

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 1983-CF-5401

Plaintiff,

vs.

DAVID EUGENE JOHNSTON,

Defendant.

ORDER FINDING DEFENDANT IS NOT MENTALLY RETARDED

THIS MATTER came before this Court pursuant to the Florida Supreme Court's March 4, 2010 Order. On February 9, 2010, Defendant filed a "Motion to Vacate Judgment of Conviction and Sentences With Special Request for Leave to Amend" alleging newly discovered evidence in relation to a mental retardation claim. In response, the State filed its "Answer and Motion to Dismiss Sixth Successive Post-Conviction Relief Motion" on February 15, 2010. Following a hearing on February 19, 2010, Defendant's Motion was denied. On appeal, however, the Florida Supreme Court reversed the summary denial of the Motion and relinquished jurisdiction to this Court for thirty days to hold an evidentiary hearing on the issue of whether the newly discovered evidence indicates that Defendant is mentally retarded pursuant to *Atkins v. Virginia*, 536 U. S. 304 (2002), section 921.137, Florida Statutes, and *Cherry v. State*, 959 So. 2d 702 (Fla. 2007). An evidentiary hearing was conducted on March 26-27, 2010.

Florida Rule of Criminal Procedure 3.203¹ sets out a three-part test for determining mental retardation in a first-degree murder case in which a defendant's alleged mental retardation

¹ This Rule, which became effective on October 1, 2004, was adopted in response to *Atkins v. Virginia*, 536 U. S. 304 (2002) wherein the United States Supreme Court held that execution of the mentally retarded constitutes excessive punishment under the Eight Amendment.

becomes an issue. According to the Rule, "mental retardation" is defined as: (1) significantly subaverage general intellectual functioning existing concurrently with (2) deficits in adaptive behavior and (3) manifesting during the period from conception to age 18.² A defendant seeking exemption from execution on grounds of mental retardation must establish that he has an IQ of 70 or below. *See Nixon v. State*, 3 So. 3d 137 (2009). *See also Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007) (under Florida law, one of the criteria to determine if a person is mentally retarded is that he has an IQ of 70 or below).

During the March 26-27, 2010, evidentiary hearing, six witnesses were called and provided testimony upon direct examination and cross-examination. Defendant called Drs. Hyman Eisenstein, Frank Gresham, Harry Krop and Gordon Taub as witnesses, while the State called Drs. Greg Prichard and Sal Blandino as witnesses. Drs. Eisenstein and Krop opined that Defendant meets the criteria for mental retardation while Drs. Prichard and Blandino opined that he did not. In addition, all of the witnesses voiced opinions on whether the WAIS-IV IQ test is newly discovered evidence in relation to Defendant's claim of mental retardation.

Defendant was given seven IQ tests over a time span of forty-two years. The 1967 Stanford-Binet, which was administered when Defendant was seven years old and the 1972 WISC which was administered when Defendant was twelve years old, yielded scores of 57 and 65 respectively, which placed Defendant in the mentally retarded range, notwithstanding the examiner's comments. Additionally, the 2009 WAIS-IV, which was administered when Defendant was forty-nine, yielded a score of 61, which also placed him in the mentally retarded

² Significantly subaverage general intellectual functioning" is defined as "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 in rule 65B-4.1032 of the Florida Administrative Code," while "adaptive behavior" is defined as 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." *See Fla. R. Crim. P. 3.203(b)*.

range. On the other hand, the WISC, WAIS-R, and two WAIS-III tests administered when Defendant was fourteen, twenty eight, forty, and forty five years old, yielded scores of 80, 83, 76, and 82 respectively, which placed him in the low functioning range:

December 1967	Age 7	Stanford-Binet - Form LM	IQ = 57 ³
May 1972	Age 12	WISC	VIQ = 65, PIQ = 72 FSIQ = 65
January 1974	Age 14	WISC	VIQ = 74, PIQ = 90 FSIQ = 80
November 1988	Age 28	WAIS-R	VIQ = 75, PIQ = 101 FSIQ = ⁴
May 2000	Age 40	WAIS-III	VIQ = 69, PIQ = 89 FSIQ = 76
May 2005	Age 45	WAIS-III	VIQ = 76, PIQ = 92 FSIQ = 82
July 2009	Age 49	WAIS-IV	VCI = 61, PRI = 82 WMI = 63, PSI = 56 FSIQ = 61

Dr. Eisenstein, a licensed clinical psychologist, testified that on May 5, 2009, and July 20, 2009, he administered several intelligence tests to Defendant, including the Test of Memory

³ This chart was entered into evidence as the State's Exhibit 1 during the March 26, 2010, portion of the evidentiary hearing.

⁴ Dr. Prichard stated in his testimony that even though the examiner left off the full scale IQ score, he scored the test and the full scale IQ was 83.

Malingering ("TOMM")⁵ and the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV"). He also reviewed various reports documenting Defendant's history, and reports from Drs. Blandino and Prichard. In addition, he conducted telephonic interviews with Clifford Johnston and Careen Johnston, Defendant's brother and stepmother, spoke with Dr. Krop, and reviewed the State of Florida Department of Corrections' adaptive checklist.

Dr. Eisenstein explained that in evaluating Defendant for mental retardation, he gave a lot of weight to the 1967 and 1972 scores, but not to the 1974 and 1988 scores because those tests did not reflect the most current testing data. Additionally, he discounted the 1974 score because he could never find the actual report and the score was only reported in other documents, which made it ambiguous in terms of where it was administered and who administered it; he also stated that there was a possibility of a "practice effect" on that particular test.

Dr. Eisenstein opined that Defendant's drop in IQ between 2005 and 2009 was based on the new configuration of the WAIS-IV, even though he admitted that there was some evidence that Defendant's processing speed on that instrument was significantly affected by his neuropsychological impairment and/or brain damage. Although Dr. Eisenstein did not know the correlation between the WAIS-III and the WAIS-IV, he stated that the WAIS-IV is the "standard." When asked if the WAIS-III tests that were given while that instrument was the standard were no longer any good, he answered, "Well, that's a very serious question. And I think that - I think that there has to be a judgment on that to call."

Dr. Eisenstein stated that Defendant met the criteria for mental retardation regarding the adaptive functioning assessment component as tested by the WAIS-IV in both communication and comprehension wherein he read at a first grade level, his ability to articulate language

⁵ According to Dr. Eisenstein, the TOMM evaluates one's ability to answer questions in a truthful and honest manner and is commonly used to evaluate deception, malingering, or faking. Dr. Eisenstein stated that Defendant did not malingere on the TOMM.

showed him to be the equivalent of 11 years of age, and he had great difficulty writing things down. Dr. Eisenstein conceded, however, that he did not interview any personnel at the Department of Corrections who would have been familiar with Defendant on a day-to-day basis to further assess this issue. Dr. Eisenstein also testified that Clifford and Careen Johnston both indicated that Defendant had trouble with comprehension and could not hold thoughts in his mind, had impaired communication skills, experienced mental health problems for which he received treatment, and began receiving social security benefits for his disabilities when he was sixteen or seventeen years of age.

Dr. Eisenstein opined that the onset of Defendant's mental retardation appeared as early as age seven based on the results of the 1967 Stanford-Binet, the 1972 WISC, and other documentation that he reviewed. However, he also acknowledged that the examiner who administered the first two IQ tests provided qualifications, or caveats, to the examinations, indicating that Defendant's intellectual ability was most likely within the "lower dull normal range."⁶

Based on his administration of the WAIS-IV⁷ and review of the previous IQ scores which he did not discount, as well as Defendant's history and records, Dr. Eisenstein opined that

⁶ On the 1967 test, the examiner noted that even though the score reflected that Defendant's intellectual function was within the retarded educable range, it was most likely a depressed intellectual assessment due to an unhealthy home environment, moderate to severe perceptual problems and/or brain damage, and severe emotional disturbance, and that Defendant's intellectual ability and innate intellectual potential was "possibly within the lower dull normal range, normal level." In the 1972 test, the examiner indicated that even though Defendant scored within the retarded, educable range, the results were again considered spurious because of the significance of his emotional problems and noted that Defendant's true ability level "would be more in keeping with the slower learner or low average range rather than the mentally retarded."

⁷ Dr. Eisenstein stated that the WAIS-IV is the "instrument that is now considered to be the standard of practice, the one that the research now has validated as being the definite instrument for assessing intellectual function."

Defendant's IQ was below 70, and thus he was mildly mentally retarded.

Dr. Frank Gresham, a licensed psychologist in Louisiana, and professor of psychology at Louisiana State University, testified that the WAIS-III maintained a verbal IQ/performance IQ distinction while the WAIS-IV no longer used that test structure and instead reported four index scores⁸ which are added together to form the full scale IQ score. He further testified that the Wechsler IQ tests are norm referenced tests in that they have no meaning unless they are compared to a normative sample of people of the same age.⁹ Dr. Gresham characterized the WAIS-IV as a total reconfiguration of the WISC, WAIS-R and WAIS-III, not just as a refinement in scoring, and testified that the WAIS-IV was a more accurate indication of Defendant's IQ than the previous scores based on the date it was normed. When asked if the WAIS-III and WAIS-R scores that were generated prior to the advent of the WAIS-IV were useless, Dr. Gresham replied that they are less accurate and that the accuracy of the tests could be measured by "Flynn Effect." Dr. Gresham opined that the correlation between the WAIS-III and the WAIS-IV was probably a "mid .8."

Dr. Gresham testified that he would not discount Defendant's 1967 or 1972 IQ scores, even though there were indications that they were not accurate, because individuals with mental retardation can also be depressed and have schizophrenia conduct disorders and brain damage.

Dr. Krop, a licensed psychologist, testified that he evaluated Defendant on May 1, 2009, utilizing a clinical interview and mental status examination; no IQ testing was done at that time.

⁸ The index scores, which are made up of subtests, are the verbal comprehension index, the perceptual reasoning index, working memory index, and the processing speed index.

⁹ Dr. Gresham explained that because the norms can become outdated, the normative sample is recalibrated each time the tests are revised; accordingly, the WAIS-IV was developed to yield a more accurate estimate of an individual's intelligence, and to update the norms for the test.

He further testified that he was evaluating Defendant for competency and to explore possible mitigating factors and that he had recommended to defense counsel that the WAIS-IV be administered to Defendant.

Dr. Krop explained that he evaluated Defendant's adaptive functioning capabilities using collateral records which made reference to Defendant's adaptive functioning level, either directly or indirectly, and the Adaptive Behavior Assessment System, Second Edition ("ABAS").¹⁰ Defendant scored four or less in all ten scales on the ABAS, and scored in the significantly limited area in the total scale which indicates, according to Dr. Krop, that he has trouble adjusting no matter what environment he is in.

Dr. Krop also reviewed the IQ scores obtained on the various tests previously administered to Defendant and determined that the 1967 and 1972 scores showed that Defendant was clearly in the range of mental retardation. Dr. Krop stated that even though the examiner who administered these tests thought that the scores were an underestimate of Defendant's true intellectual functioning, the examiner erred in making that assumption wherein it is not unusual for persons with IQ's in the mental retardation range to have more variability in the scatter, i.e., the strengths and weaknesses within each test, and thus the kind of scatter that Defendant had in the first two tests was normal. Dr. Krop also stated that the scores could have reflected Defendant's brain damage.

Dr. Krop did not have any reason to discount the validity of Defendant's full scale IQ score of 80 at the age of fourteen, but indicated that that score would not be dispositive of the pre-age 18 onset, wherein Defendant's higher score could be attributed to the "practice effect" or the "Flynn effect." However, he conceded that if he accepted that score as an accurate

¹⁰ According to Dr. Krop, the ABAS tests an individual's functioning in ten different areas, and considers a person to be significantly deficient or limited in a particular functional area if he has a score of four or less.

assessment of Defendant's true intelligence at that time, it would conclusively refute the mental retardation diagnosis both legally and clinically.

Dr. Krop explained that the twenty-three point difference in the IQ score of 84 in May 2005, and the 61 IQ score in June 2009 caused him some concern, but did not suggest to him that the WAIS-III was a "piece of junk." He further explained that he addressed his concerns about the two vastly different test scores by speaking to Dr. Eisenstein and examining the raw test data and the TOMM results himself. Dr. Krop opined that Dr. Eisenstein's testing on the WAIS-IV was valid based on the fact that there was no evidence of malingering on the TOMM and Defendant did relatively well on the perceptual reasoning index, scoring in the low average range, whereas everything else was extremely low, which shows a variability on this test corresponding to the same variability on previous IQ tests.

Dr. Krop stated that the validity of the WAIS-III was fairly high based on the normative data at the time, but contended that the WAIS-IV is a "better test in terms of current measurements and is a more valid and reliable test of a person's intellectual functioning as of today."¹¹ He also stated that most of the researchers in the area of IQ testing have suggested that some of the other testing "pretty much be thrown out in terms of the scores and that the WAIS-IV be considered the reliable test because of the current norms."¹² Dr. Krop concluded that Defendant was mentally retarded based on his score on the WAIS-IV, his adaptive functioning as assessed by Dr. Krop, and his IQ testing scores from childhood.

¹¹ Dr. Krop admitted that if he had been asked the question three or four years ago, he would have said that the "WAIS-III was probably the best test we had available to assess a person's intellectual functioning."

¹² To support this statement, Dr. Krop cited "The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False Over the Approximately True," by Dr. James Flynn, from *Applied Neuropsychology* 2009, and stated that Flynn's conclusion was that the WAIS-III scores be set aside and subjects be tested on a WAIS-IV or the Stanford-Binet-V. Dr. Krop admitted that Dr. Flynn was a "researcher" and not a clinical psychologist.

Dr. Gordon Taub, an associate professor of school psychology at the University of Central Florida, testified that even though the Psychological Corporation developed the WAIS-III with the theory of a four-factor model such as that found in the WAIS-IV, the actual scoring of the WAIS-III was through the two-factor verbal performance dichotomy. He further testified that he conducted a research study to determine whether the verbal performance dichotomy or the four-factor model was a better way to score the instrument and ultimately concluded that the four-factor model, which is actually utilized in the WAIS-IV, is significantly better than the two-factor performance model, and thus the WAIS-III's only scoring option was technically not the best way to score that instrument.¹³ In 2004, Dr. Taub published another article regarding the factor structure in the WAIS-III and whether it would hold up for the "entire normative sample across the age range of the instrument."¹⁴ Dr. Taub testified that even though the WAIS-III is not fatally flawed, extreme caution should be used when looking at scores that are derived at the verbal performance level, which is not the best scoring model for the instrument and thus raises questions concerning the construct validity of the test.

Thereafter the State moved to strike Dr. Taub's testimony, arguing that it did not meet the *Frye* standard.¹⁵ Following argument from both sides, the Court granted the motion. On March 27, 2010, defense counsel asked for permission to present testimony concerning Dr. Taub's research and the *Frye* standard. In an abundance of caution, the Court permitted counsel to recall

¹³ In 2001, prior to the publication of the WAIS-III, Dr. Taub published an article based on his research titled "Confirmatory Analysis of the Wechsler Adult Intelligence Scale, Third Edition, and a Verbal/Performance Discrepancy Justified."

This article was titled "Confirmatory Analysis of the Factor Structure and Cross-Age Invariance of the Wechsler Adult Intelligence Scale, Third Edition."

¹⁵ See *Frye v. U. S.*, 293 F. 1013 (1923) (requires judicial determination that the basic underlying principles of and methods used to analyze scientific evidence have been sufficiently tested and accepted by the relevant scientific community).

Dr. Gresham who essentially testified that Dr. Taub's research had been cited in thirty-four subsequent articles printed in peer-review journals. After considering Dr. Gresham's testimony and argument from both sides, the Court reserved ruling on the issue. In rendering its final decision, the Court has weighed and considered the testimony of all experts, including Dr. Taub, resolving the issue of admissibility in favor of Defendant, given the irrevocable nature of the death penalty.

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 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 proceeding 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.¹⁶ 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.

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

¹⁶ 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.

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."

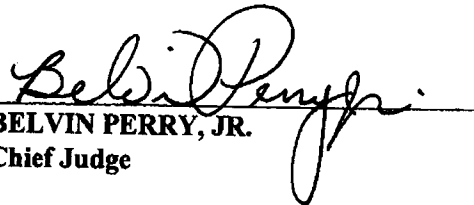
Additionally, the Court finds that Dr. Blandino's testimony that the correlation between the WAIS-III and the WAIS-IV, which Dr. Prichard testified was .94, essentially means that the two tests are almost identical, is credible. The Court also finds that Dr. Blandino's statement that Defendant's presence 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.

Based on all the evidence and testimony presented during the evidentiary hearing, the Court finds that Defendant is not mentally retarded.

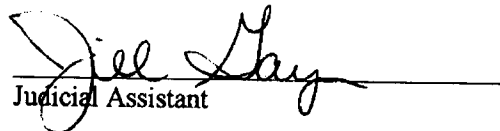
Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant David Johnston is **NOT MENTALLY RETARDED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, the 5th day of April, 2010.


BELVIN PERRY, JR.
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was furnished by e-mail, U. S. Mail or hand delivery to **Todd Doss, Esquire, Counsel for Defendant**, 725 S. E. Baya Drive, Suite 102, Lake City, Florida 32025-6092; **Kenneth Nunnelley, Esquire, Assistant Attorney General, Office of the Attorney General**, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118-3951; and **Jeffery Ashton, Esquire, Assistant State Attorney, Office of the State Attorney**, 415 N. Orange Avenue, Orlando, Florida 32801, on the 5th day of April, 2010.


Judicial Assistant