IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-839

DAVID EUGENE JOHNSTON

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

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INTRODUCTION

On May 21, 2009, this Court entered an order relinquishing jurisdiction to the circuit court for the purpose of carrying out DNA testing. This Court found, *inter alia*, that the circuit court should have granted Johnston's motion for DNA testing of material found under the victim's fingernails.[1] That testing was conducted, and, on August 17, 2009, the results of that testing were the subject of an evidentiary hearing. Despite Johnston's strident insistence on this testing, it is now mentioned only in passing in his brief. There is no mention at all of the results of that testing.

The true facts are that **the DNA testing of the fingernail samples produced a DNA profile that matched Johnston's DNA.**[2] Johnston sought this testing, and obtained a stay of execution so that the testing he wanted could be conducted. That testing removed any possible doubt about Johnston's guilt, and suggests that his Rule 3.853 motion was merely a delaying tactic. Regardless, Johnston has been given every possible opportunity

[1] For simplicity, this material is referred to as the "fingernail sample[s]" or the "fingernail DNA." There was no biological material left on the other items that were tested because it was consumed by the testing conducted before the trial took place in 1984.

[2] For technical reasons, the fingernail samples were ultimately tested using a DNA method known as "Y-STR" testing. That test method is explained fully in the statement of the facts.

to pursue every imaginable claim for relief. The DNA testing that Johnston insisted on has eviscerated any colorable claim of innocence. It is time for Johnston's sentence to be carried out.

STATEMENT OF THE CASE AND FACTS

The State does not accept the statement of the case and facts contained in Johnston's brief because it is incomplete. That brief contains no discussion at all of the August 17, 2009, hearing at which evidence of the results of the DNA testing Johnston had insisted on was presented, nor does it set out the evidence presented relating to the claim contained in Johnston's August 14, 2009, successive motion to vacate.[3] For the procedural and factual history of this case, the State relies on the statement of the case and facts contained in the State's May 14, 2009, *Answer Brief*. For the remand proceedings, the State relies on the following.

THE EVIDENTIARY HEARING FACTS[4]

[3] Johnston's brief contains no discussion of the evidence at the August 17, 2009, hearing, and contains no citation to the record of the proceedings on remand. As such, Johnston's brief does not comply with the Rules of Appellate Procedure, and is subject to being stricken. The State has not filed such a motion in the interest of expediting these proceedings.

[4] The evidentiary hearing involved two distinct issues: the DNA testing, and the successive motion to vacate filed by Johnston on the eve of that hearing. The circuit court made specific findings of fact as to both issues.

This Court issued an order on May 21, 2009, relinquishing jurisdiction to the circuit court in order to conduct DNA testing on certain pieces of evidence.[5] (SR5, R364-65). The circuit court ordered initial DNA testing to be conducted at DNA Diagnostic Center ("DDC") in Fairfield, Ohio. (SR6, R542).[6] That laboratory had been selected by Johnston. Bode Technologies had been selected by the State to conduct the same testing after DDC had concluded its work. Ultimately, DDC conducted some testing and consumed half of the available sample. By agreement between the parties, the remaining portion of the fingernail evidence was tested at LabCorp in North Carolina.[7] (SR5, R338; SRV7, R719).

At the July 30, 2009, hearing, Dr. Julie Heinig, Assistant Laboratory Director of Forensics at DNA Diagnostic Center ("DDC"), stated that DDC would need to consume the entire sample of the fingernail scraping ("K7a") in order to complete the Y-STR testing. (SR5, R317-18, 436). Dr. Heinig recommended using

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[5] The evidence included Johnston's shoe, socks, shorts, and the fingernail clippings of the victim. (V5, R364).

[6] DDC became a part of this case when FDLE recommended that Y-STR testing be done. The circuit court originally ordered that the fingernail samples be tested by **both** DDC and Bode, the lab selected by the State. DDC, under the terms of that order, was prohibited from consuming more than half of the available DNA sample.

[7] Johnston strongly encouraged the use of LabCorp. (SR5, R326-27, 330).

LabCorp as the testing laboratory (in place of DDC), "because of the work I have seen." (SR5, R326). Further, "by recommending them, and seeing their work and how they handle these samples, I don't think we're going to have much of a problem." (SR5, R326). LabCorp conducts Y-STR testing, which is the specific type of testing appropriate in this case. (SR5, R327). Dr. Heinig was familiar with the work and people at LabCorp. (SR5, R330).

At the August 17, 2009, hearing, Johnston called Dr. Julie Heinig as his only witness.[8] (SR8, R796). Dr. Heinig observed the DNA testing conducted at LabCorp. (SR8, R796). LabCorp analyst Matt Hill followed all of the appropriate procedures. (SR8, R797). LabCorp was able to obtain a Y profile, 15 out of 17 loci, on the fingernail clippings, identified as "K7a, K7b." (SR6, R542; SR8, R796, 801). The results indicated, "David E. Johnston cannot be excluded -- his Y-STR DNA profile is consistent with the profile obtained from K7A, and therefore he or any of his paternally related relatives cannot be excluded as a contributor to the Y-STR profile." (SR8, R798). LabCorp used the U.S. Y-STR database which consisted of 7,693 males individuals of various ethnic backgrounds. The LabCorp report stated:

> The select haplotype is found in one out of 7,693 total individuals within the database with a frequency

[8] Dr. Heinig has been, at all times, an expert retained by Johnston.

> of .000129, and then applying the 95 percent upper-confidence interval results in a frequency of .00384, which is equivalent to approximately one in every 2,604 individuals.
>
> (SR8, R799).

Dr. Heinig testified that Y-STR testing does not generate a profile unique to an individual. (SR8, R801). All of Johnston's paternal (*i.e.*, male) relatives would have the same profile. (SR8, R11). Y-STR testing differs from nuclear DNA testing in that nuclear DNA testing will yield a profile unique to an individual (with the exception of identical twins.) (SR8, R801).

Dr. Heinig testified that there were no issues with the testing conducted at LabCorp. She did not question the accuracy of the results contained in LabCorp's August 10, 2009, report. (SR8, R801, 805, Def. Exh. 1). The entire sample (K7a & K7b) was consumed in LabCorp's testing. (SR8, R803).

Megan Clement, technical director in the forensics department at LabCorp, was involved in the DNA testing and prepared the August 10, 2009, report. (SR8, R804). That report was introduced into evidence, and is identified as Defendant's Exhibit 1. (SR8, R15).

Corey Crumbley, Florida Department of Law Enforcement analyst, conducted DNA testing on the evidence and submitted a report on June 10, 2009. (SR8, R812-13). Several items did not show any chemical indications for the presence of blood. (SR8,

R813).[9] Crumbley's report cross-referenced FDLE's January 20, 1984, report, which set out the serological results obtained in the testing prior to trial. (SR8, R815, 819).[10] She did not doubt the accuracy of the findings in the January 1984 report. (SR8, R817, 821-21). Although she did not have cuttings[11] from these items, Crumbley targeted the areas **around** the cuttings and "took general rubbings of the entire item ... and nothing came up." (SR8, R816, 8255). If there had been any blood remaining on these items, Crumbley would have detected it. (SR8, R816). **Crumbley explained that the reason that she could not locate blood on the items was because the areas with blood on them were consumed during the pre-trial testing, and there was no blood remaining on the items**. (SR8, R25-26, 30-31).[12]

THE AUGUST 18, 2009, FINAL ORDER

[9] These items included Johnston's red shorts-"K2," Johnston's right tennis shoe-"K36," Johnston's left tennis shoe-"K37," Johnston's striped sock-"K41a," Johnston's plain white sock-"K41b," Johnston's big sock-"K42a," Johnston's small sock-"K42b." (SR5, R387-88).

[10] There was no DNA testing conducted at FDLE in 1984. (SR8, R819).

[11] These cuttings were taken as a part of the 1984 testing. (SR8, R820-21).

[12] When fairly read, Analyst Crumbley's testimony amounts to the wholly unremarkable statement that she cannot test something that no longer exists because it was consumed in the 1984 testing. The fact that she could not find blood on the clothing does not mean that the trial testimony was defective in some fashion -- it means, as she testified, that the sample was consumed 25 years ago.

In the final order, the circuit court said:

Subsequent to the initial DNA testing (completed by the Florida Department of Law Enforcement's ("FDLE") laboratory), by consent of both parties, Laboratory Corporation of America ("LABCORP") was chosen to perform Y-DTR testing. [FN1] On August 17, 2009, the State filed LABCORP's Certificate of Analysis which indicated that Mr. Johnston could not be conclusively eliminated as the source of the DNA found under the victim's fingernails, stating:

> Based on the results listed above, the Y chromosome DNA profile obtained from the DNA extract from K7a (Item 1) and the partial Y chromosome DNA profile obtained from the DNA extract from K7b (Item 2) are consistent with the Y chromosome DNA profile obtained from the reference sample from David E. Johnston (Item 4); therefore, David E. Johnston and his paternal relatives cannot be excluded as the source of the male DNA in these samples.
>
> [FN1] FDLE's laboratory does not perform this particular DNA test.

Thereafter, during the August 17, 2009, evidentiary hearing, Dr. Julie Heinig, the Assistant Director for DNA Diagnostic Laboratory in Fairfield, Ohio, testified that she had observed LABCORP's testing of the sample evidence, that all appropriate protocols were followed, and that she had reviewed the final report which indicated that 15 out of 17 loci, or markers, on the Y-chromosome matched Mr. Johnston.

The key question before this court is whether there is a reasonable probability that Mr. Johnston would have been acquitted if the results of the requested DNA testing had been admitted at trial. *See* Fla. R. Crim. P. 3.853. Having reviewing the Motion and LABCORP's Certificate of Analysis, and having heard argument from both sides, the Court concludes that even if the DNA testing results had been admitted at trial, there is no reasonable probability that Mr. Johnston would have been acquitted wherein he cannot be excluded as the source of DNA under the victim's

> fingernails and most of the DNA markers on the Y strand of the DNA sample matched his DNA.[13]
>
> (SR8, R784-85).

The circuit court went on to discuss the successive motion to vacate filed by Johnston shortly before the August 17, 2009, hearing, describing the motion as follows:

> On a collateral issue, prior to the August 17, 2009, evidentiary hearing, Mr. Johnston filed, through counsel, a "Successive Motion to Vacate Judgment and Sentence With Special Request for Leave to Amend," arguing that the State's assertions during the 1983 trial, wherein it informed the jury that human blood had been found on Mr. Johnston's right tennis shoe, socks, shoe laces, shorts, and shirt, were erroneous based on FDLE's recent DNA testing which showed no chemical indications for the presence of blood on Mr. Johnston's shorts and tennis shoes, and various socks obtained from him. [FN2] Mr. Johnston now asserts that if he had been given the benefit of the recently discovered DNA results, there is a reasonable probability that this information, in conjunction with information previously presented at the postconviction evidentiary hearings, would have resulted in an acquittal at trial.
>
> [FN2] these items are listed as samples K2, K36, K37, and K41 (a)-(c), in FDLE's report.

[13] Y-STR testing only generates a DNA profile from the "Y", or male, DNA. A Y-STR profile is not like a "traditional" DNA profile because it does not produce a profile based on all of the chromosomes, but rather is limited to the male half of the chromosome only. Johnston cannot complain about these technological limitations -- early in the relinquishment proceedings Johnston began insisting that "Y-STR" testing was the only appropriate method. He cannot complain now.

(SR8, R785). The circuit court then discussed the *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), standard applicable to claims of newly discovered evidence, and stated:

> **In an effort to resolve all pending matters before this court, the court finds that Mr. Johnston's successive motion can be considered herein as a collateral matter arising out of the DNA testing results.**
>
> In support of this motion, Corey Crumbley ("Crumbley"), a criminal analyst for FDLE, testified during the evidentiary hearing that she conducted testing in the instant case and submitted a report based on that testing, and that certain items, including Mr. Johnston's shorts, tennis shoes, striped sock, and plain white socks, did not test positive for blood. She further testified that she reviewed the 1993 reports/procedures and saw nothing incorrect about the procedures used at that time, but conceded that **the initial cuttings taken in 1983 had been consumed and such consumption could have resulted in a current lack of blood stains now available for testing.**

(SR8, R786). (emphasis added). Alternatively, the court found that the successive motion to vacate was outside the scope of this Court's relinquishment order, and could properly be denied on that additional basis. (SR8, R786-87).[14]

SUMMARY OF THE ARGUMENT

The DNA testing resulted in a profile that matched Johnston. Material found under the fingernails of Johnston's

[14] Given the circuit court's finding that the successive motion did not supply a basis for relief, the alternative "scope of the relinquishment" basis for denial needs little discussion. The circuit court resolved all of the issues before it, and no further proceedings are necessary.

victim was consistent with Johnston's DNA profile. And, Johnston was observed to have scratches on his face shortly after the he killed Ms. Hammond. His attempt to provide an innocent explanation for those scratches collapsed. The DNA evidence is dispositive of all issues, and, to the extent that Johnston says there is "newly discovered evidence," the DNA evidence (of guilt) is properly considered in the evaluation of that claim.

To the extent that Johnston raises issues concerning the trial testimony about blood found on his clothing, Johnston has never claimed that that blood did not come from the victim. He provided a ready explanation for the blood by claiming that he found the victim and "held her" after she had been killed. It makes no sense to now argue in a manner that is inconsistent with Johnston's trial theory.

Finally, to the extent that Johnston attempts to create a claim that the blood evidence testimony at trial was false, there is no factual basis for that claim. The evidence at the August 17, 2009, evidentiary hearing was clear that the reason that no blood was found on Johnston's clothing during the 2009 testing was because all of the blood had been consumed during the testing that was done prior to trial. Johnston's claim to the contrary is baseless because it has no basis in the true facts.

THE STANDARD OF REVIEW

The "standard of review" contained in Johnston's brief is incorrect. Johnston ignores the fact that an evidentiary hearing was conducted on the distinct claims that were before the circuit court, and because that is so, the applicable standard of review is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court"'" *Blanco v. State,* 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). That standard is equally applicable to claims of "newly discovered evidence." *Jones, supra*, at 532. *See, Hurst v. State,* 34 Fla. L. Weekly 37, S525, 529 (Fla. Sept. 17, 2009).

ARGUMENT

PRELIMINARY MATTERS

The arguments contained in Johnston's brief are, at best, tangential to the actual issue in this case. The case was returned to the circuit court to allow DNA testing, and that testing matched Johnston to the material found under his victim's fingernails. That result resolves any issues in this case.

Because Johnston's supplemental brief does not mention the DNA testing at all, the State has addressed that issue first. The issues contained in Johnston's brief are addressed subsequently, retaining the numbering that Johnston used.

THE DNA EVIDENCE IS DISPOSITIVE

This Court's May 21, 2009, order relinquishing jurisdiction to allow DNA testing came after Johnston insisted, at every opportunity, that such testing would exonerate him. Just the opposite happened -- that testing showed that Johnston was the source of the material found under Ms. Hammond's fingernails, which corresponds squarely with the scratches on Johnston's face that were observed immediately after the murder.[15] This evidence is unchallenged, and, in fact, **is not mentioned at all in Johnston's brief. No claim before the Court concerns the DNA testing that was conducted during the relinquishment.** The circuit court found that the DNA results did not support granting relief, and that ruling stands unchallenged. Because Johnston has conceded the inculpatory DNA results, there is no basis for relief of any sort.

While Johnston has completely ignored the DNA results (and in fact briefs the case as if those results do not exist), the results of the testing he sought are relevant to, and

[15] Johnston's explanation for the scratches was rebutted at trial, as discussed in the State's original *Answer Brief.*

dispositive of, all claims before this Court. Florida law is clear that those results are properly considered. In *Wright*, this Court held:

> Wright claims that the trial court erred when it relied upon DNA testing results to deny Wright's claims when the FDLE report was not in evidence and had never been subject to an adversarial proceeding. However, it was Wright who asked for the DNA testing. Wright cannot subsequently complain on appeal when the testing he sought produces an unfavorable result. **Moreover, on a motion for postconviction relief alleging newly discovered evidence, the circuit court considers all admissible evidence when evaluating whether a new trial is warranted.** *See Green v. State*, 975 So. 2d 1090, 1101 (Fla. 2008) (*citing Jones I*, 591 So. 2d at 915). **This includes new evidence of guilt.** *See id.* Therefore, the trial court did not err when it relied upon the DNA results to deny Wright's claims.

Wright v. State, 995 So. 2d 324, 327-328 (Fla. 2008). (emphasis added). To the extent that Johnston claims there is "newly discovered evidence" of "false or misleading" trial testimony, he overlooks the fact that the DNA results are properly considered in evaluating his claim. Putting aside for the moment the fact that the "false evidence" claim fails on its facts, the inculpatory DNA evidence prevents any chance of satisfying the second component of *Jones* because the "false evidence" claim would not probably produce an acquittal on

retrial when considered along with the DNA evidence. *See, Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).[16]

The only newly discovered evidence in this case is additional evidence of Johnston's guilt. That evidence, when combined with the evidence presented at trial, precludes any rational claim that there is any basis for relief, or that there is any probability of a different result based upon the unsupported arguments Johnston has made. In the final analysis, the DNA evidence that Johnston has ignored is dispositive of all claims contained in his brief.

THE "BLOOD ON THE CLOTHING" HAS NEVER BEEN DISPUTED

Johnston's claims relating to the blood on his clothing (which generally are that the trial testimony about the blood evidence was "false and misleading") are no more than an attempt to deflect attention from the DNA results. The true facts are that **Johnston never disputed that he had his victim's blood on him**. The testimony from trial was undisputed that the victim was bleeding, and Johnston claimed to have found her body and "held her." *See, e.g.,* Vol. IV, R. 936-39, 945, 991, 994, 995; Vol. XIV, R. 2332, 2341, 2358, 2371. Because Johnston has never denied having Ms. Hammond's blood on his clothing, this issue

[16] However, as discussed below, there was no false evidence of any sort. Johnston's argument is based on a misrepresentation of the evidentiary hearing testimony. *See, infra.*

makes no sense, even if there were some basis in fact for it.[17] *See, e.g., Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004). The blood evidence at trial was consistent with Johnston's admission that he was present at the scene[18] -- the fact that the clothing is no longer available for testing means nothing. The fingernail evidence, on the other hand, demonstrates that Johnston's presence at the scene was not as a Good Samaritan but rather as a killer.[19]

THE CLAIMS IN JOHNSTON'S BRIEF

PRELIMINARY MATTERS

The circuit court exercised its discretion in favor of considering the claims contained in Johnston's successive Rule 3.851 motion. The court made it clear in the order that, while the claims in the successive motion were outside the scope of this Court's relinquishment order and could be denied under

[17] The testing conducted pre-trial consumed the blood on Johnston's clothing. *See, infra.* Johnston has completely ignored this testimony from the evidentiary hearing.

[18] How it would help to present evidence that is directly contrary to the defense at trial is not explained, and makes no sense at all. *State v. Riechmann*, 777 So. 2d 342, 362 (Fla. 2000) ("Moreover, the statement by the crime lab that the window was completely down would not be completely favorable to Riechmann, because he testified at trial that the window was only open half-way. Additionally, it would have also been inconsistent with the testimony of his expert, who stated that the window was only 3 3/4 inches open.")

[19] In the interest of completeness, the State has briefed the three claims contained in Johnston's brief. In view of the DNA evidence, those claims are mere surplusage.

Duckett v. State, 918 So. 2d 224, 239 (Fla. 2005), it would, "in an abundance of caution," consider the claims on the merits, as well. It was not an abuse of discretion to decide the issue on alternative grounds, just as it would not have been an abuse of discretion to deny relief because the claim was outside the scope of the relinquishment. *See, Arbelaez v. State*, 898 So. 2d 25, 42-43 (Fla. 2005) ("Although we recognize that it might have been more efficient for the trial court to hear Arbelaez's *Ring* and *Atkins* claims during the remand, we cannot say that the trial court abused its discretion in declining to hear them. The trial court was justified in adhering strictly to our instructions on remand and dismissing the supplemental motion.") However, the State should not be construed as having waived reliance on cases such as *Duckett* in future circumstances involving the scope of a relinquishment order. This case presented particular circumstances, and the course of proceedings has brought the case to this Court intact, rather than leaving the matter open for piecemeal litigation which would only cause delay.

I. THE "NEWLY DISCOVERED EVIDENCE" CLAIM

On pages 6-15 of his brief, Johnston complains about the disposition of the claim contained in his successive motion to vacate which was filed immediately before the August 17, 2009, evidentiary hearing. That claim relates to the fact that the

testing conducted in 2009 did not find blood on the items of Johnston's clothing that were submitted for testing pursuant to this Court's relinquishment order. The evidentiary hearing testimony demonstrated that the blood on those items of clothing had been consumed in the course of **pre-trial testing.** Johnston does not say what relief he is entitled to, but does claim that the circuit court incorrectly found that the claim contained in the successive motion was outside of the scope of the relinquishment order. What Johnston does not say is that the circuit court's primary basis for disposing of this claim was that it had no merit, and the jurisdictional holding was in the alternative.

JOHNSTON'S CLAIM IS BASED ON AN INACCURATE AND MISLEADING INTERPRETATION OF THE EVIDENCE

Johnston says that the circuit court should not have found that the "newly discovered evidence" claim contained in the successive motion to vacate was outside the scope of this Court's relinquishment for DNA testing. Exactly what Johnston wants this Court to do is unclear. There was an evidentiary hearing on the issue,[20] and that testimony demonstrated that Johnston's claim is based on a misleading (and fanciful) interpretation of the FDLE report. The testimony of the FDLE

[20] At the time of the August 17, 2009, proceedings, Johnston made no complaint about the adequacy of the evidentiary hearing.

analyst established that the reason no blood was detected in the 2009 testing was because all of the blood on Johnston's clothes was consumed during the pre-trial testing. That testimony was clear and unequivocal, and was credited by the trial court. (SR8, R786). Johnston ignores that testimony and that finding of fact. Simply stated, Johnston is trying to re-write the testimony to fabricate a claim that does not exist and has no factual support.

To the extent that further discussion of the merits of this claim is necessary, Johnston's claim that the 1983 trial testimony about blood on his clothing was "false" is disposed of by the evidentiary hearing testimony. That testimony demonstrates that that claim has no basis in fact.

The true facts are that blood was not detected on the clothing in 2009 because all of it was consumed during the testing that took place 26 years ago. That fact does not suddenly create a "false evidence" claim that can be used as a basis for further delay in the final disposition of this case. Johnston's claim is, at best, disingenuous, and borders on frivolous. Regardless of the description applied to it, this claim most certainly is not a basis for further proceedings of any sort. The trial court properly denied relief on this claim, and that ruling should not be disturbed because there is no probability at all of a different outcome had Johnston's

"evidence" been presented at trial. *Jones, supra.* That is so because what Johnston claims is "newly discovered evidence" is not evidence at all -- his claim has no basis in fact.[21]

THE ONLY "NEWLY DISCOVERED EVIDENCE" IS ADDITIONAL EVIDENCE OF GUILT

In any event, this claim must be considered in light of the inculpatory DNA evidence, which is part and parcel of the cumulative analysis of this claim. *See, Wright, supra, Green, supra.* When the DNA evidence is considered along with the other evidence of guilt (as it must be) there is no **possibility** at all of a different result -- in light of all the evidence, there is certainly no **probability** of an acquittal. Because that is so, Johnston has not carried his burden of proof. The denial of relief should be affirmed.

II. THE "REMAND FOR HEARING" CLAIM

On pages 15-16 of his brief, Johnston appears to claim that if the circuit court did not have jurisdiction to consider the successive motion, then this case must be remanded for further proceedings on the motion. This claim has no factual basis

[21] While the circuit court did not address it, nothing prevented Johnston from raising this claim at any time since 1983, since DNA testing is not a necessary predicate to it. Johnston's claim is that there was no blood on his clothes -- that technology has existed for years, was the subject of testimony at trial, and could have been raised at any time during the preceding 26 years if there was any truth to it. In addition to having no factual basis at all, this claim is time barred because it could have been "discovered" years ago through due diligence.

because the circuit court considered and decided the successive motion on the merits in addition to the alternative jurisdictional basis for denial of relief. This claim was properly addressed by the circuit court, and further proceedings are neither necessary nor appropriate. This case was correctly decided, and the denial of relief should be affirmed in all respects.

III. THE "WRONG STANDARD" CLAIM

On pages 16-18 of his brief, Johnston says that the "alternate finding" on the merits of the successive motion was decided under the "wrong standard." Johnston overlooks the fact that the merits ruling was the primary basis for the circuit court's decision, and the "scope of the relinquishment" component was the secondary basis for denial of relief. The basis for this claim is that the trial testimony concerning blood found on Johnston's clothes was false.

At the evidentiary hearing, the testimony established that the reason no blood was found on Johnston's clothes in 2009 was because that blood had been consumed during the testing that was conducted pre-trial. Johnston's claim of some impropriety by the FDLE trial witnesses is simply baseless -- there is no evidence

to support such a claim, and that claim is so frivolous as to be unworthy of further consideration.[22]

In denying relief on this claim, the circuit court said that it had "reviewed the motion under Rule 3.853, [and] still finds that there is no reasonable probability that Mr. Johnston would have been exonerated and/or had his sentence reduced based on LABCORP's DNA analysis." (SR8, R787). The court had previously quoted the *Jones* newly discovered evidence standard, and had previously discussed the testimony of FDLE Analyst Crumbley in explaining why the 2009 analysis of Johnston's clothes did not reveal the presence of blood. While the court's language could possibly have been more precise, when the order is considered as a whole, there is no doubt but that the court was well aware of the proper standard for evaluating newly discovered evidence claims, and properly considered the fact that the LabCorp testing had produced inculpatory DNA results (which were properly considered under *Wright* and *Green)*.[23]

To the extent that discussion of the *Jones* standard is necessary, *Jones* requires that the evidence have been unknown at

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[22] It bears repeating that Johnston never complained about the evidentiary proceeding in circuit court. It is disingenuous to now claim that a further evidentiary proceeding is necessary. Johnston had his day in court, and should not be heard to complain.

[23] Footnote 7 on page 17 of Johnston's brief incorrectly suggests that the inculpatory DNA results are not a part of the "newly discovered evidence" inquiry. That is not the law.

the time of trial and undiscoverable through the use of diligence, **and** that the evidence is of such a nature that it would probably produce an acquittal on retrial. *Jones, supra.* Since the blood evidence claim is based on testing methods that were in use at the time of trial and remain in use now (SR8 R30), Johnston can hardly claim diligence as to this claim. As to the second *Jones* prong, this Court has said:

> We do agree with Hildwin that the DNA evidence was newly discovered evidence. We further agree that the newly discovered DNA evidence, which refutes the trial serology evidence by establishing that Hildwin's bodily fluids were not on the panties and wash cloth, is a significant new fact which must be evaluated in determining whether Hildwin is entitled to a new trial.
>
> However, the trial court correctly analyzed the DNA evidence using the standard we set out in *Jones v. State,* 709 So.2d 512 (Fla. 1998). In *Jones* at 521, we stated:
>
> > [T]he newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 591 So.2d at 911, 915. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at trial." *Id*. at 916.
>
> Although the newly discovered DNA evidence is significant, this evidence is not "of such nature that it would probably produce an acquittal on retrial."

Hildwin v. State, 951 So. 2d 784, 789 (Fla. 2006). As in *Hildwin*, the DNA evidence is significant -- however, in this

case that evidence is compelling evidence of Johnston's guilt that obviates any possibility of a different result.[24]

CONCLUSION

When this Court relinquished jurisdiction in May of 2009 for DNA testing, it was because Johnston had strenuously argued for such testing, asserting that it would prove his innocence. In the event, that assertion turned out to be false -- the testing that Johnston so badly wanted placed his DNA under his victim's fingernails, which coincides squarely with the scratches observed on Johnston's person shortly after the murder took place. Because the DNA testing is singularly unhelpful to Johnston, he has ignored it completely in his brief, not even disclosing what the results of the testing were.

However, Florida law does not treat inculpatory DNA results in such a trivial fashion. Those results, like any other "newly discovered evidence," must be considered along with the other evidence of guilt. In this case, those DNA results are fatal to Johnston's case.

[24] The *Jones* "probably produce an acquittal" standard is the same as the Rule 3.853 "reasonable probability of an acquittal" standard. The touchstone of both standards is undermined confidence in the outcome -- *Jones* and Rule 3.853 merely say the same thing in somewhat different terms. To the extent that the circuit court blended the two phrases, that is a distinction without a difference under the facts of this case. As the evidence stands, there is no possibility at all of a different result either as to guilt or penalty.

With respect to Johnston's principal claim (which has replaced his DNA claim completely), there is simply no factual basis for the assertion that the "blood evidence" presented at trial was false, inaccurate or misleading. The relevance of this claim is unexplained, since Johnston has never disputed that his victim's blood was on his clothing. The simple fact, which Johnston has also chosen to ignore, is that the 2009 testing did not reveal the presence of blood on Johnston's clothing because all of the blood evidence had been consumed in the pre-trial testing. That fact does not combine with the passage of time to magically become a "presentation of false evidence" claim, or any other claim, for that matter. This claim has no basis in fact.

There is no error in the circuit court's denial of relief, and that ruling should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail and U.S. Mail to: **Todd D. Doss,** 725 SE Baya Dr. Suite 102, Lake City, Florida 32025-6092 on this ____ day of October, 2009.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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