IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-356

DAVID EUGENE JOHNSTON,

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

INITIAL BRIEF OF APPELLANT

D. Todd Doss
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025
(386) 755-9119

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order summarily denying Mr. Johnston's successive Rule 3.851 motion regarding newly discovered evidence of mental retardation. The following symbols will be used to designate references to the record in this appeal:

"R." – record on direct appeal to this Court;

"PCR." - record on appeal after original postconviction motion summary denial.

"PCR2." - record on appeal after fourth and fifth postconviction motion summary denial.

'PCR3." - record on appeal after sixth postconviction motion summary denial.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston is presently under a death warrant with an execution scheduled for March 9, 2009 at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Johnston's pending execution date. Mr. Johnston, through counsel, urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PROCEDURAL RULES

STATEMENT OF THE CASE

Mr. Johnston was indicted on December 12, 1983 by an Orange County grand jury for the first-degree murder of Mary Hammond. Following a trial, Mr. Johnston was found guilty as charged by a jury. A penalty phase was conducted on May 29, 1984, during which the jury recommended a death sentence by an eight to four vote. On June 1, 1984, the trial court imposed a death sentence, finding three aggravating circumstances. Although the court found mitigating factors,[1] it found the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Johnston to death (R. 2412-2415). On direct appeal to the Florida Supreme Court, Mr. Johnston's conviction and sentence were affirmed. Johnston v. State, 497 So. 2d 863 (Fla. 1986).

On October 28, 1988, a death warrant was signed, the execution of which was ultimately stayed subsequent to the filing of Mr. Johnston's first motion to vacate judgment and sentence in state court. After an evidentiary hearing, the circuit court denied all relief. The denial was appealed to the Florida Supreme Court, which affirmed the circuit court's decision. Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991).

---

[1]The trial court found Mr. Johnston was the product of a broken home; he was abused; he was neglected and rejected by his natural mother; he was physically abused by his father; he was greatly affected by his father's death; he has a very low I.Q. and did not do well in school; and he was mentally disturbed (R. 2412-2415).

Mr. Johnston next filed a federal habeas petition and on September 16, 1993 the federal district court granted Mr. Johnston habeas corpus relief and ordered the State of Florida to either (1) impose a life sentence; (2) conduct a new penalty phase proceeding before a newly empaneled jury; or (3) obtain an appellate re-weighing or harmless-error analysis. On remand, this Court conducted a harmless-error analysis and thereafter reimposed a death sentence. Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994).[2] The federal habeas court subsequently denied all relief.

In the interim, Mr. Johnston filed his first successive motion to vacate judgment and sentence in the circuit court. The circuit court denied relief, finding the claims time-barred and, alternatively, an abuse of process. This Court thereafter affirmed the circuit court and also denied Mr. Johnston's state habeas petition. Johnston v. State, 708 So. 2d 590 (Fla. 1998).

The Eleventh Circuit Court of Appeals subsequently ruled on Mr. Johnston's appeal from the denial of his habeas petition in federal district court and denied all relief. Johnston v. Singletary, 162 F.3d 630 (11th Cir. 1998).

Mr. Johnston subsequently filed a successive state habeas petition wherein he claimed that this Court applied an incorrect

[2]A petition for writ of certiorari was filed in the United States Supreme Court, and it was denied on February 27, 1995.

standard of review in its 1991 opinion (Johnston v. Dugger, 583 So.2d 657 (Fla. 1991)). This Court denied relief. Johnston v. Moore, 789 So. 2d 262 (Fla. 2001).

Thereafter, Mr. Johnston filed his third motion to vacate judgment and sentence wherein he claimed the Florida capital sentencing scheme was unconstitutional under Ring v. Arizona, and that the State of Florida was barred from executing him under Atkins v. Virginia due to his mental retardation. Following the denial of relief by the circuit court, this Court affirmed. Johnston v. State, 960 So. 2d 757 (Fla. 2006).

On April 20, 2009, Florida Governor Crist signed a warrant for Mr. Johnston and set his execution date for May 27, 2009. Subsequently, Mr. Johnston filed his fourth successive motion to vacate his judgment and sentence. While the motion was summarily denied by the circuit court, on appeal this Court issued an order relinquishing jurisdiction and remanding to the circuit court for ninety days to conduct DNA testing.

Subsequent to the DNA testing, Mr. Johnston filed his fifth successive motion to vacate his judgment and sentence claiming that newly discovered evidence that blood was not found on Mr. Johnston's clothes warranted a new trial. The circuit court denied both the fourth and fifth successive motions to vacate the judgment and sentence. On January 21, 2010, this Court affirmed the denial of relief. Johnston v. State, No. SC09-839, Slip Op.

(Fla. January 21, 2010). On that same date, this Court lifted Mr. Johnston's stay of execution.

On February 8, 2010, Mr. Johnston filed his sixth successive motion to vacate judgment and sentence claiming that newly discovered evidence obtained through the WAIS-IV IQ test revealed that Mr. Johnston was mentally retarded and thus the State of Florida is barred from executing him under Atkins v. Virginia, 536 U.S. 304 (2002). The circuit court held a case management conference and heard argument of counsel on February 19, 2010. The circuit court then took the matter under advisement. On that same day, subsequent to the parties' argument, Governor Crist reset Mr. Johnston's execution date for March 9, 2010, at 6:00 p.m.

The circuit court then held a second case management conference on February 23, 2010. The court orally denied the motion at the case management conference and provided a detailed written order after 5:00 p.m. the same day. This appeal follows.

STATEMENT OF FACTS

This Court previously summarized the facts and circumstances of the murder of Mary Hammond as follows:

> At approximately 3:30 a.m. on November 5, 1983, David Eugene Johnston called the Orlando Police Department, identified himself as Martin White, and told the police "somebody killed my grandma" at 406 E. Ridgewood Avenue. Upon their arrival, the officers found the dead body of 84-year old Mary Hammond. The victim's body revealed numerous stab wounds as well as evidence of manual strangulation. The police arrested

> Johnston after noticing that his clothes were blood-stained, his face was scratched and his conversations with the various officers at the scene of the crime revealed several discrepancies as to his account of the evening's events.
>
> The record reveals that prior to the murder Johnston had been working at a demolition site near the victim's home and had had contact with the victim during that time. In fact, Johnston was seen washing dishes in the victim's apartment five nights before the murder.
>
> Johnston was seen earlier on the evening of the murder without any scratches on his face and the clothing he was wearing tested positive for blood. In addition, the watch that Johnston was seen wearing as late as 1:45 a.m. on the morning of the murder was found covered with blood on the bathroom countertop in the victim's home. Further, a butterfly pendant that Johnston was seen wearing as late as 2:00 a.m. that morning was found entangled in the victim's hair. The record also reveals that a reddish-brown stained butcher-type knife was found between the mattress and the boxspring of the victim's bed, a footprint matching Johnston's was found outside the kitchen window of the victim's house, and the silver tableware, flatware, a silver candlestick, a wine bottle and a brass teapot belonging to the victim were found in a pillowcase located in the front-end loader parked at the demolition site.

Johnston v. State, 497 So.2d 863 (Fla. 1986).

In his Sixth Successive Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend, Mr. Johnston delineated the facts relevant that motion as follows:

> 5. Mr. Johnston previously filed a successive motion to vacate his judgment and sentence that included a claim that he was mentally retarded and thus the State was barred from executing him. The Florida Supreme Court observed:

> In June 2002, Johnston filed a Motion to Vacate Judgment of Conviction and Sentences in the trial court because he is mentally retarded and his execution would violate his constitutional rights under the Eighth Amendment. Without conducting an evidentiary hearing, the trial court denied relief in a written order dated January 31, 2003. Johnston appealed the trial court's denial of relief to this Court, and the Court relinquished jurisdiction in its Clarified Order Relinquishing Jurisdiction for Determination of Mental Retardation dated December 17, 2004. After an evidentiary hearing, the trial court found that Johnston is not mentally retarded. Johnston v. State, 960 So.2d 757 (Fla. 2006).

On remand, the trial court denied this claim on July 26, 2005 and the Florida Supreme Court affirmed the denial on May 4, 2006.

6. Both the denial of Mr. Johnston's prior mental retardation claim and its subsequent affirmance hinged on the fact that Dr. Pritchard[3] administered the WAIS-III IQ test and obtained a score of 84. Based on this score both Dr. Pritchard and Dr. Blandino concluded that Mr. Johnston was not mentally retarded, and they did not conduct an adaptive functioning assessment.

7. The trial court stated in its "Order Finding Defendant is Not Mentally Retarded" that: "Based on the foregoing, the Court finds that the evidence demonstrates that Defendant failed to meet the first prong of the test for evaluating mental retardation. Therefore, it is not necessary to reach the remaining prongs of the three-part test." See Fla.R.Cr.P. 3.203."

8. In affirming the circuit court's order, the Florida Supreme Court stated:

> While Johnston is correct that the experts in his case did not perform adaptive functioning tests under the second prong of rule 3.203, both experts' testified that this testing was

---

[3]Drs. Pritchard and Blandino were appointed by the court to conduct a mental retardation determination.

> unnecessary and contrary to standard professional practice because all three prongs of the rule must be met in order for a defendant to be found mentally retarded. Finally, both experts concluded that Johnston is not mentally retarded pursuant to rule 3.203. Therefore, there was competent, substantial evidence to support the trial court's finding that Johnston is not mentally retarded. Johnston v. State, 960 So.2d 757, 761-762 (Fla. 2006).

9. Subsequent to the Florida Supreme Court's determination, the WAIS-IV IQ test was developed. This test constitutes the most current and accurate test for a determination of mental retardation. As Dr. Eisenstein, one of the experts who recently examined Mr. Johnston for mental retardation, stated in his report:

> The Weschler Adult Intelligence Scale - 4th Edition, was administered to Mr. David Johnston. This is the most current, up to date edition of the Weschler Intelligence Scale, revised in 2008. Research indicates that the WAIS-IV, with its new configuration of four index scores rather than just a Verbal and Performance score, is a more appropriate and better test than previous editions, with more reliable and valid scores. See Appendix A.

10. Similarly, Dr. Krop, who also recently examined Mr. Johnston for mental retardation, stated:

> As you likely know, Mr. Johnston has been assessed on numerous occasions with various tests of intellectual functioning. His scores have ranged from an IQ as low as 57 to as high as 84. It is noteworthy, however that the WAIS-IV is considered the most accurate assessment of intellectual functioning with more reliable and valid scores as it includes measures of verbal comprehension, perceptual reasoning, working memory and processing speed. See Appendix B.

11. The results of Mr. Johnston's recent IQ testing utilizing the WAIS-IV establishes that his IQ is 61. See Appendix A, B. As Dr. Krop explained in his report:

> A review of Dr. Eisenstein's test data shows Mr. Johnston's Full Scale IQ to be 61 which is in the 0.5 percentile of the overall population. The results of the TOMM indicate adequate effort on Mr. Johnston's part. See Appendix B.

12. An IQ score of 61 is significant in that Mr. Johnston now satisfies the first prong of Fl.R.Cr.P. 3.203 because he suffers from subaverage general intellectual functioning due to his performance two or more standard deviations from the mean on the WAIS-IV. Heightening this significance is the fact that this is the very prong upon which Mr. Johnston's prior mental retardation claim was denied.

13. In addition to an IQ of 61, Mr. Johnston has deficits in his adaptive behavior. As Dr. Krop stated in his report:

> In addition to the intellectual assessment, it is necessary to assess an individual's adaptive functioning level both currently and prior to the age of eighteen. A review of family interviews and the results of the ABAS show deficits in adaptive functioning in several areas including communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction, and socialization. Family members describe significant deficits from an early age and records reviewed support this contention. The onset of his cognitive and social deficits certainly occurred prior to the age of eighteen as he was admitted to the Leesville State School for the Mentally Retarded in 1973 and family members report that he has had considerable difficulty regarding his adaptive behavior as long as they can remember. See Appendix B.[4]

14. Significant medical and legally recognized indicia of mental retardation is abundant to support

---

[4]In his previous mental retardation determination, Mr. Johnston's adaptive behavior was not reviewed by the mental health experts, Drs. Pritchard and Blandino, and the trial court did not consider such in his "Order Finding Defendant is Not Mentally Retarded." Johnston, 960 So.2d at 761-762.

Drs. Krop's and Eisenstein's findings of mental retardation. Mr. Johnston's school records indicate that he was considered mentally retarded in school and placed in classes for the mentally retarded and in special education prior to age eighteen. In 1967 at the age of 7, Mr. Johnston was administered the Stanford-Binet Intelligence Scale test at the Northeast Special Education Center in Louisiana. Psychologist John R. Morella administered the Stanford-Binet Intelligence Scale test and the Peabody Picture Vocabulary Test. Mr. Johnston scored a full scale IQ score of 57 on the Stanford-Binet.

15. When he was twelve years old, Mr. Johnston was again evaluated for mental retardation. He "performed within the retarded educable range" with an I.Q. of 65. (PCR. Vol.3, 63). At the age of twelve, Mr. Johnston was performing at the first grade level in math and could not understand simple subtraction and addition problems. (Id.) He was reading at a third grade level. (Id.) A 1973 report from the Monroe Regional Mental Health Center confirms the diagnosis that Mr. Johnston was mentally retarded and had exhibited almost uncontrollable behavior at home and at school. (Id.) On August 14, 1973, Mr. Johnston was placed at Leesville State School for the Retarded.[5] He was thirteen years of age at the time he was admitted.[6]

16. On November 18, 1975, Mr. Johnston attended juvenile court in Leesville, Louisiana. He was referred to the Juvenile Reception and Diagnostic Center and later to the Louisiana Training Institute (LTI). He was released from LTI on June 8, 1976. On November 2, 1976, Mr. Johnston was arrested for stealing $7.50 from a neighbor's house. Mr. Johnston plead guilty, and the Judge ordered that a social history report be completed prior to sentencing. The

---

[5]On March 30, 1964, Leesville State School was established. The school was specifically for "the training and rehabilitation of educable and/or trainable mentally retarded children." See *Statute of Louisiana*, Act 321 (1960).

[6]Mr. Johnston's aunt, Charlene Benoit, testified at the evidentiary hearing in 1988. Mrs. Benoit described the difficulties that Mr. Johnston had in school and how he was eventually sent to a school for the retarded. (PC-R. 1286)

juvenile probation officer wrote in his report that Mr. Johnston is "... a sixteen year old boy who is badly retarded. He does not seem to know right from wrong." See Appendix C.[7]

17. The information obtained from reports from Mr. Johnston's institutional history are corroborated by family members. Ms. Careen Johnston testified previously in post-conviction and was interviewed concerning Mr. Johnston's childhood history and adaptive functioning skills. Mr. Clifford Johnston and Ms. Debra Johnston, Mr. Johnston's brother and sister, were also interviewed. The story that emerges is one of utter deprivation, severe child abuse, limited adaptive functioning, and mental retardation throughout Mr. Johnston's childhood.

18. At an evidentiary hearing family members would be able to testify that they always knew something was wrong with Mr. Johnston. He was unable to relate to children his age and exhibited significant learning difficulties. Mr. Johnston was unable to understand or participate in the games his peers would play and would become extremely frustrated and agitated when he could not understand.

19. Mr. Johnston had the same difficulties in school. School work and learning frustrated him to no end and his lack of achievement reflected his severe limitations. When Mr. Johnston did not understand what he was being taught he would get upset and often state, "I can't do it and I'm not doing it anymore." Other than attending Leesville State School for the Mentally Retarded, family members can only remember Mr. Johnston attending public elementary school for one year.

20. Mr. Johnston exhibited a severely limited ability to care for himself throughout his life. Significant anecdotal evidence of this fact is available. Without direct supervision, Mr. Johnston would place himself in dangerous situations. As a result, he was not allowed to cook on the stove and was limited to only making himself sandwiches. Even this

---

[7] In March of 1978, Mr. Johnston starting receiving money from the Social Security Administration because of his mental disabilities.

menial task was beyond Mr. Johnston's capability. He would put entirely inappropriate combinations of food on the sandwiches. Mr. Johnston's food combinations would make most people ill. He would put anything he could find in the refrigerator together, such as mixing fruit, vegetables, meat, and syrup on the same sandwich.

21. Mr. Johnston was also unable to control the amount of food he consumed and unless monitored closely would eat to the point of becoming physically ill. He would hide food all over the house and his parents would only find it once it began to smell.

22. Growing up, Mr. Johnston was unable to use the washer and dryer, or complete any complicated tasks. He could not balance a check book[8], add, subtract, make change, or generally have any concept of money. To this day Mr. Johnston cannot do math, except for adding single digit numbers, and his literacy is extremely limited.

23. In his teen years, Mr. Johnston was unable to fill out job applications, hold a full-time job, or operate anything beyond the most elemental machinery. Mr. Johnston was unable to obtain a drivers license and continually wrecked when being taught how to drive. Both Drs. Eisenstein and Krop have reviewed records and considered the information corroborated by family members and have concluded that in addition to his sub-average intellectual functioning, Mr. Johnston suffers from concurrent deficits or impairments in adaptive functioning. See App. A, B.

24. Both Dr. Eisenstein and Dr. Krop have concluded that Mr. Johnston meets the criteria for mental retardation finding that he demonstrates significantly sub-average intellectual functioning, with concurrent deficits or impairments in adaptive functioning in at least two areas and the onset was prior to the age of eighteen. See App. A, B. Given that Mr. Johnston is mentally retarded, his sentence of death stands in violation of the Eighth Amendment.

---

[8]Inmates report that they have to monitor Mr. Johnston's canteen account and apprise him of the balance and what he can afford to buy.

Atkins v. Virginia, 536 U.S. 304 (2002).

SUMMARY OF THE ARGUMENT

Newly discovered evidence of mental retardation demonstrates that Mr. Johnston's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution and Florida's constitutional prohibition against cruel and unusual punishment. In Mr. Johnston's case, the circuit court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claim based upon the new evidence, and Mr. Johnston's diligence in bringing forth the claim. The circuit court failed to take the facts as true and instead impermissibly relied on "independent research". The circuit court also largely ignored Mr. Johnston's allegations in the order summarily denying relief, and it applied erroneous legal standards. This Court should order an evidentiary hearing.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the circuit court's fact findings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The circuit court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v.

State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT

NEWLY DISCOVERED EVIDENCE OF MENTAL RETARDATION DEMONSTRATES MR. JOHNSTON'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLORIDA'S CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Within Mr. Johnston's successive motion to vacate, he advanced his claim that newly discovered evidence established that he is mentally retarded; and that, therefore, the State of Florida is barred from executing him under Atkins v. Virginia, 536 U.S. 304 (2002). The newly discovered evidence was the result of an IQ test result of 61 obtained by utilizing the newly promulgated WAIS-IV. The WAIS-IV is the most current and accurate test available.[9]

The circuit court summarily denied Mr. Johnston's claim, ruling alternatively that the motion was untimely, abusive, and did not constitute newly discovered evidence. Mr. Johnston will first discuss the fact that the circuit court engaged in an improper analysis and then address each basis for the erroneous denial:

---

[9]Mr. Johnston's prior score from a previous mental retardation hearing was an 84, although scores as low as a 57 had been obtained during Mr. Johnston's childhood.

A. The Circuit Court Improperly Conducted Independent Research in Denying Mr. Johnston's Sixth Successive Motion to Vacate.

The circuit court stated the considerations that went into its "Order Denying Sixth Successive Postconviction Relief Motion and Request for Leave to Amend" as follows:

> After fully reviewing Defendant's allegations along with the transcripts from the June 24, 2005 evidentiary hearing dealing with the issue of mental retardation, the files, motions filed by both parties, the arguments of counsel at the hearing on this motion on February 19, 2010 and **after conducting independent research** and reviewing prior court opinions, this Court finds that Defendant's motion must be denied.

(PCR3 at 246)(emphasis added).

The circuit court's reliance upon independent research clearly violates the dictates of Fla.R.Cr.P. 3.851(h)(6), which states that the court can only deny an evidentiary hearing on a defendant's motion to vacate filed after warrant, "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief." This standard is the same as for all successive motions. See 3.851(f)(5)(B).[10] Furthermore, the

[10]Indeed, successive Rule 3.850 petitioners have received evidentiary hearings based on newly discovered evidence and merits consideration. State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(the Florida Supreme Court affirmed the circuit court's grant of sentencing relief on a third Rule 3.850 motion premised upon a testifying co-defendant's inconsistent statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State, 718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with

information in the motion should be taken "at face value" and accepted as true, which is "sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990). To deny Mr. Johnston an evidentiary hearing would violate his federal rights to due process and the Florida Constitution. See, Ford v. Wainwright, 477 U.S. 399 (1986); Matthews v. Eldridge, 424 U.S. 319 (1976).

By performing independent research the circuit court violated the dictates of Fla.R.Cr.P. 3.851. Interestingly, one can see the product of the circuit court's independent research in the portion of the order discussing the WAIS-IV as it relates to the WAIS-III. The circuit court stated:

> The WAIS-IV IQ test is not newly discovered evidence because it is merely a refinement of the WAIS-

---

which defendant was charged and convicted); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for an evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

> III test. Furthermore, the results of the WAIS-IV test are based on data that was previously available and has already been taken into consideration for the purpose of assessing Defendant's IQ. The additional subtests added to the WAIS-IV measure the same factors already tested in the WAIS-III - - verbal comprehension, perceptual reasoning [FN1], working memory, and processing speed. The defense argument is that the WAIS-IV is a reconfiguration of the WAIS-III and that the WAIS-IV changed the weight of the factors used to determine the score. Since these factors were previously available and considered using the WAIS-III test, the WAIS-IV test is not newly discovered evidence but in essence is a republication of the WAIS-III test in a new form. [FN1] Perceptual organization in WAIS-III.

(PCR3 at 253-254).

This analysis is not based upon any information found within the motions, files, and records within Mr. Johnston's case. Within his motion Mr. Johnston stated as follows regarding the WAIS-IV:

> 9. Subsequent to the Florida Supreme Court's determination, the WAIS-IV IQ test was developed. This test constitutes the most current and accurate test for a determination of mental retardation. As Dr. Eisenstein, one of the experts who recently examined Mr. Johnston for mental retardation, stated in his report:
>
> > The Weschler Adult Intelligence Scale - 4th Edition, was administered to Mr. David Johnston. This is the most current, up to date edition of the Weschler Intelligence Scale, revised in 2008. Research indicates that the WAIS-IV, with its new configuration of four index scores rather than just a Verbal and Performance score, is a more appropriate and better test than previous editions, with more reliable and valid scores. See Appendix A.
>
> 10. Similarly, Dr. Krop, who also recently examined Mr. Johnston for mental retardation, stated:

> As you likely know, Mr. Johnston has been assessed on numerous occasions with various tests of intellectual functioning. His scores have ranged from an IQ as low as 57 to as high as 84. It is noteworthy, however that the WAIS-IV is considered the most accurate assessment of intellectual functioning with more reliable and valid scores as it includes measures of verbal comprehension, perceptual reasoning, working memory and processing speed. See Appendix B.
>
> 11. The results of Mr. Johnston's recent IQ testing utilizing the WAIS-IV establishes that his IQ is 61. See Appendix A, B. As Dr. Krop explained in his report:
>
> > A review of Dr. Eisenstein's test data shows Mr. Johnston's Full Scale IQ to be 61 which is in the 0.5 percentile of the overall population. The results of the TOMM indicate adequate effort on Mr. Johnston's part. See Appendix B.
>
> 12. An IQ score of 61 is significant in that Mr. Johnston now satisfies the first prong of Fl.R.Cr.P. 3.203 because he suffers from subaverage general intellectual functioning due to his performance two or more standard deviations from the mean on the WAIS-IV. Heightening this significance is the fact that this is the very prong upon which Mr. Johnston's prior mental retardation claim was denied. PCR3 14-15.

In its response to Mr. Johnston's motion, the State made no mention of the difference between the two tests.

Here, contrary to this Court's precedent and Fla.R.Cr.P. 3.851, the circuit court failed to either accept as true Mr. Johnston's factual allegations or find that Mr. Johnston's factual allegations were conclusively refuted by the files and

records in this case.[11] Instead, the circuit court substituted its opinion for that of the clearly expressed opinions of the two experts relied upon by Mr. Johnston, presumably by relying on independent evidence.

Mr. Johnston submits that when the facts asserted in his successive postconviction motion are accepted as true, it is clear that the files and records in the case do not conclusively refute his claims, thus requiring an evidentiary hearing.

B. Contrary to the Circuit Court's Order Mr. Johnston's Successive Motion Is Not Untimely.

The circuit court ruled that Mr. Johnston's motion was untimely by stating:

> The instant motion is untimely. Under Florida Rule of Criminal Procedure 3.203, a mental retardation claim must be filed with an initial 3.851 motion within the time provided in Rule 3.203 or in some cases, in a successive 3.851 motion. Fla.R.Crim.P. 3.203. Defendant's previous motion for postconviction relief asserting that he is mentally retarded was denied by the court and affirmed on appeal. *Johnston v. State*, 960 So.2d 757 (Fla. 2006). Therefore the time for raising this claim has long passed.

(PCR3 at 251).

Mr. Johnston submits that the circuit court erred in its ruling. The fact is that Mr. Johnston did bring a timely mental retardation claim in 2002. Contrary to the circuit court's erroneous conclusion, the claim brought in these proceedings is

---

[11]The files and records contained no information whatsoever relative to the WAIS-IV, its reliability, or its configuration.

based upon newly discovered evidence of mental retardation. Mr. Johnston pled diligence in his successor postconviction motion:

> 27. Undersigned counsel learned of the availability of the WAIS-IV IQ test in May 2009 in discussions with Dr. Krop, and later Dr. Eisenstein. Due to his schedule Dr. Krop was unable to return and further evaluate Mr. Johnston until much later. Dr. Eisenstein had to purchase the test and would later travel to further evaluate Mr. Johnston on July 20, 2009. After Mr. Johnston scored a 61, subsequent investigation was conducted by Mr. Johnston's investigator at the request of the undersigned. Subsequent to that investigation, the undersigned provided documentation and made family members available for interview to Drs. Eisenstein and Krop. The doctors rendered their respective reports on December 10, 2009 and January 8, 2010. Therefore, the undersigned brought this claim within one year of learning of the newly discovered evidence.

Factual allegations as to the merits of a constitutional claim as well as **to issues of diligence must be accepted as true**, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996)(emphasis added). In its order denying relief, the circuit court made no mention of these factual allegations, nor did it find that they were conclusively refuted by the files and records in this case. The circuit court's determination that Mr. Johnston's motion was untimely is erroneous.[12]

---

[12]Moreover, contrary to the circuit court's determination, this Court has in fact allowed Atkins claims to be filed after the expiration of the sixty day window set forth in Rule 3.203. In the case of Coleman v. State, FSC Case No. SC04-1520, which is currently pending in this Court, the Court relinquished jurisdiction on September 23, 2005, to permit consideration of an Atkins claim well after the expiration of the sixty day window

C. Contrary to the Circuit Court's Order Mr. Johnston's Sixth Successive Motion Is Not An Abusive Successive Motion.

The circuit court stated as follows in finding that Mr. Johnston's motion was abusive:

> The instant motion is Defendant's sixth successive motion. The issue of mental retardation has been fully litigated in this case. Defendant was evaluated in May and July of 2009, however, he did not notify the court that there was a pending evaluation or new issues during the hearing on the motion for DNA testing in 2009 or in any of the motions filed in May or August 2009. Defendant has not provided any good cause for failing to raise this claim in his previous fourth and fifth successive motions. Accordingly, this motion could have been raised in Defendant's 2009 postconviction motions and is therefore denied as an abusive successive motion.

(PCR3 at 251).

The circuit court's ruling is erroneous. First, as noted in subsection B above, undersigned counsel pled in his successive postconviction motion that he met his obligation as to diligence by bringing this claim within one year of learning of the newly discovered evidence. This factual allegation has not been conclusively refuted by the files and records in this case, and therefore it must be accepted as true.

Moreover, contrary to the circuit court's determination, Mr. Johnston in fact made reference to the pendency of WAIS-IV testing in his initial brief filed before this Court in May 2009 where he stated:

---

set forth in Rule 3.203.

> Dr. Eisenstein found that Mr. Johnston is very "primitive" in his ability to care for himself and has extreme difficulty in adaptive functioning, both now and in the past. Dr. Eisenstein opined that Johnston's adaptive functioning places him in the same class of persons as those diagnosed as mentally retarded. Dr. Eisenstein did not have enough time to give the newest IQ test, the WAIS-4. Dr. Eisenstein believes that prior IQ scores artificially inflated Mr. Johnston's scores. The new test, the WAIS-4, has accounted for the factors that may have artificially inflated these scores. This is due to a reconfiguring of the method in which attention concentration is scored. At an evidentiary hearing this evidence can be produced.

See, Initial Brief, Johnston v. State, SC09-839, pp.43-44.

Additionally, as Mr. Johnston's counsel explained at the case management conference on February 19, 2010, when he first began to learn of the newly discovered evidence issue, the case was either under the jurisdiction of this Court or on a limited remand of the DNA issue:

> THE COURT: Okay. One of the questions that Mr. Nunnelley raised in his response was that your client was tested prior to your filing that last, I believe, fifth successive motion, and he alleges an abuse of discretion since you may have known at that time the existence of this data and did not seek to bring it up in that fifth successive motion. How would you respond to that?
>
> MR. DOSS: That was a very limited remand, Judge, to deal with the DNA that was -- that was --
>
> THE COURT: I'm talking about your motion.
>
> MR. DOSS: That's what I'm saying. I filed that pursuant to the very limited remand on the DNA. This was actually an issue before Judge Wattles as to whether that exceeded the scope of remand or not. As well, Judge, just because I know you're not familiar how I came to be on this case, I actually came into this case after the warrant was signed, brought the

> motion. And then we received the remand. So when I got this -- when I got this score, I knew of the 2005 only from the –- you know, only from reading through the records and seeing that it was denied. So at that point, based upon the fact that the second and third prong were never reached, I needed to go and do the proper investigation to find out did we meet the second and third prong or not and had -- had an investigator travel to Louisiana and do the investigation and provided that, brought that raw information -- brought the raw information to the doctors. The doctors conducted their own interviews, and based upon that, they eventually produced the report, the ones that are appended to the motion. And then, Judge, I filed it, and actually it was available to be heard immediately coming off of the mandate from the Florida Supreme Court when this Court regained jurisdiction.

(PCR3 225-227).

Notably, the State moved to dismiss Mr. Johnston's fifth successive motion as exceeding the scope of the limited remand by this Court on the DNA issue (PCR2 752-755).[13] The circuit court judge at the time, Judge Wattles, subsequently ruled that the motion could be heard after an agreement by the State, where the court stated: "That's fine with me, whereas the collateral -- perhaps the way we would phrase the order would be as a collateral issue that arose out of the testing report so I don't give the impression to the Supreme Court about usurping jurisdiction that I didn't intend." (PCR2 T. at 812).

[13]This Court's order of relinquishment stated in pertinent part as follows: "[W]e hereby relinquish jurisdiction for a period of ninety days for the purpose of conducting DNA tests on the above-referenced items of evidence pursuant to the provisions of rule 3.853 and section 925.11, Florida Statutes (2008)." (PCR2 at 364).

Clearly, the circuit court lacked jurisdiction to hear Mr. Johnston's newly discovered evidence claim until after this Court disposed of his pending issues following the remand. Once Mr. Johnston's claim was more fully investigated and the reports ultimately issued on December 10, 2009 and January 8, 2010, the instant motion was prepared and filed before the mandate issued and the circuit court regained jurisdiction. This motion was not an abuse of process, and it was filed well within the one year time limit imposed upon filing claims based upon newly discovered evidence. Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001).

D. Contrary to the Circuit Court's Order Mr. Johnston's Successive Motion Is Based Upon Newly Discovered Evidence.

The circuit court observed in its order denying Mr. Johnston's motion that, "The first question this Court must answer is whether this evidence, the result of the WAIS-IV test, is truly newly discovered evidence." (PCR3 at 251-252). The court proceeded to answer the question in the negative by finding that, "The WAIS-IV IQ test is not newly discovered evidence because it is merely a refinement of the WAIS-III test." Order at 8-9. The court subsequently concluded:

> The Court finds that the WAIS-IV test is not a substantial revision of intelligence testing that changes the science or methodology in a manner that would invalidate the previous WAIS-III test results. Accordingly, Defendant's claim of newly discovered evidence does not warrant an evidentiary hearing and is summarily denied.

(PCR3 at 256).

Jones v. State, 591 So. 2d 911 (Fla. 1991) contains the requisite standard for filing successive motions to vacate pursuant to Fla.R.Cr.P. 3.851 that are based upon newly discovered evidence. In Jones, this Court adopted the standard for evaluating claims of newly discovered evidence from the federal system. Jones holds that a court must first determine that the "asserted facts 'must have been unknown by the trial court, by the party, by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" Id. at 916 (quoting Hallman v. State, 371 So.2d 482, 485)(Fla. 1979). Next, a court must further determine that, "The newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Id. at 915. "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." Marek v. State, 14 So.3d 985, 990 (Fla. 2009) citing Jones v. State, 591 So.2d 911, 915 (Fla. 1991).

Mr. Johnston met the standard set forth in Jones. The prohibition against the execution of the mentally retarded was not effectuated until Atkins was rendered in 2002. Thus, this claim was unavailable at the time of Mr. Johnston's trial in 1984. Thereafter, the WAIS-IV was not available until after Mr.

Johnston's original mental retardation determination.

The score which Mr. Johnson obtained on the WAIS-IV, 61, in conjunction with the finding of mental retardation by Drs. Krop and Eisenstein, would yield a less severe sentence as Mr. Johnston would not be eligible for the death penalty. Thus, the evidence detailed within Mr. Johnston's Rule 3.851 motion constitutes newly discovered evidence requiring relief.

At the very least, under the standard enunciated in Jones and other cases decided by this Court, Mr. Johnston is entitled to an evidentiary hearing. Jones; Moreland v. State, 582 So. 2d 618 (Fla. 1991); Richardson v. State, 546 So. 2d 1037 (Fla. 1989). The information in Mr. Johnston's motion should have been taken "at face value" and accepted as true, which is "sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990).

CONCLUSION

In light of the foregoing arguments, Mr. Johnston requests that this matter be remanded to the circuit court for a full and fair evidentiary hearing and for other relief as set forth in this brief.

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 March 1, 2010.

CERTIFICATE OF FONT

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

D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181