

IN THE SUPREME COURT OF FLORIDA

No. SC03-824

DAVID EUGENE JOHNSTON

Appellant,

v.

STATE OF FLORIDA

Appellee.

APPEAL OF THE NINTH JUDICIAL
CIRCUIT TRIAL COURT' DETERMINATION
THAT APPELLANT IS NOT RETARDED

APPELLANT'S SUPPLEMENTAL INITIAL BRIEF

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TABLE OF CONTENTS.

	Page
Table of Citations and Authorities	ii
Statement of Case and Facts	1
Summary of Argument	3
Argument	4
Conclusion	8
Certificate of Service	9

TABLE OF CITATIONS AND AUTHORITIES.

<u>Florida Rules of Criminal Procedure</u>	Page
<u>Fla R Crim P. 3.203</u>	1,3

STATEMENT OF CASE AND FACTS.

Counsel for Appellant shall refer to the Record of the portion in this case for the period beginning with and including this Court's Order dated December 17, 2004, through the Trial Court's Order dated July 7, 2005, as SR.PC.xx.

On December 28, 2004, this Court entered its Order relinquishing jurisdiction to the Trial Court for a period of 180 days for a determination of mental retardation pursuant to Florida Rule of Criminal Procedure 3.203. (SR.PC. P155) Pursuant to that Order, the Trial Court entered its Order for Appointment of Experts to Determine Whether Defendant is Mentally Retarded. (SR.PC. P167) Specifically, the Trial Court ordered that the appointed experts determine whether Appellant met the requirements for mental retardation as determined by the following factors:

- a.) significantly sub-average general intellectual functioning;
- b.) Deficits in adaptive behavior; and
- c.) Manifested during the period from conception to age 18. (SR.PC. P168)

The Trial Court's Order defined significantly sub-average general intellectual functioning in the same manner set forth in Florida Rule of Criminal Procedure 3.203(b). The Trial Court also defined 'adaptive behavior in the manner set forth in the same Rule. (SR.PC. P168)

On June 24, 2005, the Trial Court conducted an evidentiary hearing on the retardation issue. (SR.PC. P1-105) Prior to the commencement of testimony, Appellant objected to the hearing proceeding on the basis that the two court appointed experts had not complied with the Trial Court's Order setting forth the manner of testing to determine whether Appellant was retarded. (SR.PC. P3, Ln. 25-P6 Ln. 13) Neither of the court appointed experts relied upon any

testing to determine to what degree deficits in adaptive behavior may or would contribute to Appellant's mental retardation. (SR.PC P38, Ln 9; P85, Ln 5-7)

On July 27, 2005, the Trial Court entered its Order Finding Defendant is Not mentally Retarded. (SR.PC. 273-279) On July 27, 2005, Appellant filed his Notice of Appeal. (SR.PC. 279)

SUMMARY OF ARGUMENT.

The Trial Court's determination that Appellant is not retarded was not based upon the criteria set forth in Florida Rule of Criminal Procedure 3.203.

ARGUMENT

Appellant objected to the Trial Court proceeding with the evidentiary hearing due to the limited and incomplete testing and evaluation performed by the court appointed experts. (SR.PC. P3, Ln. 25-P6 Ln. 13) Neither of the court appointed experts engaged in any testing, assessment or evaluation of Appellants adaptive functioning deficits. (SR.PC. P38 Ln. 9; P85, Ln.5-7) Failure of the experts to consider adaptive functioning deficits is clearly contrary to the order of the Trial Court and the criteria set forth in Florida Rule of Criminal Procedure 3.203(b). (SR.PC. P155)

Pursuant to the Trial Court's order, Dr. Pritchard administered the WAIS-3 to Appellant. (SR.PC. P76 Ln.19-20) Dr. Blandino did not administer any testing, but, rather, relied on the testing and interpretation of Dr. Pritchard. (SP.PC. P21 Ln,22- P24 Ln. 1) Dr. Blandino did not conduct any IQ testing independent of Dr. Pritchard. (SR.PC. P21 Ln. 22-25) The testing performed by both experts was limited solely to the administration of the WAIS-3. (SR.PC. P40 Ln.20-22) Dr. Blandino testified concerning his reason for not conducting an independent IQ test. (SR.PC.P41 Ln. 1-25)

Dr. Blandino testified that mental retardation, as defined in the Diagnostic and Statistical Manual, the bible of psychologists, consists of a three prong evaluation. (SR.PC.P14 Ln,10-24) The first prong of the criteria is sub-average intellectual function usually assessed by an IQ test or assessment of intellectual ability that tends to fall below a score of 70. (SR.PC.P 14 Ln.11-18) Dr. Blandino also testified that the second prong of the assessment is an evaluation of adaptive functioning. (SR.PC. P 14 Ln.19-22) Dr. Blandino further testified that a diagnosis prior to the age of 18 was the third and final prong of a mental retardation evaluation. (SR.PC. P14 Ln.23-24) Dr. Pritchard also testified that the "...elements that constitute mental

retardation...” involve a three prong diagnosis. (SR.PC. P64 Ln.20-25) Dr. Pritchard’s testimony, while a bit more detailed, was essentially the same as Dr. Blandino’s concerning the details of the three prongs. (SR.PC. P65 Ln.1-25; P 66 Ln.1) Both experts conceded that the evaluation of mental retardation involves a three part test and evaluation.

THE RESULTS OF THE IQ TESTING ARE SUSPECT.

Dr. Pritchard’s IQ testing resulted in a verbal scale of 76, a performance scale of 95, and a full scale IQ of 84. (SR.PC. P24, Ln. 4-5) Both experts reviewed various records obtained from institutions and schools that contained IQ testing results obtained prior to Appellant’s eighteenth birthday. Dr. Blandino reviewed the test results of a Stanford-Binet IQ evaluation that was administered to Appellant in 1967 at age seven wherein Appellant scored a 57. (SR.PC. P33 Ln.17-21). Dr. Blandino also reviewed the results of a Weschler Intelligence Scale for Children that was administered to Appellant in 1972 at age 12, said results being a verbal scale of 65, a performance scale of 72 and a full scale score of 65. (SR.PC. P33 Ln.21-25) Dr. Pritchard reviewed these IQ test results. (SR.PC. P70 Ln. 1-15) Dr. Pritchard totally disregarded the 1967 score of 57 and the 1972 score of 65 in concluding that Appellant is not retarded. (SR.PC. P78 Ln.22-25; P79 Ln.1-2) Dr. Blandino apparently disregarded the 1967 and 1972 testing in his evaluation as he (Dr. Blandino) testified that he did not believe that Appellant ever suffered from mental retardation. (SR.PC. P40 Ln.15-16) Dr. Blandino did concede that Appellant may suffer from mild mental retardation. (SR.PC. P58 Ln.22-25; P59 Ln.1-2)

It is difficult to understand why the both experts completely disregarded the 1967 and 1972 testing. Dr. Pritchard testified that he had reviewed extensive records dating back to 1966 and 1967 and that the historical data presented an “...almost...ideal circumstance, because there are many cases where there is just not good historical date present.” (SR.PC. P70 Ln.1-5;

12-15) In reviewing Dr. Pritchard's testimony that having a stream of comments by professional concerning Appellant's apparent intellectual functions going back over a period of ten to twenty years is of great value in determining whether a person is mentally retarded, it becomes apparent that Dr. Pritchard totally disregarded the 1967 and 1972 IQ test results, as well and the comments by mental health professionals that Appellant was probably in the dull normal or borderline range of intelligence. (SR.PC. P73 Ln.1-13; Ln. 23-25; P 74 Ln.107) Dr. Pritchard explained that he disregarded of the 1967 and 1972 test results due to a notation that the professional testing Appellant did not feel the results were a valid representation of Appellant's IQ because emotional factors were getting in the way of optimal functioning. (SR.PC.P79 Ln.7-12) It is important to note that Dr. Pritchard, in testifying that a 1980 IQ testing result of 80 was a reliable score, was willing to disregard the professional's comments that there was some indication that Appellant was becoming test wise and, therefore, the testing may have produced an inflated score. (SR.PC. P80 Ln.3-11) Dr. Pritchard did concede that Appellant's records indicated that he had again been tested in 1981 and that while the numerical scores were not reported, the examiner's comments stated that Appellant tested in the borderline retarded to dull normal range. (SR.PC. P81 Ln.8-12) Based upon the examiner's comments, Dr. Pritchard interpreted the 1981 IQ test scores to be in the range of 70-85. (SR.PC. P81 Ln.16-18) Again, Dr. Pritchard dismisses the 1981 comments by telling the court that the comments were probably not accurate because "...I do not know exactly what they were thinking when they made that comment...". SR.PC. P79 Ln.25; P 81 Ln.1) Dr. Blandino questioned the 1967 and 1972 IQ test results for the same reason as Dr. Pritchard, namely the examiners comment that the scores were not accurate because of emotional and behavioral issues. (SR.PC. P34 Ln.5-14)

**NEITHER EXPERT EVALUATED
APPELLANT' ADAPTIVE FUNCTIONING.**

Dr. Pritchard and Dr. Blandino did not conduct any adaptive functioning testing during Appellant's evaluation. (SR.PC. P47 Ln. 18-21; P83 Ln. 5-7) Dr. Pritchard testified that a person with a high IQ can have adaptive behavior deficits and that Appellant "...certainly... had adaptive deficits." (SR.PC. P82 Ln.24-25) Dr. Blandino did testify that he had reviewed 12 volumes of records containing Appellant's medical records and classification file from the time he was admitted to the Department of Corrections. (SR.PC. P27 Ln.5-15) Dr. Blandino found an entry that diagnosed Appellant's cognitive functioning or intellectual level within the borderline range. (SR.PC. P27 Ln.18-21) Further, Dr. Blandino's testimony referred to record entries that found Appellant's communications skills to be severely impaired among several other areas assessed to be severely impaired. (SR.PC. P28, Ln.17-20)

Dr. Pritchard explained away his failure to conduct adaptive function testing as time consuming and expensive. (SR. PC. P67 Ln,21-25) Despite his testimony that adaptive functioning testing is important in the assessment of mental retardation and his belief that adaptive functioning testing results must be considered in conjunction with the IQ scores, Dr. Blandino did not conduct the testing. (SR.PC. P19 Ln.6-20)

Florida Rule of Criminal Procedure 3.203 sets forth the definition of mental retardation. In determining mental retardation, the court must find sub average intellectual functioning existing concurrently with deficits in adaptive behavior. The Rule does not permit a retardation determination based only upon the presence of one of the criteria, namely, a lack of sub average intellectual functioning. While mental health professionals may be comfortable opining that a capital defendant is not mentally retarded based upon intellectual testing only, the Rule

absolutely requires the adaptive function testing to support the opinion of the experts.

CONCLUSION

The Trial Court erred in concluding that the inquiry into Appellant's mental retardation ended with the intelligence testing results

Certificate of Service.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Kenneth Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118; and Chris Lerner, Office of the State Attorney, Ninth Judicial Circuit, 425 North Orange Avenue, Orlando, Florida 32801 this 16th day of September, 2005 by United States Mail, postage prepaid.

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Certificate of Compliance.

I HEREBY CERTIFY that the foregoing complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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