

# Supreme Court of Florida

THURSDAY, MARCH 4, 2010

CASE NO.: SC10-356

Lower Tribunal No(s): CR83-5401

DAVID EUGENE JOHNSTON

vs.

STATE OF FLORIDA

---

Appellant(s)

Appellee(s)

The execution of David Eugene Johnston, scheduled for 6:00 p.m., Tuesday, March 9, 2010, is hereby stayed pending further order of this Court.

David Eugene Johnston, a prisoner under sentence of death and under an active continuing death warrant signed by Governor Charlie Crist setting the execution for March 9, 2010, appeals the circuit court's order summarily denying his sixth successive motion for postconviction relief, which was filed pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction under article V, section 3(b)(1), of the Florida Constitution. 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). The Court reserves ruling on the issues raised in this appeal until jurisdiction returns to this Court after the relinquishment.

The parties and the trial court shall proceed in an expedited manner, and an evidentiary hearing on Johnston's Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend shall be held and an order entered within thirty days of this order.

The court reporters shall have ten days after completion of the above proceedings in which to file any transcripts with the trial court clerk, and the trial court clerk shall have five days after receipt of the transcripts in which to file a record of the entire relinquishment proceeding with this Court. Per this Court's



Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, the court reporters are directed to transmit a copy of any transcripts, in addition to paper copies, in an electronic format as required by the provisions of that order. The electronic version for this Court shall be submitted to the following e-mail address: e-file@flcourts.org.

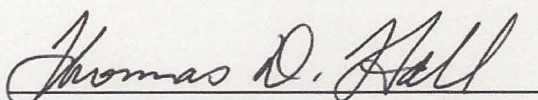
Counsel for the parties are hereby directed to file status reports with this Court every thirty days as to the progress of the relinquishment proceeding.

\*THE COVERSHEET SHALL REFLECT "SUPPLEMENTAL RECORD - VOLUME 1, ETC." AND PAGE NUMBERING SHOULD START WITH PAGE 1 AND RUN CONSECUTIVELY.

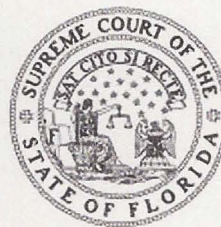
QUINCE, C.J., and PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.  
CANADY and POLSTON, JJ., dissent.

A True Copy

Test:



Thomas D. Hall  
Clerk, Supreme Court



tc

Served:

JEFFREY L. ASHTON  
D. TODD DOSS  
KENNETH S. NUNNELLEY  
HON. BELVIN PERRY, JR., CHIEF JUDGE  
HON. LYDIA GARDNER, CLERK  
HON. CHARLIE CRIST, GOVERNOR  
HON. WALTER A. MCNEIL, WARDEN