

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-356

DAVID EUGENE JOHNSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's "Order Finding Defendant Is Not Mentally Retarded" relative to Mr. Johnston's 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 summary denial.
- "PCR2." - record on appeal after fourth and fifth postconviction motion summary denial.
- "PCR3." - record on appeal after sixth postconviction motion summary denial.
- "PCR4." - record on appeal after remand for evidentiary hearing on mental retardation issue;
- "Supp. PCR4" - transcript of evidentiary hearing after remand for evidentiary hearing on mental retardation issue.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston is presently under a death warrant with a stay of execution ordered by this Court pending these proceedings. 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 death warrant.

Mr. Johnston, through counsel, urges that the Court permit oral argument.

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Argument I

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
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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 this Court, Mr. Johnston's conviction and sentence was 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 this 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). 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. On appeal, 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 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 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.

On appeal, subsequent to briefing and oral argument, this Court stayed the execution and relinquished jurisdiction to the circuit court for an evidentiary hearing on the issue of whether newly discovered evidence indicates that Mr. Johnston is mentally retarded pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), section 921.137, Florida Statutes (2009), and Cherry v. State, 959 So. 2d 702 (Fla. 2007).

Following an evidentiary hearing upon remand, the circuit

court determined that Mr. Johnston is not mentally retarded by order rendered April 5, 2010. This appeal follows.

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.

STATEMENT OF FACTS

During the evidentiary hearing following this Court's remand, collateral counsel called four witnesses to testify as to the newly discovered evidence of Mr. Johnston's mental retardation. These witnesses included not only experts in psychology and mental retardation, but also individuals with expertise in psychometric theory/measurement and theory in the administration of intelligence instruments.

Dr. Eisenstein, a clinical psychologist, testified that he conducted an evaluation of Mr. Johnston on May 5, 2009 and July 20, 2009 (Supp. PCR4 68). Dr. Eisenstein administered a number of tests, including the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) (Supp. PCR4 68).² In addition, Dr. Eisenstein

²Dr. Eisenstein also administered the Expressive Vocabulary Test, the MMPI, the Peabody Picture Vocabulary Test, the Rey Ostrich Complex Figure, the Test of Memory Malinger, the Wide-Range Achievement Test, the Wisconsin Card Sorting Test, the Halstead Category Test and the Kaufman FAST Test (Supp. PCR4 68).

reviewed numerous records and reports, including reports from Drs. Blandino, Fleming and Prichard, as well as records from the Monroe Regional Mental Health Center, the Louisiana Northeast Special Education Center, the Ouchita Parish School Board, a social investigation report from the assistant chief juvenile officer and a Florida Department of Corrections adaptive behavior checklist (Supp. PCR4 69). Moreover, Dr. Eisenstein conducted a telephone interview with Mr. Johnston's brother, Clifford Johnston, as well as with Mr. Johnston's stepmother, Careen Johnston (Supp. PCR4 69).

In discussing Mr. Johnston's educational records, Dr. Eisenstein noted that starting with grade one in 1967, Mr. Johnston received unsatisfactory grades in all subjects (Supp. PCR4 75). Mr. Johnston was in regular first grade for the first three months before being placed in a special education class (Supp. PCR4 75). A report card from 1971 established that Mr. Johnston was still in special education (Supp. PCR4 75). And for part of the next year (1972), Mr. Johnston continued to attend special education (Supp. PCR4 75). However, in the latter part of that school year, which was a third grade class, Mr. Johnston quit school and was sent to Leesville to a school for the retarded for four years; he then returned and was placed in a special education class for one year (Supp. PCR4 76).

Dr. Eisenstein reviewed a later social investigation report

authored by D.W. Channault, wherein it was indicated by Mr. Johnston's father that his son was unable to stay out of trouble and was retarded (Supp. PCR4 73, 76). D.W. Channault also stated in the report, "We have a 16-year-old-boy who is badly retarded." (Supp. PCR4 76). Additionally, Dr. Eisenstein reviewed a psychiatric evaluation conducted by John P. Burton, MD (Supp. PCR4 76). Dr. Eisenstein found the following statement by Dr. Burton to be significant, "My impression is unsocialized aggressive reaction of childhood and adolescent, mental retardation mild, institution placement is strongly recommended." (Supp. PCR4 76).

With regard to his own testing, Dr. Eisenstein testified that he administered the Test of Memory Malinger (TOMM), which evaluates one's ability to answer questions in a truthful and honest manner (Supp. PCR4 76-77).³ He also administered the Peabody, which tests one's ability to understand spoken language (Supp. PCR4 77). Mr. Johnston received a standard score of 40, which is a percentile ranking of less than .1, and an age equivalent of six years, six months (Supp. PCR4 77).

Mr. Johnston scored poorly on a number of other tests. On the Trail Making Test, which measures one's ability to sustain attention and perform a simple task, Mr. Johnston scored in the

³The TOMM showed no indication of malingering (Supp. PCR4 111).

profound range of impairment (Supp. PCR4 77-78). On the Halstead Category Test, which measures executive functioning, Mr. Johnston had trouble understanding the test and became increasingly frustrated (Supp. PCR4 79-80). Again, Mr. Johnston scored in the profoundly impaired range (Supp. PCR4 80).

As part of his analysis, Dr. Eisenstein also reviewed an adaptive behavior checklist from the Department of Corrections which was completed in 2002:

Q What did you find significant within that report?

A The sum of ratings was 33 on this checklist of 12 different functions. The scale goes from zero, which is extremely severe impairment, three to four, which is adequate or within the normal limits. So there's - - this is a range between four to zero. One is severe, two is moderate and three is mild. The overall sum on these 12 different functions of adaptive functioning, adaptive behavior was 33. The 33 places Mr. Johnston at the low end of the marginal level of adaptive functioning.

(Supp. PCR4 81-82).

In his interview with Careen Johnston, Dr. Eisenstein noted that she reported that Mr. Johnston had trouble comprehending; he often slobbered very badly while eating; he couldn't dress himself well; he couldn't hold thoughts in his mind; he had no driver's license or bank account; he had odd jobs that he couldn't hold on to; he couldn't fill out a job application; his reading wasn't good; his communication skills were impaired; he had mental health issues and took Thorazine and other

psychotropic medications; he received Social Security disability when he was 16 or 17 years old; and he went to a school for the mentally retarded (Supp. PCR4 84-85).⁴

In terms of mental retardation, Dr. Eisenstein first discussed subaverage intellectual functioning (Supp. PCR4 89). Mr. Johnston had a number of IQ tests in his records (Supp. PCR4 89). In 1967, at age seven, he was administered the Stanford-Binet and obtained a score of 57 (Supp. PCR4 89). In 1972, at twelve years old, Mr. Johnston was administered the Wechsler Adult Intelligence Scale for Children (WISC), and he obtained a full-scale score of 65 (Supp. PCR4 89-90). In 1974, Mr. Johnston obtained a full-scale score of 80 on the WISC (Supp. PCR4 90).⁵ In 1988, Mr. Johnston was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R), and he obtained a verbal IQ score of 75 and a performance IQ score of 101 (Supp. PCR4 90). The full-scale IQ score was not reported (Supp. PCR4 90). In 2000, Mr. Johnston was administered the WAIS-III, and he obtained a full-scale score of 76 (Supp. PCR4 90). And in 2005, Mr. Johnston was again administered the WAIS-III, and he obtained a

⁴Clifford Johnston related similar information in his interview with Dr. Eisenstein (Supp. PCR4 86).

⁵However, there was no actual report for this score; it was just reported in other documents (Supp. PCR4 119).

full-scale score of 84 (Supp. PCR4 89-90).⁶

In July of 2009, Dr. Eisenstein administered the WAIS-IV (Supp. PCR4 91). Mr. Johnston obtained a verbal comprehension score of 61 (.5 percentile), a perceptual reasoning score of 82 (twelfth percentile), a working memory score of 63 (first percentile), processing speed of 56 (.2 percentile), and a full-scale IQ score of 61 (.5 percentile)(Supp. PCR4 91-93). Mr. Johnston scored at two and almost two-thirds standard deviations below the mean (Supp. PCR4 94).

In his testimony, Dr. Eisenstein explained the differences between the WAIS-IV and the previous tests:

The way that the IQ score is constructed is based on research data that has a normative sample, and the normative sample, the scores from the factor analysis of the various different subtests. That analysis basically is a breakdown of the various different subtests into different categories. Those index scores is what the new IQ has now incorporated, unlike the previous IQ where there was just verbal and there was a performance, which then yielded the full-scale IQ score. The factor scores are the breakdown into various different subtests that create various different indexes. The indexes are a greater understanding of different functions that the individual is performing on. So the breakdown is far greater and certainly more definitive, so it's really - -it's really a new formulation of the test in terms of index scores, unlike the previous traditional verbal and performance IQ scores. And those index scores then are the breakdown of the various different subtests. So the WAIS-IV is constructed based on the statistical analysis that has been going on with the test for quite a while and moving away from what has always been

⁶Dr. Eisenstein noted that there is a practice effect, thus scores do increase (Supp. PCR4 119).

though as the traditional verbal and performance IQ scores. And now we have index scores which is really more definitive and more correct, precise assessment of an individual's skill levels.

(Supp. PCR4 91-92). Dr. Eisenstein testified that the WAIS-IV is the instrument that is now considered to be the standard of practice, the one that research now has validated as being the definitive instrument for assessing intellectual function (Supp. PCR4 94). The IQ from the WAIS-IV is certainly a more accurate reflection of true IQ values (Supp. PCR4 126). As Dr. Eisenstein further explained:

[T]he WAIS-IV reconfigures the way we think about IQ. And it's not a reconfiguration of the old but it's something that is really brand new. The brand new evaluation is perhaps landmark in the sense that we don't look anymore at the way we've thought about IQ for several decades as being verbal/performance plus those two which will equal the full-scale IQ score.

* * *

And it is now in the WAIS-IV we have the new way of looking at what IQ is all about in terms of these different factor analysis and pulling things apart.

There is some interesting things to talk about the WAIS-IV. There's - - as you can see, there's certain skills that are extremely low and certain skills still remain higher. For example, the PRI, the Perceptual Reasoning Index, equals 82. Now, 82, in and of itself, is not obviously below 70. So we - - and we take a look at the pattern of results. The pattern of results that's been consistent throughout all the different IQ scores is that his verbal skills have been lower and the perceptual, nonverbal have been higher. The split has been consistent throughout his entire, you know, his entire life, basically.

So when I talk about - - also about not faking bad, you see there's not faking bad even on the WAIS-IV because, again, there are skill levels, there is a

discrepancy of 21 points between the verbal index of 21 points between the verbal index of 61, the perceptual index of 82. But what happens is, there's a loading on the other skills that includes processing skills and working memory, and those skills are consistent with the much lower verbal IQ scores, and then because of this reconfiguration of the way this finally -- the IQ is scored, the whole score then drops.

(Supp. PCR4 124-26).

Addressing onset before age 18, Dr. Eisenstein noted that two IQ tests reflected scores below 70 (Supp. PCR4 95).⁷ Further, the psychiatric evaluation from the Monroe Regional Mental Health Center in 1973 classified Mr. Johnston as "mental retardation mild." (Supp. PCR4 99). And, Mr. Johnston had been admitted to the Leesville School for the Mentally Retarded (Supp. PCR4 100). Based on the WAIS-IV, the previous testing, Mr. Johnston's history and documentation, and on record review, Dr. Eisenstein concluded that Mr. Johnston meets the criteria for an individual who has subaverage general intellectual functioning that manifested before the age of 18 (Supp. PCR4 100).

As to Mr. Johnston's adaptive functioning, Dr. Eisenstein concluded that he meets the criteria for at least two areas that

⁷Dr. Eisenstein further noted that the examiner felt that this was a depressed intellectual assessment due to the many problems that Mr. Johnston was experiencing, including emotional problems, evidence of moderate to severe levels of perceptual problems and/or brain damage, schizophrenia and multiple other psychiatric diagnoses (Supp. PCR4 95-96, 121). Dr. Eisenstein characterized this as comorbidity, which is the phenomena where more than one impairment coexists at the same time (Supp. PCR4 96-97). This, however, does not disqualify someone as being mentally retarded (Supp. PCR4 97).

were significantly below levels of impairment that would constitute significant adaptive functioning impairment (Supp. PCR4 101). The first area is communication, where Mr. Johnston reads at the first grade level and his understanding of the spoken language is the equivalent of six years, six months (Supp. PCR4 101). Mr. Johnston's ability to articulate language was the age equivalent of 11 years (Supp. PCR4 101). These findings are further corroborated by the Florida Department of Corrections checklist (Supp. PCR4 101-02).

Mr. Johnston also did not have a stable work history and he has a deficit in adaptive functioning as it relates to social interpersonal skills (Supp. PCR4 102). He was a loner, he preferred to be around older people, and he would holler at children and didn't want them nearby (Supp. PCR4 102). And as noted on the DOC checklist completed by a psychologist specialist, the categories of socialization, interpersonal skills, group skills and interview behavior were found to be moderately impaired (Supp. PCR4 102-03).

Dr. Eisenstein concluded that Mr. Jonston meets the definition for mild mental retardation (Supp. PCR4 104).

Dr. Frank Gresham is a professor of psychology as Louisiana State University as well as the director of the school psychology program at that institution (Supp. PCR4 143). He has been a professor of psychology since 1979 (Supp. PCR4 143). He

currently teaches a course in psychometric theory, which is the theory that governs how tests are developed, what their technical characteristics are, and how they are validated (Supp. PCR4 144). He also has a specialization in mild mental retardation (Supp. PCR4 149). Additionally, Dr. Gresham has received federal research funding grants from the Department of Education looking at issues surrounding individuals with mental retardation and learning disabilities (Supp. PCR4 145). Much of the research funding dealt with the population of individuals having mental retardation (Supp. PCR4 149).

Dr. Gresham has published over 175 journal articles, including one titled "Applied Neuropsychology and Intellectual Assessment in *Atkins* cases" (Supp. PCR4 147). As to the psychometric theory, as part of his work Dr. Gresham has studied the WAIS testing series, including the WAIS-IV (Supp. PCR4 148).

After being accepted by the court in the area of psychology, mental retardation and psychometric theory, Dr. Gresham explained the history of the WAIS series and the distinctions between the WAIS-IV and the previous WAIS tests (Supp. PCR4 150-52). Dr. Gresham testified that the previous WAIS tests maintained a verbal IQ/performance IQ distinction, and then added those two together to form the full-scale IQ (Supp. PCR4 152, 156). The WAIS-IV is dramatically different because it went away from the verbal/performance IQ structure and now reports four index

scores, which are verbal comprehension, working memory, perceptual reasoning and processing speed (Supp. PCR4 152, 156). The WAIS-IV is a dramatically different structure than was available for the WAIS-III (Supp. PCR4 152-53). The WAIS-IV is a total reconfiguration of the scale, not just a refinement (Supp. PCR4 173).

Dr. Gresham also explained that every IQ test is a norm referenced test, which signifies that the test scores have no meaning in and of themselves unless they are compared to a normative sample of people of the same age (Supp. PCR4 153). As for the WAIS series, the normative samples are recalibrated based on the revision of the test because they become outdated (Supp. PCR4 153-54). The 1967 Stanford-Binet given to Mr. Johnston was normed in 1958; the 1972 WISC was normed in 1947, the 1988 WAIS-R was normed around 1979, and the 2000 and 2005 WAIS-III tests were normed in 1995 (Supp. PCR4 155).

According to the WAIS-IV Manual, the WAIS-IV was developed in light of research and cognitive psychology, developmental psychology and psychometric theory to yield a more accurate estimate of an individual's intelligence (Supp. PCR4 158-59). Further, the manual mentions the need for providing updated norms for the Wechsler test (Supp. PCR4 159). Dr. Gresham reiterated that the WAIS-IV is a more accurate indication of Mr. Johnston's IQ than the other listed scores (Supp. PCR4 173). It is a better

scale in terms of the psychometrics of it, and it has more updated norms, from 2006 (Supp. PCR4 174).⁸

Dr. Harry Krop, a psychologist, evaluated Mr. Johnston on May 1, 2009 (Supp. PCR4 186). This was a clinical interview focusing on an evaluation for competency and mitigating factors not addressed earlier (Supp. PCR4 187). It was from that interview that Dr. Krop expressed concerns to collateral counsel that there may be an issue of mental retardation (Supp. PCR4 187). Dr. Krop recommended that the WAIS-IV be administered (Supp. PCR4 187). Research and literature showed that the WAIS-IV was probably the most reliable and accurate assessment of intellectual functioning (Supp. PCR4 187). It is also Dr. Krop's opinion that the WAIS-IV is a better test in terms of current measurements and is a more valid and reliable test of a person's intellectual functioning (Supp. PCR4 213).

After Dr. Eisenstein administered the WAIS-IV, Dr. Krop consulted with him and received the raw data (Supp. PCR4 188). After reviewing it and consulting with Dr. Eisenstein, Dr. Krop did not see any reason to think that the test was not valid (Supp. PCR4 188-89). Further, Mr. Johnston's scoring on the WAIS-IV reflected the same variability on all the other tests

⁸The normative sample is based on the U.S. Census Bureau of Statistics stratified by race, age, socioeconomic status, mother's level of education and geographic regions (Supp. PCR4 177-78).

where the nonverbal areas were much better than the verbal areas (Supp. PCR4 201-02). Moreover, Dr. Krop submitted that the testing certainly could have reflected Mr. Johnston's brain damage which numerous evaluators have suggested exists with Mr. Johnston (Supp. PCR4 201-02). Because of the reconfiguration of the WAIS-IV, Mr. Johnston ended up with a much lower score as opposed to the prior versions of the WAIS (Supp. PCR4 202).

Dr. Krop proceeded to determine the adaptive functioning level of Mr. Johnston (Supp. PCR4 189). Dr. Krop explained that you do three things when doing an adaptive assessment: Interview the client, review as much collateral material as possible,⁹ and do a formal adaptive assessment measure using independent informants who are familiar with the defendant (Supp. PCR4 189-90).

In this case, Dr. Krop utilized the Adaptive Behavior Assessment System (ABAS), which is a questionnaire to be filled out with the individuals familiar with the defendant (Supp. PCR4 190-91). Dr. Krop made contact with three of Mr. Johnston's family members, Careen Johnston, Clifford Johnston and Deborah Johnston (Supp. PCR4 191). Careen and Clifford Johnston completed the ABAS, the results of which demonstrated that Mr. Johnston was significantly deficient or limited in adaptive

⁹Dr. Krop noted that Mr. Johnston had voluminous records in terms of psychiatric history and evaluations (Supp. PCR4 190).

functioning (Supp. PCR4 192).

In reviewing the collateral records in this case, Dr. Krop observed that the Florida Department of Corrections in 2002 performed an adaptive behavior checklist, which concluded that Mr. Johnston had a marginal adjustment to even a highly structured prison setting; and in some of the specific areas, he was considered to be severely impaired (Supp. PCR4 193). Another document from Larned State Hospital in 1981 described Mr. Johnston's level of adaptive functioning as very poor (Supp. PCR4 193). And in those same records, a Dr. Blake described Mr. Johnston's communication skills also as poor (Supp. PCR4 193-94).

In a 1975 report from Leesville State School, Mr. Johnston was described as having an adaptive behavioral level of three, which is low (Supp. PCR4 194). The prognosis for independence and productivity was poor, and Mr. Johnston had significant deficiencies in interpersonal relations, responsiveness and cultural conformity (Supp. PCR4 194).

Mr. Johnston's school records demonstrated an inability to conform to classroom situations (Supp. PCR4 194). And Mr. Johnston's vocational history shows that he had three jobs in his lifetime, the longest of which was working at a carnival for two months (Supp. PCR4 194). Mr. Johnston was fired from these jobs

(Supp. PCR4 194).¹⁰ Dr. Krop concluded that in almost every capacity and in almost every environment that Mr. Johnston has been in, he has had difficulty adjusting or adapting (Supp. PCR4 195).

With regard to the two sub 70 IQ scores where the examiner suggested that the scores might be an underestimate of Mr. Johnston's true intellectual functioning, Dr. Krop noted that the same person made both comments (Supp. PCR4 197). And these comments were based, in part, because of significant scatter and uneven performance in the tests (Supp. PCR4 197).¹¹ Dr. Krop believes that while this presumption was common back then, more advanced research shows that it is not unusual for persons with lower IQs to have more variability than an individual who scores at a higher IQ range (Supp. PCR4 197-98). Moreover, the same examiner also reported in January of 1968 and May of 1972 that Mr. Johnston continued to function within the mentally retarded educable range (Supp. PCR4 200). Dr. Krop believes that the issue here is that Mr. Johnston was functioning at the mentally retarded range from many sources to the point where he was placed

¹⁰Dr. Krop also noted that Mr. Johnston has been eligible for social security and was receiving disability funds for a mental disability (Supp. PCR4 195).

¹¹The examiner also suggested that the scores were an underestimate because of Mr. Johnston's emotional problems (Supp. PCR4 199).

in a program for the mentally retarded (Supp. PCR4 200).¹²

It is Dr. Krop's opinion that Mr. Johnston is mentally retarded using the definition that is in the Diagnostic and Statistical Manual as well as the American Psychiatric Association (Supp. PCR4 202).

Dr. Gordon Taub is an associate professor of school psychology at the University of Central Florida (Supp. PCR4 233). Amongst other subjects, Dr. Taub teaches intelligence theory measurement, which instructs students how to administer, score and interpret test intelligence (Supp. PCR4 234). Dr. Taub also has work and research experience regarding psychometric measurement and theory, including having published approximately 17 peer-reviewed articles (Supp. PCR4 234-36). Dr. Taub was accepted by the court as an expert in psychometric measurement and theory in the administration of the intelligence instruments (Supp. PCR4 236).

Dr. Taub authored an article in 2001 titled *A confirmatory analysis of the Wechsler Adult Intelligence Scale, Third Edition: Is the verbal/performance discrepancy justified?* (Supp. PCR4 236, 241; D-Ex. 4). Dr. Taub was interested in the fact that although the WAIS-III was developed with the idea of a four-factor model

¹²Moreover, Dr. Krop submitted that the testing certainly could have reflected Mr. Johnston's brain damage which numerous evaluators have suggested exist with Mr. Johnston (Supp. PCR4 198).

(processing speed, perceptual reasoning, working memory and verbal comprehension), the actual scoring of the instrument was a two-factor verbal/performance dichotomy (Supp. PCR4 237). Thus, there was no opportunity to calculate IQ using the four-factor model (Supp. PCR4 238). Dr. Taub wanted to know if the WAIS-III was providing an accurate measure of intelligence or if there was an alternative scoring system that would have been better (Supp. PCR4 233, 238). Performing a study utilizing structural equation modeling, Dr. Taub attempted to determine whether the verbal/performance dichotomy fit the data or correlation among all the subtests, or was there another scoring method that would have been better to fit the data (Supp. PCR4 239-40). Dr. Taub determined that the best way to score the WAIS-III was the four factor model consisting of verbal comprehension, perceptual organization, working memory and processing speed, the theory implied by the WAIS manufacturers but not used to score the instrument (Supp. PCR4 241). This theory, which was implied in the WAIS-III, is the current scoring system for the WAIS-IV (Supp. PCR4 241).¹³ In sum, Dr. Taub stated that the cause for the differentiation in the scoring is the application being explicit in the WAIS-IV and implicit in the WAIS-III (Supp. PCR4 242).

¹³Thus, the WAIS-IV conforms to the model that Dr. Taub had proposed (Supp. PCR4 241).

Dr. Taub authored another article in 2004 regarding the factor structure on the WAIS-III (Supp. PCR4 244; D-Ex. 5). This article also examined whether the WAIS-III was truly providing a good measure of intelligence (Supp. PCR4 245). Dr. Taub concluded that if the four-factor model had been utilized in the WAIS-III, it would have been a stable instrument across time, across all the age ranges within the normative sample (Supp. PCR4 245-46).

Dr. Taub concluded that the four-factor model utilized in the WAIS-IV constitutes a major revision from the WAIS-III (Supp. PCR4 247). Further, he stated that while the WAIS-IV is scoring the instrument according to the factor structure described in the manual, the WAIS-III is not, and thus the scoring method is flawed at the verbal/performance factor determination (Supp. PCR4 251). Dr. Taub stated that extreme caution needs to be used when interpreting these scores (Supp. PCR4 265).

In response to questions regarding the range of IQ scores received by Mr. Johnston, Dr. Taub stated that when a test administration takes place, the score that is received is the true score as of that point in time (Supp. PCR4 250-51; 258).¹⁴

¹⁴The State moved to strike Dr. Taub's testimony on the basis of Frye, in that Dr. Taub had not shown that his theory had gained general acceptance in the scientific community (Supp. PCR4 266-67). The court granted the motion to strike (Supp. PCR4 270). After the court's ruling collateral counsel subsequently moved the court to reconsider on the basis that Dr. Taub's two articles had been cited to 34 times in peer-review materials, a

Following the presentation of witnesses by Mr. Johnston, the State called two witnesses, Drs. Prichard and Blandino, to testify to their opinion that Mr. Johnston is not mentally retarded.

Dr. Prichard is a clinical psychologist who was asked by the State Attorney's office to do a mental retardation assessment of Mr. Johnston in May 2005 (Supp. PCR4 318). Dr. Prichard testified that he reviewed numerous background records and court transcripts (Supp. PCR4 318-19). In 2005, Dr. Prichard concluded that Mr. Johnston clearly did not meet the criteria for mental retardation (Supp. PCR4 318).

Recently, Dr. Prichard was again asked to review information regarding Mr. Johnston (Supp. PCR4 319). Dr. Prichard reviewed information provided by Dr. Krop, Dr. Eisenstein and collateral counsel (Supp. PCR4 319-20). Dr. Prichard again concluded that Mr. Johnston is not mentally retarded (Supp. PCR4 320).

In arriving at this determination, Dr. Prichard relied on the previous IQ testing and the comments on the sub 70 scores that while Mr. Johnston was testing in the educable mentally retarded range, that did not appear to be reflective of his

process which ensures the scientific integrity of whatever information or data is being presented in the paper (Supp. PCR4 281-284). The court reserved ruling on the issue (Supp. PCR4 314). Subsequently, in its order denying relief, the court found Dr. Taub's testimony to be admissible (PCR4 55).

optimal performance (Supp. PCR4 321).¹⁵ Dr. Prichard considers these tests to be invalid (Supp. PCR4 331). Dr. Prichard testified that regardless of the score generated, whether it be high or low, he would disregard it if there is an indication from the examiner that the score may not reflect one's true ability due to emotional problems (Supp. PCR4 348-49). Yet, when Dr. Prichard conducted the WAIS-III in 2005, he noted in his comments that Mr. Johnston was rambling, that he had auditory hallucinations and was anxious, that he had poor sleep and appetite patterns, that he would lose focus, that he believed his food was being poisoned, and that his emotional presentation was unstable (Supp. PCR4 350-51).¹⁶ And in the 1974 score, which Dr. Prichard indicated was the most valid of the ones prior to the age of 18, the test examiner stated that there were some indications of test-wiseness, especially on the performance section (Supp. PCR4 352-53).¹⁷

When asked about the extreme disparity between the 2005

¹⁵However, as was pointed out to Dr. Prichard, subsequent to the two sub 70 IQ tests being rendered, the psychiatric director of the institution labeled Mr. Johnston as "mental retardation, mild." (Supp. PCR4 360).

¹⁶According to Dr. Prichard's WAIS-III testing in 2005, Mr. Johnston scored a 76 on the verbal, a 95 on the performance, and had a full-scale score of 84 (Supp. PCR4 325). Dr. Prichard has since discovered a one point error in the scoring, and hence Mr. Johnston actually had a full-scale IQ of 83 (Supp. PCR4 325).

¹⁷This was Mr. Johnston's third IQ test in seven years (Supp. PCR4 353).

score on the WAIS-III and the 2009 score on the WAIS-IV, Dr. Prichard opined that it was not the product of the testing instruments (Supp. PCR4 325).¹⁸ Dr. Prichard did acknowledge, however, that he has never published or authored any articles relating to the WAIS-III or WAIS-IV, nor has he reviewed any articles about construct validity research as it relates to the WAIS-III and WAIS-IV (Supp. PCR4 346, 367). Further, Dr. Prichard admitted that he did not know the theory of intelligence that the WAIS-IV is based on or how that theory is utilized to obtain a full-scale IQ score other than just the fact that there's four factors (Supp. PCR4 361). Dr. Prichard also admitted that he isn't qualified to testify as to this area, nor does he have any independent support for his position (Supp. PCR4 361, 368).

Dr. Prichard further acknowledged that the WAIS-IV is the most valid, reliable test available right now and that its important to update the norms (Supp. PCR4 338, 355). He also acknowledged that the WAIS-IV was a reconfiguration of the WAIS-III, in that it went from the two-factor model to the four-factor model (Supp. PCR4 344). Moreover, Dr. Prichard agreed that some of the subtests on the WAIS-III were dropped and not included on

¹⁸Instead, Dr. Prichard suggested that the disparity could be due to anxiety, motivation or a poor testing environment (Supp. PCR4 326-27).

the WAIS-IV (Supp. PCR4 345).¹⁹ And, Dr. Prichard also acknowledged that on every single IQ test Mr. Johnston's performance was higher than his verbal; and that now, the performance part is only one of the four factors to be considered (Supp. PCR4 346).

Because Dr. Prichard was of the opinion that Mr. Johnston didn't meet the first prong for mental retardation, Dr. Prichard didn't do any adaptive functioning testing (Supp. PCR4 341-42). However, Dr. Prichard did note that he reviewed a 2005 court transcript wherein Mr. Johnston spoke to the court (Supp. PCR4 337-38). Dr. Prichard thought the transcript was compelling because Mr. Johnston expressed himself well, not like someone who is mentally retarded (Supp. PCR4 338). Also, Dr. Prichard reviewed some letters in 2005 that Mr. Johnston denied were written by him (Supp. PCR4 338). According to Dr. Prichard, the writings in the letters exceeded the ability of a mentally retarded person (Supp. PCR4 338). And, Dr. Prichard testified that he had been made aware of the fact that Mr. Johnston has legal books and transcripts in his cell (Supp. PCR4 339). Dr. Prichard opined that these legal materials seemed "pretty extensive" for a mentally retarded person (Supp. PCR4 339).

Dr. Salvatore Blandino is a licensed psychologist who was

¹⁹For instance, the picture arrangement on the WAIS-III, wherein Mr. Johnston had one of his highest scores, was not included in the WAIS-IV (Supp. PCR4 345).

accepted by the court as an expert in the area of clinical psychology (Supp. PCR4 371-73). Dr. Blandino previously examined Mr. Johnston in 2005 and was reappointed to evaluate Mr. Johnston for the present proceedings (Supp. PCR4 374). Dr. Blandino reviewed records and transcripts in preparation for the case (Supp. PCR4 374-75). Dr. Blandino's opinion, as it was in 2005, is that Mr. Johnston is not mentally retarded (Supp. PCR4 375).

Dr. Blandino proceeded to go through the history of Mr. Johnston's IQ scores, starting with the three IQ tests administered prior to the age of 18. Dr. Blandino noted the cautionary language that Mr. Johnston's sub 70 scores on his first two IQ tests may have been influenced by evidence of moderate to severe levels of perceptual problems, brain damage, a detrimental familial environment and high levels of anxiety (Supp. PCR4 377-80).²⁰ Dr. Blandino did give credit to Mr. Johnston's third IQ test which had a full-scale IQ score of 80 (Supp. PCR4 383). Dr. Blandino felt that the most important thing with this score was that there was no cautionary statement (Supp. PCR4 384). Dr. Blandino disagreed with the notion that the examiner's caution of test-wiseness, especially on the

²⁰Dr. Blandino did acknowledge that brain damage doesn't rule out mental retardation; there can be a comorbidity (Supp. PCR4 400). Further, he acknowledged that brain damage can be a cause of mental retardation (Supp. PCR4 402). But given Dr. Blandino's view of the IQ scores, he couldn't see how Mr. Johnston is mentally retarded (Supp. PCR4 402).

performance section, was a cautionary statement (Supp. PCR4 403).

Dr. Blandino opined that the subsequent test scores reflected a consistent pattern of performance (Supp. PCR4 384). Thus, according to Dr. Blandino, there is a consistent pattern if you eliminate the first two scores as invalid and consider the 2009 score to be an outlier (Supp. PCR4 410-12).

In addressing the 2009 test score, Dr. Blandino acknowledged that this was the most recent measure (Supp. PCR4 389). But he claimed that the results are only as good as the information given to get the results (Supp. PCR4 389-90). Dr. Blandino attributed the lower WAIS-IV score to stress, emotional difficulties and behavioral problems as a result of being under an active death warrant (Supp. PCR4 392).

Dr. Blandino was of the opinion that the WAIS-III and WAIS-IV had an almost perfect correlation (.94), thus the scoring differences weren't due to reconfiguration (Supp. PCR4 390-91). According to Dr. Blandino, while three of the subtests from the WAIS-III were removed and another one was added to the WAIS IV, ultimately, you still get a full-scale IQ score (Supp. PCR4 398). After making this statement, Dr. Blandino did acknowledge that by definition, every single IQ test does that (Supp. PCR4 398). And he also acknowledged that the factors that go into obtaining that IQ score are completely different (Supp. PCR4 398).

Dr. Blandino further acknowledged that he has done no

research nor authored any articles as to any of the WAIS tests or the differences between the two-factor model and the four-factor model (Supp. PCR4 399-400). Moreover, Dr. Blandino acknowledged that he has not reviewed any articles addressing this issue (Supp. PCR4 400).

Dr. Blandino testified that he didn't formally assess the adaptive functioning issue (Supp. PCR4 393). But he was critical of Dr. Krop's adaptive functioning assessment because Dr. Krop relied on people who hadn't seen Mr. Johnston in years (Supp. PCR4 395). And Dr. Blandino was also critical of the fact that Mr. Johnston purportedly wrote a 12-page letter to a pen pal in Germany (Supp. PCR4 395-96).

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 trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

ARGUMENT I

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.

In remanding Mr. Johnston's case, this Court stated, "Having reviewed the record in this case, including prior proceedings, we

reverse the summary denial of Johnston's newly discovered evidence claim relating to mental retardation and temporarily relinquish jurisdiction to the circuit court for thirty days for an evidentiary hearing to be held on the issue of whether newly discovered evidence indicates that Johnston is mentally retarded pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), section 921.137, Florida Statutes (2009), and Cherry v. State, 959 So. 2d 702 (Fla. 2007)." Johnston v. State, Case No. SC10-356 (Fla. March 4, 2010).

During the evidentiary hearing Mr. Johnston presented expert testimony establishing that he recently obtained an IQ score of 61 utilizing the newly promulgated WAIS-IV test. Mr. Johnston also established that the WAIS-IV is the most current and accurate test available. Mr. Johnston further presented rational, objective, and scientific reasoning which logically explains the disparity between the score Mr. Johnston obtained on the WAIS-IV and the score which Mr. Johnston obtained on the 2005 WAIS-III.

In opposition to Mr. Johnston's evidence, the State failed to discredit the WAIS-IV²¹ or the score which Mr. Johnston obtained on it. Rather than addressing, as this Court ordered, whether the newly discovered evidence indicates that Mr. Johnston

²¹In fact, Dr. Prichard, one of the State's experts, acknowledged that the WAIS-IV is the most valid, reliable test available right now (Supp. PCR4 338, 355).

is mentally retarded, the State focused on previous testing showing Mr. Johnston's IQ score to be above 70.

The circuit court, in its order denying relief, adapted the State's faulty argument and denied relief. As will be shown below upon an examination of each prong of the mental retardation standard, the circuit court's determination was erroneous.

A. Mr. Johnston has significantly subaverage general intellectual functioning.

Dr. Eisenstein administered Mr. Johnston the WAIS-IV IQ test on July 20, 2009. Mr. Johnston's IQ score was a 61, well below the bright-line cutoff score of 70 required under this Court's decision in Cherry. Both Drs. Eisenstein and Krop recognized the test as valid and properly administered (Supp. PCR4 188-89). Neither of the State's experts disputed these facts; rather, they simply disregarded them and instead continued to rely on selective prior testing showing IQ scores above 70 to conclude that Mr. Johnston is not mentally retarded.²²

In its order finding that Mr. Johnston does not have significantly subaverage intellectual functioning, the circuit court stated, "[T]he Court finds the testimony of the State's witnesses to be more detailed and to provide more credible

²²For instance, in arriving at his determination that Mr. Johnston is not mentally retarded, Dr. Prichard relied on the previous IQ testing and the comments on the sub 70 scores that while Mr. Johnston was testing in the educable mentally retarded range, that did not appear to be reflective of his optimal performance (Supp. PCR4 321).

explanations for the disparities in Defendant's test scores in the seven IQ tests" (Supp. PCR4 57). Specifically, with regard to the actual issue as to whether the WAIS-IV constitutes newly discovered evidence indicating that Mr. Johnston is mentally retarded, the circuit court stated,

Additionally the Court finds that Dr. Blandino's testimony that the correlation between the WAIS-III and the WAIS-IV, which Dr. Prichard testified was .94, essentially means that the two tests are almost identical, is credible. The Court also finds that Dr. Blandino's statement that Defendant's presence on death row would cause him to suffer depression, etc., which would depress his performance on the WAIS-IV, is credible.

(Supp. PCR4 58).

The circuit court's order is erroneous and is not supported by competent and substantial evidence. The fact is the State presented two witnesses whose sole area of expertise relates to psychology. When asked about the extreme disparity between the 2005 score on the WAIS-III and the 2009 score on the WAIS-IV, Dr. Prichard opined that it was not the product of the testing instruments (Supp. PCR4 325).²³ Instead, despite not having

²³Dr. Prichard espoused this opinion despite acknowledgment that the WAIS-IV was a reconfiguration of the WAIS-III, in that it went from the two-factor model to the four-factor model (Supp. PCR4 344). Moreover, Dr. Prichard agreed that some of the subtests on the WAIS-III were dropped and not included on the WAIS-IV (Supp. PCR4 345). For instance, the picture arrangement on the WAIS-III, wherein Mr. Johnston had one of his highest scores, was not included in the WAIS-IV (Supp. PCR4 345). And, Dr. Prichard also acknowledged that on every single IQ test Mr. Johnston's performance was higher than his verbal; and that now, the performance part is only one of the four factors to be

evaluated nor observed Mr. Johnston since 2005, Dr. Prichard suggested that the disparity could be due to anxiety, motivation or a poor testing environment (Supp. PCR4 326-27).

Dr. Prichard candidly acknowledged, however, that he has never published or authored any articles relating to the WAIS-III or WAIS-IV, nor has he reviewed any articles about construct validity research as it relates to the WAIS-III and WAIS-IV (Supp. PCR4 346, 367). Further, Dr. Prichard admitted that he did not know the theory of intelligence that the WAIS-IV is based on or how that theory is utilized to obtain a full-scale IQ score other than just the fact that there's four factors (Supp. PCR4 361). Dr. Prichard also admitted that he isn't qualified to testify as to this area, nor does he have any independent support for his position (Supp. PCR4 361, 368).

Likewise, Dr. Blandino acknowledged that he has done no research nor authored any articles as to any of the WAIS tests or the differences between the two-factor model and the four-factor model (Supp. PCR4 399-400).²⁴ Moreover, Dr. Blandino acknowledged that he has not even read any articles addressing

considered (Supp. PCR4 346).

²⁴While speculating that the WAIS-III and WAIS-IV are almost identical, Dr. Blandino subsequently admitted that three of the subtests from the WAIS-III were removed and another one was added to the WAIS-IV (Supp. PCR4 398). Dr. Blandino then proceeded to demonstrate his complete lack of expertise in the area when he dismissed the distinctions, stating that ultimately, you still get a full-scale IQ score (Supp. PCR4 398).

this issue (Supp. PCR4 400). And while Dr. Blandino attributed the lower WAIS-IV score to stress, emotional difficulties and behavioral problems as a result of being under an active death warrant, this opinion is certainly suspect in that he too he had not evaluated nor observed Mr. Johnston since 2005.

Clearly, the circuit court's reliance on the speculative conclusion of two witnesses with no expertise in the area is erroneous. This is even more so in light of the fact that Mr. Johnston presented specialized expert testimony as to this issue, testimony which the circuit court simply ignored.

Drs. Taub and Gresham each testified extensively regarding the difference in scoring that was caused by a reconfiguration of the WAIS. Both doctors were well-qualified to render these opinions as both are professors, have taught undergraduate and graduate classes in the area (Supp. PCR4 144, 234-36); and, Dr. Taub²⁵ has conducted research regarding the scoring methods used in the WAIS series of tests (Supp. PCR4 236, 244). Notably, Dr. Taub was accepted by the circuit court as an expert in psychometric measurement and theory in the administration of the intelligence instruments (Supp. PCR4 236); and Dr. Gresham was accepted by the circuit court in the area of psychology, mental

²⁵Dr. Taub was the coordinator for the Psychological Corporation, the maker of the WAIS and WISC series of tests, for the child pilot and standardization of the WISC-IV. The WISC is simply the WAIS for children (Supp. PCR4 234-35).

retardation and psychometric theory (Supp. PCR4 150-52).

Dr. Taub authored an article in 2001 titled "*A confirmatory analysis of the Wechsler Adult Intelligence Scale, Third Edition: Is the verbal/performance discrepancy justified?*" (Supp. PCR4 236, 241; D-Ex. 4). Dr. Taub was interested in the fact that although the WAIS-III was developed with the idea of a four-factor model (processing speed, perceptual reasoning, working memory and verbal comprehension), the actual scoring of the instrument was a two-factor verbal/performance dichotomy (Supp. PCR4 237). Thus, there was no opportunity to calculate IQ using the four-factor model (Supp. PCR4 238). Dr. Taub wanted to know if the WAIS-III was providing an accurate measure of intelligence or if there was an alternative scoring system that would have been better (Supp. PCR4 233, 238). Performing a study utilizing structural equation modeling, Dr. Taub attempted to determine whether the verbal/performance dichotomy fit the data or correlation among all the subtests, or was there another scoring method that would have been better to fit the data (Supp. PCR4 239-40). Dr. Taub determined that the best way to score the WAIS-III was the four factor model consisting of verbal comprehension, perceptual organization, working memory and processing speed, the theory implied by the WAIS manufacturers but not used to score the instrument (Supp. PCR4 241). This theory, which was implied in the WAIS-III, is the current scoring

system for the WAIS-IV (Supp. PCR4 241).²⁶ In sum, Dr. Taub stated that the cause for the differentiation in the scoring is the application being explicit in the WAIS-IV and implicit in the WAIS-III (Supp. PCR4 242).²⁷

Dr. Taub concluded that the four-factor model utilized in the WAIS-IV constitutes a major revision from the WAIS-III (Supp. PCR4 247). Further, he stated that while the WAIS-IV is scoring the instrument according to the factor structure described in the manual, the WAIS-III is not, and thus the scoring method is flawed at the verbal/performance factor determination (Supp. PCR4 251). Dr. Taub stated that extreme caution needs to be used when interpreting these scores (Supp. PCR4 265).²⁸

Similarly, Dr. Gresham explained the history of the WAIS series and the distinctions between the WAIS-IV and the previous WAIS tests (Supp. PCR4 150-52). Dr. Gresham testified that the

²⁶Thus, the WAIS-IV conforms to the model that Dr. Taub had proposed (Supp. PCR4 241).

²⁷Dr. Taub authored another article in 2004 regarding the factor structure on the WAIS-III (Supp. PCR4 244; D-Ex. 5). This article also examined whether the WAIS-III was truly providing a good measure of intelligence (Supp. PCR4 245). Dr. Taub concluded that if the four-factor model had been utilized in the WAIS-III, it would have been a stable instrument across time and across all the age ranges within the normative sample (Supp. PCR4 245-46).

²⁸In response to questions regarding the range of IQ scores received by Mr. Johnston, Dr. Taub stated that when a test administration takes place, the score that is received is the true score as of that point in time (Supp. PCR4 250-51; 258).

previous WAIS tests maintained a verbal IQ/performance IQ distinction, and then added those two together to form the full-scale IQ (Supp. PCR4 152, 156). The WAIS-IV is dramatically different because it went away from the verbal/performance IQ structure and now reports four index scores, which are verbal comprehension, working memory, perceptual reasoning and processing speed (Supp. PCR4 152, 156). The WAIS-IV is a dramatically different structure than was available for the WAIS-III (Supp. PCR4 152-53). The WAIS-IV is a total reconfiguration of the scale, not just a refinement (Supp. PCR4 173).

According to the WAIS-IV Manual, the WAIS-IV was developed in light of research and cognitive psychology, developmental psychology and psychometric theory to yield a more accurate estimate of an individual's intelligence (Supp. PCR4 158-59). Further, the manual mentions the need for providing updated norms for the Wechsler test (Supp. PCR4 159). Dr. Gresham reiterated that the WAIS-IV is a more accurate indication of Mr. Johnston's IQ than the other listed scores (Supp. PCR4 173). It is a better scale in terms of the psychometrics of it, and it has more updated norms, from 2006 (Supp. PCR4 174).

Contrary to Dr. Taub and Gresham, Drs. Prichard and Blandino were never able to render an opinion as to these scoring matters as they had no knowledge of them. The circuit court's determination, which was based on the speculation and conjecture

of two witnesses with no expertise in the area as opposed to the highly qualified opinions of two experts, clearly is not supported by competent and substantial evidence. Mr. Johnston submits the newly discovered evidence establishes that he has subaverage intellectual functioning.

B. Mr. Johnston has concurrent deficits in adaptive functioning.

During the evidentiary hearing, both of the State's experts testified that they didn't do any adaptive functioning testing (Supp. PCR4 341-42, 393). However, Drs. Eisenstein and Krop each assessed this issue and determined that Mr. Johnston has concurrent deficits in adaptive behavior (Supp. PCR4 101-03, 192-94)

In the face of un rebutted testimony, the circuit court still somehow managed to determine that Mr. Johnston didn't meet his burden:

Moreover, Defendant did not meet his burden of establishing the second prong of the test for mental retardation, wherein even though Dr. Eisenstein testified that both his communication and comprehension skills were low, no interviews were conducted with Department of Correction personnel assessing his adaptive performance there, and the affidavit from and/or interviews with Defendant's stepmother and brother provided far too little information and were too distant in time to have any probative value.

(Supp PCR4 58).

The circuit court's determination is not supported by competent and substantial evidence. The circuit court's finding

ignores the significant evidence produced through Dr. Krop, who was the primary doctor assessing adaptive functioning; and it also ignores the adaptive functioning checklist completed by the psychology specialist who was a DOC employee.

In concluding that the information provided by Mr. Johnston's step-mother and brother was too sparse the court failed to consider that Dr. Krop utilized the Adaptive Behavior Assessment System (ABAS).²⁹ The ABAS is a questionnaire to be filled out with the individuals familiar with the defendant (Supp. PCR4 190-91). Careen and Clifford Johnston completed the ABAS, the results of which demonstrate that Mr. Johnston is significantly deficient or limited in adaptive functioning (Supp. PCR4 192).

More importantly, the circuit court somehow omitted from consideration the fact that in reviewing the collateral records in this case, Dr. Krop observed that the Florida Department of Corrections in 2002 performed an adaptive behavior checklist,

²⁹Moreover, the court obviously ignored the information from Careen and Clifford Johnston demonstrating that their information was anything but sparse, but rather establishing that Mr. Johnston had trouble comprehending; he often slobbered very badly while eating; he couldn't dress himself well; he couldn't hold thoughts in his mind; he had no driver's license or bank account; he had odd jobs that he couldn't hold on to; he couldn't fill out a job application; his reading wasn't good; his communication skills were impaired; he had mental health issues and took Thorazine and other psychotropic medications; he received Social Security disability when he was 16 or 17 years old; and he went to a school for the mentally retarded (Supp. PCR4 84-85).

which concluded that Mr. Johnston had a marginal adjustment to even a highly structured prison setting; and in some of the specific areas, he was considered to be severely impaired (Supp. PCR4 193).³⁰ The circuit court did not consider that another document from Larned State Hospital in 1981 described Mr. Johnston's level of adaptive functioning as very poor (Supp. PCR4 193). And in those same records, a Dr. Blake described Mr. Johnston's communication skills also as poor (Supp. PCR4 193-94).

In a 1975 report from Leesville State School, Mr. Johnston was described as having an adaptive behavioral level of three, which is low (Supp. PCR4 194). The prognosis for independence and productivity was poor, and Mr. Johnston had significant deficiencies in interpersonal relations, responsiveness and

³⁰Likewise, Dr. Eisenstein also reviewed the adaptive behavior checklist from the Department of Corrections which was completed in 2002:

Q What did you find significant within that report?

A The sum of ratings was 33 on this checklist of 12 different functions. The scale goes from zero, which is extremely severe impairment, three to four, which is adequate or within the normal limits. So there's - - this is a range between four to zero. One is severe, two is moderate and three is mild. The overall sum on these 12 different functions of adaptive functioning, adaptive behavior was 33. The 33 places Mr. Johnston at the low end of the marginal level of adaptive functioning.

(Supp. PCR4 81-82).

cultural conformity (Supp. PCR4 194).

Mr. Johnston's school records demonstrated an inability to conform to classroom situations (Supp. PCR4 194). And Mr. Johnston's vocational history shows that he had three jobs in his lifetime, the longest of which was working at a carnival for two months (Supp. PCR4 194). Mr. Johnston was fired from these jobs (Supp. PCR4 194).³¹ Dr. Krop concluded that in almost every capacity and in almost every environment that Mr. Johnston has been in, he has had difficulty adjusting or adapting (Supp. PCR4 195).

Mr. Johnston submits that based on the foregoing, the circuit court's finding is in error and Mr. Johnston has adequately established that he suffers from concurrent deficits in adaptive functioning.

C. Mr. Johnston's mental retardation manifested itself during the period from conception to the age of 18.

In its order denying relief, the circuit court's analysis of this issue comprised of the following sentence, "Lastly, it was not established that there was onset of mental retardation prior to the age of 18 wherein Defendant's first two test scores were discounted and his IQ score at age 14 was too high to place him in the mental retardation range." (Supp. PCR4 58).

³¹Dr. Krop also noted that Mr. Johnston has been eligible for social security and was receiving disability funds for a mental disability (Supp. PCR4 195).

The court's analysis amounts to nothing more than cherry picking. Mr. Johnston had two sub 70 IQ scores prior to the age of 18, the 1967 Stanford-Binet that was a 57, and the WISC score of 65 obtained in 1972 (Supp. PCR4 89-90). The very doctors that administered those tests diagnosed Mr. Johnston as mentally retarded and this diagnosis then resulted in Mr. Johnston being taken from his parents home and placed in the Leesville State School for the Mentally Retarded. The fact that a diagnosis of mental retardation was rendered and Mr. Johnston was placed as a result of that diagnosis in a school for the mentally retarded conclusively establishes that the onset of mental retardation occurred before the age of 18.

Clearly, this is not a situation where the court was forced to rely upon a random IQ score in the school records. Mr. Johnston's retardation and mental health issues kept him in virtually constant contact with the social services system within the State of Louisiana. Dr. Krop observed during his testimony that:

. . . Mr. Johnston has been involved for so long with mental health professionals there, there were voluminous records in this case, maybe more than most of the other cases that I've dealt with in terms of psychiatric records, evaluations and so forth. So there were certainly a lot of evaluations to review. Some of these were preconviction (sic) and some of them postconviction.

(Supp. PCR4 190).

And Dr. Krop perceptively observed later in his testimony:

If I could just add one more thing. In just staying on the topic of those first two IQ tests, the person who - - who reported in her opinion she thought that the scores were an underestimate because of emotional problems, despite that, she reported to the mother in January of 1968, in her report she said that the mother was told that David's functioning is at the mentally retarded level, although, again, she believed that is due to emotional problems.

In May of 1972, which was the same person at the same program, despite her belief that he underestimates, the report says, quote, David formally continues to function within the educable retarded range. So again, I think the issue here is a fact that this person was functioning at the mentally retarded range from many sources to the point where he was placed in a program for the mentally retarded.

(Supp. PCR4 199-200).

Despite being diagnosed as being mentally retarded prior to the age of 18, and despite being placed in a school for the mentally retarded prior to the age of 18, the circuit court solely based its decision relative to onset of mental retardation upon the fact that the State's doctors discounted the scores of 57 and 65 and relied upon the 1974 score of 80. The court's determination is contrary to competent and substantial evidence. Such a determination ignores the aforementioned evidence as well as the fact that the testimony from the State's experts was completely contradictory and fatally flawed.

The two State experts discounted the two sub 70 IQ scores on the basis that the comment by the examiner completely disqualified the validity of the tests. However, neither expert was willing to accept the validity of the comment from the 1974

test that warned of indications of test-wiseness, especially in the performance section. Interestingly, the performance score on the 1974 test increased more than a full standard deviation from the WISC that was given approximately eighteen months earlier.

Dr. Prichard agreed that test-wiseness would mean something akin to practice effect (Supp. PCR4 353). Dr. Blandino, however, attempted to play semantical games regarding the comment about test-wiseness relative to the 1974 test in the following exchange on cross-examination:

Mr. Doss: But at the same time, you didn't - - you didn't put any caveat on the January 1974 test of an 80 where the examiner said that it appeared that he exhibited test-wiseness and that it affected the performance score?

Dr. Blandino: To me, when I hear test-wiseness, that doesn't translate into practice effect. And he did not use that word or that phraseology in the report.³² Wiseness, to me, means that it's somebody that's been tested before, they are aware they are going to be tested, they know what to expect, that they're gonna be asked questions, that they're taking an IQ test, but that does not translate into practice effect. Nowhere is that mentioned in that qualitative description.

Mr. Doss: But it is mentioned that the examiner thought that it elevated the performance score, correct?

Dr. Blandino: That's not my reading of it.

Mr. Doss: You reviewed Dr. Prichard's report, right?

³²There was no actual report associated with the 1974 IQ test. It was just reported in other documents with no indication of who examined Mr. Johnston (Supp. PCR4 119-120).

Dr. Blandino: Yes, I did.

Mr. Doss: I believe he quotes directly from it. Do you have Dr. Prichard's report there?

Dr. Blandino: No, I don't. No.

Mr. Doss: I'll let - - I'm gonna quote from this and then I'll let you - - I'll let you look at it.

Dr. Prichard quoted from the examiner, said it was - - it was conveyed, quote, there was some indication of test-wisness, especially on the performance section, but he did appear to be functioning in the dull normal range. Isn't that indicating that that test-wisness is affecting the score possibly?

Dr. Blandino: Can I see that, please?

Mr. Doss: Yes.

Dr. Blandino: There was some indication of test-wisness, especially on the performance section. Again, test-wisness. Me, my interpretation is awareness. It's not saying because of this, the performance is being affected. It's not saying there is a practice effect. Again, to me, wiseness is - - is he's conveying that there's a level of awareness.

(Supp. PCR4 403-04). Clearly, Dr. Blandino simply made a post-hoc rationalization for not realizing that this comment was present in Dr. Prichard's report. A warning about test-wisness was pointedly given by the examiner and not so coincidentally the performance section was indeed more than a full standard deviation above the performance score from the same test given eighteen months earlier. The 1972 score on the performance section was 72 and eighteen months later it was 90. Yet, Dr. Blandino attempted to portray the comment and the result as

insignificant. Mr. Johnston submits that this attempt demonstrates a lack of credibility as to his opinion and reveals an anchoring bias present in his testimony.

Drs. Prichard and Blandino's over-reliance on the cautionary statement from the examiner that administered the 1967 and 1972 IQ tests was further exposed when Dr. Krop cogently and more specifically³³ explained the context of the statement as follows:

The first two testings that were done, which are referenced both in my report, I believe, and also Dr. Prichard and Dr. Blandino's reports, which I also reviewed, is the first time he was tested, and that was with the Stanford-Binet, he had an IQ of 57. He was tested five years later with the WISC, which was the first children's version of the Wechsler and he had a full-scale IQ of 65.

So the two tests that were done early in his career or early in his life were both clearly in the range of mental retardation. They were done by the same individual who in both of - - I believe it's a female. Both of her reports suggested that she thought that on the basis of his test performance that these may be an underestimate of his true intellectual functioning. She said that, in part, she felt that because of the significant scatter, and she used both the inter test and intra test scatter. And what that means is that between the different tests, there were strengths and weaknesses and within each test there were some variability. She hypothesized that the reason for the - - that she believed that the scores were not a true estimate of his functioning was because of this scatter, and perhaps uneven performance, reflected his anxiety level and, therefore, she felt that his emotional functioning or poor emotional functioning somehow had an impact on his true intellectual

³³Contrary to the circuit court's findings, Dr. Krop's explanation regarding the first two IQ scores are much more specific and detailed than Drs. Prichard and Blandino, as well as being more plausible.

functioning.

I think she was in error in making that assumption mainly because - - and I do recall back then³⁴ we thought that intra tests and inter tests scatter did reflect possibly some emotional disorder and also could reflect a person who has brain damage.

I think the more advanced the research has become and the literature that is now out on testing, number one, shows that it is not unusual for persons with lower IQ, that is in the retardation range, to have more variability than a person who scores at a higher IQ range. So it's basically fairly typical, particularly in the mild mental retardation, which is Mr. Johnston's case, it is not unusual to have the kind of scatter he had in those first two tests.

Also, the testing certainly could have reflected Mr. Johnston's brain damage which numerous evaluators have suggested exists with Mr. Johnston. And you can go back to reports when he was seven and eight years old and there were suggestions that he suffered from some type of brain damage and so therefore - -

(Supp. PCR4 196-98).

Mr. Johnston submits that based on the foregoing, the circuit court's finding is in error and Mr. Johnston has adequately established that his mental retardation manifested itself prior to the age of eighteen.

CONCLUSION

Mr. Johnston submits that he has demonstrated his entitlement to relief based on the fact that newly discovered evidence establishes that he is mentally retarded. Based upon the record and his arguments, Mr. Johnston respectfully urges the

³⁴Dr. Krop was practicing in 1972 in contrast Drs. Prichard and Blandino, who did not begin practicing until the 1990's.

Court to reverse the lower court and impose a sentence of life imprisonment.

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 this 27th day of April, 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.

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