

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-356

DAVID EUGENE JOHNSTON

Appellant,

v.

STATE OF FLORIDA

Appellee.

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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

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RESPONSE TO ORAL ARGUMENT REQUEST

The issue in this case is very narrow, and is fully explained and developed in the comprehensive order issued by the Circuit Court.¹ The State suggests that oral argument is unnecessary in this case because it will not aid this Court in its decision-making process.

RESPONSE TO STATEMENT OF THE CASE

The statement of the case set out on pages 1-5 of Johnston's brief is argumentative, and the State does not accept it. The State relies, instead, on the factual and procedural background of this case contained in this Court's January 2010, decision. *Johnston v. State*, 27 So. 3d 11, 14-18 (Fla. 2010). This Court lifted its stay of execution in that decision. *Id.*

On February 8, 2010, Johnston filed his sixth successive motion for post-conviction relief. The circuit court summarily denied the claims, but this Court determined that Johnston was entitled to an evidentiary hearing on the mental retardation claim contained in that motion, and relinquished jurisdiction. (SR1-2). Following a two-day evidentiary hearing on March 26-27, 2010, the circuit court entered its order finding that Johnston is not mentally retarded. That order resolved the credibility

¹ For convenience, a copy of Judge Perry's April 5, 2010, order is attached as an appendix to this brief.

choices in favor of the expert testimony presented by the State and against the expert testimony presented by Johnston.

RESPONSE TO "STATEMENT OF FACTS"

The "statement of facts" set out at pages 5-29 of Johnston's brief is argumentative and incomplete. The State relies on the following:

Dr. Hyman Eisenstein, clinical psychologist, conducted an evaluation of Johnston on May 5, 2009, and July 20, 2009. (SR64, 67-8). He administered several tests² to Johnston, which included the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV"). (SR68). In addition, he reviewed reports from Drs. Blandino, Fleming, and Prichard.³ He also reviewed medical records and reports from Monroe Regional Mental Health Center from Monroe, Louisiana, Northeast Special Education Center, the Ouachita Parish School Board, Monroe, Louisiana, a social investigation from the assistant chief juvenile

² On May 5, Dr. Eisenstein administered the Expressive Vocabulary Test, the Minnesota Multiphasic Personality Inventory Test, Second Form, the Peabody Picture Vocabulary Test, Third Edition, some projective drawings, the Rey Ostrich Complex Figure, the Test of Memory Malingered, Trail Making Test, Part A and B, the Wide-Range Achievement Test, Third Edition, and the Wisconsin Card Sorting Test. On July 20, in addition to administering the WAIS-IV, Eisenstein administered the Halstead Category Test and the Kaufman Fast Test. (SR68, 108).

³ Although Dr. Fleming and Dr. Baron Angus indicated there was severe emotional disturbance, a long history of psychiatric disturbance and emotional problems, numerous hospitalizations, and some brain damage, they did not indicate that Johnston was mentally retarded. (SR126-27).

officer, and State of Florida Department of Corrections adaptive behavior checklist from Ms. Wiley. (SR69). Eisenstein conducted telephone interviews with Johnston's brother, Clifford Johnston, and step-mother, Careen Johnston. (SR69). Eisenstein also spoke with Dr. Krop regarding a mental retardation determination. (SR69-70).

Johnston started receiving unsatisfactory grades in school beginning in first grade in 1967. He was in a regular first grade class for three months before being placed in a special education class. (SR75). Johnston was in special education classes in 1971 and received satisfactory grades or a grade of "B" in all subjects. (SR75). Johnston continued in special education classes for the first part of the 1972 school year until he quit school in January 1973. He was then sent to a "retarded school" in Leesville for four years and then returned for special education classes for one year. (SR75-6). Eisenstein cited to a December 7, 2000 document, which was provided to him by Johnston's former defense team (CCRC). The document referred to the Leesville school as a school for "training and rehabilitation for educable and trainable mentally retarded children." (SR107). However, there was no documentation from the school itself that indicated the school was for the "mentally retarded." (SR108). A 1976 social investigation report (Def. ID "F") authored by D.W. Chennault, chief juvenile officer,

indicated Johnston's father felt Johnston was "unable to stay out of trouble and his son was retarded." Further, Chennault wrote, "we have a 16-year-old boy who is badly retarded." (SR73, 76). A 1973 psychiatric evaluation report (Def. ID "B") written by Dr. John Burton stated, "My impression is unsocialized aggressive reaction of childhood and adolescent [sic], mental retardation mild, institution placement is strongly recommended." (SR76).

Eisenstein administered a variety of tests. The Test of Memory Malingering, (TOMM), which evaluates one's ability to answer questions in a truthful and honest manner, indicated Johnston was not malingering. (SR76-7, 1108, 111). Eisenstein agreed that malingering can result in someone wanting to score lower than his or her true ability in order to benefit from it. (SR116). It is possible to "fake bad" but not possible to "fake good." (SR116, 118).

Results from the Peabody Picture Vocabulary Test, which tests one's ability to understand spoken language, indicated Johnston received a standard score of 40, which equates to a percentile ranking of less than 0.1, and an age equivalent of six years and six months. (SR77). The Trail Making Test, Parts A and B, which measures one's ability to sustain attention, concentration and the ability to perform a simple, straightforward task, produced scores in the "profound range of

impairment." (SR77-8, 112). Eisenstein administered the Wisconsin Card Sorting Test, which assess frontal lobe impairment, and the Halstead Category Test, which measures executive functioning. (SR78-9). Johnston became frustrated with the test which resulted in a score in the "profoundly impaired range." (SR79-80, 112). The results from the Minnesota Multiphasic Personality Inventory Test ("MMPI")⁴ indicated "severe psychopathology." (SR109, 110). There was a high elevation on the schizophrenia scale. The hysteria scale had a score of severe psychopathology. (SR111). However, the results were "questionable" because the "F scale" was elevated - - that scale indicates that an individual is overstating psychopathology. (SR109).

Eisenstein also reviewed a Florida Department of Corrections Adaptive Behavior Checklist dated February 27, 2002. (SR80). The overall sum of the scores indicated Johnston was "at the low end of the marginal level of adaptive functioning."⁵

⁴ In May 2009, Johnston was under a death warrant when the MMPI-II was administered. (SR109). Eisenstein administered the "short version" which consists of 399 true/false questions, and requires a sixth grade reading level. (SR110, 111). Johnston experienced difficulty in taking the test. (SR110). Eisenstein never explained why it was appropriate to administer the MMPI to the supposedly "retarded" Johnston.

⁵ The areas of reading, writing ability, and coherent speech were marked as "considerably moderately impaired." (SR102). Eisenstein agreed this "checklist" is not a normed, standardized adaptive behavior assessment instrument. (SR112).

(SR82). However, none of the DOC files that Eisenstein reviewed described Johnston as mentally retarded. (SR116).

During his telephone conversation with Careen Johnston, Eisenstein said she reported Johnston "did some weird stuff." Johnston didn't comprehend; slobbered badly when he was eating; could not dress himself perfectly; could not hold thoughts in his mind; did not have a driver's license and did not have a bank account. Further, Johnston once stole a car and crashed it into a tree. (SR83). Johnston worked odd jobs but could not keep them. He could not read well and either walked or rode a bicycle. His communication skills were impaired and he got agitated during conversations. (SR83-4). Careen Johnston said, "David isn't right." (SR84). Johnston had mental health issues. They took him for treatment. He took Thorazine and other psychotropic medications for seizures. (SR84). Careen said, "They never told us he was retarded or not, but they did give us medicine to deal with his situation." (SR84). At age 12, he was suspended from school and attended the "Leesville School for the mentally retarded" for less than a year. At age 16 or 17, he received social security disability. (SR85).

Eisenstein said Clifford Johnston relayed similar information. (SR86). Clifford said Johnston "would tell you the truth." He could dress himself but had a limited education. He was unable to fill out job applications and was "a handful to

deal with." However, Johnston was "meticulous about bathing and dressing himself."⁶ (SR86).

Johnston had a history of IQ tests in his records. In 1967, at age seven, Johnston was administered the Stanford-Binet which resulted in a score of 57. (SR89, 113-14). In 1972, at twelve years old, Johnston was administered the Wechsler Adult Intelligence Scale for Children (WISC), which resulted in a full-scale score of 65 (SR89-90). In 1974, at age 14, Johnston obtained a full-scale score of 80 on the WISC. (SR90, 117). However, Eisenstein discounted this score due to the "practice effect" as well as not having seen the actually report itself. (SR119). In 1988, Johnston was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) which resulted in a verbal IQ score of 75 and a performance IQ score of 101. The full-scale IQ score was not reported. (SR90, 105). Although the full-scale IQ was not reported, it would be higher than 75, which falls outside the range of mental retardation. (SR106)⁷. In May 2000, Johnston was administered the WAIS-III which resulted in a full-scale score of 76. (SR90). In May 2005, Johnston was again administered the WAIS-III which resulted in a full-scale IQ score of 84. (SR90). When Eisenstein "re-scored" this test, he

⁶ Johnston has been incarcerated since 1983. (SR103).

⁷ As Dr. Prichard later testified, determining the full-scale IQ score was a simple matter of consulting the test manual. Eisenstein simply refused to perform that simple task.

reached a full-scale IQ score of 82 due to "computation errors" by Dr. Prichard. (SR122, 133). Eisenstein said this was a valid IQ test score. (SR133-34).

In July 2009, Eisenstein administered the WAIS-IV to Johnston. (SR91, 108). Johnston's verbal comprehension score was 61 (.5 percentile). His perceptual reasoning score was 82 (12th percentile). His working memory score was 63 (1st percentile). His processing speed score was 56 (.2 percentile). Johnston's full-scale IQ score was 61 (.5 percentile). (SR91, 92-3). Johnston scored at two and two-thirds standard deviations below the mean. (SR94). Eisenstein explained the different IQ scores in the following way:

The way that the IQ score is constructed is based on research data that has a normative sample, and the normative sample, the scores form 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 thought 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.

(SR91-2).

Eisenstein testified that the WAIS-IV is the "instrument that is now considered to be the standard practice, the one that the research now has validated as being the definitive instrument for assessing intellectual function." (SR94, 134-35). Eisenstein said, "you have to go with what you have in terms of the most current data." (SR136). Brain damage can affect the score results in the new WAIS-IV. (SR128). Further, "there has to be a judgment call" regarding the results obtained on previous WAIS-III administrations. (SR135). The drop in IQ from the 2005 IQ test to the 2009 IQ test is because, "the WAIS-IV reconfigures the way we think about IQ." (SR124).

In addressing the onset of mental retardation prior to age 18, Eisenstein said two of the IQ scores reflected scores below 70: an IQ score of 57 on the Stanford-Binet at age 7, and an IQ score of 65 on the WAIS Intelligence Scale for Children at age 12. (SR95). However, the examiner who tested Johnston at age 7 further qualified that score by stating that it was "a **depressed intellectual assessment** due to many problems [Johnston] is experiencing." Johnston's "intellectual ability and innate intellectual potential is possibly within the low, dull, normal

range, normal level." (SR95, 114, 117, 121). The examiner who tested Johnston at age 12 said:

David performed within the retarded, educable range. **Results are considered spurious and not reflecting this youngster's true ability level because of the significant emotional problems with David.**

(SR95-6, 114, 117). Johnston's records reveal a diagnosis of schizophrenia and multiple psychiatric diagnoses. He was treated with psychotropic medications and hospitalized on numerous occasions. (SR96). Eisenstein characterized this as "comorbidity." (SR97). The IQ scores from the 1967 and 1972 IQ tests meet the criteria for a diagnosis of mental retardation prior to age 18. (SR97). Based on the score of the Wechsler Adult Intelligence Scale-Fourth Edition, the previous testing, Johnston's history and record documentation, Eisenstein concluded that Johnston meet the criteria for an individual with an IQ of 70 or below, with an onset of mental retardation prior to age 18. (SR100).

Eisenstein testified that Johnston meets the criteria of significant impairment in at least two areas of adaptive functioning: communication and "non-stable" work history. (SR101, 102). Johnston reads at a first grade level. His understanding of spoken language is equivalent to six years, six months. Johnston's ability to articulate language is equivalent to age eleven. Johnston had "great difficulty" writing things

down. (SR101). However, Eisenstein did not speak with any personnel at the Department of Corrections who are familiar with Johnston on a day-to-day basis. Johnston has been incarcerated since 1983. (SR103, 113). Johnson did not have any evidence of a stable work history. (SR102). Johnston is a "loner" and preferred to be around older people. He hollered at children and threatened them. (SR102).

Eisenstein concluded that Johnston meets the prongs of an IQ significantly below 70. He has current adaptive functioning deficits with both onset before age 18 as well as the present time that meet the criteria for substantially impaired adaptive functioning. The onset was before age 18 and continues at the present time. In Eisenstein's opinion, Johnston meets the criteria for a diagnosis of mild mental retardation.⁸ (SR103-04).

Dr. Frank Gresham is a professor of psychology at Louisiana State University as well as the director of the school's psychology program. He has been a professor of psychology since 1979. (SR, R142-43). 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." (SR144). He also has a specialization in mild mental retardation. (SR149). Dr. Gresham has received

⁸ Eisenstein determined Johnston met the criteria for mental retardation after completing his work on this case in November 2009. (SR130, 131).

federal research funding grants from the Department of Education for research involving school children placed in special education programs under different labels, which includes mild mental retardation, specific learning disabilities, and emotional disturbance. (SR145, 162-63). However, most of the research funding dealt with the population of individuals with mental retardation. (SR149).

Gresham has published over 175 peer-reviewed journal articles, including one titled "Applied Neuropsychology and Intellectual Assessment in *Atkins* cases." (SR146-47, 225, 284). The article stated, "it's obvious to any well-trained psychologist that all measurements contain error." (SR227). Gresham did not testify in the *Atkins* case. (SR225). As to the psychometric theory, Gresham has studied the WAIS testing series, including the WAIS-IV. (SR148).

Gresham explained the history of the WAIS series and the distinctions between the WAIS-IV and the previous WAIS tests. (SR150-52). There are three age levels for measuring intelligence: the Wechsler Preschool and Primary Scale of Intelligence ("WPPSI"); the Wechsler Intelligence Scale for Children ("WISC"); and the Wechsler Adult Intelligence Scale ("WAIS"). (SR150-51).

Gresham said that the previous versions of the WAIS tests produced a verbal IQ and performance IQ, which is the non-verbal

IQ. Those two scores added together form the full-scale IQ (SR152). The WAIS-IV is different because it "basically went away from the verbal/performance IQ structure and now reports four what are called index scores." (SR152, 173). These indexes included a verbal comprehension index, a perceptual reasoning index, a working memory index, and a processing speed index. (SR152). Each one of the indexes has a mean score of 100 and a standard deviation of 15. Added together, these four scores form a full-scale IQ that has a mean of one hundred and a standard deviation of 15. Gresham said, "That's a dramatically different structure than was available for the WAIS-III." (SR152-53).

Gresham said IQ tests are known as normed referenced tests. The test scores are compared to a normative sample of people of the same age. (SR153). As for the WAIS series, the normative samples are recalibrated based on the revision of the test because they become outdated. (SR153-54). Gresham said, "Norms are becoming antiquated, becoming dated, and so if you wait too long a period of time between recalibration of those norms, you are going to have inaccurate test scores." (SR154).⁹ Gresham said that the December 1967 Stanford-Binet given to Johnston was normed in 1958; the 1972 WISC was normed in 1947, the 1988 WAIS-

⁹ Gresham could not say if incarcerated individuals were part of the normative sample for any of the WAIS tests, including the WAIS-IV. In addition, he did not know if brain injured people were included or excluded from the sample. (SR229, 230).

R was normed around 1979, and the 2000 and 2005 WAIS-III tests were normed in 1995. (SR155). The 2009 WAIS-IV¹⁰ administered to Johnston was normed in 2006. (SR156).

Gresham said there are some new subtests on the WAIS-IV that were not on the WAIS-III: visual puzzles and figure weights. (SR156-57). For the WAIS-IV, all the subtest scores are added to form the index scores, and, in turn, added to form a full-scale IQ score. (SR158).

Gresham testified that, 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." (S4158-59). The manual mentions "the need for providing updated norms for the Wechsler test." (SR159).

Gresham said he would not invalidate Johnston's earlier IQ scores from 1967 and 1972 due to the issue of "comorbidity." (SR163, 172, 174). Other professionals might disagree with him. (SR174-75). In addition, although brain trauma is one cause of mental retardation, if it occurred to someone post-18 and caused cognitive deficits, it would not be mental retardation. (SR172-73, 175).

Gresham opined that the WAIS-IV is a more accurate indication of Johnston's IQ than the other listed scores.

¹⁰ The WAIS-IV was published in August 2008. (SR177).

(SR173-74). He said, "It's a better scale in terms of the psychometrics of it ... it has more relevant, - - updated norms, so the scores are going to be more accurate given the fact it was only normed as recently as 2006." (SR174). The WAIS-III and WAIS-R scores are "less accurate" because of when they were normed. (SR180). They are less accurate due to the "Flynn Effect." In fact, Gresham said that the **only way he knew to determine how "less accurate" the older WAIS tests were through the "Flynn Effect."** (SR180-81).¹¹

Gresham testified that the 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. The normative sample included individuals with IQ's as low as 45 and as high as 145. (SR177-78).

Gresham has taught one class on the WAIS-IV and administered the test only one time, which was not in a death penalty case. (SR179, 228). Based on all the data, Gresham has not estimated Johnston's true IQ score. (SR231). In his opinion, Johnston's median score is 70. (SR231-32). However, "It's always going to be a question." (SR231).

¹¹ This case does not turn on the "application" of the "Flynn effect," and, because that is so, there is little testimony in this record about that phenomenon. The State does not agree that the "Flynn effect" can withstand a *Frye* challenge should the case present itself. This is not that case.

Dr. Harry Krop, psychologist, evaluated Johnston on May 1, 2009.¹² (SR184, 186). This was a clinical interview to evaluate Johnston for competency and to explore possible mitigating factors which may or may not have been addressed earlier. No testing was conducted at this time. (SR187). After the interview, Dr. Krop expressed concerns to collateral counsel that there may be an issue of mental retardation. He recommended that the WAIS-IV be administered. (SR187). Krop said, "Research and literature ... showed that the WAIS-IV was probably the most reliable and accurate assessment of intellectual functioning." (SR187).

After Eisenstein administered the WAIS-IV, Krop consulted with him and received the raw data. (SR188). Although Krop saw no problems in terms of the way Eisenstein scored the test, "I had a question because the score was certainly much lower than some of the previous or the most recent tests." (SR188). Krop considered this "puzzling." (SR195). The 23-point difference from 2005 to 2009 caused Krop "concern." (SR217). However, Johnston's verbal IQ score has been consistent and he has performed "relatively well" on his performance IQ. (SR218). Krop could not give "a full explanation" for the 23-point difference. (SR219). Krop spoke to Eisenstein about his clinical impressions

¹² During his career, Krop has evaluated about 1,500 individuals for a mental retardation determination. (SR211-12).

as to the effort Johnston put forth while taking the test, as well as any extraneous or interfering variables that may have brought his test score down lower than some of the more recent tests. (SR188). Krop did not see any reason to think that the test was not valid. (SR189).

As part of a mental retardation determination, Krop looked at Johnston's level of adaptive functioning. (SR189). In assessing adaptive functioning, a reviewer does three things: interview the client, review collateral material, and conduct a formal adaptive assessment measure using independent informants who are familiar with the defendant. (SR189-90). Krop contacted three of Johnston's family members: Careen Johnston, Clifford Johnston, and Deborah Johnston. (SR191). Careen completed the Adaptive Behavior Assessment System, Second Edition ("ABAS"). Clifford Johnston had difficulty in responding to all of the items, so the ABAS was not completed on him. (SR191, 204). Deborah Johnston "perceived the whole process as pretty overwhelming." (SR191). As a result, Careen Johnston, Johnston's stepmother, was the primary informant. (SR204, 205). Johnston had not seen her stepson in several years. She answered the questions as she remembered him from growing up and as a young adult living in her home. (SR205). Krop said, for a determination of mental retardation, "present adaptive functioning" is considered, but he "would not discount prior

adaptive functioning." (SR206, 207). In the ten scales¹³ of the ABAS administered to Careen Johnston, David Johnston scored four or less on all of them. One area was scored as a four, and the remaining areas were scored as one's, two's, or three's. (SR192). An average score is ten, with a standard deviation of three. A person is considered significantly deficient in a particular functional area with a score of four or less. (SR192).

Krop reviewed numerous collateral records from at least 20 different evaluations or sets of records, including testimony from prior proceedings. (SR192). In a 1975 report from Leesville State School,¹⁴ Johnston was described as having an adaptive behavioral level of three, "which is low." (SR194). His prognosis for independence and productivity was "poor," and Johnston "had significant deficiencies in interpersonal relations, responsiveness and cultural conformity." (SR194). A March 1981 report written by Dr. Alan Blake said Johnston "misuses and mispronounces words." (SR193-94). An April 1981 document from Larned State Hospital in Oklahoma described Johnston's level of adaptive functioning as "very poor." (SR193). School records indicated Johnston was expelled from

¹³ The areas include: communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction, and social. (SR192).

¹⁴ Krop said the Leesville State School does not have "for the Mentally Retarded" as part of its proper name. (SR203).

school on numerous occasions due to "inability to conform to classroom situations." (SR194). Further, a 2002 Florida Department of Corrections adaptive behavior checklist concluded that Johnston had a "marginal adjustment" in a highly structured prison setting. (SR193). In some of the specific areas, he was considered to be severely impaired. (SR193). Johnston reported that he had three jobs in his lifetime but never had gainful employment. (SR194-95). Krop concluded that Johnston "has had difficulty adjusting in no matter what environment he is in." (SR195).

Krop said Johnston's IQ scores from 1967 and 1972 of 57 and 65, respectively, are "clearly in the range of mental retardation." Krop said that there was no evidence of malingering and noted that the testing was done prior to Johnston's involvement with the criminal justice system. (SR196-97). However, Krop opined that the examiner was in error in stating that these scores did not reflect Johnston's true intellectual functioning due to poor emotional functioning. (SR197, 199-200). In addition, numerous examiners have suggested Johnston suffers from some type of organic brain damage. (SR198).

Krop could not explain the scores that were above the mental retardation range. (SR200). The norms for the WAIS-III were "several years old" when it was administered to Johnston in

2005 by Dr. Prichard. The WAIS-IV "is the most reliable test because it has up-to-date norms." (SR200). The WAIS-IV does not have a verbal IQ and performance IQ and full-scale IQ. It has a full-scale IQ that is broken down into more specific classifications that include perceptual reasoning, verbal comprehension, working memory, and processing speed. According to research, "this is a more reliable estimate of all the different areas, including a person's full-scale IQ." (SR201). Research suggests that every other IQ score prior to the WAIS-IV should be discarded. (SR208-09). Krop cited to an article written by James Flynn,¹⁵ a researcher, that recommended "WAIS-III scores be set aside and subjects tested on a WAIS-IV or the Stanford-Binet-V." (SR209). Therefore, the WISC and WAIS-R scores could be considered. (SR209). Krop did not see any reason to discount the full scale IQ of 80 administered to Johnston when he was 14-years old. (SR209-10). And, "hypothetically," if a full scale IQ of 80 is accepted as Johnston's true intellectual functioning, Johnston would not meet the criteria as mentally retarded. (SR220, 222).

Krop said there was no evidence Johnston was malingering on the WAIS-IV. He performed "relatively well" on the perceptual reasoning index while "everything else was extremely low." The

¹⁵ James Flynn is not a psychologist. (SR209).

non-verbal areas were much better than the verbal areas, consistent with the other tests. (SR201-02). Due to the reconfiguration of the WAIS-IV, Johnston ended up with a much lower score as opposed to previous versions of the WAIS. (SR202).

Krop said the DSM-IV-TR¹⁶ sets out three criteria that a person must meet in order to be diagnosed as mentally retarded: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in present adaptive functioning; and 3) onset prior to age 18. (SR207-08).

During his career, Krop has evaluated about 1,500 individuals for a mental retardation determination. (SR211-12). He utilized the WAIS-III at least 250 times. (SR212). However, 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 as of today." (SR213). But, "I would have said three or four years ago that the WAIS-III was probably the best test that we had available to assess a person's intellectual functioning." (SR213). Further, Krop did not suggest re-testing individuals that have been deemed not mentally retarded based on the score from a WAIS-III unless "prior IQ scores showed the

¹⁶ American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*. Washington, DC, American Psychiatric Association, 2000.

possibility that they were close to the mentally retarded range based on the current definition of IQ.” (SR214).¹⁷ The WAIS-IV manual does not suggest discounting WAIS-III scores. (SR215-16).

Krop does not see “a whole lot of significant difference between an IQ of 74 and 68.” Further, the WAIS-IV manual was not written for the purposes of being used in death penalty proceedings. (SR216).

In Dr. Krop’s opinion, Johnston is mentally retarded using the definition that is in the Diagnostic and Statistical Manual as well as the American Psychiatric Association. (SR202).

Dr. Gordon Taub is an associate professor of school psychology at the University of Central Florida. (SR233). Taub teaches a variety of courses, including intelligence theory measurement, which instructs students how to administer, score and interpret test intelligence. (SR234). Taub is a national trainer on the Woodcock-Johnson Test of Cognitive Ability and the Woodcock-Johnson Test of Achievement, the Stanford-Binet-V, and the WISC-IV. He has published approximately 17 peer-reviewed articles (SR234-35, 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?”

¹⁷ This comment is curious since Johnston’s WAIS-III score was not close to the mentally retarded range.

(SR236-37, 241). Taub's interest was whether the WAIS-III provided an accurate measure of intelligence based on the verbal/performance dichotomy. (SR238, 240). Taub said, "in theory" the four factors in the WAIS-IV and WISC-IV (processing speed, perceptual reasoning, working memory and verbal comprehension), were present in the WAIS-III. (SR238). Although the factors were present in "theory," it did not apply to the scoring to calculate a full-scale IQ score. (SR238). Taub determined that the four-factor model was statistically significantly better than the two-factor model. (SR240). Therefore, 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 current scoring method utilized with the WAIS-IV. (SR241).

Taub opined that "we need to use a lot of caution in interpreting verbal/performance scores on the WAIS-III." (SR243). His research indicated that a full-scale IQ score derived from the two-factor model is not the best way to score the instrument. "The best way to score it is to have a four-factor model that leads to a full-scale IQ." (SR243-44, 246).

Taub authored another article in 2004, "Confirmatory Analysis of the Factor Structure and Cross-Age Invariance of the Wechsler Adult Intelligence Scale, Third Edition" which examined

whether the WAIS-III was "truly providing a good measure of intelligence." (SR245). 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." (SR246). Taub concluded that the four-factor model utilized in the WAIS-IV was a "major revision" from the WAIS-III. (SR247).

Taub said the difference in Johnston's IQ scores from 2000 to 2009 "needs some reconciliation." (SR248-49). Taub stated that the WAIS-IV is scored according to the factor structure described in the manual. Taub concluded that the WAIS-III scoring method is "flawed at the verbal/performance factor determination." (SR251-52).

Taub said the "true [IQ] score" is the score that is obtained on a given day on a given test. (SR251, 253). For example, the IQ score of 80 that Johnston received at age 14 was a "true score." (SR255, 259). Taub agreed that the examiners for the 1967 and 1972 tests believed Johnston's scores were suspect. (SR253-54). Taub said it is possible for an individual to score at least six points higher on an IQ test within a five year period. (SR257-58). "You can get lucky." (SR258).

Taub agreed there were two IQ scores below the cutoff for a determination of mental retardation and four scores above the

cutoff. (SR259-60). Taub said the WAIS-III scores need to be interpreted "with extreme caution." (SR265).¹⁸

Johnston recalled Dr. Gresham. (SR283). Subsequent to Taub's testimony, Gresham and Taub discussed Taub's peer-reviewed articles. (SR283). Gresham explained the process by which those articles are published (SR283-84), and testified about which of Taub's articles had been cited in published materials or journals. (SR286-305). Citation of an article does not imply agreement with it, and, in fact, the authors of the articles that cited to Taub's article "disagreed that the scientific methodology used to accomplish what the author [Taub] intended was appropriate." (SR306)

Gresham published an article in 2009 titled "Interpretation of Intelligence Test Scores in *Atkins* Cases Conceptual and Psychometric Issues." The article discussed various aspects of understanding the limitations of the WAIS-III. (SR307). Even though Gresham has extensive experience in the area of mental

¹⁸ Taub testified he is the only person that has published research on the scoring method of the WAIS-III. (SR266, 269). Subsequently, the State moved to strike Dr. Taub's testimony on based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), because Johnston had not shown that this theory had gained general acceptance in the scientific community. (SR266-67). The court granted the motion to strike. (SR270). Johnston moved the court to reconsider its ruling on the basis that Taub's articles had been cited to 34 times in peer review materials. (SR281-83). The court reserved ruling (SR314) and ultimately found the testimony admissible. (SR54-5).

retardation, he did not cite to Taub's work as he was not aware of it. (SR306, 308). Gresham said his own article discussed interpreting intelligence tests and the "Flynn Effect," and that it "had nothing to do with measurement invariance factor, structure ... any of those types of things." (SR309). However, had he been aware of Taub's work, Gresham would have cited to it. (SR310).

Dr. Gregory Prichard, clinical psychologist, has performed approximately 4,000 mental retardation assessments during his career. (SR315, 317). In May 2005, Prichard evaluated Johnston to determine whether he met the statutory criteria for a diagnosis of mental retardation. (SR318). Prichard reviewed voluminous records from Johnston's past which included school and mental health records, reports from other mental health experts, and court transcripts. (SR318-19). Prichard determined Johnston "clearly does not meet the criteria or mental retardation according to Florida Statutes." (SR319, 340).

Subsequent to 2005, Prichard again reviewed information regarding Johnston. (SR319). He reviewed Eisenstein's testing, reports and raw data, Krop's information, and additional court transcripts. (SR319-20). Prichard again concluded Johnston is not mentally retarded. (SR320). In Prichard's opinion, the idea that the change in scoring method would cause Johnston's IQ to drop to 61 is "absurd." (SR342). The correlations between the

WAIS-III and WAIS-IV tests are very high. (SR342). A person does not score "20-something points different than previous versions of the WAIS." (SR343).

Prichard relied on a number of different Wechsler tests administered to Johnston since he was seven years old. (SR320). The various versions of these tests are "excellent instruments" to assess intelligence. (SR343). In addition, he relied on "commentary from professionals who have evaluated him ... which makes the picture very clear." (SR 320). In analyzing the IQ score of 57 Johnston obtained on the 1967 Stanford-Binet, Prichard stressed the importance of the examiner's comment that Johnston "tested in the educable mentally retarded range but that it does not appear to be reflective of his optimal performance." (SR321, 347). Comments are a routine and typical part of a psychological report, and Prichard would discount the score based on the examiner's comments. (SR322, 437-48). Regarding the 1972 WISC IQ score of 65, which was administered by the same mental health expert as the 1967 test, Prichard said the examiner's comment "is extremely important." (SR323-24). The examiner said the result was "spurious due to the obvious emotional problems of David which were depressing intellectual functioning." (SR324). Prichard discounted this score, as well. (SR348). In Prichard's opinion, these two test scores are not

"outliers," they are invalid. However, the July 2009 score could be considered as an outlier. (SR331, 334).

Prichard said Johnston's full-scale IQ score was 83 in 2005.¹⁹ (SR325). Further, Prichard commented in his 2005 report that Johnston "rambles some and told very lengthy stories." Johnston heard voices and had a weird sound in his ears. Johnston thought someone was trying to poison his food. Johnston's emotions were "up and down, variable." His sleep and appetite patterns were not good. He talked a lot and lost focus. Johnston tried hard on the test-taking. (SR350).

Prichard said a number of external factors and internal factors can affect a person's optimal performance on any given day, which would explain the disparity in the 2005 and 2009 scores. (SR325-26). Prichard said intelligence is a static trait that does not vary much across time. Further, "the idea that the true IQ is whatever you come up with on a particular day, is, in my opinion, pretty absurd." (SR326). Anxiety, motivation, and external distractions can affect a person's performance. (SR326).

Prichard said there were "a few interesting differences" between his testing in 2005 and that of Eisenstein administered in 2009. (SR327). For example, in 2005 Prichard asked Johnston,

¹⁹ Prichard initially scored Johnston with a score of 84, but corrected a scoring error which resulted in a full-scale IQ score of 83. (SR325).

"Who is Martin Luther King?" Johnston responded, "A black civil rights leader." In 2009, when Johnston was asked the same question, he responded, "I've never heard of him." (SR328). On that particular subtest, Prichard scored Johnston with a score of 5, where Eisenstein scored Johnston with a 4, which generated a lower IQ score. (SR328). In another area, Prichard asked Johnston in 2005, "How much is \$4 plus \$5?" Johnston generated the correct response within three seconds. When asked by Eisenstein in 2009, "Lee has four blankets and buys four more, how many does he have all together?" After 52 seconds, Johnston said, "I can't add." (SR328). This was a big discrepancy in the same skill. (SR329). Prichard said Johnston was able to generate correct answers with more complex arithmetic questions in 2005 than he was in 2009. Prichard gave Johnston a scaled score of 7, in the high borderline to low average range. However, Eisenstein gave Johnston a score of 1, which was a scaled score in the "severely retarded range." Prichard said, "This is a huge disparity that is hard to explain." (SR329).

Prichard said the TOMM (validity testing) was not administered properly to Johnston. Eisenstein administered the TOMM two months prior to the WAIS testing. Prichard said the TOMM is designed to be administered within a day of the WAIS in order to extrapolate the information in a meaningful way. (SR330).

In Prichard's opinion, the January 1974 IQ score of 80²⁰ is a valid score. The examiner commented that Johnston was "alert, cooperative and friendly. He was verbally expressive and projected an air of self-confidence." (SR332, 352-53). Johnston obtained a full scale score of 81 on the 1989 testing. (SR332-3). The examiner did not report a full scale score, but that means only that she did not comment on it. As Dr. Prichard said, "all you have to do is look it up in the manual." (SR332).²¹

Prichard said, using a 95% confidence level, Johnston's IQ scores fall within a range from 78 to 84. In Prichard's opinion, the 2009 IQ score of 61 is an outlier because all the other test scores generated the same confidence intervals that overlapped. (SR335, 336). Further, "luck" has a minimal effect on a person's IQ score. (SR337).

Prichard reviewed a transcript from a May 2005 hearing wherein Johnston articulated himself quite well. In addition, Prichard reviewed some of Johnston's handwritten letters which used good wording and were written in cursive. In Prichard's opinion, this contraindicated a person with mental retardation.

²⁰ Prichard reviewed a July 3, 1973 letter, written by Dr. John Burton, psychiatric director from Monroe Regional Mental Health Center, which indicated Johnston suffered from mild mental retardation. However, this letter, which Prichard opined was Dr. Burton's "impression," did not affect Prichard's opinion that the **1974** testing was a valid test. (SR359, 362-63).

²¹ Line 23 on page 332 of the supplemental record should have the word "not" before the word "make." In context, this is clear.

(SR338). Johnston's writings²² demonstrated a "high borderline to high average guy." (SR339). In addition, recent reading material found in Johnston's possession, which included legal books and court transcripts, is inconsistent with a person suffering from mental retardation. (SR339). In Prichard's opinion, the 2009 score is not a valid representation of Johnston's IQ. The IQ scores obtained over a period of time are consistently in the 80's range, which renders adaptive behavior moot. Johnston does not meet the first prong of the criteria for a diagnosis of mental retardation -- therefore it is not necessary to test for adaptive behavior. Johnston is "still not mentally retarded." (SR341-42).

Prichard does not doubt the validity of the WAIS-IV as an intelligence testing instrument and it is the most valid, reliable test available today. The WAIS-IV is a reconfiguration of the WAIS-III. (SR343-44). Prichard explained the most significant difference between the WAIS-III and the WAIS-IV is that the four factors now calculated within the WAIV-IV also now include processing speed and working memory. (SR365). Most importantly, the correlation between the WAIS-III and WAIS-IV is .94, "almost a perfect correlation, which means there is so much overlap between the tests in terms of what we are measuring that

²² Johnston denied writing these letters although his signature appeared to be the same as that on other documents. (SR338, 355-56).

they're almost identical." (SR366, 369-70). **All of the prior WAIS versions are valid tests.** (SR343). Johnston's performance score has consistently been higher than his verbal score. (SR346).

Prichard agreed that familiarity with a test could "potentially" inflate a result. (SR353). However, in Prichard's opinion, the WAIS-III administered to Johnston in 2005 was not flawed and should not be discounted. It was "a valid administration and the results were a valid representation of his IQ." (SR365). Prichard concluded that there is no "mandate professionally that generates any legitimacy to the idea that the WAIS-III is a test that should be thrown out or discarded or somehow invalid." (SR368).

Dr. Salvatore Blandino, psychologist, evaluated Johnston in May 2005 and was recently re-appointed to evaluate him for this proceeding. (SR371, 374). Blandino reviewed Johnston's records, Eisenstein's and Krop's evaluations, previous postconviction proceeding transcripts, school records, and prior mental health documents. (SR374-75). In 2005, Blandino's opinion was that Johnston is not mentally retarded. (SR375). Blandino made it clear that that opinion has not changed, saying "My conclusion, again, is that he is not mentally retarded." (SR375).

Blandino explained the history of Johnston's IQ scores obtained through the years. He noted the cautionary comments of

the examiner on the first two tests that resulted in scores of 57 and 65, which fell into the mentally retarded range. The examiner stated that the scores may be a depressed estimate due to "moderate severe levels of perceptual problems' and/or brain damage, a familial environment that is very detrimental to this youngster's intellectual and emotional development, and current high levels of anxiety." (SR377-79). Johnston's intellectual potential is "possibly within the dull normal level." (SR379). The 1972 test results were "spurious and not reflective of (Johnston's) true level of ability because of significant emotional problems." (SR380). Subsequent mental health professionals are expected to note these observations which inform them of any potential problems or issues with the scores. (SR383). The 1974 IQ test is the first time Johnston scored above the mental retardation range, and, importantly, it is prior to age 18. (SR383). There was no caveat or cautionary statement made by the examiner which, in Blandino's opinion, "gives further credence to the caveats that were given in the '67 and '72" reports. (SR384). There was a consistent pattern of performance for the next 14 years. (SR384-85). Johnston's verbal score versus performance score is always significantly lower. Blandino noted the stability in the scores post age 14, that in at least four instances, Johnston's scores are in the range of borderline intellectual functioning. (SR388, 410-11).

Blandino stated that the 2009 IQ test results "were the most recent measure. But, the results are only as good as the information given to get the results." (SR389-90). Further, Johnston's performance on the arithmetic test for Prichard was significantly different than that for Eisenstein. This was also a lower score than the 1972 IQ score. (SR390).

The correlation between the WAIS-III and WAIS-IV is "pretty high," at .94, which "is almost the perfect correlation." (SR390). The 20-plus difference drop in score from 84 to 61 did not occur due to the four-factor model and reconfiguration of the WAIS-IV. (SR391). Historically, Johnston suffers from emotional and behavioral problems, anxiety, depression, and motivational issues. In 2009, he was under an active death warrant, "he realizes he's gonna be executed." These things would affect Johnston's working memory, processing speed, and perceptual reasoning ability. (SR391-92).

In Blandino's opinion, Johnston is not mentally retarded and has "never suffered from retardation." (SR391, 396). Further, Blandino diagnosed Johnston with a cognitive disorder, not otherwise specified. (SR391). He did not assess Johnston's adaptive functioning level. (SR393). Blandino questioned Krop's scoring of Johnston's adaptive functioning for two reasons: it was not clear if it was done retrospectively or concurrently; and it was not reliable to base it on a person who has not had

face-to-face contact with Johnston in 25 to 30 years. (SR394). Therefore, Blandino considered those results invalid. (SR396).

RESPONSE TO STANDARD OF REVIEW

The "standard of review" set out on page 29 of Johnston's brief is incorrect. The standard of review applied by an appellate court when reviewing a trial court's ruling on a post-conviction relief motion following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So. 2d 1250, 151 (Fla. 1997), quoting *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), quoting *Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Nelson v. State/McNeil*, 2010 WL 1707218 (Fla. Apr. 29, 2010); *Clark v. State*, 2010 WL 1707120 (Fla. Apr. 29, 2010); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998); See *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) ("This Court does not ... second-guess the circuit court's findings as to the credibility of witnesses." (citing *Trotter v. State*, 932 So.2d 1045, 1050 (Fla.2006))); *Bottoson v. State*, 813 So. 2d 31, 33 n. 3 (Fla. 2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State*, 788 So.

2d 917, 923 (Fla. 2001) (“We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.”).

SUMMARY OF THE ARGUMENT

The circuit court correctly found that Johnston is not mentally retarded. Johnston does not satisfy the criteria for such a diagnosis, and the expert testimony relied on by Johnston at the evidentiary hearing was properly rejected as not credible. Assuming that the results obtained on an intelligence test that did not exist at the time of the previous mental retardation litigation can be “newly discovered evidence,”²³ there is no basis for relief because those recent results are not accurate for the reasons explained by the experts whose testimony was credited by the circuit court.

ARGUMENT

COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE CIRCUIT COURT'S FINDING THAT JOHNSTON IS NOT MENTALLY RETARDED

PRELIMINARY MATTERS

The two-day evidentiary hearing was a classic “battle of the experts,” and, at the conclusion of that hearing, the

²³Under *Jones*, newly discovered evidence must be in existence but unknown at the time of the prior proceedings. Since the WAIS-IV admittedly did not exist until 2008, any results obtained on that test are not, and cannot be, “newly discovered” in the sense that that term of art has always been understood and interpreted. Labeling the WAIS-IV results “newly discovered” has the potential to confuse the *Jones* standard and its application.

circuit court resolved the credibility choices in favor of the witnesses called by the State and against the witnesses called by Johnston. That is the function of the circuit court, and it performed that task correctly and reached the correct result. The findings of the circuit court are supported by competent substantial evidence -- the credibility determinations which came after the court had the opportunity to observe the witnesses' testimony and demeanor should not be disturbed.

The rationale underlying Johnston's brief is flawed for several reasons. Johnston presented evidence about the differences in the "scoring model" between the WAIS-III and WAIS-IV, but never explained how any difference was at work in this case and resulted in the huge disparity in Johnston's attained scores on those test instruments. In fact, the **only** testimony from any witness that went directly to the claim that the older intelligence tests were "less accurate" came from Dr. Gresham, who said that the "Flynn Effect" was the only way he knew to accomplish that, but he had not made those calculations. (SR180-81). When all is said and done, there is no evidence at all to support Johnston's challenge to the accuracy of the earlier IQ testing.

Further, Johnston takes the State to task for not "discrediting" the WAIS-IV or the score Johnston attained on it. The credibility of the WAIS-IV test instrument is not the issue,

and there is no reason for the State to "discredit" that test. This case is, fundamentally, about the accuracy of Johnston's WAIS-IV score, and even a cursory review of the record reveals multiple reasons that Johnston's score on that test instrument is unworthy of belief. In an attempt to deflect the inadequacies of his evidence, Johnston attacks the State for referring to Johnston's previous intelligence testing which, when all is said and done, provides a clear picture of an individual who functions well above the range of mental retardation, and whose execution has been delayed for far too long.

THE MENTAL RETARDATION CRITERIA

In *Cherry*, this Court explained the criteria for mental retardation as a bar to execution in clear terms:

Cherry challenges the circuit court's determination that he is not mentally retarded in accordance with the definition set forth in section 921.137(1), *Florida Statutes* (2002), which provides:

As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, 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.

Thus, Cherry must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, Cherry must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007). With respect to the adaptive functioning component, there is no doubt at all that any deficits in adaptation must exist concurrently (“presently”) with the sub-average IQ score. In *Phillips*, this Court made that clear:

However, in *Jones*, 966 So. 2d at 325-27, we held retrospective diagnosis insufficient to satisfy the second prong of the mental retardation definition. We found that both the statute and the rule require significantly subaverage general intellectual functioning to exist concurrently with deficits in adaptive behavior.

Phillips, supra. Accord, Brown v. State, 959 So. 2d 146 (Fla. 2007).²⁴

²⁴ In *Jones*, in discussing the adaptive function component testimony by the same Dr. Eisenstein who testified in this case, this Court said:

The DSM-IV states that the second criterion for mental retardation is “[c]oncurrent deficits or impairments in present adaptive functioning.” (Emphasis added.) Dr. Eisenstein's testimony that in this phrase the word “present” actually refers to past, or childhood, adaptive functioning would impose an Alice-in-

THE CIRCUIT COURT DECIDED THE ISSUES CORRECTLY

Johnston claims, for reasons that are at times unclear, that the circuit court should have found that he is mentally retarded. Johnston would have that court reach that conclusion based on a single test, the WAIS-IV that was given in July of 2009, even though Johnston's IQ scores over the last 35 years have **all** been well above the range that would support a diagnosis of mental retardation.²⁵ Johnston further attempts to rely on the very type of retrospective adaptive functioning assessment that was flatly rejected in *Jones, Phillips, and Brown*. Neither Krop nor Eisenstein attempted any sort of **present** assessment, even though the law has been settled for some time that that is exactly what is required. Dr. Eisenstein certainly should have known this, since he was the expert who attempted to twist the meaning of the word "present" and had his creative

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 at 327.

²⁵ Johnston makes much of the fact that he produced scores in the mentally retarded range when he was age 7 and 12. He ignores the fact that the examiner who administered those tests said in his report that the scores were too low and not a true reflection of Johnston's ability. His argument with respect to these scores ignores the true state of the evidence. Likewise, his reference to the "Leesville State School for the Mentally Retarded" on page 42 of his brief is simply false -- that was never the name of that facility. (SR203).

attempt to bend the facts to help an inmate rejected by this Court.

In its order denying relief, the circuit court summarized the evidence supporting that decision as follows:

On March 27, 2010, Dr. Prichard, a licensed psychologist, testified that in 2005 he was asked to assess Defendant for mental retardation. At that time Dr. Prichard administered the WAIS-III to Defendant and obtained a full scale score of 84. He also reviewed various records pertaining to Defendant's schooling and mental health problems, transcripts from court proceedings, and transcribed testimony from various professionals and Defendant himself. As a result of this work, Dr. Prichard determined that Defendant was not mentally retarded.

Dr. Prichard testified that he has not seen Defendant since 2005, but was recently asked to reevaluate him. He did this by reviewing information provided by defense counsel, Dr. Krop, and Dr. Eisenstein, including Dr. Eisenstein's testing, reports, and raw data concerning the WAIS-IV, and reanalyzing the information from his prior evaluation of Defendant. Based on this new review, Dr. Prichard concluded that Defendant is not mentally retarded.

Dr. Prichard opined that Defendant's first two IQ tests were invalid based on the examiner's remarks that the results were spurious. However, the January 1974 score on the WISC was valid based on the examiner's positive remarks that Defendant was alert, cooperative, friendly, verbally expressive, and exhibited self confidence during the testing. Dr. Prichard stated that it was possible to compute the full scale IQ from November 1988, which he did in 2005, and the score was 83. According to Dr. Prichard, the WAIS-III he administered in 2005 was not flawed and should not be discounted in view of the WAIS-IV wherein the administration of the test was a valid administration and the results were a valid representation of Defendant's IQ.

When asked if he could offer any explanation as to the

extreme disparity between the score of 83 Defendant obtained in 2005 on the WAIS-III and the score of 61 he obtained in 2009 on the WAIS-IV, Dr. Prichard responded that IQ scores typically vary across time, and thus the disparity was not a product of the testing instrument or Defendant's IQ, but instead involved a number of external and internal factors affecting Defendant's optimal performance. **He further testified that the disparity could not be explained by the four factor model utilized in the WAIS-IV wherein the correlation between the WAIS-III and the WAIS-IV was .94, or almost perfect, which signified that the WAIS-III was measuring the same constructs as the WAIS-IV and there was a great deal of overlap between the two instruments, making them almost "identical."** Dr. Prichard also characterized the 2009 IQ score as an outlier because it did not intersect with previous tests which showed consistent scores over time.

Dr. Prichard also opined that the TOMM [the Test of Memory Malinger] was not administered properly in that by administering the TOMM and the WAIS-IV some two or three months apart, the ability to make an extrapolation from one test to the other was lost. According to Dr. Prichard, the TOMM should have been given on the day preceding the WAIS-IV or the day after the WAIS-IV was administered.

Dr. Sal Blandino, a licensed psychologist, testified that he evaluated Defendant in May 2005, and was recently asked to evaluate him again. In his latest evaluation, Dr. Blandino essentially reviewed Defendant's records, including Dr. Eisenstein's evaluation, Dr. Krop's evaluation, a transcript from a Rule 3.850 hearing, and several other documents. Dr. Blandino stated his opinion in 2005 was that Defendant was not mentally retarded, and he still believes that not only is Defendant not mentally retarded, but he never suffered from mental retardation; instead, he is in the borderline range of intellectual functioning.

According to Dr. Blandino, his current opinion is based on consistent findings over 31 years (with the majority occurring after age 18) which indicate that Defendant's true ability is solidly in the range of borderline intellectual functioning. [FN16] **Dr. Blandino stated that the correlation between the WAIS-**

III and the WAIS-IV is very high and in fact is too high to explain the 23 point difference in the 61 and 84 score differences. Furthermore, in explaining the differences between the 1967, 1972, and 2009 scores, Dr. Blandino opined that during the earlier tests, Defendant was experiencing behavior and emotional problems, anxiety, depression, and motivational issues. In 2009, he was on an active death warrant, meaning "he realizes he's gonna be executed," which would cause depression, stress, emotional difficulties and behavioral problems and affect things like working memory, processing speed, and even perceptual reasoning ability.

[FN16] According to Dr. Blandino, these findings include Defendant's test scores as well as the qualifiers, or caveats on the first two IQ tests, the third IQ test wherein Defendant scored 80 points with no negative caveats from the examiner, the fact that Defendant's scores were increasing and thus going from the retarded range to the borderline intellectual function range which was "prophesied" when the examiner opined that his true functioning range was higher than the retarded range.

Based on the foregoing, **the Court finds the testimony of the State's witnesses to be more detailed and to provide more credible explanations for the disparities in Defendant's test scores in the seven IQ tests.**

Specifically, Dr. Prichard testified that the comments of the examiner who tested Defendant in 1967 and 1972 were a routine and typical part of a psychological report to alert future readers as to the effort the examinee put forth in the test and thus the results of these two tests were spurious at best. He further testified that there could be a number of internal and external factors affecting an individual on any given day, and thus it was quite normal for Defendant's IQ scores to vary from time to time; as an example of this variability, Dr. Prichard compared Defendant's answer to the question "Who is Martin Luther King" on the 2005 WAIS-III to the answer he gave to the same questions on the 2009 WAIS-IV; in the first situation, Defendant responded a "black civil rights leader,"

while in the second situation, he indicated that he had never heard of Martin Luther King. Dr. Prichard also pointed out another variability in Defendant's performance in the arithmetic domain of both tests; in the 2005 test, Defendant was able to add \$4 plus \$5, while in the 2009 test, when asked to add 4 blankets plus 4 blankets, he told the examiner, "I can't add."

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.

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. Lastly, it was not established that there was onset of mental retardation prior to age 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.**

(SR55-58). (emphasis added).

That order is dispositive of Johnston's claims, which come down to no more than his dissatisfaction with the result. The circuit court properly resolved the credibility issues. Drs. Prichard and Blandino explained why the IQ scores obtained when Johnston was very young were not reliable -- that reasoning was cogent and rational, and was properly credited by the circuit

court over the nebulous, "because I say so," testimony of Johnston's experts. As both Dr. Prichard and Dr. Blandino described, the reports of testing clearly said that the scores were not an accurate reflection of Johnston's ability. None of Johnston's experts could supply a reason for ignoring clear statements by the examiner who did the actual work. If those scores are not reliable, and all the credible evidence is that they are not, it is unjustifiable to rely on those demonstrably invalid scores.²⁶

That leaves Johnston with the WAIS-IV, which the circuit court found did not produce a valid score, either. In the face of that evidence, there is no credible suggestion that Johnston's IQ score falls into the mentally retarded range. Whatever may have caused the low score on the WAIS-IV, that score is not valid -- the circuit court properly reached that conclusion. More significantly, Johnston has not explained why the circuit court is wrong.

Johnston also tries to make much of the fact that his

²⁶ The absurdity of the position taken by Johnston's experts demonstrates the lengths to which these psychologists will go to provide testimony favorable to a death row inmate. It is wholly irrational, and arguably unprofessional, to rely on IQ test scores when the professional administering the testing explicitly says that the score is an underestimate of Johnston's real intelligence. That testimony shows the clear bias of Dr. Eisenstein and Dr. Krop, and is clear evidence of why their testimony is absolutely unbelievable.

"academic" witnesses (Drs. Gresham²⁷ and Taub) were not rebutted by the State witnesses. However, Johnston has failed to mention that both Dr. Prichard and Dr. Blandino testified that the statistical correlation between the WAIS-III and the WAIS-IV is 0.94, which is an almost perfect correlation.²⁸ (SR366, 369-70; 390). Johnston has not challenged the accuracy of that testimony, and the most he can do is launch a volley of *ad hominem* abuse which does nothing to undermine the significance of that testimony. And, because of the 0.94 correlation, the lengthy testimony of Drs. Gresham and Taub²⁹ is meaningless. Whatever those two "experts" have to say concerning the comparison of the WAIS-III to the WAIS-IV is frivolous in the face of that unchallenged testimony about the almost perfect correlation between the two test instruments. (SR342, 390). Any difference in test "design" did not contribute to the 21-point difference in Johnston's two most recent IQ scores. The 2009 score of 61 on the WAIS-IV is demonstrably invalid, as the

²⁷ Dr. Gresham, who Johnston says is an expert in psychometrics, did not know the correlation between the two tests. (SR181).

²⁸ A 1.00 would be a perfect correlation.

²⁹ Dr. Taub testified at length about a study that he did about the "model" used in the WAIS-III. It is probable that this testimony cannot truly withstand a *Frye* challenge, and Johnston certainly failed to properly establish the acceptance of the principle (whatever it really is) because he presented no disinterested witnesses to support the testimony. *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995). At the end of the day, it makes no difference in light of the unchallenged correlation between the two tests.

circuit court found. Johnston is simply not mentally retarded.

With respect to the adaptive functioning assessment component (and to the extent that it is worthy of discussion in light of the failure to satisfy the first component), Johnston presented no evidence at all of his present functioning, as the circuit court correctly found. That failure of proof is dispositive. *Jones, supra; Phillips, supra; Brown, supra.* Likewise, there was no proof at all of onset prior to the age of 18.

The circuit court properly concluded that Johnston had failed to establish any of the three diagnostic criteria of mental retardation. That finding is supported by competent substantial evidence and should not be disturbed.

CONCLUSION

This case was remanded to the circuit court for a hearing on Johnston's claim that a new IQ test showed that he was mentally retarded, and that that new test was significantly more accurate than the IQ tests he has taken over the preceding 30-plus years. Those tests, when the results were valid, never produced a score falling in the range of mental retardation.

After a two-day hearing at which six mental health professionals testified and which generated a transcript of over 400 pages, the only evidence Johnston presented that touches on the "less accurate" nature of the earlier IQ scores consists of

seven (7) lines of testimony found on pages 180-181 of the supplemental record -- that testimony does no more than say that the only way to assess the accuracy of the tests is through the "Flynn effect," something about which Johnston presented no evidence at all. When all is said and done, Johnston obtained a stay of execution, and a remand for an evidentiary hearing, based upon flawed claims made to this Court.

Even putting aside the failure to prove the linchpin of his claim, Johnston is not entitled to relief because there is no credible evidence that he is mentally retarded. Whatever the reason for Johnston's score of 61 on the most recent testing, that score is not a valid reflection of his intelligence. The circuit court correctly found, based upon the evidence, that Johnston is not mentally retarded and denied relief. That result should be affirmed in all respects and the stay of execution vacated. It is time for Johnston's sentence to be carried out.

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 May, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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