IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-356

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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PRELIMINARY MATTERS

This appeal is from the denial of Johnston's sixth successive motion for post-conviction relief. Johnston's execution was scheduled for Tuesday, March 9, 2010, at 6 p.m. in an order signed by Governor Crist on February 19, 2010. On Monday, February 22, 2010, this Court issued a death warrant scheduling order which, among other things, directed that all trial court proceedings be concluded and applicable orders entered by Wednesday, February 24, 2010. This Court also ordered that "**any notice of appeal arising from any trial court order shall be filed in the trial court by Thursday, February 25, 2010.**"

The post-conviction relief motion that is the subject of this appeal was filed on February 9, 2010. The Circuit Court conducted a case management conference on February 19, 2010 -- Johnston's execution was scheduled by the Governor later that day. The Circuit Court then scheduled a "case management conference" for Wednesday, February 24, 2010, but, after receiving this Court's warrant scheduling order, rescheduled that proceeding for Tuesday, February 23, 2010, at 11:00 a.m. **At that hearing, the Circuit Court stated that the motion for post-conviction relief was denied, and that a written order would be issued later that day.** The written order was received by the parties at approximately 6:00 p.m. on February 23, 2010.

Despite the explicit, mandatory language setting the time for filing any notice of appeal contained in this Court's February 22, 2010, order, and despite having known that the post-conviction relief motion was denied on February 23, 2010 (in a hearing that was attended by all parties), Johnston did not file his notice of appeal until the early morning hours of February 26, 2010, when he transmitted that 2-page document by e-mail to counsel and the courts.[1] **Johnston offered no explanation for his untimely filing.**[2]

This Court's order clearly required that any notice of appeal be filed "by Thursday, February 25, 2010." Johnston ignored that order. Johnston has known that his post-conviction relief motion was denied since February 23, 2010, when the trial court announced that ruling in open court -- there is no reason at all that Johnston could not have complied with this Court's order.

The "Constitution does not require one-sidedness in favor of the defendant," *Davis v. Kemp*, 829 F.2d 1522, 1528 (11th Cir.

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[1] Johnston has shown a pattern of dilatory practice since his warrant was signed in April of 2009. That pattern has included, among other things, the last-minute DNA testing motion, and the fifth successive motion which was filed after the DNA testing was completed but made no mention of that testing. Ignoring this Court's schedule and filing the notice of appeal late is but the latest example.

[2] An identical notice of appeal was sent by e-mail and received by the undersigned at 9:51 a.m. on February 26, 2010. The reason for the second notice is unclear.

1987), nor does the Constitution require that the Courts regard their own scheduling orders as aspirational rather than mandatory. This Court issued an unambiguous scheduling order which directed that various actions shall be completed on or before specified times. The filing of a notice of appeal is certainly the least labor-intensive part of prosecuting an appeal, and there is no reason at all that Johnston could not have complied with this Court's order. In 1987, the Fifth Circuit said that "[c]ounsel delays must be eliminated through sanctions, if not through persuasion." *Brogdon v. Butler,* 824 F.2d 338, 344 (5th Cir. 1987). That observation is applicable here.[3]

STATEMENT OF THE CASE AND FACTS

In his last appearance before this Court, the factual and procedural history of this case was summarized as follows:

> David Eugene Johnston, a prisoner under sentence of death, appeals the postconviction court's order denying his fourth and fifth successive motions for postconviction relief, filed under *Florida Rule of Criminal Procedure* 3.851. We have jurisdiction. Art. V, § 3(b)(1), *Fla. Const*. For the reasons explained below, we affirm the postconviction court's orders denying Johnston's successive motions for postconviction relief.

[3] The same year, the Fifth Circuit also commented about ". . . counsel, particularly in capital cases, who typically use every possible delaying tactic, secure in the belief that no judge will impose sanctions on them for exceeding the bounds of acceptable behavior." *Streetman v. Lynaugh*, 812 F.2d 950, 965 n.4 (5th Cir. 1987).

FACTS AND PROCEDURAL HISTORY

On May 18, 1984, Johnston was convicted of the first-degree murder of Mary Hammond, which occurred on November 5, 1983, in Orange County, Florida. After a jury trial, the trial court sentenced Johnston to death. His conviction and sentence were affirmed by this Court on direct appeal. *Johnston v. State*, 497 So.2d 863 (Fla. 1986). The facts and circumstances of the murder are summarized 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 that 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.

Id. at 865. Johnston gave the police a number of different statements about his interactions with victim. In his statements to police, Johnston said he went by the victim's home in the early morning hours of November 5, 1983, and saw lights on in the apartment. He said he went into the unlocked apartment to check on Mary Hammond, but the evidence also showed that a window to the apartment was broken and a key case belonging to the victim was found outside the apartment. Johnston also told police conflicting stories about seeing a man running from the apartment. Although Johnston first told police he found the victim dead, he later said he found her alive but injured on her bed, where he spoke to her and cradled her head. He said that after he got blood on himself, he washed it off in the victim's bathroom. The jury convicted Johnston of first-degree murder and, after a penalty phase proceeding, recommended a death sentence by an eight-to-four vote.

Governor Martinez signed the first warrant for Johnston's execution on October 28, 1988, but the execution was stayed after Johnston filed his initial motion for postconviction relief and petition for habeas corpus. This Court affirmed denial of Johnston's postconviction claims relating to his competency to stand trial, claims of ineffective assistance of trial counsel, and several constitutional challenges to his sentence of death, and we denied habeas relief. *Johnston v. Dugger*, 583 So. 2d 657 (Fla. 1991). Subsequently, Johnston filed a petition for writ of habeas corpus in the federal district court raising claims of ineffective assistance of counsel, competency, and constitutional claims relating to the penalty phase. That petition

was denied and the denial was affirmed by the Eleventh Circuit Court of Appeals. *Johnston v. Singletary*, 162 F.3d 630, 632 (11th Cir. 1998).

This Court subsequently affirmed denial of Johnston's second motion for postconviction relief and denied his second petition for habeas corpus, in which he raised claims relating to competency, ineffective assistance of counsel in the penalty phase, trial court errors in the penalty phase, and issues relating to the sentencing factors. *Johnston v. State*, 708 So. 2d 590 (Fla. 1998). After this Court issued its decision in *Stephens v. State,* 748 So. 2d 1028, 1033-34 (Fla. 1999), which clarified the standard to be used in reviewing ineffective assistance of counsel claims, Johnston filed another petition for writ of habeas corpus in this Court, arguing that Stephens should apply retroactively to his case. Relief was denied in *Johnston v. Moore*, 789 So.2d 262, 263 (Fla.2001).

In June 2002, Johnston filed a third motion to vacate judgment of conviction and sentence, asserting that he is mentally retarded and that his execution would violate his constitutional rights under the holding of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that it is unconstitutional to execute a person who is mentally retarded; and in August 2002, Johnston added a challenge to the constitutionality of his death sentence in response to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which held that a defendant has a Sixth Amendment right to have a jury find all facts upon which the Legislature conditions an increase in the maximum punishment. *See id*. at 589. We affirmed denial of the *Atkins* and *Ring* claims in *Johnston v. State*, 960 So. 2d 757, 758 (Fla. 2006).

On April 20, 2009, Governor Charlie Crist signed a second death warrant authorizing Johnston's execution. Johnston was appointed new counsel, who then filed a fourth successive motion for postconviction relief in the trial court raising five claims and two motions. [FN1] In addition to his successive postconviction claims, he filed a motion

for DNA testing under Florida Rule of Criminal Procedure 3.853 seeking testing of certain items of clothing and the fingernail clippings taken from the victim. [FN2] Johnston also moved for production of other evidentiary items on which he sought to have additional forensic testing performed. On May 8, 2009, the postconviction court denied the motion for DNA testing and the motion for production of evidence for forensic testing. The court also denied relief on the remainder of the claims. Johnston then filed this appeal. After oral argument was held, we granted a stay of execution on May 21, 2009, and relinquished jurisdiction to the trial court for ninety days for DNA testing of the victim's fingernail clippings and certain items of Johnston's clothing said to bear indications of blood.

The postconviction court directed the Florida Department of Law Enforcement (FDLE) to conduct DNA testing on the items of clothing and the victim's fingernail clippings. After that testing, the FDLE report was submitted stating in part that no blood could be found on the items of clothing and accordingly, no DNA testing was performed on the clothing. Based on the FDLE lab report, Johnston filed a fifth successive motion for postconviction relief, alleging that the FDLE lab report was newly discovered evidence that proved there was no blood on his clothes, which if introduced at trial would probably have resulted in an acquittal. The victim's fingernail clippings were tested for DNA by FDLE but the lab could not obtain a complete DNA profile. FDLE could only say that the material under the victim's fingernails came from a male. FDLE also reported that it did not have the capability of performing the Y-STR DNA testing necessary to develop a complete profile of that male DNA and recommended that the Y-STR DNA testing be conducted elsewhere.

The Y-STR DNA testing was subsequently completed by LabCorp, a private molecular biology and pathology laboratory in North Carolina, with observers from the Florida Department of Law Enforcement and from DNA Diagnostics of Fairfield, Ohio, a laboratory that Johnston had specifically requested. On August 17, 2009, the postconviction court held a hearing at which the court received the DNA report. Dr. Julie Heinig of

DNA Diagnostics of Fairfield, Ohio, testified that she had observed the testing done by LabCorp and had conferred with Megan Clement of LabCorp concerning the testing. Dr. Heinig testified that appropriate procedures were followed and that, according to the DNA testing report, the Y-STR DNA testing indicated that David Johnston's DNA profile was consistent with the profile obtained from Mary Hammond's fingernails, and therefore neither he nor his paternally related relatives could be excluded as a contributor to that DNA sample. The report stated as follows:

> Based on the results listed above, the Y chromosome DNA profile obtained from the DNA extract from K7a [fingernail clippings] (Item 1) and the partial Y chromosome DNA profile obtained from the DNA extract from K7b [fingernail clippings] (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.

Johnston's fifth successive motion for postconviction relief did not cite the LabCorp DNA test results as a ground for relief, but alleged only that the FDLE report stating that no blood was found on the items of clothing was newly discovered evidence that mandated a new trial.

The court and parties agreed to take evidence at that same August 17, 2009, hearing on the FDLE report that was the basis of Johnston's fifth successive motion for postconviction relief. The trial court then heard the testimony of FDLE laboratory analyst Corey Crumbley, who testified that she conducted testing on the clothing items and submitted a report dated June 10, 2009. The testing results and the report show that the items of clothing tested did not have any indications of the presence of blood on them. [FN3] Crumbley testified that DNA testing was not available at the time of the crime, but that the clothing items were tested for blood in 1984 using the same test that is used now, the phenolphthalein Kastle-Meyer color screen test. Crumbley cross-referenced the current

report to the FDLE report dated January 20, 1984, which indicated the presence of blood on a number of the items, and explained:

> I looked back into the case file to see where they identified blood previously, and those areas appear to have been consumed at the time of that prior testing. Once I saw that, I examined the item as if it had never been examined before to see if I could find any other areas that there might be blood.

The original cuttings from the items of evidence were not available to her. The 1984 FDLE report indicated that all the samples taken from the shorts were consumed by the testing, as was the sample taken from the right shoe. The left shoe had no cuttings taken and showed no evidence of blood and, at the 1984 trial, the FDLE report did not indicate the presence of blood on the left tennis shoe. Crumbley also testified that the socks she was given to test had no cuttings taken from them and that current testing showed no evidence of blood on the socks. Similarly, we note that in 1984, FDLE witness Keith Paul testified that no blood was found on the socks.

Crumbley further testified that she was familiar with the findings in the original trial report and that the new testing results did not cast any of those 1984 serological findings into doubt. She explained:

> [W]hen I looked at the evidence and the areas where it appeared that positive results for blood had been obtained, there were cuttings removed, no stain visible, so there was no reason for me to think that I was either going to get a positive result or negative result now as related to back then. If I got a negative result, it wouldn't necessarily have called those results into question because there was no stain for me to test.

The trial court entered its final order on August 18, 2009, denying postconviction relief. The final order resolved the original motion for DNA testing filed by Johnston, which prompted the relinquishment,

and resolved the fifth successive motion for postconviction relief that Johnston filed August 14, 2009, based on information revealed in the FDLE lab report. After discussing the standard of review for a claim of newly discovered evidence in the order, citing *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*), the postconviction court stated that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial" and that "[t]o 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 the trial." The postconviction court denied relief on the newly discovered evidence claim, concluding in essence that if the FDLE report were admitted into evidence at a retrial, when considered in the light of all other admissible evidence, it would not probably result in an acquittal. At the conclusion of the relinquishment, we granted supplemental briefing on Johnston's fifth successive postconviction motion.

We turn now to Johnston's claims on appeal, beginning with his fifth successive motion for postconviction relief filed during the relinquishment proceeding. In that motion, Johnston claims that the FDLE lab report stating that the chemical presence of blood was not found on the clothing tested by FDLE is newly discovered evidence that would probably result in an acquittal. As explained below, we find that there is no merit to this claim.

> [FN1] The issues raised in the instant postconviction proceeding were: (1) a motion for DNA testing of items bearing evidence of human blood and for DNA testing of the fingernail clippings taken from the victim; (2) newly discovered evidence consisting of a recent report by the National Academy of Sciences, titled *Strengthening Forensic Science in the United States: A Path Forward*, reveals Johnston's conviction was based on infirm forensic evidence; (3) a motion for production of latent fingerprints, a pair of his shoes, and plaster casts of shoeprints in evidence at

trial, for additional forensic testing; (4) the clemency process is arbitrary and capricious in violation of the constitution; (5) Johnston is exempt from execution because he is severely mentally ill; (6) the death penalty is now unconstitutional and violates binding international law because of the inordinate length of time he has been on death row; and (7) the shackling of Johnston at trial violated the constitution.

[FN2] Rule 3.853 originally contained a deadline for filing motions for postconviction DNA testing of October 1, 2003. That was later extended to October 1, 2005. Prior to expiration of the October 1, 2005, deadline, the Court on September 29, 2005, issued an order amending rule 3.853(d), extending the deadline to July 1, 2006. The Legislature then enacted chapter 2006-292, *Laws of Florida* (the Act), which amended chapter 925, Florida Statutes. The Act removed the deadline for filing postconviction DNA motions, and the Court responded by adopting the amendment to rule 3.853(d) in *In re Amendments to Fla. Rule of Criminal Procedure 3.853(d),* 938 So. 2d 977 (Fla. 2006). In 2007, rule 3.853 was amended to state that the motion may be filed or considered at any time after the judgment and sentence become final, as the statute provides. *See In re Amendments to Fla. Rules of Criminal Procedure 3.170 & 3.172*, 953 So. 2d 513 (Fla. 2007). However, we urge postconviction counsel to file any viable motion for DNA testing at the earliest opportunity and not wait until the eve of execution to determine that DNA testing is necessary.

[FN3] Items K2 (shorts), K36 (right tennis shoe), K37 (left tennis shoe), K41a (striped sock), K41b (plain white sock), K42a (big sock), and K42b (small sock).

Johnston v. State, 2010 WL 183984, 1-4 (Fla. 2010).

THE PREVIOUS MENTAL RETARDATION LITIGATION

After the United States Supreme Court decision in *Atkins*, Johnston filed a post-conviction relief motion raising a claim that he is mentally retarded and therefore cannot be executed. That claim was denied following an evidentiary hearing, and this Court affirmed that result, saying:

> On June 24, 2005, the trial court held an evidentiary hearing to determine if Johnston meets the mental retardation criteria set out in *Florida Rule of Criminal Procedure* 3.203. [FN2] Based upon the evidence received at the hearing, the trial court concluded that Johnston is not retarded. We now review that ruling and affirm the trial court's determination.
>
> > [FN2] 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 this 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 now challenges the trial court's findings.
>
> Prior to the evidentiary hearing, the trial court appointed Drs. Sal Blandino and Gregory A. Prichard to examine Johnston. Dr. Blandino, a licensed psychologist, examined Johnston at Union Correctional Institution on May 31, 2005. Dr. Blandino testified that mental retardation is a disorder classified in the Diagnostic and Statistical Manual using a three-

prong test. The first prong involves "sub-average intellectual functions usually assessed by an IQ test or an assessment of intellectual ability that tends to fall below a score of 70, so 69 and below." The IQ testing is performed by administering a Wechsler Series or Stanford-Binet test. The second prong involves deficits in adaptive functioning, which concerns general functioning behavior in life, and the third prong requires that the deficiencies must be present prior to age eighteen. Dr. Blandino did not conduct the IQ testing himself in this case because of the close proximity in time (two weeks) between Dr. Prichard's testing and Dr. Blandino's examination. He also did not administer a further IQ test because he concluded that Dr. Prichard's results were almost identical to the results that were obtained from testing of Johnston some thirty-one years earlier. On the tests, Johnston's score on the verbal scale was 76, his performance scale was 95, and his full scale IQ was 84. This score falls between the upper range of borderline intellectual functioning and low average intellectual functioning. Borderline intellectual functioning is defined as a score between 70 and 84; low average is between 84 and 99; and average is between 100 and 115.

Dr. Blandino testified that he did not notice severe impairments in Johnston's communication or reading abilities. However, Dr. Blandino noted that when Johnston was administered a Stanford-Binet test at age seven, he scored a 57; furthermore, he also took a Wechsler Intelligence Scale for Children test when he was twelve and scored a 65. However, Dr. Blandino discounted these earlier scores because the test administrators placed a caveat in their notes indicating "that this was not an accurate assessment of his functioning because of behavioral and emotional issues, and that he was actually performing or was functioning at a higher level." This observation was bolstered by a test administered two years after the last test, on which he scored significantly better, and thirty-one years later, by the most recent test, which was identical to the previous one. Finally, Dr. Blandino concluded that Johnston is not mentally retarded. He also noted that Johnston told him he was mentally retarded, which is not typical of a person who is truly mentally retarded, and stated that he

thought Johnston knew that being found mentally retarded would help his "legal predicament." He testified that he did not assess Johnston's adaptive functioning because

> I thought it was a moot point given the fact that he didn't meet two of the three criteria for the diagnosis of mental retardation, and again, the IQ score being as high as it was and the fact that ... mental retardation did not appear to be present prior to age 18, and again by the current score it wasn't there ..., so I figured why waste the time and money.

Concerning the 95% confidence interval typically involved in IQ testing, Dr. Blandino testified that a score of 84 falls decisively in the 80-88 range, solidly in the borderline to low average intellectual functioning range.

Dr. Prichard, a licensed clinical psychologist, testified concerning the three prongs that determine mental retardation as well. He stated that the three prongs are not independent elements; rather, they must all be present in order for mental retardation to be present. Dr. Prichard testified that the "acceptable, standard manner of proceeding in an assessment within the profession of psychology" is to stop at the first prong if the IQ score assessed there is too high to constitute mental retardation. Johnston had extensive mental health records, and there was "incredible agreement" between the different forms of formal testing that had been performed on Johnston throughout his life. Three tests over the course of thirty years, one at age thirteen, one performed in 1988, and the one Dr. Prichard performed, resulted in practically the same score, indicating to Dr. Prichard that Johnston is functioning in the 80s intellectually. Dr. Prichard agreed with Dr. Blandino's belief that Johnston's two early low IQ test scores should be discarded because, at the time, "emotional factors were getting in the way of optimal functioning." [FN3] Dr. Prichard stated that, although Johnston exhibited some adaptive deficits, he did not perform testing concerning this because of his determination that Johnston's IQ score was too high. Dr. Prichard

concluded that even with the standard error of measurement, Johnston's IQ level is not near the level of mental retardation.

> [FN3] Dr. Prichard stated that adaptive functioning is one of the three prongs of mental retardation because, even if a person scores in the mentally retarded range on the IQ test, his adaptive functioning may be so high as to deem him not mentally retarded. The reverse is not true, however. No matter how poor a person's adaptive functioning is, a person cannot be mentally retarded if he scores in the non-mentally retarded range.

On July 7, 2005, the trial court entered an order finding that Johnston is not mentally retarded because of the evidence from both experts who "testified that [Johnston] consistently scored too high on IQ tests to support a finding of 'significantly subaverage general intellectual functioning.'"

After the United States Supreme Court's decision in *Atkins*, in which the Court held that the execution of the mentally retarded constitutes excessive punishment under the Eighth Amendment and that states are free to establish their own methods for determining which offenders are mentally retarded, this Court adopted rule 3.203, which provides that a trial court shall conduct an evidentiary hearing for a determination of mental retardation. *Fla. R.Crim. P.* 3.203(e); *see also Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure*, 875 So. 2d 563, 571 (Fla. 2004). The definition of mental retardation is provided in rule 3.203(b):

> "[M]ental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.... "[S]ignificantly subaverage general intellectual functioning" ... means performance that is two or more standard deviations from the mean score on a

> standardized intelligence test.... "[A]daptive behavior" ... means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Under this rule, the three prongs of mental retardation consist of: (1) subaverage general intellectual functioning, (2) deficits in adaptive behavior, and (3) manifestation before age 18; these three prongs are to be considered in the conjunctive.

The standard of review utilized by this Court in reviewing a trial court's finding on a defendant's mental retardation claim is whether competent, substantial evidence supports the finding.

As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the [trial court's decision].

Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981) (footnote omitted), *aff'd,* 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *see also Windom v. State*, 886 So. 2d 915, 927 (Fla. 2004) (*citing Porter v. State,* 788 So. 2d 917, 923 (Fla. 2001)) ("This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence.").

Johnston argues that the trial court erred in finding him not mentally retarded because the experts appointed by the trial court only considered the first prong of rule 3.203. We find no error and conclude that the trial court's findings are supported by competent, substantial evidence. First, Johnston had to score two standard deviations below the mean score

> on an IQ test, or 70, in order to satisfy the first prong of rule 3.203(b). While Johnston did score below this number in tests he took early in his life, the test administrators noted that the low scores were probably due to behavioral and emotional problems at the time. These observations were apparently proved true later when tests performed on Johnston from the age of thirteen on were consistently in the upper borderline intellectual to low average functioning range, well above the determinative line for retardation. Both experts' testimony during the evidentiary hearing supported such a conclusion.
>
> 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 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, 759-762 (Fla. 2006).

THE ORDER ON THE MOST RECENT POST-CONVICTION RELIEF MOTION[4]

On February 24, 2010, Orange County Circuit Judge Belvin Perry summarily denied Johnston's sixth successive motion for post-conviction relief, which, like his third motion, claimed he was mentally retarded. The Circuit Court described the current litigation as follows:

> Defendant presents this claim based upon newly discovered evidence which was previously unavailable

[4] The statement of the facts contained in Johnston's brief does not discuss the trial court's order denying the motion that is the subject of this appeal.

to counsel or Defendant. He argues that the newly discovered evidence establishes that he is mentally retarded and therefore not eligible for execution based upon the holding in *Atkins v. Virginia,* 536 U.S. 304 (2002), which held that the execution of the mentally retarded is prohibited. In June of 2002, Defendant filed his third 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. Without conducting an evidentiary hearing, the trial court denied relief in a written order dated January 31, 2003. Defendant appealed the order and the Florida Supreme Court relinquished jurisdiction to the trial court for a determination of mental retardation in an order dated December 17, 2004. On June 24, 2005, the trial court held an evidentiary hearing to determine whether Defendant met the mental retardation criteria set out in section 921.137 of the *Florida Statutes* and *Florida Rule of Criminal Procedure* 3.203. After the hearing, the trial court found that Defendant was not mentally retarded. Defendant appealed this ruling to the Florida Supreme Court and the Court affirmed the trial court's ruling in *Johnston v. State,* 960 So. 2d 757 (Fla. 2006), holding that substantial competent evidence supported the postconviction trial court's finding that Defendant was not mentally retarded.

Defendant now asserts that subsequent to the Florida Supreme Court's determination, the fourth edition of the Wechsler Adult Intelligence Scale (WAIS) IQ test was developed. According to Defendant, this test constitutes the most current and accurate test for a determination of mental retardation. Defendant was tested by defense expert, Hyman H. Eisenstein, Ph.D.[5] using the WAIS-IV IQ test and his IQ as established by

[5] This is the same Dr. Eisenstein about whom the Court had the following observation: "Dr. Eisenstein's testimony that in this phrase the word "present" actually refers to past, or childhood, adaptive functioning would impose an Alice-in-Wonderland definition of the word 'present.' *See* Lewis Carroll, *Through the Looking-Glass* (1872) ("When I use a word, it means just what I choose it to mean-neither more nor less."), *quoted in Hartford Ins. Co. of the Midwest v. Minagorri*, 675 So. 2d 142, 144 (Fla. 3d DCA 1996). *Jones v. State,* 966 So. 2d 319, 327 (Fla. 2007).

the new test is 61. *See* Dr. Eisenstein's Report attached to Defendant's motion. Defendant also alleges that he has deficits in his adaptive behavior according to defense expert, Harry Krop, Ph.D. Thus, Defendant is seeking to re-litigate the issue of mental retardation under the flag of newly discovered evidence, that evidence being the WAIS-IV IQ test.

(V.2, R249-250).

The Court denied Johnston's motion based on three independently adequate reasons:

Untimely

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.

Abusive Successive Motion

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 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.

Newly Discovered Evidence

The first question this Court must answer is whether this evidence, the result of the WAIS-IV test, is

truly newly discovered evidence. As part of the evidence and motion filed in this case, the defense presented the report of Dr. Eisenstein who did an evaluation of Defendant on May 5, 2009 and July 20, 2009. The purpose of the evaluation was to gain a greater understanding of Defendant's past and present intellectual functioning and to determine whether he met the criteria for mental retardation. Dr. Eisenstein administered Defendant's WAIS-IV test. Dr. Eisenstein in his report said the following about the WAIS-IV test:

> This is the most current, up to date edition of the Wechsler 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.

Dr. Krop in his report said the following:

> It is noteworthy, however that the WAIS-W 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.

Thus, is the WAIS-IV to be considered new evidence? In the case of *Schwab v. State,* 969 So. 2d 318 (Fla. 2007), the defense argued that the defendant's sentence of death was constitutionally unreliable based upon newly discovered evidence of neurological impairment arid a connection between brain pathology and sexual offense. Schwab submitted, as an attachment to his rule 3.851 motion, a report by Dr. Eisenstein, which concluded that Schwab suffered from organic brain impairment in the frontal lobe of the right brain, and two recent scholarly articles regarding brain anatomy and sexual offenses.

The Supreme Court said "as for Schwab's argument that he is entitled to a new trial due to two recent scientific articles regarding brain anatomy and sexual offense, this Court has not recognized 'new opinions'

or 'new research studies' as newly discovered evidence." *Schwab,* 969 So. 2d at 325-326.

In *Diaz v. State,* 945 So. 2d 1136 (Fla. 2006), the Florida Supreme Court held that a doctor's letter discussing lethal injection research was not newly discovered evidence because the author's conclusions were based on data previously available.

In *Rutherford v. State,* 940 So. 2d 1112 (Fla. 2006) the Florida Supreme Court concluded the ABA Report on the State's Death Penalty was not newly discovered evidence because it was a compilation of previously available information related to Florida's death penalty system and consisted of legal analysis and recommendations for reform, many of which were directed to the executive and legislative branches.

In *Morton v. State,* 995 So. 2d 233 (Fla. 2008), the defendant asserted that the trial court erred in denying his claim that newly discovered evidence from a 2004 brain mapping study, which establishes that sections of the human brain are not fully developed until age twenty-five, warranted a re-weighing of his age as a mitigating factor. The Florida Supreme Court held that it had previously rejected recognizing "new research studies" as newly discovered evidence if based on previously available date.

Here, if Defendant's argument that results from the WAIS-IV IQ test constitutes new evidence is accepted, any upgraded version of a test that produces different results favorable to a defendant could be considered newly discovered evidence. This would essentially open the flood gates for defendants to demand retesting on matters that have been fully litigated and would destroy the principles of *res judicata.*

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

Furthermore there is no evidence presented that calls into question the validity of the WAIS-III IQ test that was administered by Gregory A. Prichard, Ph. D., nor any of the previous IQ tests given to Defendant throughout his life.

. . .

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.

In summary, the Court finds that Defendant has exhausted his attempts to obtain all available relief in this case. The mental retardation issue has been fully litigated and at a hearing held February 23, 2010 at 11:00 a.m., defense counsel and the State acknowledged that there were no other issues or motions to be addressed by the Court at this time. For the foregoing reasons, Defendant's motion is summarily denied.

(V.2, R251-254, 256).[6]

THE STANDARD OF REVIEW

This Court has described its review of successive, under-

[6] In the portion of the order that is omitted, the Court reiterated the evidence from the prior mental retardation hearing. The transcript of that hearing, and the reports of the two experts, are attached to the order denying relief.

warrant rule 3.851 proceedings in the following way:

> As we explained in *Tompkins v. State*, 994 So. 2d 1072, 1080-81 (Fla. 2008):
>
> > *Florida Rule of Criminal Procedure* 3.851 governs the filing of postconviction motions in capital cases. Rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception permits filing beyond this deadline if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." *Fla. R. Crim. P.* 3.851(d)(2)(A) .... Rule 3.851 also provides certain pleading requirements for initial and successive postconviction motions. *Fla. R. Crim. P.* 3.851(e)(1)-(2). For example, the motion must state the nature of the relief sought, *Fla. R. Crim. P.* 3.851(e)(1)(C), **and must include "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought.**" *Fla. R. Crim. P.* 3.851(e)(1)(D).
>
> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to *de novo* review. *See, e.g., Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006).
>
> Because Grossman's claim was summarily denied, our review is *de novo*. *Walton v. State*, 3 So. 3d 1000,

1005 (Fla. 2009).

Grossman v. State, 2010 WL 424912 (Fla. 2010). (emphasis added).

SUMMARY OF THE ARGUMENT

Summary denial of Johnston's sixth successive motion for post-conviction relief was proper. The separate reasons relied upon for denial of relief are independently correct, and should not be disturbed.

ARGUMENT

PRELIMINARY MATTERS

There are four equally compelling and valid reasons for denying Johnston's sixth successive motion for post-conviction relief. Those reasons are addressed herein. The State suggests that it would be appropriate for this Court to affirm the denial of relief on alternative grounds to ensure that Florida's procedural rules, and the findings of the Florida Courts, are properly respected.

THE CLAIM CONTAINED IN THE SIXTH SUCCESSIVE MOTION HAS ALREADY BEEN DECIDED[7]

In his brief, Johnston raises four identifiable "reasons" that he is entitled to relief in the form of an evidentiary hearing. What Johnston does not address is that the mental retardation claim **has already been decided adversely to him.**

[7] The transcript of the June 24, 2005, hearing on Johnston's claim that he is mentally retarded is attached to the circuit court's order.

Johnston does not explain, or even mention, why he is entitled to a second determination of the same claim. This Court's 2006 decision on the mental retardation issue is *res judicata*. Johnston is not entitled to endlessly litigate that issue, nor is he entitled to file serial post-conviction relief motions each raising a single claim. The sixth successive motion falls squarely within the Rule 3.850(f) provision that a successive motion may be dismissed if "it fails to allege new or different grounds for relief and the prior determination was on the merits." As the circuit court said in denying relief:

> Here, if Defendant's argument that results from the WAIS-IV IQ test constitutes new evidence is accepted, any upgraded version of a test that produces different results favorable to a defendant could be considered newly discovered evidence. This would essentially open the flood gates for defendants to demand retesting on matters that have been fully litigated and would destroy the principles of *res judicata*.

(V.2, R253). The sole issue contained in the motion has already been decided on the merits, and summary denial was proper.[8]

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[8] Johnston continues to complain that the 2005 proceedings addressed only the IQ score component of mental retardation. Florida law is clear, as this Court held in that proceeding, that:

> We have consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See, e.g.,*

THE "INDEPENDENT RESEARCH" CLAIM

On pages 14-18 of his brief, Johnston says he is entitled to relief in the form of an evidentiary hearing because the trial court "improperly conducted independent research" prior to denying the successive motion. When the trial court's language is not taken out of context and twisted to suit one's purpose (V. 2, R. 246), it is clear that the trial court was referring to **legal** research, a conclusion that is crystal clear on reading the transcript of the February 23, 2010, hearing. (V. 2, R. 239-41). In any event, Johnston has pointed to no legal authority which stands for the proposition that a judge cannot conduct research concerning the issues pending before him. That argument is absurd, and does not provide a basis for any further proceedings of any sort.

To the extent that Johnston claims that a portion of the trial court's discussion of the WAIS-IV intelligence test is not based on information found in the "motions, files and records," that claim is refuted by Johnston's own brief. The very factors that Johnston says were improper are set out in the portion of the successive motion reproduced at pages 6-8 and 16-17 of the

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> *Jones*, 966 So.2d at 325; *Johnston*, 960 So.2d at 761. **Thus, the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation.**

Nixon v. State, 2 So. 3d 137, 142 (Fla. 2009). (emphasis added).

Initial Brief. Johnston's claim of "improper independent research" has no basis, assuming there can ever be a basis for criticizing a court for conducting research on issues pending before it. This claim is spurious.

THE MOTION IS UNTIMELY

On pages 18-19 of his brief, Johnston claims that his most recent mental retardation motion is not untimely because he was "diligent" in raising the claim. "Diligence" has nothing to do with the timeliness of the motion -- Johnston has already litigated his *Florida Rule of Criminal Procedure* 3.203 claim that he cannot be executed because he is mentally retarded. The circuit court decided the claim against him, and that holding was affirmed on appeal. Under the terms of Rule 3.203, Johnston is not allowed to bring yet another motion raising the same claim because the time for raising such a claim has long passed. The circuit court correctly found that the re-raised mental retardation claim is untimely. That procedural ruling is a sufficient reason, standing alone, to affirm the denial of relief. (V.2, R251).

To the extent that any further discussion is necessary, Johnston attempts to force his claims of "diligence" into the context of a claim that is time-barred. The concepts are not related, and, in finding the successive motion untimely, the circuit court quite rightly did not conflate the issues.

Diligence has nothing to do with timeliness under *Florida Rule of Criminal Procedure* 3.203, especially when there has already been a full judicial determination of the mental retardation claims.[9]

JOHNSTON'S SIXTH SUCCESSIVE MOTION
IS ABUSIVE

On pages 20-23 of his brief, Johnston says that his assertion that he brought the most recent mental retardation claim at the "first opportunity" is not refuted by the record and must be accepted as true. That claim is incorrect. According to the attachments to the motion, Johnston's newly-selected mental state expert, Dr. Eisenstein, evaluated Johnston on May 5 and July 20, 2009. For unknown reasons, Dr. Eisenstein did not prepare a report of that evaluation until December 2009. However, the significant fact is that the evaluation was conducted at a time that it could have been the basis for a claim in both Johnston's **fourth and fifth** successive post-conviction relief motions, which were filed in May and August of 2009. At the very least, there is no good faith reason that the "mental retardation" claim could not have been raised in the August 17, 2009, post-conviction relief motion. Because that is so, **and without conceding that the allegations contained in the**

[9] Whatever significance can be attached to the course of proceedings in *Coleman v. State*, Case No. SC04-1520, that case does not stand for the proposition that Johnston gets to litigate his mental retardation claim twice.

motion are "newly discovered," the motion should be denied as abusive under *Florida Rule of Criminal Procedure* 3.850(f). The "mental retardation" claim could have been raised in any of the 2009 post-conviction relief motions, and Johnston's failure to raise the claim until now is a bad faith abuse of the post-conviction procedure.[10]

The circuit court held that:

> 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 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.

(V.2, R251).[11] That procedural basis for the denial of relief is also correct under settled Florida law. That ruling should not

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[10] On pages 20-21 of his brief, Johnston refers to his prior initial brief's mention of WAIS-IV testing as if it had some significance. The only thing that shows is that Johnston could have raised this claim in at least his fifth successive motion to vacate. Rather than demonstrating a lack of abuse of process, that assertion, if it shows anything, demonstrates the dilatory nature of Johnston's litigation strategy.

[11] To the extent that Johnston complains that the State moved to dismiss the fifth successive motion for exceeding the scope of the remand, that argument shows nothing, especially since the state withdrew that objection. Johnston could have raised the claim, but chose not to. Because that is so, any discussion about what defenses would have been raised, and how the issue would have been disposed of, is pure speculation. *See, Way v. State,* 760 So. 2d 903, 916 (Fla. 2000).

be disturbed, either.

JOHNSTON HAS NOT PLEADED "NEWLY DISCOVERED EVIDENCE" BECAUSE THE INTELLIGENCE TEST ON WHICH THIS CLAIM IS BASED DID NOT EXIST AT THE TIME JOHNSTON LITIGATED HIS MENTAL RETARDATION CLAIM IN 2006

In the sixth successive motion, Johnston claimed that the results of an intelligence test administered to him in 2009 are "newly discovered evidence" under Florida law. This is so, according to Johnston, because those results were obtained on an intelligence test (the *Weschler Adult Intelligence Scale-IV*) that was published after the 2006 litigation concluded.[12] The intelligence test used in the 2006 litigation was the WAIS-III, which was the version of the Weschler test that was current and in use at that time. As the circuit court found, **Johnston does not challenge the results obtained on that test, nor does he suggest that the full scale score of 84 that Johnston obtained is somehow in error. Johnston has suggested nothing at all to call the WAIS-III score of 84 into question.**[13] (V.2, R.254). Johnston has offered no reason at all to justify re-opening the retardation claim.

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[12] This intelligence test, which is commonly referred to as the WAIS-IV, was released in August of 2008. *See,* http://www.pearsoned.com/pr_2008/082708a.htm.

[13] The circuit court found that there is no evidence presented that calls into question the validity of the WAIS-III IQ test that was administered by Gregory A. Prichard, Ph. D., nor any of the previous IQ tests given to Defendant throughout his life. (V.2, R254).

In an effort to obtain a second bite at the apple, Johnston says that the WAIS-IV test is "newly discovered evidence" because that test has been developed (or at least released for use) since the previous proceedings. However, that fact serves to take the test out of the "newly discovered evidence" realm and place it squarely in the posture of **new** "evidence." By Johnston's own admission, the WAIS-IV could not have been used at the time of the prior proceedings because it did not exist. Because that is so, the "evidence" that Johnston claims to present is not newly discovered at all because it fails to meet the "in existence but unknown at the time of the previous proceedings" prong of *Jones v. State*, 591 So. 2d 911 (Fla. 1991). *Kearse v. State*, 969 So. 2d 976, 987 (Fla. 2007) ("The evidence must have existed . . .").

Intelligence test scores obtained on subsequently developed intelligence tests do not fit squarely into the "newly discovered evidence" paradigm, anyway. It is well-known, based on litigation since the 2002 *Atkins* decision, that intelligence is relatively static, and, more importantly, it is well-settled that an individual cannot "fake good" (*i.e.*, artificially inflate) on an intelligence test. Likewise, it is well-known that intelligence tests are periodically "re-normed" and updated. However, that updating of tests is in no way akin to a scientific advance that renders prior testing inadequate or

inaccurate. **Johnston has said nothing to call the accuracy of the previous testing into question**, and has offered no more than the obvious comment that the WAIS-IV is the current version of the Weschler test to support his claim for relief. **That pleading deficiency is an additional reason supporting denial of relief.**

Johnston's position ignores any concept of *res judicata*, and is completely inconsistent with any notion of finality to litigation. If the law were as Johnston would have it be, the following **additional** cases in which this Court upheld a finding that the defendant is not mentally retarded would be subject to relitigation (but for *Bottoson*) based on the bare fact that the WAIS-IV test has been released for use: *Nixon v. State*, 2 So. 3d 137, 146 (Fla. 2009); *Evans v. State/McNeil*, 995 So. 2d 933, 954 (Fla. 2008); *Phillips v. State*, 984 So. 2d 503, 513 (Fla. 2008); *Bevel v. State*, 983 So. 2d 505, 519-520 (Fla. 2008); *Kearse v. State/McDonough*, 969 So. 2d 976, 992 (Fla. 2007); *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007); *Johnston v. State*, 960 So. 2d 757, 762 (Fla. 2006); *Cherry v. State*, 959 So. 2d 702, 714 (Fla. 2007); *Brown v. State*, 959 So. 2d 146, 150 (Fla. 2007); *Rodgers v. State*, 948 So. 2d 655, 668 (Fla. 2006); *Burns v. State*, 944 So. 2d 234, 249 (Fla. 2006); *Trotter v. State/McDonough*, 932 So. 2d 1045, 1050 (Fla. 2006); *Foster v. State*, 929 So. 2d 524, 533 (Fla. 2006); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006); *Zack v. State*, 911 So. 2d 1190, 1201-

1202 (Fla. 2005); *Bottoson v. State*, 813 So. 2d 31, 33 (Fla. 2002). Once the issue is decided, it is *res judicata*, and is not subject to being continually reopened merely because the defendant (as Johnston has done) can find an expert that will say something that the defense believes is more favorable to his position. *Nixon, supra*, at 1022; *Harris v. Vasquez*, 943 F.2d 930, 950 n.18 (9th Cir. 1991) (defendant does not get a second bite at the "psychiatric apple.").[14]

Finally, if Johnston's premise that only the latest intelligence test produces a valid IQ score is accepted (and that that score qualifies as "newly discovered evidence"), that means that **every** prior intelligence test (not just the ones that hurt the defendant) is no longer valid.[15] If that were the case, the pre-18 onset component of mental retardation is wiped out because it can never, under Johnston's theory, be established. That would work a change that the mental state profession and the legislature (and the United States Supreme Court in *Atkins*)

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[14] The situation Johnston has contrived to present is analogous to DNA testing under Rule 3.853. Under that rule, repetitive testing is not allowed, and there is no reason that intelligence testing should be viewed differently. The rationale against repetitive testing in the DNA context is even more applicable here, given that psychological assessment is far more subjective than DNA testing.

[15] Stated differently, if Johnston's argument is taken to its reasonable conclusion, it means that every IQ score except the most recent one is meaningless because the older scores are wiped out by the "newly discovered evidence." For this case, it means that the scores set out on page 9 of Johnston's brief are not available for consideration.

has explicitly included in the definition of mental retardation. And, if Johnston's view of intelligence testing is correct, that means that there is no stability or validity to any intelligence test except the most recent version of it. If that is the case, and that is what Johnston is saying, then the entire concept of intelligence testing lacks any semblance of reliability and accuracy, and should be the subject of a *Frye* hearing before any credence is placed on such testing. Of course, as the proponent of that evidence, Johnston has the burden of proof. Nothing contained in his filings indicates that he can meet it.

In finding that the WAIS-IV intelligence test is not "newly discovered evidence," the circuit court said:

> The WAIS-IV IQ test is not newly discovered evidence because it is merely a refinement of the WAIS-III test. Furthermore the results of the WAJS-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.
>
> ...
>
> 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.

(V.2, R253-256). *Citing*, *Morton v. State*, 995 So. 2d 233 (Fla. 2008); *Schwab v. State*, 969 So. 2d 318 (Fla. 2007); *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006).

When all is said and done, Johnston's sixth successive motion for post-conviction relief was the product of expert-shopping in an effort to litigate his case in the most piecemeal fashion possible. It is axiomatic that Johnston is not entitled to an expert opinion that is helpful to him -- it is equally clear that he is not entitled to evade the strict time limitations governing a claim of mental retardation as a bar to execution contained in *Florida Rule of Criminal Procedure* 3.203. Likewise, he is not entitled to relitigate a claim that has already been decided adversely to him, nor is he entitled to abuse the post-conviction process by piecemeal, repetitive filings. The circuit court properly denied relief, and that result should be affirmed in all respects.

CONCLUSION

For the reasons set forth above, the denial of the sixth successive post-conviction relief motion should be affirmed.

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 U.S. Mail to: **Todd D. Doss**, 725 SE Baya Dr. Suite 102, Lake City, Florida 32025-6092 on this ____ day of March, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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