IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-839

DAVID EUGENE JOHNSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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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ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. JOHNSTON'S RULE 3.853 MOTION FOR POSTCONVICTION DNA TESTING.

The State begins by reciting the circuit court's order denying Mr. Johnston's claim. The State then reiterates that Mr. Johnston had scratches on his face and neck immediately after the victim's body was found, that they were not present prior to the murder, and that they were not caused by Mr. Johnston's puppy (Answer at 5, fn 2). The logical conclusion to be drawn from the State's argument is that the scratches on Mr. Johnston had to have come from the victim.[1] By the State's own argument, it would seem that DNA testing is appropriate here. If the DNA evidence under the victim's fingernails does not match Mr. Johnston, then he did not commit the murder.

The State proceeds to assert that Mr. Johnston is suggesting that the evidence against him be re-assessed and that Mr. Johnston is arguing for a complete review of the sufficiency of the evidence (Answer at 6). Contrary to the State's version of Mr. Johnston's argument, Mr. Johnston presented facts to establish that favorable DNA results would exonerate him from the

[1]In fact, during Mr. Johnston's trial, the prosecutor asserted that there was a violent struggle, during which the victim scratched Mr. Johnston's face and neck (T. 986).

crime.[2] This was his burden under Fla. R. Crim. P. 3.853. Mr. Johnston has met this burden, and the State has done nothing to show otherwise.[3]

The State also claims that Mr. Johnston's 3.853 motion does not explain how DNA testing could prove his innocence (Answer at 8). The State is mistaken. As Mr. Johnston explained in his 3.853 motion, the State linked Mr. Johnston's scratches on his face and neck, as well as the blood on his clothes and shoes, to the murder. Investigator Dupuis testified as to these stains and how the blood spatter projected from the victim to Mr. Johnston. In a case in which there were no eyewitnesses, no fingerprint evidence, no hair evidence and no confession, the absence of the victim's blood on Mr. Johnston, as well as the absence of Mr.

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[2]Moreover, the State ignores the point that Mr. Johnston is making: that he is mentally ill, that he has made many inconsistent statements, and that the circuit court cherry-picked only those statements that were beneficial to denying this issue.

[3]The State's claim that witnesses confirmed Mr. Johnston's ownership of the butterfly necklace and the watch (Answer at 7, fn 5), is misleading. While Patricia Mann initially stated that she had seen Mr. Johnston wearing this necklace at the 7-Eleven Store prior to the murder (T. 572), she later admitted that what she actually saw around his neck was a heart-shaped necklace (T. 577). The fact that Mr. Johnston was wearing a heart-shaped necklace that evening was later confirmed by the testimony of Farron Martin who stated that Mr. Johnston was wearing a heart-shaped pendant when he left the apartment at 1:00 A.M. (T. 713).

Additionally, Officer Candeleria testified that he encountered Mr. Johnston earlier that morning at a bar and that he noticed the watch Mr. Johnston was wearing (T. 531). Officer Candeleria subsequently testified at trial that the watch found at the scene appeared to be the same watch he saw Mr. Johnston wearing earlier at the bar (T. 531).

Johnston's DNA under the victim's fingernails, would surely result in an exoneration.

In asserting that this case does not present a factual scenario where DNA testing could provide any benefit, the State in an accompanying footnote seemingly relies on the fact that no testing was conducted at the 1984 trial on the fingernail scrapings because of the impossibility of obtaining meaningful results (Answer at 9, fn 6). The State cannot possibly believe that science hasn't advanced in the last 25 years to allow for such testing today. Even the most casual observer would likely recognize that minute quantities of blood are sufficient for DNA testing.[4]

As a final point, while conceding that Mr. Johnston's 3.853 motion is "technically permissible" (Answer at 11), the State nevertheless disparages Mr. Johnston for pursuing an avenue to which he is entitled ("Johnston's motion is no more than a blatant and frivolous attempt to delay his execution" (Answer at 11). Perhaps the State's need to resort to such tactics is its way of attempting to avoid the fact that Mr. Johnston has satisfied the requirements of Rule 3.853 and is therefore

[4]Forensic serologist Keith Paul testified at trial that there appeared to be minute quantities of blood on submitted fingernails, but he conducted no tests because the amount was insufficient for testing purposes (T. 879).

entitled to DNA testing.[5] Mr. Johnston submits that this case should be remanded to the circuit court for DNA testing in accordance with Fla. R. Crim. P. 3.853.

ARGUMENT II

NEWLY DISCOVERED EVIDENCE HAS REVEALED THAT MR. JOHNSTON WAS CONVICTED BASED UPON INFIRM FORENSIC EVIDENCE IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

This Court has recognized that "reports" issued by governmental or other bodies that affect the integrity of a defendant's trial or penalty phase can constitute newly discovered evidence. See, Trepal v. State, 846 So.2d, 405, 409-410 (Fla. 2003)(relinquishing jurisdiction for defendant to file a new successive motion to vacate judgment and sentence based on the newly discovered information in the report released by Office of the Inspector General, U.S. Dept. Of Justice, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosive-Related and Other Cases (1997);* receded from on other grounds, Guzman v. State, 868 So.2d 498 (Fla. 2003). The State takes issue with that fact and argues that "To the extent that further discussion is necessary, reports similar in character to this one have not been considered to be

[5]Undersigned counsel was appointed to this case less than three weeks ago. He reviewed the case and raised what he considered to be viable issues. Undersigned counsel raised these issues in good faith, and any insinuation by the State to the contrary is both uncalled for and untrue.

newly discovered evidence. *Trepal v. State*, 846 So.2d 405(Fla. 2003). FN8 The report in *Trepal* contained information that actually concerned the case before the court. *Trepal*, 846 So.2d at 409. That is certainly not the case here." (Answer at 14).

The State is mistaken as to what Trepal involved and its implications. The relevant issue argued in Trepal, as it relates to the case at bar, concerned the investigation into fraud at the FBI Laboratory and specifically the reported findings. See, Office of the Inspector General, U.S. Dep't of Justice, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosive-Related and Other Cases* (1997). Trepal's case was one of those investigated and this Court remanded his case while on appeal to allow Trepal to file a postconviction motion in the circuit court to address the relevant claims. A full evidentiary hearing was held on Trepal's motion. Although Trepal's claim was ultimately denied, Trepal, 846 So.2d at 409, this Court did not hold that the report was not newly discovered evidence as implied by the State in its argument. Significantly, as noted above, this Court remanded for an evidentiary hearing on the matters in the report that related to Trepal. The same should be done in Mr. Johnston's case with regard to the type of testing that was conducted and thereafter questioned in the National Academy of Sciences report, *Strengthening Forensic Science in the United State: A Path*

Forward, http://www.nap.edu/catalog/12589.html, Prepublication Copy.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING MR. JOHNSTON'S REQUEST FOR FORENSIC TESTING RESULTING IN A VIOLATION OF MR. JOHNSTON'S RIGHTS TO DUE PROCESS UNDER BOTH THE U.S. AND FLORIDA CONSTITUTIONS.

The circuit court and the State have both misapprehended the value of the forensic testing requested by Mr. Johnston. The State quotes and champions the circuit court's finding that "there is no reasonable probability that the results of additional forensic testing would exonerate Mr. Johnston of the crime (Answer at 16). In doing so, the State ignores the fact that other than the aforementioned conclusory statement, the circuit court provides no rationale for the basis of its denial.

A review of the record reveals just how important the forensic evidence was to the State's case. The State's closing argument, for example, belies the State's current claim that the forensic evidence and any testing of it would not have any bearing on Mr. Johnston's case, much less tend to exonerate him:

> Now, Mr. Wolfe mentioned to you that much of the State's case is based on circumstantial evidence.
>
> I would agree that a good deal of the State's case is based on circumstantial evidence.

(T. 958).

* * *

When Mr. Wolfe has talked to you a little bit about the officers who got to the scene and that Mr. Johnston was there, from listening to Mr. Wolfe's argument, I suspect that he wants you to believe that at that time the officers decided that David Johnston was there, that he had made a few minor contradictions in his statements and that they decided to arrest him.

Well, I would ask you to carefully consider the evidence and what the officers knew when they got there. When the officers first arrived on scene they didn't have any reason to suspect David Johnston.

He was the person that called the 911 number and reported it at that point in time. They didn't have any reason to look at him and think that he was the suspect.

It was the physical evidence they found at the scene and the stories that Mr. Johnston had told them that aroused their suspicions at that time and what did Mr. Johnston do?

(T. 959).

* * *

Now, what else did the officers notice at the scene?

The officers also noticed some scratch marks on Mr. Johnston's face. They asked him if he had been in any arguments or anything earlier in the evening and he hadn't and that was some good hard evidence the officer saw at the scene that aroused their suspicions about Mr. Johnston.

(T. 960-61).

* * *

What else did the officers know before they made the arrest?

The officers had investigated the outside of the scene and they found some footprints outside by the front kitchen window. That was another piece of evidence that they had.

They compared that with the shoes of Mr. Johnston at that point in time and the treadwear on his shoes seemed to match the footprints they saw outside the window which would lead the officers to believe that David Eugene Johnston broke the front window to Mary Hammond's apartment and Mr. Johnston in his initial statements to the police never mentioned him standing around that front window to the apartment.[6]

(T. 962).

* * *

Mr. Wolfe wants you to believe that whoever the real murderer is, their fingerprints are on the coke can but no where (sic) else in the apartment.

If you will remember the testimony of Officer Hietchew, the fingerprints are not always left when someone touches an object.

All right. Fingerprints are sometimes left. There are certain factors that come into consideration. The fingerprints last for periods of time.

It's just as consistent that whoever bought that coke can, if Miss Hammond bought it at the grocery store and a bagboy touched it and put it in her car. It's just as consistent as being the real murderers.

There is no way of knowing who those fingerprints

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[6] Mr. Johnston has requested testing and examination of these footprints. Plaster casts are still in evidence at the Orlando Police Department.

Interestingly, the State also had Terrel Kingery testify regarding pattern evidence relating to Mr. Johnston's shoes (T. 740-52). He received plaster casts, a pair of shoes, and photographs of shoe tracks, among other things (T. 742). Subsequently, he compared the prints and expressed the opinion that Mr. Johnston's left shoe could have made the print (T. 745). Kingery described the process he utilized as inking the shoes, putting the shoes on his feet (not the same size as Mr. Johnston) and then personally making the prints. He admitted the shoes had already been tested for blood and that he did not use the same soil as that at the crime scene.

belong to.[7]

(T. 982).

* * *

> That happened during a violent struggle. That happened when Mary Hammond was fighting for her life. That happened when Mary Hammond was fighting for her life. That happened when Mary Hammond was **scratching and clawing at David Eugene Johnston when she scratched his face and his neck and she ripped that chain from his neck and then it lodged in her hair.**[8]
>
> (T. 986)(emphasis added).

* * *

> **There is no evidence that anybody else was in that apartment except David Eugene Johnston** and I would ask you to return a verdict that speaks the truth because that's what a trial is.

(T. 989)(emphasis added).

For the State to now advance and persist in its argument that somehow the forensic evidence is irrelevant to this case is baseless and without merit. At trial, the State relied extensively upon the forensic evidence to establish that Mr. Johnston was the one and only assailant of Mary Hammond and to

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[7] Gene Hietchew testified that fourteen latent prints had been lifted at the crime scene of which four were usable (T. 681). The prints did not match Mary Hammond, Kevin Williams, or David Johnston (T. 682). However, the police failed to compare the prints of Jose Gutierrez who had been observed within hours of the crime sitting in the driveway looking as if he were spoiling for a fight. Mr. Johnston has requested the opportunity to compare those fingerprints.

[8] The fingernail clippings containing flesh and blood are still in the possession of Orlando Police Department.

disprove his assertion that she had already been attacked prior to his arrival.

In Mr. Johnston's case the value of the testing is heightened by the State's reliance on the contradictions in his statements, Mr. Johnston's profound mental illness, brain damage and the fact he operates at a mental age of 6.6 years to 11.8 years.[9] Mentally challenged individuals such as Mr. Johnston often have difficulty remembering events and/or recounting them accurately. This inability heightens the risk of wrongful conviction and the need for forensic testing. When considered in conjunction with the newly discovered evidence claim that the testing procedures used in capital cases such as Mr. Johnston's have been exposed as oftentimes fraught with error, it becomes glaringly apparent that Mr. Johnston's case requires an independent forensic review of the evidence by his own forensic experts.

Additional testing of the evidence listed above is critical to Mr. Johnston's claim of innocence, and would in no way harm the State. It would be a violation of due process for Mr. Johnston to be denied access to independent forensic testing in this case. See Osborne v. District Attorney's Office, 521 F.3d 1118 (9th Cir. 2008), cert.granted, (currently pending) District

[9] A neuropsychological evaluation conducted on May 5, 2009 revealed the mental age cited.

Attorney's Office v. Osborne (U.S. Sup. Ct., Case No. 08-6). Clearly, the requested testing should be allowed and relief should issue.

ARGUMENT IV

THE CLEMENCY PROCESS AND THE MANNER IN WHICH IT WAS DETERMINED THAT MR. JOHNSTON SHOULD RECEIVE A DEATH WARRANT ON APRIL 20, 2009, WAS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In opposing this claim, the State relies on the fact that Mr. Johnston had a clemency proceeding in 1987 (Answer at 19). The State fails to address Mr. Johnston's argument that the process that occurred in 1987 before Mr. Johnston's life history was fully developed cannot be the "fail safe" that is envisioned by the United States Supreme Court. See Harbison v. Bell, – U.S. – (April 1, 2009).

The State also asserts that Mr. Johnston's argument that collateral counsel was precluded from seeking clemency until Harbison was decided "makes no sense". (Answer at 20). Perhaps the State has somehow overlooked the fact that in Marek v. State, the State represented to this Court, "For the Court's benefit, it should be noted, first that Mr. McClain has asserted he will not have adequate time to properly litigate Marek's case, however, **in spite of the state statute barring CCRC and registry appointed counsel from handling clemency**, he will devote his time to the preparation of a clemency application. *See* Sections 27.51(5)(a);

27.511(9); and 27.5303(4), Fla. Statutes." (Marek v. State, Case No. 09-765, April 30, 2009 Answer Brief at 45,)(emphasis added).

Mr. Johnston submits that relief is warranted.

ARGUMENT VI

BECAUSE OF THE INORDINATE LENGTH OF TIME THAT MR. JOHNSTON HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BINDING NORMS OF INTERNATIONAL LAW.

The State asserts with bold emphasis that Mr. Johnston "**cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction and sentence.**" (Answer at 27-28)(emphasis in original). In making this statement, the State neglects to address the fact that Mr. Johnston has been eligible for execution since 1999, when his first round of postconviction appeals were exhausted in state and federal court.[10] Thus, the delay in carrying out Mr. Johnston's execution is not attributable to him.

CONCLUSION

Based upon the record and his arguments, Mr. Johnston respectfully urges the Court to reverse the lower court, order a

[10]The fact that successive postconviction motions do not prevent a warrant from being signed is evident from the case of Marek v. State, where Marek had a pending successive 3.851 motion when the Governor signed his warrant on April 20, 2009.

new trial and/or resentencing, impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission and U.S. Mail, postage prepaid, to Kenneth S. Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on May 15, 2009.

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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