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

REPLY BRIEF OF APPELLANT

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CLAIM I

THE LOWER COURT ERRED IN SUMMARILY DENYING HENYARD'S NEWLY DISCOVERED EVIDENCE CLAIM BASED ON THE AFFIDAVIT EXECUTED BY JASON NAWARA ON JULY 24, 2008 AND EVIDENCE OF BRADY VIOLATION.

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. At the time of Henyard's capital trial proceedings, Jason Nawara was a juvenile being housed in the detention center with Henyard's co-defendant, Alfonza Smalls. As the State reiterates the Appellant's briefing argument that Mr. Henyard's trial attorneys would have been prevented from speaking with him at the time of Mr. Henyard's trial because of his own pending criminal proceedings it ignores the argument at the case management proceedings that: "**there was no way for trial counsel - - opposing counsel to even know the name of Mr. Nawara**. He was a juvenile at the particular time. Everything about Mr. Nawara's case was being sealed. We couldn't even find out who Mr. Smalls was even being housed with at the juvenile detention center because they were, in fact, all juveniles." PC-R, Vol. III, 528-9. Similarly, Mr. Jimmy Kennedy was a juvenile at the detention center and there was no way for counsel to know that Mr. Kennedy existed or had information that would incriminate Mr. Smalls in the murders of Jasmine and

Jamilya.

As Jones clarifies the standard of newly discovered evidence, the evidence must be 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). Trial counsel for Mr. Henyard requested discovery from the state on February 22, 1993. In that request, counsel asked in part for the names and addresses of all persons known to the prosecutor to have information relevant to the offense charged, and to any defenses with respect thereto; the substance of any oral statement of a co-defendant, principal, accomplice, or accessory; and material information within the state's possession or control which tends to negate the guilt of the accused as the offense charges. (Trial ROA Vol. I, 19-20). It is apparent that the state was aware of its obligation to provide continuing disclosure as evidenced by the thirty-two separate supplemental discovery responses which were filed between March of 1993 and January of 1994 to include additional witnesses, statements, and reports. However as the trial record would reflect, the state never disclosed or amended its response to include Jimmy Kennedy or the transcript of his statements taken by the lead prosecutor in Henyard's case on March 22, 1994. This transcript alone could have led to the discovery of Jimmy Kennedy, Jason Nawara and perhaps other corroborating witnesses who could testify that Mr. Smalls willingly admitted on

several occasions to being a killer.

At the case management conference, Appellant's counsel attempted to explain how they obtained the Kennedy transcript which led to the identity of Mr. Nawara. Appellant's counsel also indicated that the transcript could have come about through recent public records. What the Appellee has failed to establish on the record or in its reply is the exact date or time period in which the state disclosed the Kennedy transcript to trial counsel or post-conviction counsel. This evidence would rebut the Appellant's claim that Jason Nawara could not have been found earlier by the exercise of due diligence. It is this type of evidence which is not conclusively refuted by the record which requires an evidentiary hearing to determine due diligence. See, Swafford v. State, 679 So.2d 736, 739 (Fla. 1996) (Case remanded for determination of whether Swafford had demonstrated as a threshold requirement that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence.).

Under the second prong of Jones, the trial court's analysis is premised upon an error that Nawara's hearsay statements, regarding Henyard's co-defendants criminal admissions to being a killer, would not be admissible because they lacked corroborating circumstances to demonstrate trustworthiness. The lead prosecutor in Henyard's case provides the reliability needed to corroborate Nawara's

statements at the case management conference.

> By Mr. Gross: It was an interview that I did with Mr. Kennedy. It was back on March 22, 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 an admission from Alfonza Smalls by the way of this Kennedy individual**.

PC-R Vol III, 531. (*Emphasis added*). By the state's admission at the case management conference, Jimmie Kennedy who was being housed with Mr. Smalls and Mr. Nawara also heard Mr. Smalls' criminal admissions. The record is devoid of any evidence that would challenge the credibility of Mr. Nawara statements that Mr. Smalls admitted to being a killer or Mr. Kennedy's statement, taken by the state in 1994, that Mr. Smalls indicated that we killed them.

Henyard's jury did not have evidence that Mr. Smalls admitted to being a killer. The jury's verdict although unanimous was not reached without due consideration. Although we are prohibited from violating the providence of a jury's decision, we can tell from the jury verdict that the jury was at qualms with its decision when the verdict was changed three different times before reaching its decision. (Trial ROA at 2557).

The Appellee further argues that Henyard cannot satisfy the second prong of Jones because the evidence will not establish that Henyard would have received a

life sentence. The Appellee relies upon the trial court's "House of Cards" analysis in support of its position and further argues that Henyard was the triggerman due to the high velocity blood found on Henyard's clothing which would refute his contention that Smalls was the triggerman. The absence of evidence on Mr. Smalls clothing is not conclusive that he did not fire the fatal shots which killed Jasmine and Jamilya nor did the state present any witnesses which could conclusively establish that Henyard was the triggerman. Just as the absence of Mrs. Lewis' blood on Henyard's clothing would establish that he did not shoot Mrs. Lewis when by his own admission he claims to have shot Mrs. Lewis and Mrs. Lewis observed Henyard fire one shoot towards her leg before losing consciousness it goes to reason that Mr. Smalls could have been the actual triggerman and later bragged to those in the detention center that "I'm a Killer" but left no evidence to reveal his true role in the crimes. Because Smalls clothing was found with larger quantities of blood, any high velocity blood would not have been visible. Similarly when the state collected DNA evidence from the rape kit, there was no DNA evidence of Smalls' found in the sample. This does not prove that Mr. Smalls did not rape Mrs. Lewis when she testified that Smalls raped her after Henyard.

The Appellee also cites to Sims, Rutherford, Diaz, and Van Poyck in support of summary denial of Mr. Henyard's newly discovered evidence claim. Appellee Brief at 20-21 (citations omitted). The foregoing cases are clearly distinguishable

from Mr. Henyard's case. In Sims, the Appellee argues that the trial court summarily denied his newly discovered evidence claim filed after his warrant was signed. This is error. The trial court conducted an evidentiary hearing on Sims' warrant post-conviction pleading which claimed the existence of newly discovered evidence. In lieu of live testimony, the Court accepted by stipulation four affidavits as evidence before denying Sims' relief. Sims v. State, 754 So.2d 657, 659 (Fla. 2000). In reviewing the lower court's decision which found that the affidavits themselves would not be admissible upon retrial and further that one of the affidavits lacked indicia of reliability and trustworthiness, Henyard's trial court did not conduct an evidentiary hearing nor allow Henyard to present the testimony of Jason Nawara, who was available to testify in the warrant proceedings. Additionally, Jason Nawara is not providing evidence that he received through some obscure collateral witness. Jason Nawara has evidence that Mr. Smalls, Henyard's co-defendant, admitted on several occasions to being a killer. Jimmy Kennedy heard it as well and therefore similar credibility concerns are not present in Mr. Henyard's claim.

Rutherford is also distinguishable. The two affiants in Rutherford received varying accounts from Mary Heaton who gave varying accounts regarding the murder. Mary Heaton's statements themselves were found to be contradictory on their face and her mental problems only contributed to making her statements less

credible. Rutherford v. State, 926 So.2d 1100 (Fla. 2006). Diaz is distinguishable because as the state points out the recantation witness did not recant his original trial testimony as to who was the actual shooter. And finally, Van Poyck v. State, the court specifically found that the newly discovered evidence claim was not timely under Fla. R. Crim. P. 3.851. 961 So.2d 220, 224 (Fla. 2007).

The lower courts summary denial of Mr. Henyard's newly discovered evidence claim was error. Had the jury heard the testimony of Mr. Nawara or Mr. Kennedy they likely would have recommended a life sentence for Mr. Henyard. The evidence is not so overwhelming that Mr. Henyard's role in the crime could not have been considered relatively minor when compared with Mr. Smalls. Although Henyard admittedly took his grandfather's gun and bragged about stealing a car, Mrs. Lewis the surviving victim in this case testified that Mr. Small, the younger one, approached her after putting her daughters in the passenger side of the vehicle. He raised his shirt and showed her a gun and said get in the car and don't say a word. She asked him if she could get her babies out the front seat. He motioned for the other one and said this is the one, we have one. Her children climbed over the seat and they all sat in the backseat. The man with the gun, the younger one, got in on the passenger side in front. The man who had been on the sidewalk got in on the driver's side. The guy with the gun appeared younger. As they were driving her children started crying and the younger guy told her to make

them shut the “f” up. The younger guy was not driving and gave the driver directions. When she had her hand on the door handle just in case she had an opportunity to jump out with her kids, it was the younger one who told her doing stuff like that is going to make me hurt you. When the car finally stopped, Henyard removed her from the car and raped her on the trunk. The younger one put the gun on the trunk and was fondling himself. When she reached for the gun, the younger one grabbed it and placed it on the ground stating, “B” you’re not going to get this gun. Mrs. Lewis also testified that when she told them to just let her go and take the car, it was the younger one who said, No we can’t do that. It was the younger one who was doing all the talking. And while Henyard was raping her, the younger one taunted hurry up man so that he could get some. (Trial ROA 1809-1850). Although the state wants to minimize Alfonza Smalls’ role in the whole criminal episode, it was in fact Mr. Smalls who had the gun and accosted Mrs. Lewis and her children. But for Mr. Smalls, Mrs. Lewis and her daughters may have gotten in the car and driven away from the Winn Dixie store without further incident. It cannot be stated that Mr. Henyard was the most culpable and any jury hearing that Mr. Smalls continued to brag to the other detainees at the detention center that he was a killer would have been a compelling argument in determining that Henyard, although older, was the not the leader in the crime and his role when compared with Smalls was relatively minor. Further the absence of

evidence is not indicative that Mr. Smalls did not shoot Jasmine and Jamilya. It only means that he had a greater hand in disposing of the bodies based upon the amount of blood on his clothing.

CLAIM V

THE LOWER COURT ERRED IN SUMMARILY DENYING HENYARD'S POSTCONVICTION PLEADINGS WITHOUT AN EVIDENTIARY HEARING.

The Appellee in its Answer Brief responds to the Appellant's claim regarding a procedural by raising, yet again, another procedural bar. (Brief for Appellee at 41). This procedural bar is inapplicable to this claim because it was unknown whether the trial court would apply a procedural bar until it had ruled. Mr. Henyard would not have a claim involving the fundamental fairness of his proceedings until the lower court ruled in an erroneous way giving rise to a Due Process violation.

Next, the Appellee attempts to distinguish *Hutto v. State*, 981 So.2d 1236 (Fla. 1st DCA 2008) and *Romeo v. State*, 965 So.2d 197 (Fla. 3rd DCA 2007), both of which address the issue of successive postconviction motions. Both cases squarely address the issue of the necessity of merit rulings. Further, *Hutto* clearly identifies current Florida law. The Appellee, in attempting to distinguish *Hutto* from the instant case, actually reinforces Henyard's position. Answer Brief at 42. ("*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.")

The Appellee's attempt to distinguish *Hutto* and *Romeo* because they are not Rule 3.851 cases, is disturbing. Justice Anstead, concurring specially in *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005), regarding the non-retroactive application of *Crawford v. Washington* wrote:

> While most of the cases discussed above arose under rule 3.850 rather than rule 3.851, no one, including the State, has ever contended that the constitutional right to habeas corpus available to all prisoners under subdivision (h) of rule 3.850 could be denied to death-sentenced individuals whose claims were filed after the 2000 adoption of the retroactivity limitation in what is now rule 3.851(d)(2)(B). *See Amends. to Fla. Rules of Crim. Proc. 3.851, 3.852 & 3.993*, 772 So.2d 488, 495 (Fla.2000). Stated another way, no one has asserted that courts could constitutionally permit habeas filings to all prisoners invoking claims under decisions like Crawford, but deny the same opportunity to seek the writ to those sentenced to death and presenting the exact same *Crawford* claims. In addition to the obvious equal protection problem, the United States Supreme Court has held "that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny." *California v. Ramos*, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Precluding a claim such as Chandler's would result in lesser, not greater, scrutiny in capital cases, unless we are to turn our constitutional law upside down and provide the greater degree of scrutiny to the lesser cases.

Chandler, 916 So.2d at 740 (Anstead, J., Concurring Specially).

Unfortunately, the State proves Justice Anstead wrong by arguing for the application of two different standards. Mr. Henyard contends that he would be, and is, entitled to substantially more process than the lower court provided, i.e., the same process that is provided by the current Rules. *See Eddings v. Oklahoma*,

102 S.Ct. 869, 878 (1982) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.") (O'Connor, J., concurring). *See also Burger v. Kemp*, 107 S.Ct. 3114 (1987); Strickland v. Washington, 466 U.S. 668 (1984) (right to effective assistance of counsel at capital sentencing proceeding); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (right to accurate sentencing instructions at capital sentencing proceeding). Some individuals will have life and death facts determined in a hurried court in a successor setting under warrant, and others will have the fact determined during a critical stage in a criminal/capital proceeding? This is utterly arbitrary, and risks incorrect decisions, as the record produced below vividly illustrates. *See Ake v. Oklahoma*, 105 S.Ct at 1094-95, 1097 (1985) ("[t]he State . . . has a profound interest in assuring that its ultimate sanction is not erroneously imposed")(emphasis added); *Gardner v. Florida*, 430 U.S. 349, 360 (1978)("the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death"); *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) ("[F]undamental fairness" requires that indigents be provided "an adequate opportunity to present their claims fully within the adversary system.").

Such procedures create “a substantial risk that [death] will be inflicted in an

arbitrary and capricious manner," and therefore, violate the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Beck v. Alabama*, 447 U.S. 625, 637 (1980). "[T]he procedures by which the facts of the case are determined assume an importance as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

The Appellee makes no effort to dispute the claim that successive motions filed after an execution warrant has been signed are treated differently than pre-warrant successive motions. The Rules for both are the same. Appellee makes the incorrect "assumption" that post-warrant motions must be meritless and procedurally barred or they wouldn't be ruled meritless and procedurally barred. This is nothing more than circular logic.[1]

It is clear that the arbitrary and sporadic application of a procedural bar is not valid. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *see also Ford v. Georgia*, 498 U.S. 411 (1991). Such an application can violate Due Process. *See Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955); *See also, NAACP v.*

[1] The State attempts to label Mr. Henyard's argument as a statistical analysis. Mr. Henyard respectfully submits that the State is confusing statistics with simple math.

Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301, 84 S.Ct. 1302, 1310, 12 L.Ed.2d 325 (1964) (further proceedings in same case); *Wright v. Georgia*, 373 U.S. 284, 291, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349 (1963); *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 1835, 80 L.Ed.2d 346 (1984) (only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights"); *Barr v. Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766 (1964).

Next, the State attempts to dismiss this Court's precedent and the Rule of Law by ignoring the dictates in *Thompkins v. State*, 894 So.2d 857 (Fla. 2005). The State cites no caselaw for the proposition that *Thompkins* should not be followed in this case. In fact, the argument proffered by the State, where trial court may or may not dispense with this Court's Rules, is a clear example of the arbitrary and capricious manner Mr. Henyard's case has been adjudicated. Furthermore, the Appellee offers no compelling reason why the *Thompkins* rule should be ignored other than it can.

Finally, the State argues that "due process requires 'that the defendant be provided ***meaningful*** access to the judicial process.'". Answer Brief at 4 (emphasis added). Here, both parties agree. The difference between the two positions is that the State's definition of "meaningful" renders Mr. Henyards rights

meaningless. Relief should be granted.

CONCLUSION

The Appellant fully incorporates all prior pleadings and briefings in this Reply. The Appellant further requests that this Court remand the present proceeding to the lower court for a full and fair evidentiary hearing. The finality of impending death should not preclude due process and the opportunity to be heard.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on August 29, 2008.

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