IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-839

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO PRELIMINARY MATTERS

In what has become a continuing theme throughout this death warrant litigation, the State has chosen to resort to petty and personal attacks against undersigned counsel. In its Answer Brief, the State goes to great lengths to assail Mr. Johnston for filing his notice of appeal at 12:24 a.m. on February 26, 2010, rather than February 25, 2010. The State insists that this action represents "a pattern of dilatory practice." (AB 2, fn 1).

According to the Merriam-Webster dictionary, the definition for the word "dilatory" is "tending or intended to cause delay." At no point does the State explain how Mr. Johnston's notice of appeal, filed 24 minutes late, was intended to cause delay.[1] The State's assertion is especially perplexing in light of the fact that this Court had already set a briefing schedule that was in no way dependent on when the notice of appeal was filed. It is unfortunate that the State finds it necessary to engage in such unprofessional tactics when such a serious matter is concerned.

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[1]Mr. Johnston's notice of appeal was filed at 12:24 a.m. on February 26, 2010. The slight delay occurred because undersigned counsel inadvertently failed to file the notice during the day on February 25, 2010. The circuit court's order was received after 5:00 p.m. on February 23, 2010. The next day undersigned counsel began working on Mr. Johnston's initial brief in recognition of the tight briefing schedule outlined in this Court's February 22, 2010 order. The following day undersigned counsel had prepared the notice of appeal and realized shortly after midnight, while working on Mr. Johnston's initial brief, that he had forgotten to file the notice earlier in the day. Undersigned counsel then immediately filed the notice of appeal.

ARGUMENT IN REPLY

In its answer brief, the State erroneously treats Mr. Johnston's claim as an initial filing pursuant to Rule 3.203 rather than a claim based on newly discovered evidence. In doing so, the State ignores the fact that the proper analysis is dictated by this Court's decision in Jones v. State, 591 So. 2d 911 (Fla. 1991):

> 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).
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> 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). Here, Mr. Johnston has 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. Thereafter, the WAIS-IV was not available until after Mr. Johnston's original mental retardation determination. Further, 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.

The only argument advanced by the State regarding the newly discovered evidence standard of Jones consists of a confusing assertion that the evidence is "new", not "newly discovered." (AB 29). As the State attempts to explain, the evidence is "new", as opposed to "newly discovered", because it was not "in existence but unknown" at the time of Mr. Johnston's original trial (AB 29).

The State's argument evinces a gross misunderstanding of the nature of the evidence. The relevant evidence is Mr. Johnston's intellectual functioning, his IQ. Mr. Johnston's IQ has always been present, what has changed is the accuracy in measuring it. This is no different than any other forensic evidence that exists at the time of the original proceedings and subsequently a test is developed that more accurately assesses the value of that evidence.[2] The reality is that the evidence of mental retardation has always been in existence in Mr. Johnston's case, but the ability to measure and identify it has improved.

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[2]Under the State's theory, a defendant would never be able to avail himself of scientific advances in forensic testing, such as modern advances in DNA technology.

In an additional argument, despite the fact that Dr. Eisenstein did not administer the WAIS-IV IQ test at issue until July 20, 2009, the State categorizes Mr. Johnston's claim as abusive because it was not included in his fourth successive motion to vacate filed in May, 2009 (AB 27). The State further asserts that Mr. Johnston's claim should have at the very least been raised in his fifth successive motion to vacate filed on August 17, 2009. Id. This argument is advanced despite the fact that the State filed a motion to dismiss on jurisdictional grounds that very motion, alleging it exceeded the scope of this Court's remand for DNA testing.[3] For the State to now argue

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[3]The circuit court, relying on the State's motion to dismiss Mr. Johnston's fifth successive motion to vacate as well as on this Court's decision in Duckett v. State, 918 So.2d 224 (Fla. 2205), found first and foremost that it was without jurisdiction to hear Mr. Johnston's successive motion:

> As noted by the State here in its "Motion to Dismiss 'Successive Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend,'" the Florida Supreme Court's order in the instant case relinquished jurisdiction for the very limited purpose of performing DNA testing on specific items listed by Mr. Johnston. Accordingly, this court concludes that it has the authority to deny Mr. Johnston's Successive Motion to Vacate Judgment and Sentence on the basis of *Duckett* alone.

(PCR2 787)(fn omitted). Only after the circuit court made this determination did it state,

> Moreover, in an abundance of caution, the court has reviewed the motion under Rule 3.853, but still finds that there is no reasonable probability that Mr. Johnston would have been exonerated and/or had his sentence reduced based on LABCORP's DNA analysis.

that Mr. Johnston was required to bring his newly discovered evidence claim relative to mental retardation while the case was on a limited remand for DNA testing, is disingenuous.[4]

The State further asserts that Mr. Johnston is prohibited from raising a mental retardation claim since it was litigated previously. However, contrary to the State's argument, and as discussed in Mr. Johnston's initial brief, the claim brought in these proceedings is based upon newly discovered evidence of mental retardation. As the State is fully aware, previously litigated issues are often the subject of newly discovered evidence claims in successive postconviction motions. Such claims include, amongst other issues, recantations of prior testimony, cases where substantial impeachment evidence comes to light, or cases in which more accurate DNA testing has become available. And such claims, including the one set forth by Mr. Johnston, are to be evaluated under the standard this Court set forth in Jones.

Finally, the State urges this Court to envision the dreaded slippery slope that would follow if it were to consider Mr. Johnston's claim as newly discovered evidence:

(PCR2 787).

[4]Notably, neither the State nor the circuit court in its order addressed the fact that the circuit court did not have jurisdiction on August 17, 2009, to entertain a claim of newly discovered evidence of mental retardation.

> 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). (AB 30-31)(emphasis in original).

In relying on many of the aforementioned cases, the State, whether intentionally or mistakenly, is simply misrepresenting the substance of these cases to this Court. One of the individuals whose case the State claims would have to be relitigated, Clarence Hill, was executed quite some time ago by the State of Florida. Another case listed by the State, Johnston v. State, 960 So. 2d 757, 762 (Fla. 2006), is actually the same Johnston in the present case. And at least seven of the other individuals listed by the State failed to meet the standard for mental retardation under either the second (adaptive functioning) and/or third prong (onset before age 18) in addition to the first

prong (IQ score).[5] Thus, none of these cases could possibly be subject to relitigation regardless of a potentially lower IQ score. Clearly, the State's doomsday scenario has been grossly exaggerated.

CONCLUSION AND RELIEF SOUGHT

Mr. Johnston requests that this Court remand his case to the circuit court for an evidentiary hearing, for the circuit court to properly consider his motion under the applicable legal standards, and for the circuit court to subsequently vacate his judgment and sentence in the above-styled cause.

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 3, 2010.

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced

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[5]Four of the cases cited above by the State not only failed on the first prong (IQ score), but also the second prong (adaptive functioning) of the Atkins requirements. Burns v. State, 944 So. 2d 234, 248 (Fla. 2006); Trotter v. State, 932 So. 2d 524 (Fla. 2006); Brown v. State, 959 So. 2d 146 (Fla. 2007); Bevel v. State, 983 So. 2d 505, 520, fn. 8 (Fla. 2008). Two other cases failed on both the second and third prongs. Rodgers v. State, 948 So. 2d 655, 667 (Fla. 2006); Foster v. State, 929 So. 2d 524, 533 (Fla. 2006). And another case failed on all three prongs. Phillips v. State, 995 So. 2d 933 (Fla. 2008).

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