IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1139

ROBERT BEELER POWER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO ARGUMENT I

In its Answer, the State argues that the circuit court did not err in summarily denying Mr. Power's claim regarding the constitutionality of Florida's lethal injection procedures because the claim is procedurally barred and because this Court's recent decisions in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007) control this case. (Answer at 7-8). The State asserts that Mr. Power's claim is procedurally barred because he raised the constitutionality of lethal injection in his prior postconviction proceeding. The State fails to recognize, however, that the lethal injection challenge in Mr. Power's amended successive Rule 3.851 motion was based in large part on the facts of the Angel Nieves Diaz execution in December 2006, which constitutes newly discovered evidence that the lethal injection procedures violate the Eighth Amendment. Furthermore, this Court has stated that "when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred." *Schwab*, 969 So. 2d at 322.

The State also asserts that Mr. Power's claim has no merit and has repeatedly been denied by this Court, pointing to the recent *Lightbourne* and *Schwab* decisions. Mr. Power acknowledged in his Initial Brief that this Court recently rejected lethal injection challenges in *Lightbourne* and *Schwab*, but the

fact remains that "a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). Mr. Power's Rule 3.851 motion pled facts regarding the merits of his claim and his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Power's claim and that an evidentiary hearing is required.

Furthermore, in *Schwab*, this Court held that the circuit court erred in failing to take judicial notice of the record in *Lightbourne*, reasoning that "Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the evidence already presented in *Lightbourne*, the court should have taken judicial notice of that evidence." *Schwab*, 969 So. 2d at 323. Mr. Power is entitled to no less. Since his allegations were also sufficiently pled and since the circuit court considered and denied his successive Rule 3.851 motion prior to the *Lightbourne* evidentiary hearing, the circuit court should have granted Mr. Power evidentiary hearing on his claim. Although the State argues that Mr. Power raised nothing different from Lightbourne in his motion and there is therefore no need for an evidentiary hearing, Lightbourne was not afforded a full and fair hearing and there

is a wealth of relevant, admissible evidence that Mr. Power would present at an evidentiary hearing that was not presented in the *Lightbourne* proceedings.

REPLY TO ARGUMENT II

In its Answer, the State asserts that Mr. Power's claim that he is exempt from execution because he suffers from severe mental illness is procedurally barred because it was raised in his prior postconviction proceedings. The State cites to this Court's opinion in *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006) in which this Court agreed with a circuit court that a September 17, 2006 American Bar Association Report on Florida's death penalty is not newly discovered evidence. While Mr. Power's third argument in his Initial Brief involved this ABA Report, his second argument was based on ABA Resolution 122A, which was approved on August 8, 2006. As Mr. Power pointed out in his Initial Brief, since his claim was based wholly on this Resolution, it could not have been raised prior to August 8, 2006. The circuit court made no findings as to whether the ABA Resolution constitutes newly discovered evidence. Rather, the circuit court based its denial of this claim on the idea that the claim is successive because "the issue of mental illness was presented at the 2001 evidentiary hearing." (PC-R2. 2271).

As Mr. Power pointed out in his Initial Brief, he raised a claim of ineffective assistance of counsel in his initial postconviction proceedings, arguing that his trial counsel was ineffective for failing to investigate and present available mitigating

evidence at his penalty phase. At the evidentiary hearing, Mr. Power presented testimony regarding his severe mental illness by experts which the circuit court found to be "much more compelling and credible than those presented by the State." (PC-R. 3731). Significantly, the circuit court rejected his claim solely on the basis that Mr. Power had refused to allow his counsel to present mitigation. The instant claim is distinguishable from the previous claim because it is based on newly discovered evidence and it is grounded in the Eighth Amendment.

REPLY TO ARGUMENT III

Mr. Power relies on the arguments set forth in his Initial Brief.

CONCLUSION AND RELIEF SOUGHT

In light of the foregoing arguments, and the arguments presented in Mr. Power's Initial Brief, Mr. Power submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for an evidentiary hearing on his claims. Based on his claims for relief, Mr. Power is entitled to a new trial and/or sentencing proceeding. Finally, Mr. Power submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Barbara C. Davis, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, and Chris Lerner, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32802, this _____ day of April, 2008.

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Counsel certifies that this brief is typed in Times New Roman 14-point font.

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