IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-356

DAVID EUGENE JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

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)(emphasis added).

As Mr. Johnston has established, the newly discovered evidence, the WAIS-IV, does in fact indicate that he is mentally retarded. Appellee has produced no evidence to the contrary. In fact, as Appellee acknowledges in its own statement of facts, state expert Dr. "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." (Supplemental Answer at 31).

Given Appellee's inability to refute the newly discovered

evidence which Mr. Johnston has produced, Appellee instead attempts to fault Mr. Johnston for failing to challenge the accuracy of the earlier IQ testing (Supplemental Answer at 37). In doing so, Appellee fails to comprehend that when Mr. Johnston provided thorough explanations from qualified experts as to the validity of the newly discovered evidence, these explanations also provided rational, objective and scientific reasoning which logically explains the differences between the WAIS-IV and prior tests (See e.g., Supp. PCR4 91, 92, 94, 124, 126, 152, 153, 156, 173, 174, 242, 247, 251). Appellee seemingly ignores the fact that even its own expert, Dr. Prichard, admitted 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; and that some of the subtests on the WAIS-III were dropped and not included on the WAIS-IV, including the picture arrangement test wherein Mr. Johnston had one of his highest scores (Supp. PCR4 344-46).[1]

Despite having failed to rebut Mr. Johnston's newly discovered evidence in any way, Appellee desperately clings to the notion that Mr. Johnston's score on the WAIS-IV is unworthy of belief (Supplemental Answer at 38). Appellee asks this Court to disregard Mr. Johnston's score on the "most valid, reliable

[1]Further, 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).

test available today", because some of Mr. Johnston's older scores indicate IQ scores of over 70; and although some of Mr. Johnston's older scores indicate IQs under 70, Appellee submits that those shouldn't count (Supplemental Answer at 40).[2] Appellee's quibbling over which of Mr. Johnston's many prior IQ scores, ranging from 57-84, should count as evidence of whether Mr. Johnston's is mentally retarded, does nothing to negate the fact that Mr. Johnston has presented unrebutted newly discovered evidence establishing an IQ of 61. Contrary to Appellee's assertion (Supplemental Answer at 40), the reasons are clear as to why the circuit court should have found that Mr. Johnston is mentally retarded.

Still having failed to discredit the WAIS-IV or the score which Mr. Johnston obtained on it, Appellee blindly asserts that the circuit court properly reached the conclusion that the WAIS-IV did not produce a valid score (Supplemental Answer at 45). As Mr. Johnston previously demonstrated in his Supplemental Initial Brief, the circuit court's determination is not supported by competent and substantial evidence. More to the point, the circuit court's determination is not supported by any evidence.

---

[2]It is disingenuous that Appellee wishes to discount Mr. Johnston's prior sub-70 IQ scores based upon the supposed concerns of the test examiner, yet Appellee wholeheartedly endorses Mr. Johnston's 1974 score of 80, despite the test examiner's concerns of test-wiseness on the part of Mr. Johnston (Supp. PCR4 352-53).

Instead, the court relied upon the speculative conclusion of a State expert who despite not having seen Mr. Johnston in five years, stated that Mr. Johnston's "presence on death row would cause him to suffer depression, etc., which would depress his performance on the WAIS-IV." (Supp. PCR4 58). Clearly, the circuit court's reliance on such unfounded conjecture to dismiss the WAIS-IV score is erroneous.[3]

Appellee also attempts to assert that the testimony of the State's experts regarding the correlation between the WAIS-III and the WAIS-IV should be credited over the testimony of Mr. Johnston's experts (Supplemental Answer at 45). In doing so, Appellee does not even attempt to offer any explanation, credible or otherwise, as to why the Court should credit the testimony of two witnesses with no expertise in this area over well-qualified experts who were recognized by the circuit court as experts in psychometric measurement and theory in the administration of the intelligence instruments (Supp. PCR4 150-52, 236).[4] Appellee had

---

[3]Appellee doesn't even attempt to argue in favor of the circuit court's faulty reasoning. Rather, Appellee weakly maintains that "[w]hatever may have caused the low score on the WAIS-IV, that score is not valid - - the circuit court properly reached that conclusion." (Supplemental Answer at 45).

[4]Dr. Prichard candidly acknowledged that he has never published nor 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

the opportunity at the remanded evidentiary hearing to present expert testimony regarding the construct of the WAIS-IV in comparison to the WAIS-III. For whatever reason, Appellee instead chose to present witnesses whose sole expertise is in psychology.[5] Appellee's attempt to now rely on witnesses with no expertise in the critical areas at issue must be disregarded.[6] Like Appellee's argument, the circuit court's determination, which was also based on the speculation and conjecture of two witnesses with no expertise in the area as opposed to the highly

---

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). Moreover, Dr. Blandino acknowledged that he has not even read any articles addressing this issue (Supp. PCR4 400).

[5]This lack of expertise can be seen in Dr. Blandino's, and subsequently the circuit court's, unfounded reliance on the correlation of 0.94 between the WAIS-III and the WAIS-IV. Dr. Blandino testified that the two tests were almost identical. This fact is relatively insignificant given that the correlation between the WAIS-III tests administered in 2000 and 2005 is 1.0, yet they resulted in divergent scores, a 76 and an 84 respectively. Moreover, the WISC taken three times by Mr. Johnston as a child had a correlation of 1.0 yet resulted in divergent scores with a variance of 65 to 80. This Court should disregard the unfounded correlation testimony as a "red herring."

[6]Further, Appellee's apparent frustration for failing to having presented the appropriate experts, and thus causing Appellee to lash out at Mr. Johnston's "'academic' witnesses" (Supplemental Answer at 45), is unwarranted.

qualified opinions of two experts, is not supported by competent and substantial evidence.

On a final note, Appellee at several points during the briefing as well as during the remanded evidentiary hearing seemingly insinuates that Mr. Johnston was never sent to a school for the mentally retarded. Such an insinuation is patently false. There is no dispute that Mr. Johnston was sent to the Leesville State School in Louisiana. According to the *Statute of Louisiana*, Act 321 (1960), the Leesville State School was established on March 30, 1964, and it was specifically for "the training and rehabilitation of educable and/or trainable mentally retarded children."

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 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

20th day of May 2010.

CERTIFICATE OF FONT

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

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