IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Case No. SC03-824

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

SUPPLEMENTAL ANSWER BRIEF

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RESPONSE TO STATEMENT OF THE CASE AND FACTS

The statement of the case and facts set out on pages 1-2 of the Appellant's brief is essentially accurate, but it omits any reference to the evidence presented at the evidentiary hearing. The State relies on the following statement of the case and facts.

This case was relinquished to the Circuit Court for a determination of whether the defendant met the criteria for a diagnosis of mental retardation under *Florida Rule of Criminal Procedure* 3.203. The Circuit Court appointed two psychologists, Dr. Sal Blandino and Dr. Greg Prichard, pursuant to the provisions of that Rule. (R167-70). Both experts found that Johnston did not meet the criteria for a diagnosis of mental retardation contained in the Rule because his full scale IQ score was 84. (R24, 38, 43-4, 75).

During the evidentiary hearing, both experts testified that a diagnosis of mental retardation is not appropriate unless three criteria are satisfied: significantly sub-average general intellectual functioning, concurrent deficits in present adaptive functioning, and onset before the age of 18. (R14, 64-66). The three criteria are in the conjunctive, and, unless all three are satisfied, the individual is not mentally retarded. (R50, 66-7). Both experts testified that in a case such as this

one (when the individual has a full scale IQ score of 84) there is no basis for conducting an assessment of the individual's level of adaptive functioning because he cannot, by definition, meet the diagnostic criteria for mental retardation. (R19-20, 38-9, 47-8, 66-7).[1] In other words, in the case of a defendant with a full scale IQ of 84, that defendant can never satisfy the "significantly subaverage general intellectual functioning" component, and, therefore, can never be diagnosed as mentally retarded. (R19-20, 47-8, 66-7). As both experts emphasized, an individual cannot produce an IQ score that artificially **inflates** their true intelligence -- in other words, it is not possible to "fake smart."

SUMMARY OF THE ARGUMENT

Johnston's brief is insufficient to present an issue for review by this Court because it contains no argument supporting what amounts to nothing more than his dissatisfaction with the decision of the Circuit Court. Moreover, the evaluations conducted by the experts were not deficient -- mental retardation requires the co-existence of three separate criteria. It makes no sense at all to require than an evaluation assess all three criteria when one of the criteria is clearly

[1] Johnston repeatedly told Dr. Blandino that he is mentally retarded. (R45). That sort of behavior is wholly uncharacteristic of persons who are truly mentally retarded. (R45-6).

absent. In any event, Johnston's full scale IQ is 84 -- that score is far above the cut-off score of 70 established by Rule, statute and case law.

ARGUMENT

A. Johnston's Brief is Insufficient to Present an Issue for Review.

The "Argument" section of Johnston's brief is slightly over four pages in length. No case law is cited in the brief, though Johnston does include one reference to *Florida Rule of Criminal Procedure* 3.203 on page seven of his brief. Florida law is settled that "[t]he purpose of an appellate brief is to present arguments in support of the points on appeal." *Bryant v. State*, 901 So. 2d 810, 827-828 (Fla. 2005), *citing, Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). The First District Court of Appeal has stated:

> This Court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention. It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. . . . When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy. Again, it is not the function of the Court to rebrief an appeal.
>
> *Polyglycoat Corp. v. Hirsch Distributors, Inc.,* 442 So. 2d 958, 960 (Fla. 4th DCA 1983), *review denied*, 451 So. 2d 848 (Fla. 1984) (citations omitted*). See*

> *F.M.W. Properties, Inc. v. Peoples First Financial Savings & Loan Ass'n*, 606 So. 2d 372 (Fla. 1st DCA 1992)

White v. White, 627 So. 2d 1237, 1239 (Fla. 1st DCA 1993). And, as this Court has held, "issues raised in [an] appellate brief which contain no argument are deemed abandoned." *Shere v. State*, 742 So. 2d 215, 218 (Fla. 1999). While Johnston's brief leaves no doubt that he disagrees with the finding of the trial court, no argument supporting that disagreement is contained within the brief. Johnston's brief is insufficient, and the trial court should be affirmed in all respects.

B. Competent Substantial Evidence Supports the Trial Court's Ruling.

Despite Johnston's claim that neither expert followed the trial court's order appointing them,[2] competent substantial evidence supports the trial court's finding that Johnston is not mentally retarded. The trial court found:

> As explained by Dr. Prichard, and supported by the DSM-IV-TR, Defendant had to score two standard deviations below the mean score, or 70, in order to meet the first prong of the mental retardation analysis. However, both Dr. Blandino and Dr. Prichard testified that Defendant consistently scored too high on IQ tests to support a finding of "significantly subaverage general intellectual functioning." *See Fla. R. Crim. P.* 3.203(b).

[2] Whether the order can even be read as Johnston interprets it is questionable. Regardless, the order did not purport to direct the experts to conduct the evaluations in a specific way. (R167-70).

> Based on the foregoing, the Court finds that the evidence demonstrates that Defendant failed to meet the first prong of the test for evaluating mental retardation. Therefore, it is not necessary to reach the remaining prongs of the three-part test. *See Fla. R. Crim. P.* 3.203.

(R277-78).

Johnston's belief that the experts in some way conducted an insufficient or incomplete evaluation is contradicted by the evidence before the court. That evidence is unchallenged but for Johnston's unsupported assertion that even though his IQ score is far too high to allow a diagnosis of mental retardation, the experts should have nevertheless undertaken to assess his present level of adaptive functioning and to determine whether the "condition" manifested itself before Johnston was 18.[3] That position is contrary to common sense -- all three components of the diagnostic criteria must exist in order to diagnose mental retardation. Assessing two components when the third required component has been found not to exist is an exercise that serves no purpose at all -- it is a pointless undertaking that elevates form over substance.

[3] Dr. Blandino was the expert selected by Johnston, who knew, well before the evidentiary hearing, that Dr. Blandino had not conducted an adaptive assessment because Johnston's IQ score (by itself) precluded a diagnosis of mental retardation. Johnston voiced no dissatisfaction with Dr. Blandino's work until the morning of the hearing, when he complained that no adaptive assessment had been conducted(R3-7) If Johnston truly believed that such an assessment was necessary, he should have raised the issue in a timely fashion instead of waiting until the hearing was starting.

C. Diagnosis of Mental Retardation is Based upon the Existence of Three Co-Equal Criteria.

Under § 921.137, *Florida Rule of Criminal Procedure* 3.203, and the *Diagnostic and Statistical Manual - Fourth Edition - Text Revision*, three criteria are required to diagnose an individual as mentally retarded. The person must have significantly subaverage general intellectual functioning as determined by an individually administered standardized intelligence test,[4] concurrent deficits in present adaptive functioning, and the condition must manifest before the age of 18. All three criteria must be met, and, if one criteria is not present, a diagnosis of mental retardation is not appropriate and cannot be made. (R50, 66-67). Stated differently, the diagnostic standard for mental retardation is in the conjunctive, just like the *Strickland* standard that applies to ineffectiveness of counsel claims.[5]

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant seeking relief on ineffectiveness of counsel grounds

[4] Section 921.137 requires the Department of Children and Families to specify the intelligence tests to be used. The *Weschler Adult intelligence Scale - III* is one of those tests, and is the test that was given to Johnston. The propriety of the testing is not in dispute.

[5] Alternatively, in a less elegant analogy, Johnston's argument can be compared to a three-legged stool that only has two legs. The stool will not work, and no amount of trying will change that fact. Likewise, no amount of trying will change the hard fact that Johnston's IQ score (one leg of the stool) is too high to support a finding that he is mentally retarded.

must prove not only that counsel's performance was constitutionally deficient, but also that he was prejudiced as a result of counsel's deficient performance. The law is well-settled that a court deciding an ineffectiveness claim is not required to rule on **both** components of *Strickland* -- if the defendant cannot prevail on the prejudice prong, the court need not address the performance prong because the defendant cannot, as a matter of law, carry his burden of proof. *Strickland v.* Washington, 466 U.S. at 697; *Wike v.* State, 813 So. 2d 12, 20 n.7 (Fla. 2002). No one would seriously suggest that the Court is **required** to address both prongs in order to have drafted a legally sufficient order, and there is no rational basis for treating the mental retardation determination differently.[6]

D. Rule 3.203 Does Not Require the Experts to Perform Work that is Unnecessary to the Formulation of an Opinion.

The heart of Johnston's argument seems to be that the mental state professionals appointed to conduct a Rule 3.203 evaluation are required by the Rule to assess each of the three diagnostic components even if the defendant cannot satisfy one or more of those criteria. The Rule does not say that, and common sense does not require it.

[6] The State recognizes that the *Strickland* analogy is an imperfect one -- an ineffectiveness of counsel determination is a legal conclusion, while the mental retardation determination turns on the proof (or failure of proof) of specific facts. However, the analogy is illustrative.

Rule 3.203(b) sets out the definition of mental retardation as that term is used in the Rule:

> As used in this rule, 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 rule, 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 in rule 65B-4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, 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.

Fla. R. Crim. P. 3.203(b).[7] Nowhere in this definition does the Rule purport to say that every component part of the definition must be addressed in every case -- likewise, nothing in any other part of the Rule suggests or implies that every component of the definition must be considered in every evaluation conducted under the Rule. The trial court is required to determine if the defendant raising mental retardation as a bar to imposition of the death penalty meets the definition of mental retardation contained in the Rule -- if the defendant does not meet one component of the definition (like Johnston), the defendant is not mentally retarded and is not entitled to relief.

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[7] As discussed above, this definition of mental retardation is consistent with the DSM-IV-TR and § 921.137, *Fla. Stat.*

To the extent that further discussion of this issue is necessary, Rule 3.203(e) illustrates the overbroad character of Johnston's position. In pertinent part, that Rule reads as follows:

> The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is mentally retarded **as defined in subdivision (b) of this rule**. . . . If the court determines that the defendant has not established mental retardation, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

Fla. R. Crim. P. 3.203(e). (emphasis added).The Rule does no more and no less than direct the trial court to determine if the defendant meets the definition of mental retardation contained in the Rule -- it imposes no requirement that the court consider (or require the experts to consider) all parts of the definition when it is clear that the defendant does not meet one part of the definition and therefore cannot be diagnosed as mentally retarded. Johnston's contrary position is based on a misreading of the Rule.

E. <u>The Present IQ Score is the One that Matters</u>.

On pages 5-6 of his brief, Johnston complains that the "results of the IQ testing are suspect" because Johnston has, at

times in the past, produced IQ scores lower than his current score of 84. As Johnston's own expert testified, and as the trial court found, "even though Defendant's emotional and behavioral factors seemed to obstruct his early test scores, as he aged he was able to perform better on the tests." (R275). The trial court went on to find that Johnston's earlier IQ scores were explained by his emotional and behavioral problems at the time of testing -- it is not possible to "fake good" on an IQ test. (R275-76). Those findings of fact are uncontroverted, and, in the final analysis, Johnston's argument is simply that he is dissatisfied with the result. Competent substantial evidence supports the trial court's findings, and those factual determinations should not be disturbed.

F. Johnston is not Mentally Retarded as a Matter of Law.

In *Zack v. State*, which was released on the same day that the trial court entered its order, this Court held, *inter alia*, that a defendant seeking to invoke mental retardation as a bar to execution must prove that his IQ is 70 or below. This Court held:

> The evidence in this case shows Zack's lowest IQ score to be 79. Pursuant to *Atkins v. Virginia*, 536 U.S. 304, 317, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002), a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." **Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below**. See § 916.106 (12),

> *Fla. Stat*. (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that "significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department); *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

Zack v. State, 30 Fla. L. Weekly, S591, 593-4 (Fla. July 7, 2005). (emphasis added).[8] The relevance of *Zack* to this case is two-fold. *Zack* establishes that an IQ score of 70 or below is necessary before an individual can be found mentally retarded. With an IQ score of 84, Johnston does not meet that requirement. And, *Zack* is consistent with the notion that if the IQ score is higher than 70, the defendant is not mentally retarded, and there is therefore no need to address the remaining component parts of the mental retardation definition.

CONCLUSION

The trial court properly found that Johnston is not mentally retarded based upon his IQ score of 84. That score is unchallenged, and, under any possible view of the evidence, demonstrates that Johnston has failed to carry his burden of

[8] *Zack* was not available to the trial court. However, it was decided before Johnston filed his brief. Even though *Zack* is authority that is directly contrary to Johnston's position, it is not cited in his brief.

proving that he is mentally retarded. Johnston's argument that the adaptive function component (and presumably the pre-18 onset component) of the three-part definition should have been addressed even though the IQ score standing alone forecloses a diagnosis of mental retardation is based on a misunderstanding of the diagnostic process. It is not a basis for relief.

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: **J. Edwin Mills**, P. O. Box 3044, Orlando, Florida 32802-3044, on this_____ day of October, 2005.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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