IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD,

Appellant,

v. Case No. SC05-1337

STATE OF FLORIDA,

Appellee.
_____/

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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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The direct appeal record will be cited as "DAR" with the appropriate volume and page numbers [DAR V#:page#] and the original postconviction record will be cited as "PCR" with the appropriate volume and page numbers [PCR V#:page#]. The record from this successive rule 3.851 appeal will be cited as "Succ. PCR" with the appropriate volume and page numbers [Succ. PCR V#:page#].

STATEMENT ON ORAL ARGUMENT

Appellee submits that oral argument is not necessary for appellate review of the instant cause. The decisional process will not be significantly aided by oral argument as the only issue presented in the instant brief is a successive postconviction claim based on the United States Supreme Court's decision in Roper v. Simmons, 125 S. Ct. 1183 (2005). As it is quite clear that Simmons is not applicable to Appellant's case, this appeal can be decided on the record, briefs, and the case law presented therein.

STATEMENT OF THE CASE AND FACTS

Thee following factual summary is taken from this Court's opinion affirming Appellant's death sentences 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 was found guilty by the jury of three counts of armed kidnapping in violation of *section 787.01, Florida Statutes* (1995), one count of sexual battery with the use of a firearm in violation of *section 794.011(3), Florida Statutes* (1995), one count of attempted first-degree murder in violation of *sections 782.04(1)(a)(1)* and *777.04(1), Florida Statutes* (1995), one count of robbery with a firearm in violation of *section 812.13(2)(a), Florida Statutes* (1995), and two counts of first-degree murder in violation of *section 782.04(1)(a), Florida Statutes* (1995).

After a penalty phase hearing, the jury recommended the death sentence for each murder by a vote of 12 to 0. The trial court followed this recommendation and sentenced Henyard to death. The court found in aggravation: (1) the defendant had been convicted of a prior violent felony, *see* section 921.141(5)(b); (2) the murder was committed in the course of a felony, *see* section 921.141(5)(d); (3) the murder was committed for pecuniary gain, *see* section 921.141(5)(f) and, (4) the murder was especially heinous, atrocious or cruel, *see* section 921.141(5)(h).

The court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, *see* section 921.141(6)(g), and accorded it "some weight." The trial court also found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, *see* section 921.141(6)(b),(f), and accorded these mental mitigators "very little weight." As for nonstatutory mitigating circumstances, the trial court found the

> following circumstances but accorded them "little weight": (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family; (4) the defendant can adjust to prison life; (5) the defendant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial court 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. The court concluded that the mitigating circumstances did not offset the aggravating circumstances.

Henyard v. State, 689 So. 2d 239, 242-245 (Fla. 1996) (footnotes omitted), cert. denied, 522 U.S. 846 (1997).

Appellant filed a motion for postconviction relief in the Fifth Judicial Circuit on August 7, 1998. After conducting an evidentiary hearing, the lower court issued an order denying Henyard's postconviction claims. Appellant appealed the denial of postconviction relief to this Court, and his appeal was denied on May 27, 2004. Henyard v. State, 883 So. 2d 753 (Fla. 2004).

Henyard next filed a petition for writ of habeas corpus in federal court. On August 2, 2005, the federal district court issued an order denying Appellant's habeas petition. Henyard has appealed that decision to the Eleventh Circuit Court of

Appeals and has moved to hold his federal appeal in abeyance pending the resolution of this appeal by this Court.[1]

While Appellant's federal habeas petition was under review by the district court, the United States Supreme Court issued its opinion in Roper v. Simmons, 125 S. Ct. 1183 (2005). In Simmons, the Court held that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the imposition of the death penalty on offenders who were under the age eighteen at the time of their capital crimes. On April 15, 2005, Appellant filed a successive motion for postconviction relief in state court based on Simmons. On May 23, 2005, the lower court conducted a case management conference pursuant to Florida Rule of Criminal Procedure 3.851(f)(5)(B). (Succ. PCR Vol 1:172-87). After hearing argument from counsel on the motion, the lower court issued an order denying Appellant's motion, stating in part:

> 5. Defendant's successive motion and amended successive motion are based primarily on the United States Supreme Court's recent decision in Roper v. Simmons, 125 S. Ct. 1183 (2005), prohibiting the execution of juvenile offenders who were under the age of eighteen at the time of their capital crime. Henyard contends that the Roper decision, when read in conjunction with cases from the Florida Supreme Court, requires that this Court either conduct a new penalty phase proceeding, or at the least, schedule an evidentiary hearing in order to reevaluate the

[1] As of the date of this filing, the Eleventh Circuit has not ruled on Appellant's motion to hold the proceedings in abeyance.

> statutory and non-statutory mitigating factors related to Defendant's age and maturity. The Court finds this unnecessary, as these issues were fully explored during the penalty phase and again during Henyard's first motion for postconviction relief. The advent of Roper in 2005 does not affect the age or maturity of the defendant in 1993. **By its own terms, Roper does not apply to Henyard,** who was eighteen years, seven months old when he shot two little girls to death. After having considered the arguments of counsel, and being fully advised of the applicable legal authority, this Court finds that Defendant's successive motion and amended successive motion are legally without merit.

(Succ. PCR Vol. 1:154-57) (emphasis added). This appeal ensued.

SUMMARY OF THE ARGUMENT

The lower court properly denied Appellant's successive postconviction motion as legally insufficient. As the court correctly noted, the clear language in Roper v. Simmons, 125 S. Ct. 1183 (2005), does not mandate that Appellant is entitled to any form of relief for the murders he committed when he was *over* the age of eighteen.

ARGUMENT

ISSUE

THE UNITED STATES SUPREME COURT'S RECENT DECISION IN ROPER V. SIMMONS, 125 S. CT. 1183 (2005), BARRING THE EXECUTION OF JUVENILES WHO COMMITTED MURDER WHILE UNDER THE AGE OF EIGHTEEN, HAS NO APPLICABILITY TO APPELLANT'S CASE.

Appellant filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 based on newly discovered evidence and the United States Supreme Court's recent opinion in Roper v. Simmons, 125 S. Ct. 1183 (2005).[2] After conducting a case management conference and hearing argument on the motion, the lower court summarily denied the motion. Because Appellant is clearly not entitled to relief pursuant to Simmons, the State submits that this Court should affirm the lower court's denial of the motion.[3]

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[2] The "newly discovered evidence" portion of his motion dealt with a recent study by the National Institutes of Health, published in May, 2005, entitled "Dynamic Mapping of Human Cortical Development During Childhood through Early Adulthood." (Succ. PCR Vol. 1:147-52) Of course, the United States Supreme Court considered many such studies when making its decision in Simmons. After considering all the relevant factors, including these types of studies, the Simmons Court held that a bright line could be drawn at the age of eighteen. The single scientific study cited by Appellant should not cause this Court to expand the sound reasoning of the United States Supreme Court.

[3] A trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998).

In Roper v. Simmons, 125 S. Ct. 1183 (2005), the United States Supreme Court held that the execution of juvenile offenders who were ***under*** the age of 18 at the time of their capital crimes is prohibited by the cruel and unusual punishment clause of the Eighth Amendment. The Court noted that a bright line must be drawn when an individual turns 18. "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Simmons, 125 S. Ct. at 1197-98.

In the instant case, Henyard was 18 years and seven months old at the time he committed the brutal murders of Jasmine and Jamilya Lewis. Despite the unequivocal language in Simmons that limits the constitutional prohibition to executions of juveniles who were ***under*** the age of 18 at the time of their capital crimes, Appellant argues that his death sentences should be vacated or that he is entitled to a new penalty phase so that the aggravating and mitigating circumstances can be reweighed. Appellant interprets Simmons and dicta in Urbin v. State, 714 So. 2d 411 (Fla. 1998), as mandating a new penalty phase so that the trial court can reweigh the evidence presented at Henyard's penalty phase and postconviction evidentiary hearing. Clearly, however, the decisions relied on by Henyard do not require that this Court grant such relief.

During Henyard's trial and penalty phase, defense counsel argued extensively that Henyard's age of 18½ was a statutory mitigating factor. Defense counsel further related Henyard's chronological age to testimony from an expert witness that Henyard had a "mental" age of thirteen years old. (DAR V21:2507-2536). All of these factors, and more,[4] were considered in mitigation, but given the extensive aggravating circumstances present in this case, the jury returned two unanimous recommendations for the death penalty.

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[4] Appellant asserts that evidence from his postconviction evidentiary hearing which was not presented at the penalty phase would cause the jury to recommend life. Contrary to his claims, the State would note that the evidence at the postconviction evidentiary hearing was largely cumulative to that presented at the penalty phase. See, e.g., Henyard v. State, 883 So. 2d 753, 761 (Fla. 2004) (finding that evidence of Henyard's mental age presented at postconviction evidentiary hearing was cumulative to the "arguably more extensive" evidence presented by trial counsel at the penalty phase).

Additionally, the State must correct some of the misstatements contained in Appellant's brief. First, counsel asserts that Appellant "was sexually abused as a child." Initial Brief at 17. As this Court has properly noted, the evidence conflicted on this allegation. See Henyard, 883 So. 2d at 761-62. Henyard denied being sexually abused to his defense trial team and the only witnesses who testified regarding the alleged abuse heard about it from Henyard himself and had no independent verification that the alleged abuse actually took place. Collateral counsel also states that "[t]here was testimony concerning the possibility that Richard Henyard suffered from Fetal Alcohol Syndrome." Initial Brief at 17. In denying Appellant's initial postconviction motion, the postconviction court found that there was no definitive evidence that Henyard had fetal alcohol syndrome and specifically granted Henyard an opportunity to pursue this claim, but found that he ultimately abandoned the claim given his failure to present any evidence supporting it. (PCR V4:743).

In weighing the aggravating and mitigating factors, the trial court found that Appellant's age of eighteen was entitled to "some weight." The court also found numerous non-statutory mitigating factors, including those involving Appellant's functional emotional level, his lack of maturity, his low intelligence, his impoverished upbringing and his dysfunctional family background. Nevertheless, the court found that the four aggravating factors outweighed the mitigating evidence and sentenced Henyard to death for each murder. On direct appeal, this Court upheld Appellant's death sentences and found that the four aggravating factors outweighed the mitigation. Henyard v. State, 689 So. 2d 239 (Fla. 1996). After considering all of the circumstances in this case, this Court found that Henyard's death sentences were proportionate to other capital cases.[3] Id.

Appellant now attempts to extend the bright-line holding in Simmons to his case and argues that Simmons and dicta in Urbin requires the reversal of his death sentences, or in the alternative, that he receive a new penalty phase proceeding or an evidentiary hearing so that the lower court can reweigh the aggravating and mitigating circumstances. The State submits

[3]This Court once again considered and affirmed Henyard's death sentences after examining the record from the postconviction evidentiary hearing conducted in 1999. Henyard v. State, 883 So. 2d 753 (Fla. 2004).

that the decisions relied on by Appellant are inapplicable to his case. As previously noted, the holding in Simmons is clearly not applicable to Appellant's case. See also Moreno v. Dretke, 362 F. Supp. 2d 773, 812-13 (W.D. Tex. 2005) (rejecting attempt by eighteen-year-old murderer to extend the holding of Simmons to his case because accepting his argument would "eviscerate the bright line drawn by the Supreme Court"). Additionally, the language relied on by Appellant in Urbin is also inapplicable to Appellant's case.

In Urbin v. State, 714 So. 2d 411 (Fla. 1998), this Court reversed the death sentence of a seventeen-year-old based on this Court's proportionality review. In dicta, this Court noted that "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes." Id. at 418. The granting of relief on proportionality review to a seventeen-year-old defendant in a single murder case with vastly different aggravating and mitigating circumstances does not suggest that Henyard is entitled to any form of relief in the case at bar. Clearly, had this Court felt that Henyard's death sentences were unconstitutional or disproportionate given his age, the court would have granted him relief on direct appeal or on review of the denial of his postconviction motion.

Appellant’s successive postconviction motion attacks his judgment and sentences imposed over 10 years ago. The filing of this meritless successive motion serves only to prejudice the State by unnecessarily delaying the cause of justice. The people of the State of Florida deserve finality and the expedient resolution of this proceeding so that Henyard’s death sentences may be enforced. Accordingly, the State requests that this Court affirm the lower court’s summary denial of Appellant’s successive postconviction motion.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of Appellant's successive motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mark S. Gruber, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel – Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this 21st day of November, 2005.

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).

Respectfully submitted,

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