DAVID EUGENE JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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REPLY TO INTRODUCTION

Respondent goes to great lengths to assail Mr. Johnston for not raising and arguing the results of the DNA testing. Since, as Respondent proclaims, these results were not favorable to Mr. Johnson, Mr. Johnson is at a loss as to what Respondent would like for him to discuss.

As Respondent should know, issues not raised on appeal are considered waived or abandoned. The DNA testing did not exonerate Mr. Johnston. Mr. Johnston has no complaint with the lab that conducted the testing. Therefore, he did not raise what he considered to no longer be a meritorious issue. Respondent's attack on Mr. Johnson for **not raising** a meritless issue is absurd.

ARGUMENT IN REPLY

ARGUMENT I

NEWLY DISCOVERED EVIDENCE OF INNOCENCE WARRANTS A NEW TRIAL IN MR. JOHNSTON'S CASE BECAUSE HAD THE JURY KNOWN OF THE NEW EVIDENCE IT PROBABLY WOULD HAVE ACQUITTED MR. JOHNSTON OF THEMURDER OF MARY HAMMOND; THEREFORE, MR. JOHNSTON'S CONVICTION ANDSENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Respondent seeks to dispose of this issue by asserting that "The testimony from trial was undisputed that the victim was bleeding, and Johnston claimed to have found her body and 'held her.'" (Answer at 14). Thus according to Respondent, in light of 14).

Respondent's reliance on selective, unreliable statements from a mentally ill individual in no way changes the fact that

the jury was presented with inaccurate testimony. Mr. Johnston is without a doubt mentally ill,[1] he was recognized as such at the time of trial,[2] and thus his many contradictory statements to the police are simply unreliable.[3] Respondent's attempt to cherry pick only those statements which benefit his argument is

[1]Among other mental issues, Mr. Johnston has been diagnosed as suffering from schizophrenia (R. 1140, 1178).

[2]On direct appeal, this Court affirmed the denial of Mr.Johnston's Faretta claim, stating,

> The trial judge made the proper inquiry in this case and correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of **Johnston's mental condition**. In fact the court's order denying Johnston's motion for self-representation and counsel's motion to withdraw specifically cited Johnston's age, education, and **reports of psychiatrist and past admissions into mental hospitals**. Clearly, the trial court was correct in concluding that Johnston would not receive a fair trial without assistance of counsel.

Johnston v. State, 497 So. 2d 863 (Fla. 1986)(emphasis added).

[3]In one statement to the police, Mr. Johnston related tha the did not touch the victim (T. 494). In another statement, he did touch the victim (T. 823). In one statement to the police, Mr. Johnston related that the victim was dead when he found her (T. 494). In another statement, she was alive and appeared to be trying to speak to him (T. 845).

ARGUMENT III

THE CIRCUIT COURT'S ALTERNATE FINDING APPLIED THE WRONG STANDARD AND CONSIDERED THE WRONG EVIDENCE.

Respondent takes issue with whether the lower court's merits ruling as to this issue constitutes the alternate finding (Answer at 19). According to Respondent, "Johnston overlooks the fact that the merits ruling was the primary basis for the circuit court's decision, and the 'scope of the relinquishment' component was the secondary basis for denial of relief." (Answer at 19-20).

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

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

R. 787(fn omitted). Only after the lower court made this

[4] Respondent places no value on the fact that Mr. Johnstonwas emphatically consistent in his denial of the victim's murder (T. 845). Nor would Respondent presumably accept Mr. Johnston'sprior claim that he had been attacked by Judge Powell in chambers following his evidentiary hearing.

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

R. 787

In response to Mr. Johnston's assertion that the lower court failed to analyze his successive motion to vacate under the proper standard, Respondent concedes only that "the court's language could possibly have been more precise." (Answer at 20). Respondent then proceeds to assert that "there is no doubt that the court was well aware of the proper standard for evaluating newly discovered evidence claims." (Answer at 20-21).

Respondent's conclusory statement has no support in the record. While Mr. Johnston's claim involved newly discovered evidence, it is clear from the lower court's order that it failed to consider the claim under that standard. Nor did the lower court determine, as it was required, "If the motion, files, and records in the case conclusively show the movant is entitled to no relief." Fla.R.Cr.P. 3.851(f)(5)(B).[5] Instead, the lower

[5] The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[]on the face of the pleadings." Card v. State, 652 So. 2d 344, 346(Fla. 1995). Respondent cannot dispute that successive Rule

3.850 petitioners have received evidentiary hearings based on newly discovered evidence and merits consideration. See e.g.,State v. Mills, 788 So. 2d 249, 250 (Fla. 2001)(the Florida consider Mr.

Johnston's successive motion, and it alternatively analyzed the claim under the standard for motions brought pursuant to rule 3.853. Here, the lower court failed to properly consider Mr. Johnston's successive motion to vacate.

CONCLUSION AND RELIEF SOUGHT

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

Supreme Court affirmed the circuit court's grant of sentencing relief on a third Rule 3.850 motion premised upon a testifying co-defendant's inconsistent statements to an individual while incarcerated); Lightbourne v. State, 742 So. 2d 238, 249 (Fla.1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); Melendez v. State,718 So. 2d 746 (Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); Swafford v. State, 679 So.2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce an acquittal);Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla.1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"); Jones v. State, 591 So. 2d 911, 916 (Fla.1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun).

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 October 16, 2009.

CERTIFICATE OF FONT

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

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