

FILED
THOMAS D. HALL

IN THE SUPREME COURT OF FLORIDA

2009 MAY 22 P 3:39

CLERK, SUPREME COURT

DAVID EUGENE JOHNSTON,

CASE NO.: SC09-839

Petitioner,

L.T. CASE NO.: CR83-5401

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR CLARIFICATION OF ORDER
RELINQUISHING JURISDICTION FOR DNA TESTING

Comes now the Defendant, **DAVID EUGENE JOHNSTON**, by and through his undersigned counsel, and hereby moves this Court to clarify its order of May 21, 2009 relinquishing jurisdiction to the circuit court to permit DNA testing. In support of this motion, Mr. Johnston avers:

1. This Honorable Court entered its order dated May 21, 2009 staying Mr. Johnston's execution scheduled for May 27, 2009 and relinquishing jurisdiction to the circuit court for ninety days to complete DNA testing of Mr. Johnston's tennis shoes, socks, and shorts, as well as fingernail clippings of Mary Hammond. However, no mention is made of the hair and debris samples that Mr. Johnston had also requested to be tested.

2. During the case management hearing below, Mr. Johnston had orally amended his 3.853 motion to include hair and debris

folds held by the Orlando Police Department. PCR. Vol II, 32. This amendment was accepted and acknowledged by the circuit court. Id. at 43. Additionally, Mr. Johnston included this amendment as part of his appeal of this cause and specifically referenced the oral amendment in his initial brief. IB at 7, fn. 4. The State of Florida did not object to the amendment, but instead opposed all DNA testing.

3. This Honorable Court made no reference to the hair and debris folds in the aforementioned order and Mr. Johnston seeks to clarify whether the hair and debris folds are to be included in the DNA testing.¹ The order was not clear as to whether the failure to mention the hair and debris was purposeful or inadvertent.²

WHEREFORE, Mr. Johnston respectfully requests that this Court clarify its May 21, 2009 order in the above-styled cause as to whether the hair and debris folds are to be included in the ordered DNA testing.

¹Mr. Johnston will not attempt to provide any argument within this motion as to the merits of testing the hair and debris folds as the time for that has passed.

²Judge Robert Wattles held a telephonic status conference on the afternoon of May 21, 2009 soon after the afternoon release of the aforementioned order. The State of Florida took the position that it would object to any attempt to include the hair and debris folds in DNA testing, despite the circuit court's willingness to include them for testing if the parties would stipulate to their inclusion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion 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 22, 2009.

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