IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-1544

RICHARD HENYARD,

Appellant, **Death Warrant Signed**
Execution Scheduled for
September 23, 2008 at
6:00 pm

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellant was convicted of two counts of first degree murder, three counts of armed kidnapping, one count of attempted first degree murder, and sexual battery. On August 19, 1994, Mr. Henyard was sentenced to death on two counts of first degree murder consecutive to life sentences on all other charges. The judgment and sentence were affirmed on direct appeal. *Henyard v. State*, 689 So. 2d 239 (Fla. 1996), cert. denied, *Henyard v. Florida*, 522 U.S. 846, 118 S.Ct 130, 139 L.Ed. 2d 80 (U.S. Fla. Oct 06, 1997). He then filed a motion for postconviction relief, followed by an amended Fla. R. Crim. P. 3.850 motion. The trial court's denial of postconviction relief was affirmed in *Henyard v. State*, 883 So. 2d 753 (Fla. 2004). Thereafter, Mr. Henyard filed a petition for a writ of habeas corpus in federal court, which was denied. *Henyard v. Crosby*, 2005 WL 1862694 (M.D. Fla. 2005). The United States Court of Appeals Eleventh Circuit granted a Certificate of Appealability on two issues and denied relief. *Henyard v. McDonough*, 459 F.3d 1217 (11th Cir. 2006). The United States Supreme Court denied certiorari. *Henyard v. McDonough*, 127 S.Ct. 1818 (2007). A first successive postconviction motion based primarily on the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005) was denied by the trial court, and the denial was affirmed on appeal. *Henyard v. State*, 929 So. 2d 1052

(Fla. Apr. 11, 2006).

A second successive motion for postconviction relief was filed on October 16, 2007, which is still pending in this Court (Case No. SC08-222). On April 23, 2008, Mr. Henyard filed a motion to amend the October 16, 2007 motion in light of *Baze v. Rees*, 551 U.S. ___, 128 S.Ct. 1520, 170 L.2d 428 (2008). On May 13, 2008, the trial court denied the motion due to lack of jurisdiction because Mr. Henyard had already filed a notice of appeal. Mr. Henyard then filed a motion in this Court to relinquish jurisdiction on May 19, 2008.

A death warrant was signed on July 9, 2008. The day after the warrant was signed, this Court issued an order that established an expedited litigation scheduled and stated that "Appellant's Motion to Relinquish Jurisdiction to the Trial Court in Light of *Baze v. Rees* is hereby denied; however in light of the scheduled execution of appellant on September 23, 2008, the trial court has jurisdiction to consider any successive motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851." Mr. Henyard filed a third successive motion for postconviction relief on August 4, 2008. On August 14, 2008, the trial court summarily denied the motion without an evidentiary hearing.

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

Mr. Henyard requested an evidentiary hearing on Claims I, II, and III. *See* PC-R Vol. III at 492. Fla.R. Crim.P. 3.851(f)(5)(B) provides that a defendant is entitled to an evidentiary hearing on postconviction claims for relief unless the motion, files, and records in the case conclusively show that the movant is entitled to no relief. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, this Court must accept all allegations in the motion as true to the extent they are not conclusively refuted by the record. To uphold the trial court's summary denial, the claims must be either facially invalid or conclusively refuted by the record. *Hodges v. State*, 885 So. 2d 338 (Fla. 2004); *McLin v. State*, 827 So. 2d 948 (Fla. 2002).

SUMMARY OF ARGUMENT

Based on the newly discovered evidence of the testimony of Jason Nawara, Mr. Henyard can now demonstrate that his codefendant, Alfonza Smalls, is more culpable than Mr. Henyard in the murders of Jasmine and Jamilya. If this evidence was presented during penalty phase, Mr. Henyard would likely have received a life sentence. Furthermore, the transcript that led to the discovery of this evidence was

withheld by the State in violation of *Brady*.

Newly discovered evidence in the form of recent research concerning emotional development reveals that Mr. Henyard's mental and emotional deficits have produced a disability that is identical to mental retardation in its disabling features. This recent research, together with a recent psychological evaluation of Mr. Henyard conducted by Janice Stevenson, Ph.D. warrant an extension of the holdings of *Atkins* and *Roper* to the case at hand.

Baze announces a standard for evaluating the constitutionality of lethal injection procedures that embraces the concept of risk, unlike the inherent cruelty standard that this Court established in *Jones* and has since applied to Florida's lethal injection method of execution in *Schwab* and *Lightbourne*. Because the lower court was bound by *Lightbourne*, the lower court's summary denial of relief should be reversed and remanded.

In part because a risk standard requires greater scrutiny of DOC procedures, Fla. Stat. §945.10 (2006), which conceals the identity of the participants in an execution, is unconstitutional.

Fla. Stat. §27.702, which, as interpreted by this Court in *Diaz*, prevents CCRC attorneys from filing civil rights challenges to Florida's lethal injection method of execution by way of 42 U.S.C. §1983, is unconstitutional. The Court's

rationale in *Diaz*, which was that CCRC clients seeking to file an action challenging lethal injection may do so by way of a petition for a writ of habeas corpus under 28 U.S.C. § 2254, has been undermined by the recent decision in which the U.S. Eleventh Circuit Court of Appeals rejected Mark Schwab's application to file a § 2254 petition challenging lethal injection.

Finally, the denial of Mr. Henyard's right to an evidentiary hearing deprives him of the protections afforded by the Due Process Clause guaranteed by the U.S. Constitution.

ARGUMENT I

THE LOWER COURT ERRED WHEN IT SUMMARILY DENIED MR. HENYARD'S NEWLY DISCOVERED EVIDENCE CLAIM BASED ON THE AFFIDAVIT EXECUTED BY JASON NAWARA ON JULY 24, 2008. THIS EVIDENCE MAKES MR. HENYARD'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

A. The *Jones* Standard

Newly discovered evidence may be grounds for relief in a proceeding on a motion to vacate a sentence where the facts on which the claim is based were unknown to the trial court and the moving party or counsel at the time of trial, and the evidence could not have been ascertained by the party or his counsel in the exercise of due diligence. *Jones v. State*, 591 So. 2d 911 (Fla. 1991); 28A Fla. Jur

2d HABEAS CORPUS AND POSTCONVICTION REMEDIES § 169 (1998). In order to obtain relief on such newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial, *Jones*, 591 So. 2d 911, or result in a life sentence rather than the death penalty. *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992). Due diligence in evaluating new evidence under *Jones* does not imply perfect diligence. *See Williams v. Taylor*, 529 U.S. 420 (2000) (counsel duly diligent where not on notice of need for particular investigation). Mr. Henyard did not know and could not have known about the facts asserted in this claim until counsel communicated appropriately with Jason Nawara. Due diligence does not require clairvoyance. As the Supreme Court held in *Williams*, a habeas corpus petitioner has no duty to investigate misconduct that may provide a basis for relief until he has notice that the misconduct occurred. *Williams*, 529 U.S. 420.

B. <u>The Evidence That Entitles Mr. Henyard to Relief</u>

In his August 4, 2008 motion for relief, Mr. Henyard submitted an affidavit executed by Jason Nawara on July 24, 2008. PC-R Vol. II at 304-05. Mr. Nawara, who is serving a sentence at Jefferson Correctional Institution, remains available to testify to the substance of his statements, which provide that: In 1993, Mr. Nawara, who was then fourteen years old, was arrested for first degree murder. While

awaiting trial, he was housed in the Lake County Jail with Mr. Henyard's co-defendant, Alfonza Smalls, who was also fourteen years old and awaiting trial for his role in the case at hand. Mr. Nawara states in the affidavit that during the fourteen months that they lived together in the same quad, he heard Mr. Smalls state in a group setting on several occasions, "I'm a killa, you just a car thief" and "I've killed before and I'll kill again." According to Mr. Nawara, he could tell that Mr. Smalls was "dead serious" when he made these statements. Furthermore, Mr. Nawara states that Mr. Smalls never denied killing the victims in the instant case, nor did he say or insinuate that Mr. Henyard killed the victims.

The trial court summarily denied relief in an order dated August 14, 2008. PC-R Vol. III at 535-53. Although the trial court did not directly address the first prong of *Jones*, it found that, "Assuming that the defense has met its burden of showing the evidence was unknown at the time of trial and could not have been known with the use of due diligence under the first prong of *Jones*, Mr. Henyard has not demonstrated that he could succeed on the second prong." PC-R Vol. III at 541. Because the trial court did not grant Mr. Henyard an evidentiary hearing on this claim, the Court must accept all allegations in the motion as true, including Mr. Nawara's affidavit, to the extent that they are not refuted by the record. See *Hodges*, 885 So. 2d at 335.

The court further erroneously found in its order that the statements made by Mr. Smalls to Mr. Nawara are hearsay statements that would be inadmissible at a penalty phase trial. PC-R Vol. III at 542. Fla. R. Crim. P. 921.141(1) states that in a penalty phase trial:

> [E]vidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters related to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, ***regardless of its admissibility under the exclusionary rules of evidence***, provided the defendant is accorded a fair opportunity to rebut any hearsay statements (*emphasis added*).

Even if Mr. Nawara's testimony regarding Mr. Smalls' statements does not fall under any hearsay exception, his statements would be admissible at a penalty phase trial. Moreover, the Rules of Evidence 90.804 (1) and (2)(c) defines the parameters for the introduction of statements by witnesses who themselves are unavailable to testify. In this case, the defense could have called Alfonzo Smalls who would have pled his 5th Amendment protection against self-incrimination. At this time, the Court would have declared Mr. Smalls unavailable as a witness which would have allowed the defense to call Jason Nawara to introduce the statement of Mr. Smalls. See Perry v. State, 675 So.2d 976 (Fla. 4th DCA 1996);

Brinson v. State, 382 So.2d 322 (Fla. 2nd DCA 1979).

Additionally, the testimony of Mr. Nawara that Mr. Smalls stated on numerous occasions that he was a killer would establish statutory mitigation that Mr. Smalls is more culpable than Mr. Henyard and/or that Mr. Henyard's involvement was relatively minor in comparison to Mr. Smalls. Even if Mr. Smalls is not found to be the more culpable party, the evidence could have been presented as nonstatutory mitigation to establish that Mr. Henyard was not the actual person who shot Jasmine and Jamilya.

Applying *Jones* to the case at hand, Mr. Nawara's testimony meets the first prong of the test for newly discovered evidence because it was not known to the trial court or defendant's counsel and it could not have been known by the defendant or counsel by the use of due diligence. Mr. Henyard's counsel was not aware that Mr. Nawara might have information concerning Mr. Henyard's case until recently, when CCRC found Mr. Nawara's name in a transcript of a jailhouse interrogation of a juvenile by the name of Jimmy Kennedy. PC-R Vol. III at 495. Assistant State Attorney William Gross conducted the interrogation on March 22, 1995. PC-R Vol. III at 531. In fact, the transcript further reveals that the State questioned Mr. Kennedy regarding Mr. Henyard's and Mr. Smalls' pending criminal case. PC-R Vol. III at 531. By the State's own admission, the transcript

is "real hard to read." PC-R Vol. III at 531. Reading Mr. Nawara's name on the transcript proved even more difficult, as it appears that at one time a highlighter was used on the document, which had the effect of blocking out a lot of the names on the copy. PC-R Vol. III at 495. The transcript in question was not provided in discovery to Mr. Henyard's trial counsel, and the State did not reveal Mr. Kennedy's name in its discovery response. Therefore, this evidence satisfies the first prong of *Jones*.

The trial court also erred in its finding that the second prong of *Jones* is not met because "[i]n no reasonable interpretation of the phrase could Mr. Henyard ever be considered a 'relatively minor participant' in these capital felonies." PC-R Vol. III at 541. Although Mr. Henyard confessed to raping and shooting Ms. Lewis and being present when Jasmine and Jamilya were shot, he continuously denied that he shot the girls, *Henyard v. State*, 689 So.2d 239 (Fla. 1997), unlike Mr. Smalls, who, while his case was still pending, bragged that he killed before and he would kill again. Likewise, defense counsel argued at trial that although Mr. Henyard was involved in the crime, it was Mr. Smalls and not Mr. Henyard who shot Jasmine and Jamilya. ROA at 1106-07. Mr. Nawara's testimony supports Mr. Henyard's statement and defense counsel's argument at trial that Mr. Henyard did not shoot the girls.

A statutory mitigating circumstance under Fla. Stat. 921.141(d) is that "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." The fact that it was Mr. Smalls and not Mr. Henyard who shot Jasmine and Jamilya mitigates Mr. Henyard's culpability and establishes an additional statutory mitigating factor under Fla. Stat. 921.141(d), which was not established at trial. Additionally, Mr. Smalls was the one who accosted Mrs. Lewis and her children at the Winn Dixie as they were leaving. Mr. Smalls called for Mr. Henyard to come to the car and drive. And it was Mr. Smalls who bragged to others in the detention center that he was a "killer." Mr. Smalls who is the more culpable in the murders of Jasmine and Jimilya received a life sentence because of his age; however, Mr. Henyard received a death sentence because at the time of the offense he was six months over the age requirement for being a juvenile. However, the mitigation at trial established Henyard's emotional maturity between ten and thirteen years of age, which this court specifically found to be age thirteen, which is vastly different than his eighteen years of age at the time of the crime. When one weighs this evidence which would have established a valid mitigator, and the mitigators established at trial against the aggravating circumstances, the jury which was clearly at odds when they changed their vote three times (ROA at 2557), likely would have

recommended a life sentence for Mr. Henyard.

C. ***Brady* or *Giglio* Claim**

At a case management conference on August 8, 2008, counsel for Mr. Henyard orally modified the pleadings to include a *Brady* or *Giglio* claim regarding the aforementioned transcript of the jailhouse interrogation of Mr. Kennedy, which was withheld by the State at the time of trial. PC-R Vol. III at 506. Mr. Henyard was not granted an evidentiary hearing to further develop this claim. Thus, defense counsel's assertion that the State withheld the transcript of the interrogation of Mr. Kennedy must be accepted as true to the extent that it is not rebutted by the record. See *Hodges*, 885 So.2d at 335. The only mention of the *Brady* or *Gigilo* claim in the trial court's order of August 14, 2008 is in a footnote, where the court states:

> Although the defense counsel bantered *Brady* and *Giglio* claims might be appropriate, both the State and Defense reviewed the transcript during a brief recess in the hearing. The 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.

PC-R Vol. III at 541. This finding by the court is error. Defense counsel orally amended the pleadings to include a *Brady* or *Giglio* claim, but counsel was not permitted to further develop the claim at an evidentiary hearing. At the case management conference on August 8, 2008, defense counsel for Mr. Henyard, pled

this claim as follows:

> We have couched the claim as a newly discovered evidence claim, but there is a provision in the civil rules, of course, to modify the pleadings. It wouldn't be the first time that I've had a hearing and asked to modify the pleadings to see the facts that arise through the course of the hearing . . . Well, I'm saying if it turns out the prosecutor concealed evidence . . . that would have been beneficial to us under *Brady* or *Giglio*, then indeed I'm asking for a *Brady* or *Giglio* claim.

PC-R Vol. III at 506.

In response to defense counsel's Brady/Giglio claim at the case management conference, Assistant State Attorney William Gross responded on the record that: "[T]here is no Brady violation, period." PC-R Vol. III at 518. In response to the state's argument defense counsel argued that:

> As far as the Brady/Giglio allegation, the Brady/Giglio violation would be as to Mr. Kennedy, not to Mr. Nawara. Because, as the state did point out, they did not speak with Mr. Nawara. However, they spoke to Mr. Kennedy. And in that recorded transcript, Mr. Kennedy indicates that Mr. Smalls says that we killed…. It could have added credence to defense counsel's argument that Mr. Small was, in fact, the triggerman. Mr. Kennedy was never listed as a witness and he gave statements to…Mr. Gross during the transcribed hearing.

PC-R Vol. III at 527-8. After a break during the case management conference, the state also argued regarding the Brady/Giglio claim:

> It was an interview that I did with Mr. Kennedy. It was back on March 22nd of 1994. And I asked him point-blank what Alfonza Smalls said. And Mr. Smalls said that "we" kidnapped these people. "We raped them, and we killed them." And when I said, Well, did he ever say which person actually killed the children? He said no, that he just said "we." So that's the closest that we ever got to any kind of admission from Alfonza Smalls by the way of this Kennedy individual. It's right in this transcript.

PC-R Vol. III at 531. Therefore, not only did the transcript of the interview with Mr. Kennedy contain Mr. Nawara's name, it also contained information about a statement made by Mr. Smalls to Mr. Kennedy, in which Mr. Smalls admits to killing the victims in this case, which is clearly discoverable and should have been disclosed by the state. Trial counsel was denied the benefit of this information, and any other evidence that it may have developed. Defense counsel orally fully pled a Brady/Giglio claim on the record. In response, the state responded orally in the negative. Because the allegations of the claim were not conclusively refuted by the record, the trial court erred in not conducting a full evidentiary hearing. See *Hodges*, 885 So. 2d at 335.

The issue of the transcript of Mr. Gross' interrogation of Mr. Kennedy more appropriately falls under *Brady v. Maryland*, 373 U.S. 83 (1963) than *Giglio v. United States*, 405 U.S. 150, 92 U.S. 763 S.Ct 763, 31 L.Ed. 2d 104 (1972), which

deals with deliberate deception by prosecutors who knowingly present false evidence. There are three elements of a *Brady* claim: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). The U.S. Supreme Court has held that the [prosecutor's] duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976).

In the case at hand, the State's failure to disclose the transcript of Mr. Gross' interrogation of Mr. Kennedy satisfies the three elements of *Brady*. First, the transcript itself reveals that Mr. Smalls told Mr. Kennedy that "we killed them." This negates any theory that Mr. Henyard acted alone in the actual killing of Jasmine and Jamilya. Furthermore, the discovery of the transcript eventually led to collateral counsel finding and speaking with Mr. Nawara, who stated that Mr. Smalls admitted to him that he has killed before and was in fact a killer. Again, this negates any theory that Mr. Henyard acted alone in the actual killing of Jasmine and Jamilya and actually supports Mr. Henyard's continued insistence that he did not shoot the two girls. Second, the transcript was not provided to Mr.

Henyard's trial counsel in discovery. Under *Brady*, there is no requirement that the evidence in question was willfully withheld by the prosecution, only that it was in fact withheld, regardless of whether or not it was requested. As Assistant State Attorney Gross was both the person who interrogated Mr. Kennedy and the prosecutor who tried Mr. Henyard's case, there is no question that the prosecutor in this case was aware of the existence of the transcript and willfully failed to disclose the statements of Mr. Kennedy which would have reasonably led to the discovery of Mr. Nawara. Finally, as we addressed above, the third prong of *Brady* is satisfied because Mr. Henyard was prejudiced by not being able to provide the testimony of Mr. Nawara during his penalty phase, which would have established an additional statutory and/or non statutory mitigator under Florida Statute 921.141(d) and likely would have led to a life sentence for Mr. Henyard.

ARGUMENT II

THE LOWER COURT ERRED WHEN IT SUMMARILY DENIED MR. HENYARD'S CLAIM THAT CUMULATIVE MENTAL AND EMOTIONAL DEFICITS ESTABLISH A CONSTITUTIONAL BAR TO HIS EXECUTION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDEMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. <u>The Evidence That Entitles Mr. Henyard to Relief</u>

In his third successive motion for relief, Mr. Henyard argued that he has

mental and emotional disabilities due to impairments in brain functioning that affect him in the same way as mental retardation, and these limitations were apparent long before he turned eighteen years old. Although Mr. Henyard's IQ score did not fall below two standard deviations when it was measured by standard IQ tests, this does *not* mean that he does not have a claim that his execution is barred due to intellectual disability. Mr. Henyard's impairment has produced a disability that is identical to mental retardation in its disabling features, as those features were described in *Atkins v. Virginia*. 536 U.S. 304, 122 S.Ct. 2242, 53 L.Ed. 335 (2002). Mr. Henyard's mental and emotional disabilities preclude his execution under the Eighth and Fourteenth Amendments.

The *Atkins* Court rested its decision on two foundations. The first is that people with "disabilities in areas of reasoning, judgment, and control of their impulses" rising to the level of mental retardation "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. The second foundation is the disadvantage experienced by people with retardation in legal proceedings:

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,'

> *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.

Id. at 320 (footnote omitted). These principles apply equally to Mr. Henyard's deficits.

The *Atkins* Court elaborated on the disabilities in areas of reasoning, judgment, and control of their impulses that affect people with mental retardation:

> [T]hey have diminished capacities to understand and process information, to abstract and process information, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id. at 318 (footnotes omitted).

These disabilities are the limitations in adaptive behavior that are characteristic of mental retardation. These disabilities are frequently produced in people who have mental retardation by significant limitations in intellectual functioning, as measured by IQ tests. However, these very same disabilities can be produced by brain impairments not associated with significant limitations in intellectual functioning. The Eighth Amendment logic of *Atkins*, therefore, applies

to Mr. Henyard. While Mr. Henyard's deficiencies do not warrant an exemption from criminal sanctions, they do diminish his legal culpability. *Atkins*, 536 U.S. at 320.

The trial court summarily denied relief on this claim. PC-R Vol. III at 544-48. Although the court denied the claim based on its finding that the claim is procedurally barred, which is addressed below, it stated that:

> [E]ven if the claim were not procedurally barred, the claim is without merit based upon the current state of the law in Florida. See generally, *Connor v. State*, 979 So.2d 852 (Fla. 2007) ("To the extent that Connor is arguing that he cannot be executed because of his mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position."); *Kearse v. State*, 969 So. 2d 976 (Fla. 2007) (rejecting the claim of eighteen year old defendant that his low level of intellectual functioning and emotional impairments render him ineligible for execution under *Atkins* and *Roper*); *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006) (there is currently no per se "mental illness" bar to execution.)

PC-R Vol. III at 545. Because the trial court did not grant an evidentiary hearing on this claim, the Court must accept all allegations in the motion as true. See *Hodges*, 885 So. 2d at 335.

This case is distinguishable from the cases cited by the trial court in that Mr. Henyard is not merely arguing that mental illness, a low level of intellectual functioning, or emotional impairments bar his execution under *Atkins*. Instead, Mr.

Henyard asserts that his mental and emotional deficits have produced a disability that is identical to mental retardation in its disabling features. An examination of Mr. Henyard's background reveals that he has the significant limitations in adaptive behavior that the Supreme Court identified as characteristic of mental retardation:

1. Diminished capacities to understand and process information

Mr. Henyard struggled throughout school. He was diagnosed with a specific learning disability from an early age. Dr. Toomer's examination revealed that he had significant deficits in processing information and cognitive function. The School Child Study Team reported that test data was suggestive of organically based problems (brain involvement impairing his abilities versus emotional issues). Mr. Henyard received special education services off and on throughout his academic career, and was retained in first and eighth grades. Dr. Toomer reported a full scale IQ of 85. Dr. Bauer found full scale IQ of 88. Both reported significant differences between Mr. Henyard's verbal and performance IQ scores, suggesting impairment in the right hemisphere of his brain.

2. Diminished capacities to engage in logical reasoning

The circumstances of the crime illustrate Mr. Henyard's lack of logical reasoning. Mr. Henyard drove the victim's car back to the area closest to where he

lived but previously told several witnesses that he had stolen a car. He abandoned the car near a school where it was quickly found, but he kept the car keys in his jacket. There is no logical reason why Mr. Henyard would keep the victim's car keys upon abandoning the car. Additionally, the codefendant's bloody clothes were left near the car. Mr. Smalls was cognizant enough to change his clothes; however, Mr. Henyard went to the police station the next day with the shorts and shoes he had on the night of crime. Mr. Henyard's diminished capacity did not allow him to comprehend or process how keeping the victim's keys upon abandoning the car or remaining in the same clothes that he wore when the crime was committed could be collected as evidence which could be used against him at trial. Many would classify this as being illogical or not demonstrating sound judgment.

3. Diminished capacities to control impulses

Mr. Henyard had no prior adult record. However, there were some indicators, which included petty thievery. Mr. Henyard was noted in school records that he was throwing welding rods and metal in shop class. In a separate juvenile offense, Mr. Henyard was involved in a robbery and breaking and entering and received juvenile sanctions. Mr. Henyard was also charged with grand theft of a motor vehicle involving his aunt, Jackie Turner, which was later dismissed.

Even after using his aunt's vehicle without consent, upon release from the county jail, Mr. Henyard went to his aunt's home because he had nowhere else to go and she allowed him to stay there. Mr. Henyard's background and development left him with the inability to control minor impulses. Jackie Turner is available to testify that Henyard's biological mother was a petty criminal and would earn extra money from thievery. On several occasions, she would take Mr. Henyard with her and require him to steal. Although Mrs. Turner tried to instill in Mr. Henyard good values, she never tried to keep Mr. Henyard from spending time with his mother or replace her in his eyes. Mr. Henyard's cognitive growth and development was comprised from witnessing and participating from early childhood years in his mother's crimes.

4. Diminished capacities to understand the reaction to others and being a follower rather than leader in group setting

Mr. Henyard had very limited social skills and was very withdrawn growing up. He had no significant father figure and had a neglectful mother who rarely accepted her responsibilities as a mother. Mr. Henyard had an overwhelming need to be accepted by others and usually associated with younger children. When Mr. Henyard was scheduled to advance to high school, he begged and pleaded with his mother to allow him to remain in middle school. Upon

learning of Mr. Henyard's request, Mrs. Turner is available to testify that she pleaded with his mother to help him to understand that his age required him to advance in school and social settings and not remain behind because his friends were still attending middle school. Mr. Henyard's mother was very detached and unwilling to help him develop the necessary social skills which would have strengthened his emotional development and maturity. His mother allowed him to remain the child that watched his mother walk by him standing in the doorway and not acknowledge his existence. Even after the crime was committed, Mr. Henyard passively remained silent while Mr. Smalls and Emmanuel Yon, who was an accessory after the fact, bragged about raping a white woman. The victim was African American.

5. Emotional retardation

Records indicate that while Mr. Henyard did not meet the criteria for being mentally retarded at the time of the crime, he does show a combination of deficits that rendered him substantially different from the average adult at the time of the crime. The deficits include an extremely low emotional age that can be conceptualized as emotional retardation. Records indicate a long pattern of biological-based learning problems in early childhood, traumatic neglect, and emotional impoverishment that combined to caused him to be functioning at a

substantially subnormal level at the time of the crime, and to be functioning in the area of a ten and thirteen year old emotionally, according to Drs. McMahon and Toomer respectively.

Henyard's prior diagnosis of learning disorder meets the statutory definition (6A-6.03018). The specific type of learning disorder, identified as a Nonverbal Learning Disorder, is gaining acceptance and it is felt to negatively affect the individual's ability to perceive interpersonal and emotional situations.

Recent research indicates that emotions are a part of cognition (thinking) that have an important role in regulating and modulating behavior and decision-making. Research also indicates that emotional development and the ability to make emotional and social judgments is a skill that begins developing very early, as an infant, and is shaped by both neuropsychological (brain-based) factors such as nonverbal abilities, as well as early emotional environmental influence such as a maternal bond. Mr. Henyard was abandoned by his mother from the age of two months. Although she was physically present at times, she did not bond with Mr. Henyard or demonstrate any emotional connection with her child. Mr. Henyard's impaired caregiving at infancy produced avoidant/disorganized attachment, which compromised his emotional maturity. Attachment disorganization and subsequent severe and chronic trauma, which is incorporated by reference to claim three,

disrupts the neurological development and comprises social and cognitive and emotional impairment.

B. <u>This claim is not procedurally barred.</u>

The trial court found in its order denying relief that this claim is procedurally barred under Fla. R. Crim. P. 3.851 and 3.203, and also because it is a "variation of a claim previously raised." PC-R Vol. III at 547.

The previously raised claim to which the court was referring is Mr. Henyard's first successive postconviction motion, in which he argued that *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the Eighth Amendment prohibits the execution of persons under the age of eighteen, precludes his execution because despite his chronological age at the time of the offense, his mental age was thirteen. See *Henyard*, 929 So. 2d 1052.

As argued below in Argument V, and therefore incorporated herein, the trial court deviated from the essential elements of law in holding that the ***<u>raising</u>*** of a claim triggers a procedural bar. Rule 3.851(e)(2) is very specific in that a previously raised claim has to be decided *on the merits*. Mr. Henyard's previous claim did not receive a merits ruling and the prior denial was affirmed by this Court without opinion. *Henyard v. State*, 929 So.2d 1052 (Fla. 2006)(Table).

Furthermore, the trial court erred in its finding that this claim is procedurally

barred under Fla. R. Crim. P. 3.851. Fla. R. Crim. P. 3.851(e)(2)(C) permits capital defendants to file successive motions based on newly discovered evidence. This claim is based on newly discovered evidence in the form of recent research regarding emotional development. In order to be considered newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of due diligence." *See Lightbourne v. State*, 841 So. 2d 431, 440 (Fla. 2003), quoting *Jones*, 709 So. 2d at 521.

The trial court cited *Hill v. State*, 921 So. 2d 579 (Fla. 2006) to support its finding that the research cited by Mr. Henyard is not "new evidence." PC-R Vol. III at 546-47. However, this case in distinguished from *Hill* because while the psychological evaluation cited by the defendant in *Hill* was nearly twenty years old and was available to the defendant at an earlier time, the research Mr. Henyard is relying on in this claim is very recent and could not have been previously discovered by the use of due diligence because it did not exist. Additionally, Mr. Henyard's contention that the recent research he cited constitutes newly discovered evidence is supported by Justice Anstead's opinion in Hill, in which he found that a recent lethal injection study concerning lethal injection protocols cited by Hill

constitutes newly discovered evidence. *Hill*, 921 So. 2d 579 (Anstead, J., concurring in part and dissenting in part).

Allowing Mr. Henyard to proceed on an *Atkins* claim based on brain impairment and mental deficiency rather that significantly sub average IQ is consistent with this current body of research. In WHAT IS MENTAL RETARDATION: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY (H. Switzky and P. Greenspan ed., AAIDD 2006), the editors explained that adaptive behavior should be the determinative factor in diagnosing mental retardation because it is the way in which intellectual disability manifests itself in a person's life. In the newest commentary on the 10th edition of its manual, MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (AAID 2002), the AAIDD sets out the following guideline:

> In the evaluation of school-related adaptive behavior or in the interpretation of adaptive behavior/direct observation, the assessment should focus heavily on functional systems of assessment with an emphasis on adaptive behavior. This is because (a) adaptive behavior examines aspects of intelligence and functioning that cannot be ascertained on the basis of an IQ test, and (b) adaptive behavior gets at the core of what MR/ID is as a construct of disability.
>
> AAIDD, MR Manual User's Guide (2007) (emphasis added). Switzky and Greenspan propose a modification of the definition of retardation that puts the emphasis on limitations in adaptive behavior

> The solution seems fairly simple, and that is to reverse the order of the wording . . . Doing so , the definition might read as follows: 'MR is a form of disability, first suspected in childhood or adolescence, that is characterized by significant deficits in adaptive social, academic and practical functioning that are attributable to significant limitations in the ability to think and process information adequately.' This proposed definition does several things that could, if taken seriously, serve to finally put 'King IQ' in its place and raise adaptive behavior -- termed 'adaptive functioning' to free ourselves from all of the baggage associated with that poorly defined term -- is now put toward the beginning of the definition, such that the starting point for the for the diagnosis is now establishing limitations in adaptive rather than first establishing limitations in intelligence. By describing the intellectual criterion with the nonjargon words 'ability to think and process information,' we are indicating that what is important is not a score on an IQ test but an exploration of an individual's intellectual processes. However, by inserting the words 'that are attributable,' we hope to indicate that adaptive behavior deficit is not separable from intellectual deficit, but rather flows from it.

Switzy and Greenspan, *supra*.

Mr. Henyard's intellectual disability meets this definition. He has "significant deficits in adaptive social, academic, and practical functioning that are attributable to significant limitations in the ability to think and process information adequately" that were first observed in his childhood and adolescence. Mrs. Turner is available to provide background testimony regarding Henyard's adolescent development and his mother's lack of attachment with him from

infancy. Since adaptive behavior "gets at the core" of what mental retardation is, Henyard meets the criteria of *Atkins* and his execution is barred by the Eighth and Fourteenth Amendments to the U.S. and Florida Constitutions.

ARGUMENT III

THE LOWER COURT ERRED WHEN IT SUMMARILY DENIED MR. HENYARD'S CLAIM THAT HIS MENTAL ILLNESS AT THE TIME OF THE OFFENSE AND AT PRESENT RENDER HIS SENTENCE OF DEATH AND IMMINENT EXECUTION UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

All allegations regarding the Defendant's mental condition asserted elsewhere in this brief are incorporated herein.

A. <u>The Evidence that Entitles Mr. Henyard to Relief</u>

In his third successive motion for postconviction relief, Mr. Henyard submitted a report from Janice Stevenson, Ph.D., an expert in the field of child and adolescent clinical psychology. PC-R Vol. II at 419-27. In short, Dr. Stevenson found that based on Mr. Henyard's traumatic sexual abuse as a child, his severe post-traumatic stress disorder, and his severely reduced mental functioning ability that he did not have the requisite moral culpability to be executed. PC-R Vol. II at 419-27.

The trial court summarily denied relief on this claim. PC-R Vol. III at 548.

Because the trial court did not grant an evidentiary hearing on this claim, the Court must accept all allegations in the motion as true, including Dr. Stevenson's report. See *Hodges*, 885 So. 2d at 335. Although the court found that this claim is procedurally barred, which is addressed below, it also found that "even if it is not procedurally barred, the claim lacks merit as this court declines to extend the holding in *Atkins* and *Roper*." PC-R Vol. III at 548. Mr. Henyard urges this court that the evolving standards of decency, coupled with the recent research presented by Mr. Henyard and the evaluation by Dr. Stevenson warrant an extension of the holdings of *Atkins* and *Roper* to the case at hand.

The Defendant's mental condition at the time of the offense bars the death penalty under the rationale of *Atkins*, 536 U.S. 304 and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Eighth Amendment prohibits "excessive" sanctions. A claim that punishment is excessive is judged by the evolving standards of decency that mark the progress of a maturing society. Persons suffering from mental illness to the same degree as Mr. Henyard by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. While their deficiencies may or may not warrant an exemption from criminal

sanctions, they do diminish their personal culpability. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. Unless the imposition of the death penalty on a severely mentally ill person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment. With respect to retribution, the severity of the appropriate punishment necessarily depends on the culpability of the offender. With respect to deterrence, exempting the significantly mentally ill from execution will not lessen the deterrent effect of the death penalty with respect to offenders who are not severely mentally ill. Such individuals are unprotected by the exemption and will continue to face the threat of execution.

B. <u>This claim is not procedurally barred.</u>

The trial court erred in its finding that "[l]ike the new evaluation presented in *Hill*, *supra*, this court does not find that the self-serving evaluation based upon interviews with the defendant offers any truly new evidence." PC-R Vol. III at 548. As the trial court agreed in its August 14, 2008 order, Claims II and III are "intricately intertwined." PC-R Vol. III at 544. Thus, the new evidence presented in Claim III should be examined not in a vacuum, but in conjunction with the new

evidence presented in Claim II. In *Hill*, which was decided in 2006, the appellant cited as newly discovered evidence a psychological evaluation from 2005 in addition to a psychological evaluation from 1989. *Hill*, 921 So. 2d at 583. The case at hand is distinguished from *Hill* because in addition to Dr. Stevenson's recent evaluation of Mr. Henyard, the appellant is offering recent research that was not previously available. In other words, while Mr. Henyard could have been and was evaluated previously, it would have been impossible to conduct an evaluation in light of current research because it did not exist.

The trial court also erred in its finding that "this claim was previously litigated in the defendant's prior post conviction motion." PC-R Vol. III at 548. As argued below in Argument V, and therefore incorporated herein, the trial court deviated from the essential elements of law in holding that the ***raising*** of a claim triggers a procedural bar. Rule 3.851(e)(2) is very specific in that a previously raised claim has to be decided *on the merits*. Mr. Henyard's previous claim did not receive a merits ruling and the prior denial was affirmed by this Court without opinion. *Henyard v. State*, 929 So.2d 1052 (Fla. 2006)(Table).

ARGUMENT IV

THE LOWER COURT ERRED WHEN IT REAFFIRMED ITS PRIOR RULING WITH REGARD TO FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION, FLORIDA STATUTE 945.10, AND FLORIDA STATUTE 27.702 IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDEMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

As noted above, Henyard filed a successive motion for post conviction relief on October 16, 2007. The trial court summarily denied these claims on January 8, 2008. The motion contained four claims, three of which have been raised on appeal. Rearranged, they are: 1) Newly discovered evidence shows that Florida's lethal injection method of execution violates the Eighth Amendment; 2) Fla. Stat. 945.10 (2006) as implemented by the protocols, which conceals the identity of the participants in an execution, is unconstitutional; and 3) Fla. Stat. 27.702, which as interpreted by the Florida Supreme Court in *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006) prohibits CCRC from filing a 42 U.S.C. § 1983 federal rights suit challenging lethal injection, is unconstitutional. In light of the Florida Supreme Court's directive that this Court has jurisdiction to consider any motion filed pursuant to Rule 3.851 and this Court's earlier denial of Henyard's motion to amend the October 16, 2007 predicated on finding a lack of jurisdiction, the three

claims are reasserted and updated in Mr. Henyard's August 4, 2008 motion.

A. Newly discovered evidence shows that Florida's lethal injection method of execution violates the Eighth Amendment.

In its order dated August 14, 2008, the trial court denied Mr. Henyard's claim that newly discovered evidence shows that Florida's lethal injection method of execution violates the Eighth Amendment because "[t]he *Baze* decision does not undermine the rationale of prior Florida Supreme Court holdings." PC-R Vol. III at 550. However, under the Florida Constitution, Florida's interpretation of the Eighth Amendment prohibition against cruel and unusual punishment must be in conformity with the United States Supreme Court's decisions. Art I, § 17 Fla. Const.; See also *Lightbourne*, 968 So.2d at 334. Although *Baze* had not been decided at the time Mr. Henyard filed his successive motion, this Court is bound to follow *Baze* because it is a decision of the United States Supreme Court. His claim is not based on an isolated mishap, but rather on the assertion that the current (August 1, 2007) Florida Department of Corrections protocols and their proposed implementation were defective. The botched execution of Angel Diaz is not an isolated incident, but rather is evidence of the problems inherent in Florida's lethal injection method of execution. The Florida Supreme Court's reaffirmation of an inherent cruelty standard in *Lightbourne v. McCullum*, 969 So. 2d 326 (Fla. 2007)

and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007) is now in conflict with the plurality opinion in *Baze* and with the position taken by all but two of the members of the United States Supreme Court.

Nor is the claim procedurally barred. *See Schwab v. State*, 969 So.2d 318, 321 (Fla. 2007). As argued below in Claim V, and incorporated herein, Mr. Henyard filed a lethal injection claim in 2007 and appealed that denial to this Court. That appeal is still pending. *Henyard v. State*, Case Number SC08-222. Thus, no bar can be applied.

B. Fla. Stat. 945.10 (2006) as implemented by the protocols, which conceals the identity of the participants in an execution, is unconstitutional.

In its order of August 14, 2008, the trial court denied "this portion of the defendant's claim as set forth in paragraph 8 of the its [sic] Order on Defendant's Successive Motion to Vacate Judgments of Sentence entered January 8, 2008." PC-R Vol. III at 550. As the court correctly stated in its order, no new argument or evidence was presented to the court as to this claim in Mr. Henyard's August 4, 2008 motion. PC-R Vol. III at 16. Therefore, as to this claim Mr. Henyard relies on the argument presented in the brief filed in this Court on July 1, 2008 regarding case number Case No. SC08-222. *See* Initial Brief of Appellant at 13-16.

C. Fla. Stat. 27.702, which as interpreted by the Florida Supreme Court in

***Diaz v. State*, 945 So. 2d 1136 (Fla. 2006) prohibits CCRC from filing a 42 U.S.C. § 1983 federal rights suit challenging lethal injection, is unconstitutional.**

In its August 14, 2008 order, the trial court denied Mr. Henyard's claim that Fla. Stat. 27.702, which as interpreted by the Florida Supreme Court in *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006) prohibits CCRC from filing a 42 U.S.C. § 1983 federal rights suit challenging lethal injection, is unconstitutional. PC-R Vol. III at 551. In support of its finding, the court found that the claim is procedurally barred under *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998), in which this Court held that CCRC is not authorized to pursue federal civil right actions on behalf of capital defendants. PC-R Vol. III at 551. The court further found that even if this claim is not procedurally barred, it is without merit based upon *Diaz v. State*, 945 So. 2d 1136. PC-R Vol. III at 551.

Mr. Henyard's F.S. § 27.702 claim was originally filed in October of 2007. The claim as stated in the successive Fla. R. Crim. P. 3.851 motion acknowledged this Court's decision in *Diaz*, but argued that Mr. Henyard and any other similarly situated death row inmate should not have their right to challenge the constitutionality of lethal injection in a federal proceeding impaired or extinguished because of the arbitrary constraints of § 27.702. The statutory limitation on CCRC is an unconstitutional deprivation of due process, access to the

courts, equal protection, and the protection against cruel and unusual punishment as embodied in the federal constitution.

In particular, by denying CCRC counsel the opportunity to pursue 42 U.S.C. § 1983 federal civil rights suit challenging method of execution, Fla. Stat. 27.702 not only denies capital defendants the right to effective assistance of counsel, it in essence denies them the right to any counsel at all in certain situations. In *State ex rel. Butterworth v. Kenny*, this Court cites *Murray v. Giarratano,* 492 U.S. 1 (1989), for the proposition that there is no right to counsel for postconviction relief proceedings even where a defendant has been sentenced to death. 714 So. 2d at 407. Mr. Henyard urges this court to reconsider its holding in *Butterworth* that capital defendants are not entitled to postconviction counsel. First, rather than rejecting the claim that capital defendants are entitled to counsel in state postconviction proceedings, *Giarratano* only rejected the claim that Giarratano was entitled to postconviction counsel in his particular case, and "implicitly held that other facts would lead to other results." Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1089; *Giarratano*, 492 U.S. at 14-15 (Kennedy, J. concurring). Second, "the Eighth Amendment mandate of reliability in capital proceedings is simply not achievable unless a defendant has the assistance of

counsel" in postconviction proceedings. *Id.* This point is especially relevant in light of the fact that 68 percent of death sentences do not survive postconviction review. *Id.* at 1096. Prohibiting CCRC counsel from filing federal civil rights actions under 42 U.S.C. § 1983 creates a gap in representation in an area that is of crucial importance to capital defendants.

Furthermore, even if this Court finds that there is not a constitutional right to postconviction counsel, the government's decision to provide capital defendants with counsel for postconviction proceedings triggers a constitutional obligation to provide those defendants with effective assistance of counsel. See Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31. In *Evitts v. Lucey*, the United States Supreme Court interpreted the Due Process Clause of the Constitution to contain a meaningfulness requirement. 469 U.S. 387, 397 (1985). What this means is "that when the government creates a right designed to protect or enhance the reliability of the criminal trial or the individual liberty of criminal defendants, the voluntarily-created statutory right must be meaningful; it must be more than a futile gesture." McConville, *supra*, at 37. Thus, because Florida statutorily provides capital defendants with postconviction counsel under Fla. Stat. 27.701 and 27.701, it is

obligated under the Due Process and Equal Protection Clauses to ensure that that representation is meaningful, and that postconviction counsel in effective. By dictating what CCRC counsel can and cannot file on behalf of their clients, the Florida legislature is interfering with counsel's ability to provide meaningful and effective representation with regard to method of execution claims, in violation of the Due Process and Equal Protection Clauses.

Some of the events that gave this claim more force occurred during the second week of November, 2007, immediately after the Florida Supreme Court had denied all relief in *Schwab,* 969 So. 2d 318. Schwab then filed an application to file a successive habeas petition challenging Florida's method of execution in the U.S. Eleventh Circuit Court of Appeals. That court denied Schwab's application because Schwab could not meet the stringent requirements of a successive 28 U.S.C. § 2254 petition, but the court added the following language:

> Even if such a claim were properly cognizable in an initial federal habeas petition, instead of in a 42 U.S.C. § 1983 proceeding . . . this claim cannot serve as a proper basis for a second or successive habeas petition.

In Re: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (2007). As the reason for the disclaimer the court cited *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 2099, 165 L.Ed.2d 44 (2006); *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117,

158 L.Ed.2d 924 (2004), *Rutherford v. McDonough*, 466 F.3d 970, 973 (11th Cir.2006) (observing that pre *Nelson* circuit law requiring challenges to lethal injection procedures to be brought in a § 2254 proceeding is "no longer valid in light of the Supreme Court's *Hill* decision"). Henyard's argument here is that this language confirms that a federal challenge to Florida's lethal injection method of execution in this circuit must be brought by way of a § 1983 action rather than a § 2254 petition. The Eleventh Circuit's decision undermines this Court's rationale in *Diaz* that CCRC clients seeking to file an action challenging lethal injection may do so by way of a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

The trial court found that this claim was procedurally barred. PC-R Vol. III at 551. However, it failed to acknowledge that there are significant timing issues that apply to the filing of a § 1983 claim. A § 1983 claim carries a two year statute of limitations, but does not require exhaustion of state remedies, unlike the one year statute of limitations and exhaustion requirements of § 2254. The start date for a § 2254 petition is determined by the finality of the judgment and the completion of state postconviction proceedings, whereas the limitations period for filing a § 1983 starts at the accrual of a cause of action.

This issue was recently addressed in *McNair v. Allen*, 515 F.3d 1168 (C.A.11 (Ala.), January 29, 2008). There, the court of appeals held that the two

year statute of limitations on § 1983 claim brought by an Alabama death row inmate challenging the method by which he was to be executed began to run, not at time of inmate's execution or on the date that federal habeas review was completed, but when the inmate, after his death sentence had already become final, became subject to a new execution protocol. McNair's start date was found to have been the point at which he opted (by silence, similar to Florida) to be executed by lethal injection rather than by electrocution. However, the court specifically noted that "the statute of limitations began to run at that time; therefore, **absent a significant change in the state's execution protocol (which did not occur in this case**) . . . " *McNair*, 1177 (emphasis added). The court further noted that:

> The dissent notes Alabama's execution protocol is subject to change. Although that is true, neither party suggests the lethal injection protocol has undergone any material change between 2002 and the present.

Id. n.6.

Mr. Henyard argues here that significant and material changes in Florida's protocol did occur on August 1, 2007, and that these changes constitute newly discovered evidence. In fact, two of the many changes that occurred are those which have been often cited by the State in rebuttal to claims that Florida's method

of execution is constitutional, namely the qualifications of the execution team and the addition of a consciousness requirement.

As the Florida Supreme Court stated in *Lightbourne*:

> Section 922.105(1) now provides: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." The statute does not provide the specific procedures to be followed or the drugs to be used in lethal injection; instead it expressly provides that the policies and procedures created by the DOC for execution shall be exempt from the Administrative Procedure Act, chapter 120, Florida Statutes.

Lightbourne, 969 So.2d at 342.

Thus, Mr. Henyard's cause of action for § 1983 purposes accrued on August 1, 2007 and he has two years from that date to file a claim. The issue of CCRC not being permitted under Fla. Stat. 27.702 did not become ripe until the statute of limitations for filing a § 1983 began to run and Mr. Henyard sought counsel to represent him on that claim. For the above reasons, this claim is not procedurally barred. Fla. Stat. 27.702 should be deemed unconstitutional, or this Court should reconsider its interpretation of that statute so as to permit CCRC counsel to pursue a method of execution claim in the federal courts.

ARGUMENT V

MR. HENYARD'S DENIAL OF HIS RIGHT TO AN EVIDENTIARY HEARING AND THIS COURT'S HISTORIC REFUSAL TO ENFORCE THIS RIGHT UNDER THE FLORIDA RULES OF CRIMINAL PROCEDURE VIOLATES THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS IN THE FLORIDA CONSTITUTION.

The trial court denied Mr. Henyard an evidentiary hearing on each of the four claims asserted in his successive motion. PC-R V. III at 552. Mr. Henyard's right to an evidentiary hearing is governed by constitutional law and Fla. R. Crim. P. 3.851(e)(2). *Rivera v. State*, 33 Fla. L. Weekly S386 (Fla. June 12, 2008). *See also Schwab v. State*, 969 So.2d 318 (Fla. 2007).

Simply because a death warrant has been signed scheduling an execution date does not mean that the dictates of Rule 3.851 can be ignored. Section 3.851(h)(5) makes no distinction between a successive motion and a motion filed after a warrant has been signed.[1] Successive motions for postconviction relief are procedurally barred only when a prior claim in a motion for postconviction relief was adjudicated on the merits and not when the previous claim was summarily denied or dismissed for legal or procedural insufficiency. *See Hutto v. State*, 981 So. 2d 1236 (Fla. Dist. Ct. App. 1st Dist. 2008); *see also Romeo v. State*, 965 So.2d

[1] Fla.R.Crim.P. 3.851(h)(5) states "Postconviction Motions. All motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule."

197 (Fla. 3rd DCA 2007). The only claim that was previously ruled on by the merits in a prior motion to vacate was Mr. Henyard's claim that he received ineffective assistance of counsel. *See Henyard v. State*, 883 So.2d 753, 757, fn.6. All other claims were summarily denied. In fact, Mr. Henyard's successive mental health claim was also summarily denied and affirmed by this Court without an opinion. *Henyard v. State*, 929 So.2d 1052 (Fla. 2006)(Table). It was error, and continues to be error, for a court to dismiss such claims as procedurally barred.

There is a growing and disturbing pattern established by this Court in denying successive motion filed under Fla.R.Crim.P. 3.851(e)(2) that violates the Due Process Clause and the Eighth Amendment. From the time the State of Florida utilized lethal injection as a method of execution, only four individuals out of twenty-two (including Mr. Henyard) were allowed an evidentiary hearing on any claim raised in a successive motion to vacate filed after a warrant has been signed. In fact, in only one case, that of Mr. Provenzano, did this Court remand the case back to the trial court for an evidentiary hearing.

However, since 2007 at least since seven individuals have been granted evidentiary hearings on a successive post-conviction motion to vacate under Fla. R.Crim.P. 3.851 (e)(2). Thus in a span of about a year, nearly twice the number of individuals without an active death warrant have been granted an evidentiary

hearing than those with an active warrant over the past eight years. In fact, Mr. Henyard's claims and procedural posture are nearly identical, with the only distinguishing factor being his active death warrant.

Furthermore, the unusual procedural posture that Mr. Henyard finds himself in does not dispense with this Court's constitutional duty under the Fifth, Eighth, and Fourteenth Amendments to adjudicate his appeal. For example, in *Thompkins v. State*, 894 So.2d 857 (Fla. 2005), this Court noted that where an appeal is pending before this Court and the Court denies a motion to relinquish jurisdiction for the trial court to consider the new claim, the trial court should hold any successive motion in abeyance until the appeal process is completed. *Thompkins*, 894 So.2d 857 (Fla. 2005). Specifically, this Court stated:

> We recognize that due to this Court's denial of Tompkins' motion to relinquish, a procedural dilemma now arises because Tompkins is time-barred from filing a new postconviction motion raising his newly discovered evidence claims. *See Glock v. Moore*, 776 So.2d 243, 251 (Fla.2001) ("[A]ny claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence."). Accordingly, although we affirm the trial court's order, we conclude that Tompkins should be permitted 60 days to refile his successive postconviction motion *nunc pro tunc* to February 5, 2003, the date his prior motion was filed in the trial court. To avoid this procedural dilemma in the future, we conclude that if an appeal is pending in a death penalty case and this Court denies a motion to relinquish jurisdiction for the trial court to consider a new claim, the trial court should hold any successive postconviction motion in abeyance until the appeal process is completed.

Id. at 859-60.

Neither the trial court nor this Court followed the dictates of *Thompkins* even though the two cases are procedurally indistinguishable. Worse yet, this Court appears to have changed the rules it established by doing the exact opposite when it expedited the case in order to accommodate the executive branch's execution schedule. Mr. Henyard's appeal to this Court on his lethal injection claim filed on October 16, 2007 is still pending before this Court. *See Henyard v. State*, Florida Supreme Court case number SC08-222.

When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause. *Evitts v. Lucy*, 469 U.S. 387, 400-01 (1985). For instance, although a State may choose whether it will institute any given program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). *See also Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*,

402 U.S. 535, 539 (1971); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 165-166 (1951) (Frankfurter, J., concurring).

Mr. Henyard has been repeatedly denied the opportunity to litigate his claims contained in his motion to vacate in an evidentiary hearing. The lower courts have consistently denied his claims without the protections afforded to other individuals with successive post-conviction motions. Furthermore, this Court is clearly ignoring the procedure announced in the *Thompkins* decision. This Court should remand the case back to the trial court for an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

The lower court's order summarily denying relief on Claims I, II, and II should be reversed and the Appellant should have the opportunity to develop his claims in a full and fair hearing.

Mr. Henyard's CCRC counsel should be authorized to pursue a method of execution claim in the federal courts. Fla. Stat. 27.702 should be deemed unconstitutional, or this Court should reconsider its interpretation of those statutes so as to permit CCRC counsel to pursue a method of execution claim in the federal courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on August 25, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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