First, Rule 3.851(e)(2) has no such requirement, much less, a "very specific" requirement. Second, although the trial court did not conduct an evidentiary hearing on his prior successive motion, the court nonetheless denied the claim because it was "legally without merit." See V1:154-58 (SC05-1337), Henyard v. State, 929 So. 2d 1052 (Fla. 2006).

the same evidence that he utilized in 2005 to support his argument that he was emotionally and mentally a juvenile.

Obviously, as the trial court correctly found, the basis of the instant claim has been available to Henyard since the time of the Atkins and Roper decisions. In fact, the assertions contained in Henyard's motion regarding his mental and emotional disabilities are all based on testimony from the penalty phase and/or his original postconviction evidentiary hearing conducted in 1999. As such, the State submits that the lower court properly denied the instant claim as procedurally barred.

Additionally, even if the trial court erred in finding the claim procedurally barred, the court properly found that it lacked merit. This Court has rejected the same exact claim in Diaz v. State, 945 So. 2d 1136 (Fla. 2006). In Diaz, the defendant asserted that his personality disorders were sufficiently similar to mental retardation so as to exempt him from execution. Id. at 1151-52. This Court stated:

> [N]either this Court nor the Supreme Court has recognized mental illness as a per se bar to execution. Instead, mental illness can be considered as either a statutory mental mitigating circumstance if it meets that definition (i.e., the crime was committed while the defendant "was under the influence of extreme mental or emotional disturbance") or a nonstatutory mitigating circumstance. See § 921.141(6), Fla. Stat. (2006). Such mental mitigation is one of the factors to be considered and weighed by the court in imposing a sentence.
>
> . . .

> In light of this record, Diaz has not even shown that he suffers from a mental illness. And even if he could, this would not automatically exempt him from execution as there is currently no per se "mental illness" bar to execution.

Diaz, 945 So. 2d at 1151-52; see also Kearse v. State, 969 So. 2d 976, 991-92 (Fla. 2007) (rejecting claim of eighteen-year-old defendant that his low level of intellectual functioning and emotional impairments rendered him ineligible for execution under Atkins and Roper); Connor v. State, 979 So. 2d 852 (Fla. 2007) ("To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position."); Bello v. State, 547 So. 2d 914, 916 n.1 (Fla. 1989) (rejecting as meritless claim that execution of mentally ill constitutes cruel and unusual punishment).

As the trial court noted in its order, extensive testimony was presented at the penalty phase regarding Henyard's age and emotional/mental health issues, and these circumstances were all taken into account as mitigating evidence. (V3:545); see also Henyard v. State, 689 So. 2d 239, 244 (Fla. 1996) (noting that the trial court found Henyard's age as a statutory mitigator, found both mental statutory mitigators, and also considered nonstatutory mitigating factors related to his emotional age and impoverished and dysfunctional upbringing); Henyard v. State,

883 So. 2d 753, 759-64 (Fla. 2004) (rejecting Henyard's ineffective assistance of penalty phase counsel claims because testimony at postconviction evidentiary hearing was similar and cumulative to penalty phase testimony regarding mitigating circumstances). Because Henyard has not alleged or established that he is mentally retarded, this Court should reject his attempt to extend the United States Supreme Court's Atkins and Roper decisions to create a *per se* mental or emotional illness bar to executions.

CLAIM III

THE TRIAL COURT PROPERLY DENIED HENYARD'S CLAIM THAT HIS MENTAL CONDITION RENDERS HIS DEATH SENTENCE UNCONSTITUTIONAL.

In his third claim, Henyard reiterates the allegations contained in Claim II, supra, but supplements his claim with a recent mental health evaluation conducted by psychologist Dr. Janice Stevenson. The trial court denied the "virtually indistinguishable" claim for the same reasons cited in Claim II, supra. The court, again relying in part on Hill v. State, 921 So. 2d 579 (Fla. 2006), found that Dr. Janice Stevenson's "self-serving" evaluation of Henyard based on her six-hour interview with him was not "new evidence" and therefore the claim was procedurally barred. (V3:548). The court further found the claim procedurally barred as it was simply a variation of Henyard's 2005 successive postconviction claim based on Roper v. Simmons, 543 U.S. 551 (2005). Finally, the court found the claim lacked merit because Florida law has not extended Atkins and Roper to include mentally ill defendants. The State submits that the lower court properly denied Henyard's claim.

In Hill v. State, 921 So. 2d 579, 584 (Fla. 2006), this Court addressed a similar claim and affirmed the trial court's denial of the claim as procedurally barred:

> Under Florida Rule of Criminal Procedure 3.203, Hill was required to raise any claim he may have under Atkins

> within sixty days of October 1, 2004. He failed to do this; therefore, his claim is procedurally barred.
>
> In addition, the trial court correctly determined that this claim is also procedurally barred under rule 3.851(e)(2)(B). As stated in its December 23, 2005, order, "the Atkins decision was rendered in 2002, and [Hill] has provided no reason as to why he could not have raised this claim in his successive motion filed in 2003." The psychological evaluation Hill primarily relies upon to establish this claim was conducted in 1989. Hill does not claim that this study was not available to him at an earlier time, nor is there any indication that this evaluation was inadequate. While Hill does allege a December 15, 2005, psychological evaluation to support his claim, this evaluation provides no truly new evidence to support Hill's claim. This newest evaluation declares that Hill has "mild mental retardation"; however, it finds Hill's IQ to be sixteen points above the level required to establish mental retardation in Florida. Such a finding does not exempt a defendant from execution. See Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005) (finding that in order to be exempt from execution under Atkins, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below). This claim is procedurally barred.

Similar to the facts in Hill, Henyard could have raised this claim previously and his recent psychological evaluation is not "truly new evidence." The six-hour interview with Appellant that served as the basis for Dr. Stevenson's opinion that his behaviors were "consistent with persons diagnosed" with post traumatic stress disorder is not based on any new evidence, but rather was based on Appellant's statements to the psychologist.

Additionally, it should be noted that Henyard has previously been evaluated by three mental health experts and none of these experts opined that he suffered from any major

mental illnesses.[12] The fact that collateral counsel has obtained yet another mental health expert to give a different opinion based on the same exact evidence does not entitle him to relief. See Hill, 921 So. 2d at 584; see also Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) ("We have held that counsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'") (quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); Downs v. State, 740 So. 2d 506 (Fla. 1999) ("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.") (citations omitted); Jones v. State, 732 So. 2d 313, 317-18 (Fla. 1999) (noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.").

[12] Dr. Toomer testified at the penalty phase regarding Henyard's emotional and mental health issues which the trial court considered in mitigation. (DAR V8:1496-1513; V20-21:2297-2404). Trial counsel had also retained Dr. Elizabeth McMahon for the penalty phase, but trial counsel did not call her because she did not find any statutory mental mitigating factors. (PCR V7:116-64). At the postconviction evidentiary hearing, Dr. Bauer testified that Henyard had no severe psychopathology. (PCR V6:1095).

As discussed in Claim II, supra, in addition to being procedurally barred, the instant claim lacks merit. This Court has consistently rejected attempts to extend Atkins and Roper beyond their express holdings. See Kearse v. State, 969 So. 2d 976, 991-92 (Fla. 2007); Connor v. State, 979 So. 2d 852 (Fla. 2007); Henyard v. State, 929 So. 2d 1052 (Fla. 2006) (rejecting Henyard's attempt to extend Roper to his case given his emotional age of thirteen-years-old); Diaz v. State, 945 So. 2d 1136 (Fla. 2006). Because Henyard has failed to establish that the lower court erred in summarily denying his successive postconviction claim, this Court should affirm the court's ruling.

CLAIM IV

THE TRIAL COURT PROPERLY DENIED HENYARD'S LETHAL INJECTION CLAIMS.

On October 18, 2007, Henyard filed his second successive postconviction motion raising four claims related to Florida's lethal injection procedures. The trial court summarily denied these claims and the case is currently pending on appeal. See Henyard v. State, SC08-222. After Governor Crist signed a death warrant in Henyard's case, Appellant supplemented his prior lethal injection claims in the instant successive postconviction motion. Henyard provided additional argument as to two of his prior claims: (1) newly discovered evidence shows that Florida's lethal injection procedures violate the Eighth Amendment; and (2) Florida Statutes, section 27.702, prohibiting CCRC from filing a federal civil rights action challenging lethal injection, is unconstitutional.

The State adopts and relies on the arguments contained in its Answer Brief filed in Henyard's other pending case, SC08-222, but submits that the trial court properly rejected Henyard's supplemental arguments. In pertinent part, the court stated:

> Of the remaining two issues, the defense asserts that the Florida Supreme Court's reaffirmation of an inherent cruelty standard in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007) and Schwab v. State, 969 So. 2d 318 (Fla. 2007), cases that this court expressly relied upon in

originally denying the defendant's claim, is now in conflict with the plurality opinion in Baze. The State argues herein and in its Answer Brief of Appellee that the Baze decision is of no moment to the Florida Supreme Court's prior holdings and was addressed by the Florida Supreme Court in Lightbourne. "Alternatively, even if this Court did review this claim under a "foreseeable risk" standard as Lightbourne proposes or an "unnecessary" risk as the Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation." Lightbourne at 352.

The Court agrees with the State. The Baze decision does not undermine the rationale of prior Florida Supreme Court holdings, and this Court continues to rely upon its previous ruling and the authority cited therein. This Court further supplements the authority initially cited, Lightbourne and Schwab, with the post-Baze cases cited in the State's response at page 22 [Schwab v. State, 33 Fla. L. Weekly S431 (Fla. June 27, 2008) (post-Baze decision upholding the constitutionality of Florida's lethal injection protocol); LeBron v. State, 982 So. 2d 649 (Fla. 2008) (same); Woodel v. State, 33 Fla. L. Weekly S290 (Fla. May 1, 2008) (same); Griffin v. State, 2008 Fla. LEXIS 1086 (Fla. June 2, 2008) (decision without publication)].

The final issue raised by the defendant based upon Florida Statutes section 27.02 [sic] and updated by the defendant's citation to In re: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (11th Cir. 2007) and McNair v. Allen, 515 F.3d 1168 (11th Cir. 2008). The defense argues its belief that the only proper federal review would be to bring a §1983 claim which Florida Statutes section 27.02 [sic] prohibits CCRC from filing on behalf of the defendant. **Whether or not the federal court will hear a successive habeas petition or a §1983 as the appropriate vehicle for the defendant to challenge Florida's method of execution is a red-herring to this Court's consideration of whether or not his challenge to the constitutionality of Florida Statutes section 27.02 [sic] is time barred.** This Court continues to rely on State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) in its finding the § 27.02 [sic] claim is procedurally barred. Further, even if the claim is not procedurally barred, the Court relies

> upon its previous determination that the claim is without merit based upon Diaz v. State, 945 So. 2d 1136 (Fla. 2006).

(V3:550-51) (emphasis added) (footnote omitted).

Regarding Henyard's instant supplement to his claims raised in his other pending case, SC08-222, the State notes that in Schwab v. State, 33 Fla. L. Weekly S431, S431 (Fla. June 27, 2008), this Court recently reaffirmed that lethal injection was constitutional and rejected a claim that Baze v. Rees, 551 U.S. ___, 128 S. Ct. 1520 (2008), somehow unsettled Florida law about the constitutionality of lethal injection:

> Schwab then filed a third successive motion for postconviction relief, again challenging whether Florida's lethal injection protocol violates the Eighth Amendment. The circuit court denied the motion in a comprehensive order, and we affirm the circuit court's denial of relief, which we attach and adopt. We agree with the circuit court that Schwab failed to allege newly discovered evidence that would result in a decision different than that reached in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 76 U.S.L.W. 3620 (May 19, 2008), and Schwab, 969 So. 2d at 326. The circuit court's decision is consistent with our recent decisions in Lebron v. State, 33 Fla. L. Weekly S294 (Fla. May 1, 2008); Woodel v. State, 33 Fla. L. Weekly S290 (Fla. May 1, 2008); and Griffin v. State, No. SC06-1055, 2008 WL 2415856 (Fla. June 2, 2008).

Given this precedent, the lower court's ruling should be affirmed and Appellant's arguments about Baze should be rejected.

Likewise, Henyard's supplemental argument regarding his prior constitutionality challenge to Florida Statutes, section

27.702 is also without merit. As the trial court correctly noted, Henyard's argument regarding whether or not a federal court will entertain a successive habeas petition or a § 1983 action is a "red-herring" to his underlying constitutional attack to section 27.702. As the lower court properly found, this claim is procedurally barred as it could have been raised over a decade ago. See State ex rel. Butterworth v. Kenney, 714 So. 2d 404 (Fla. 1998). Furthermore, as this Court held in Diaz v. State, 945 So. 2d 1136, 1154-55 (Fla. 2006), the claim is meritless.

Because Henyard has failed to establish any error in the trial court's denial of these claims, this Court should affirm the court's ruling.

ISSUE V

WHETHER THIS COURT VIOLATES DUE PROCESS BY UPHOLDING SUMMARY DENIALS OF SUCCESSIVE POSTCONVICTION MOTIONS AFTER A DEATH WARRANT HAS BEEN ISSUED.

Henyard's final issue asserts that this Court frequently denies due process of law by upholding summary postconviction denials after a death warrant has been issued. As this claim was not presented below, there is no applicable standard of review. In fact, Henyard's failure to raise this claim below precludes consideration of this issue, and it must be summarily rejected on that basis. Kokal v. State, 901 So. 2d 766, 778-80 (Fla. 2005) (finding postconviction due process claim to be procedurally barred where specific issue had not been presented to trial court); Thompson v. State, 796 So. 2d 511, 514, n.5 (Fla. 2001) (issue which was not raised in postconviction motion but presented for the first time on appeal is barred); Shere v. State, 742 So. 2d 215, 219, n.9 (Fla. 1999); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988).

In addition, Henyard's claim is without merit. Henyard first offers the inaccurate proposition that a procedural bar is only properly applied to postconviction claims which have been previously rejected on the merits, citing Hutto v. State, 981 So. 2d 1236 (Fla. 1st DCA 2008), and Romeo v. State, 965 So.2d 197 (Fla. 3rd DCA 2007). The broad language in Hutto noting

that a claim previously denied as insufficiently pled may be cognizable in a later postconviction motion under Florida Rule of Criminal Procedure 3.850 cannot be read as authorizing litigation of claims which should have been raised previously but were not. Hutto in fact affirmed the summary denial of claims in the successive motion which "should be raised on direct appeal," and only the claim of ineffective assistance was remanded for a hearing. Hutto, 981 So. 2d at 1237. Romeo did not involve any motion for postconviction relief, but considered a claim presented under a motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a), which may be made "at any time," and thus is clearly distinguishable.

Pursuant to Rule 3.851(f)(5)(B), a successive motion may be denied without an evidentiary hearing where "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Henyard makes no claim in this issue that the files in his case do not conclusively show he is entitled to no relief, and he fails to identify any issue which should properly be subjected to an evidentiary hearing under Rule 3.851(f)(5)(B). Claims which could or should have been raised previously are properly summarily denied as procedurally barred in successive postconviction motions. Contrary to Henyard's argument, a prior merits ruling is not a prerequisite

to the application of a procedural bar in a successive motion. Riechmann v. State, 966 So. 2d 298, 307 (Fla. 2007) (finding claim in successive motion was properly summarily denied where no legal justification was offered for failing to assert the issue previously); Owen v. State, 854 So. 2d 182, 187 (Fla. 2003) (same).

Henyard's argument that trial courts cannot declare a procedural bar as to an issue raised in a successive motion which was or would have been procedurally barred in an initial postconviction motion is specious. Clearly, a defendant may not revive a procedurally barred claim by presenting it in a successive postconviction motion. Such argument suggests that the language of Rule 3.851(e)(1), that "[t]his rule does not authorize relief based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal," does not apply to successive motions. However, any postconviction motion, successive or otherwise, must comply with the time limitation set forth in Rule 3.851(d); if filed more than one year after the judgment and sentence have become final, the motion must allege either (A) facts which were unknown and could not have been discovered previously; (B) a fundamental constitutional right which has been granted retroactive application; or (C) counsel's neglect in failing to file a

timely motion. Thus, despite Henyard's assertion to the contrary, claims which are procedurally barred are obviously not authorized in a successive, untimely motion.

Furthermore, although Henyard suggests that a due process violation is demonstrated statistically because evidentiary hearings are granted more often on successive postconviction motions without active death warrants, any statistical anomaly is explained by the fact that defendants subject to an active death warrant are more likely to present meritless, procedurally barred issues in an attempt to delay an imminent execution, whereas defendants presenting a successive postconviction motion in the absence of an active death warrant are more likely to have discovered a new claim which has not been previously litigated. In other words, the impetus for many successive postconviction motions which are not litigated under an active death warrant is the discovery of a potential new claim, whereas the impetus for most, if not all, successive postconviction motions litigated under an active death warrant is the signing of the warrant. Such circumstances do not dictate the granting of an evidentiary hearing without regard to the propriety of the issue presented.

In addition, Henyard's reliance on a statistical difference between evidentiary hearings awarded on successive

postconviction motions under a warrant and those not under a warrant is misplaced because Henyard offers no showing that evidentiary hearings are granted on successive motions without warrants at a greater percentage than such hearings are granted on motions filed under an active warrant. Henyard claims that, since the time lethal injection has been adopted (an apparent arbitrary starting point), evidentiary hearings have only been granted to four of twenty-two defendants[13] under an active warrant; yet at least seven unidentified defendants not under an active warrant have received evidentiary hearings on unidentified claims since 2007. Conspicuously absent from this equation is the number of successive motions by non-warrant defendants that have been summarily denied in any relevant time period. In order to have his empirical allegations considered, Henyard should identify how many successive postconviction motions have been summarily denied over the same time period that four hearings were granted to twenty-two defendants in active warrant cases. There have obviously been many more than twenty-two successive postconviction motions filed since lethal injection was adopted in 2000. In this case alone, Henyard has filed two previous successive motions, both of which were

[13] Henyard neglects to mention that several of these inmates affirmatively waived any collateral challenges to their convictions and sentences.

summarily denied despite the fact that no warrant was pending. Because Henyard has made no attempt to compare apples to apples, this Court can easily reject his statistical argument.

Henyard's reliance on this Court's opinion in Tompkins v. State, 894 So. 2d 857 (Fla. 2005), is also misplaced. While Tompkins offers a general rule to accommodate a particular jurisdictional context, this Court clearly maintains the right to control the exercise of its jurisdiction in any given case. At the time the Tompkins decision was issued, Tompkins did not have a scheduled execution date. This Court's proper determination to permit the court below to exercise jurisdiction over a new postconviction motion, despite the pendency of Henyard's prior appeal, does not implicate any constitutional rights.

Finally, Henyard's suggestion that due process requires the granting of an evidentiary hearing on any claim presented in a successive motion which was not adjudicated on the merits in a prior postconviction motion has no support in any of the cases he cites. As this Court has recognized, due process in postconviction proceedings only requires "that the defendant be provided meaningful access to the judicial process." Kokal, 901 So. 2d at 778. There is no authority which suggests that an evidentiary hearing must be held any time a death warrant is

issued simply because the State has provided an opportunity for further litigation upon issuance of a warrant. In this case, as in most death warrant proceedings, the defendant has been afforded process far beyond what is due under the United States Constitution.

For all of these reasons, this Court must deny relief on this issue.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court affirm the lower court's order denying Henyard's successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. Regular Mail to Mark S. Gruber, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this 27th day of August, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR APPELLEE