IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-839

DAVID EUGENE JOHNSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order summarily denying Mr. Johnston's successive Rule 3.851 motion. The following symbols will be used to designate references to the record in this appeal:

"R."	– record on direct appeal to this Court;
"PCR."	- record on appeal after original post-convictionsummary denial.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston is presently under a death warrant. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Johnston, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND THE FACTS

Mr. Johnston was indicted on December 12, 1983 by an Orange County grand jury for the first-degree murder of Mary Hammond (hereinafter "the victim").

Mr. Johnston, thereafter, was tried and convicted. A penalty phase was conducted on May 29, 1984, during which the jury recommended a death sentence by an eight to four vote. On June 1, 1984, the trial court imposed a death sentence, finding three aggravating circumstances.[1] Although it found mitigating factors,[2] the trial court found the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Johnston to death (R. 2412-2415). On direct appeal this Court affirmed Mr. Johnston's convictions and sentences. Johnston v. State, 497 So. 2d 863 (Fla. 1986).

On October 28, 1988, a death warrant was signed, the execution of which was ultimately stayed subsequent to the filing of Mr. Johnston's first motion to vacate judgment and sentence. After an evidentiary hearing, the circuit court denied all

[1] The aggravating circumstances found were: (1) prior violent felony conviction; (2) offense committed during the commission of an enumerated felony; and (3) the offense was especially heinous, atrocious, or cruel (R. 2412-2415).

[2] In mitigation, the trial court found Mr. Johnston was the product of a broken home; he was abused; he was neglected and rejected by his natural mother; he was physically abused by his father; he was greatly affected by his father's death; he has a very low I.Q. and did not do well in school; and he was mentally disturbed (R. 2412-2415).

relief. The denial was appealed to this Court, which affirmed the circuit court's decision. Johnston v. Dugger, 583 So.2d 657 (Fla.

1991).

Mr. Johnston next filed a federal habeas petition. On September 16, 1993, the federal district court granted Mr. Johnston habeas corpus relief and ordered the State of Florida to either (1) impose a life sentence; (2) conduct a new penalty phase proceeding before a newly empaneled jury; or (3) obtain an appellate re-weighing or harmless-error analysis. This Court conducted a harmless-error analysis and thereafter reimposed a death sentence. Johnston v. Dugger, 583 So.2d 657 (Fla. 1991).[3] The federal district court subsequently denied all relief.

In the interim Mr. Johnston filed his first successive motion to vacate judgment and sentence in the circuit court. The circuit court denied relief, finding the claims time-barred and, alternatively, an abuse of process. This Court thereafter affirmed the circuit court and also denied Mr. Johnston's habeas petition. Johnston v. State, 708 So. 2d 590 (Fla. 1998).

The Eleventh Circuit Court of Appeals subsequently ruled on Mr. Johnston's appeal from the denial of his habeas petition in federal district court and denied all relief. Johnston v.

[3] A petition for writ of certiorari was filed in the United States Supreme Court, which denied the petition on February 27,1995. Singletary, 162 F.3d 630 (11th Cir. 1998).

Mr. Johnston subsequently filed a third state habeas petition wherein he claimed this Court applied an incorrect standard of review in its 1991 opinion (Johnston v. Dugger, 583 So.2d 657 (Fla. 1991)).

This Court denied relief. Johnston v. Moore, 789 So.2d 262 (Fla. 2001).

Mr. Johnston then filed his third motion to vacate judgment and sentence, wherein he claimed the Florida capital sentencing scheme was unconstitutional under Ring v. Arizona, and that the State of Florida was barred from executing him under Atkins v. Virginia due to his mental retardation. The circuit court denied relief and this Court affirmed. Johnston v. State, 960 So.2d 757 (Fla. 2006).

On April 20, 2009, the Governor signed a warrant scheduling Mr. Johnston's execution. Mr. Johnston filed a Rule 3.851 post-conviction motion on May 6, 2009. The circuit court denied relief on May 9, 2009. Mr. Johnston appealed to this Court and on May 21, 2009, this Court stayed his execution and relinquished jurisdiction to the trial court for ninety days to conduct DNA testing and any proceedings that resulted from such testing.

After initial DNA testing was conducted below, Mr. Johnston filed a successive Rule 3.851 motion to vacate his judgment and sentence based upon newly discovered evidence. The claim centered upon the fact that FDLE, during the DNA testing, failed to find any indication of blood on several items that had previously been identified through testimony at trial as having indications of the presence of blood. The trial court summarily denied the Rule 3.851 motion as outside the scope of relinquishment and, alternatively, reviewed the motion under Rule 3.853 and found, "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." This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. Johnston's motion to vacate. Newly discovered evidence has revealed that Mr. Johnston was convicted based on infirm forensic evidence in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. While conducting DNA testing, the Florida Department of Law Enforcement found *no* indication of the presence of blood on several items of evidence which the State insisted at trial contained blood, presumably that of the victim. This newly discovered evidence was not previously discoverable and would probably result in acquittal in a retrial.

The trial court erred in finding that Mr. Johnston's successive motion to vacate was outside this Court's order of relinquishment. The plain language of this Court's order contemplates that further proceedings would be necessary once DNA testing was complete, and Mr. Johnston's motion was based upon newly discovered evidence that was produced by the DNA testing conducted by FDLE. The trial court alternatively found, "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." See Appendix at 4. This finding is erroneous as Mr. Johnston's successive motion to vacate judgment and sentence was filed pursuant to Fla.R.Cr.P. 3.851, not 3.853. Additionally, Mr. Johnston's motion to vacate relied upon results obtained during STR-DNA testing conducted by FDLE at the State's

insistence, and not the subsequent results obtained by LABCORP during Y-STR DNA testing. Therefore, the trial court did not properly consider Mr. Johnston's successive motion to vacate and the summary denial is in error. This Court should remand to the trial court for a full evidentiary hearing and proper consideration of Mr. Johnston's successive motion to vacate.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's fact-findings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

Additionally, the lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

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.

DNA testing has revealed that the State of Florida relied upon evidence that was untrue and misleading in obtaining the conviction of David Johnston. This new evidence is substantial evidence challenging the validity of Mr. Johnston's convictions and sentences.

This newly discovered evidence was previously unavailable to trial counsel or post-conviction counsel.

DNA testing has revealed that the State incorrectly informed the jury that multiple items in evidence contained the presence of blood. Officer Stickley testified at trial that when she interviewed Mr. Johnston at the crime scene, she noticed a red stain on his right tennis shoe and red dots on his right bicep

(T. 498). Officer Kenneth Roberts testified that he observed brown colored splatters on Mr. Johnston's tennis shoe, socks and arm, which appeared to be blood (T. 507). Officer Candalaria testified that he observed speckles of blood on Mr. Johnston's left bicep, his left leg, his socks, and his shoe laces (T. 52728). Investigator Richard Dupuis testified that he was asked by other officers to look at Mr. Johnston's clothing and render an

opinion as to whether there were any bloodstains on the clothing

(T. 538). After explaining the concept of bloodstain analysis to the jury, Dupuis stated that he observed a reddish stain on Mr. Johnston's right sock and that the stain projected in a downward motion. He also observed a dark stain on Mr. Johnston's shoes, as well as a single red stain on the groin area of his shorts (T. 540). Dupuis then opined, based on his experience and training, that the stains appeared to be blood. He also opined that the clothing was a target for the blood, explaining that the blood was either projected or cast off something else and then came into contact with Mr. Johnston's clothing (T. 541). Dupuis further stated that the blood was in motion when it came into contact with the clothing since it was not a smear type pattern

(T. 542). Officer Ostermeyer testified that he took into evidence Mr. Johnston's clothing. Additionally, he ran a presumptive blood test on the stains on the clothing; the test was presumptively positive for blood (T. 641-44). Reactions to the Luminol were also observed on the back of Mr. Johnston's shirt, his sleeves, his waistband, the front of his shorts, the back pocket area of his shorts, and his right tennis shoe (T. 648). Investigator Mundy testified that during an interview with Mr. Johnston, he noticed a couple of red stains on his clothing

(T. 780). Forensic serologist Keith Paul testified that he tested Mr. Johnston's clothing for the presence of blood and

determined that there was human blood present on the stretchband of Mr. Johnston's shorts (T. 854). Paul also conducted tests on the stains

found on Mr. Johnston's tennis shoes and determined that the stains were human blood (T. 867).

Based on recent DNA testing by FDLE, we now know that the jury was incorrectly informed that Mr. Johnston had blood on his shoes, shorts, shirt and socks. When FDLE most recently tested the evidence submitted in this case on remand they found no chemical indications for the presence of blood on items K2, K36, K37, K41a, K41b, K42a, and K42b.[4] Supp. R., Vol. 5, 388. These items are respectively, Mr. Johnston's shorts, his right and left tennis shoes, and two pairs of Mr. Johnston's socks.

There was only circumstantial evidence linking Mr. Johnston to the murder of Mary Hammond. At trial the State forcefully argued that Mr. Johnston was covered in blood and that blood spatter found upon Mr. Johnston's clothing refuted his version of events and established that he murdered Mary Hammond.

However, it now appears that the evidence which the jury relied upon to convict Mr. Johnston of murder was false. In fact, as FDLE's testing revealed, there were no chemical

[4] Interestingly, the State, over Mr. Johnston's objections, had FDLE conduct STR-DNA testing. The FDLE DNA results were inconclusive. However, FDLE found that several items had no indications for the presence of blood, contrary to prior testimony at Mr. Johnston's trial. Mr. Johnston had requested that DNA Diagnostic Center conduct Y-STR DNA testing due to the age, condition and size of the sample.

indications of blood upon any of Mr. Johnston's clothing. Had the jury heard this information, it would have substantially refuted the State's case. The testing results discovered through the June 10, 2009 FDLE

report authored by FDLE Analyst Corey Crumbley was the first indication that the State's evidence presented at trial and relied upon by the jury was scientifically unsound.

As noted above, the State had presented the testimony of Richard Dupuis and Donald Ostermeyer to support their argument that Mr. Johnston had substantial amounts of blood upon him. This testimony would have been subject to not only devastating impeachment, but exposed as absolutely false if Mr. Johnston had been given the benefit of the recent results discovered during DNA testing. Given a full and fair evidentiary hearing, Mr. Johnston would establish that there is a reasonable probability that the undisclosed information, in conjunction with that previously presented at the prior post-conviction evidentiary hearings, if presented at trial would have resulted in an acquittal on Mrs. Hammond's murder. Consideration of this evidence is required, for it establishes that Mr. Johnston's convictions and death sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments. Jones v. State, 591 So. 2d 911 (Fla. 1991).

A. This Court's order dated May 21, 2009 relinquishing jurisdiction plainly contemplates proceedings subsequent to the ordered DNA testing.

The trial court summarily denied Mr. Johnston's motion to vacate. See Appendix[5] A. In doing so the trial court specifically references Duckett v. State, 918 So.2d 224 (Fla. 2005) as supporting its finding that Mr. Johnston's successive motion to vacate exceeds this Court's order relinquishing jurisdiction, and more specifically finds in pertinent part:

> As noted by the State here in its "Motion to Dismiss 'Successive Motion to Vacate Judgement and Sentence with Special Request for Leave to Amend,'" (Fn.3, The State's Motion was filed in open court during the evidentiary hearing) 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 Judgement and Sentence on the basis of *Duckett* alone. 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 upon LABCORP's DNA analysis.

Appendix A at 4.

[5] The "Final Order Denying Relief After DNA Testing and Denying 'Successive Motion to Vacate Judgement and Sentence With Special Request for Leave to Amend'" rendered and filed by the circuit court on or about August 18, 2009 was mistakenly not made part of the record on appeal filed in the above-styled cause. It is therefore attached as referenced as Appendix A in an effort to expedite these proceedings. Simultaneous with the filing of this brief, Mr. Johnston is filing Appellant's Motion to Supplement the Record requesting this Court order that the circuit court's order be included in the record on appeal through supplemental filing.

The trial court clearly misapprehended the meaning of the language contained in this Court's order dated May 21, 2009 wherein this Court stated in pertinent part:

> Having reviewed the record in this case, including all prior proceedings and the briefs of the parties, and having heard oral argument of counsel, we hereby relinquish jurisdiction for a period of ninety days for the purpose of conducting DNA tests on the above-referenced items of evidence pursuant to the provisions of rule 3.853 and section 925.11, Florida Statutes(2008). Pursuant to the rule and statute, the results of the DNA testing shall be provided in writing to the trial court, counsel for Johnston, and the prosecuting attorney.

> The DNA testing **and all proceedings in the trial court subsequent to the DNA testing results** shall be concluded and any order entered no later than ninety days from the date of this order.

Supp. R., Vol.5, 364 (Emphasis added).

The plain language of the order contemplates that other proceedings may emanate from the testing result. While the DNA testing itself is governed by Fla.R.Cr.P. 3.853, the results are processed through the procedures outlined in Fla.R.Cr.P. 3.851. The DNA testing statute contained in Section 925.11, Florida Statutes (2008), as well as the rule of criminal procedure governing DNA testing, simply outline the procedures to follow as to testing itself and provide the gateway to testing. Rule 3.853 prescribes the procedures to follow as to the necessary contents of a motion seeking testing and the contents of any order ruling upon such a motion. Neither section 925.11, nor rule 3.853, provide any mechanism to pursue relief based upon any outcome related to the testing. Therefore, the import of this Court's reference to proceedings subsequent to the receipt of the results of DNA testing was an acknowledgment that depending upon the results of DNA testing subsequent proceedings could possibly be necessary.

When the outcome of DNA testing results give rise to a post-conviction claim for the defense, rule 3.851 provides the mechanism to utilize those results to pursue a motion to vacate the judgment and sentence. Otherwise, defendants would have no means for litigating the results they obtained through 3.853. In Mr. Johnston's case, testing conducted under 3.853 established an absence of blood on items that the jury heard had blood on them. This is powerful evidence

which undermines the State's case and substantiates Mr. Johnston's statement about what happened that day of the murder. Mr. Johnston must have the ability to present his argument concerning this exculpatory evidence to the courts. His 3.851 motion to vacate his judgment and sentence based upon those results is a necessary and expected follow-up to the 3.853 proceedings mandated by this Court.

The circuit court failed to properly consider Mr. Johnston's motion to vacate pursuant to the requirements of rule 3.851 and instead found that it was without jurisdiction to consider the motion or the claim therein. See Appendix A. This was despite the State agreeing that the motion could be heard, irrespective of their protestations otherwise in their motion to dismiss, and the trial court allowing a very limited evidentiary inquiry through the testimony of FDLE analyst Corey Crumbley. The trial court ultimately failed to rule upon or consider this testimony when rendering its Final Order Denying Relief After DNA Testing and Denying "Successive Motion to Vacate Judgement and Sentence With Special Leave to Amend." See Appendix A.

B. The circuit court applied the wrong precedent in determining it was without jurisdiction to hear Mr.Johnston's successive motion to vacate.

The circuit court erroneously found the case of Duckett v. State, 918 So.2d 224 (Fla. 2205), as the controlling precedent governing its authority to rule upon Mr. Johnston's motion to vacate. Duckett is both distinguishable and inapplicable to Mr. Johnston's case. Duckett involved a relinquishment by this Court to conduct DNA testing, after oral argument; however, Duckett,

unlike Mr. Johnston, had not filed a motion for DNA testing pursuant to rule 3.853 or section 925.11. The issue had first been raised at oral argument and as this Court detailed in the Duckett opinion:

> At oral argument, counsel for Duckett and the State indicated that DNA testing might be possible on certain items of clothing introduced into evidence. We relinquished jurisdiction to the trial court in order to determine whether there in fact existed clothing that could be tested for DNA. The circuit court determined that none of the evidence examined could produce any relevant information, with one possible exception. A slide identified as Q6(3), which contained a smear from a vaginal swab taken in 1987, contained an unidentified number of sperm heads that might be useful for further testing. However, because of the small number of sperm heads on the slide as well as the deteriorated condition of the slide, it was determined that testing the slide would not produce any meaningful results and would consume the sample. Duckett informed the circuit court by letter that he did not wish to pursue testing of Q6(3) based on the unlikelihood of obtaining a DNA profile under current technology and the fact that the sample would be consumed in any attempted test. In its order, the circuit court noted that Duckett had requested that certain items – two cigarette butts found at the crime scene, a flip-flop found in the water near the victim, two beer bottles, and one beer can be tested for DNA. The circuit court ruled that these items were outside the scope of this Court's mandate relinquishing jurisdiction, "and such testing would amount to nothing more than a fishing expedition." footnote omitted.

Id. at 230.

Interestingly, footnote 2 at the end of the above quoted passage contains the relevant language from this Court's order relinquishing jurisdiction in Duckett:

> At oral argument before this Court on May 6, 2003, both Duckett and the State stipulated that DNA testing maybe possible on clothing introduced into evidence in this case. Therefore, we remand this case to the trial court to determine whether clothing exists that can be tested for DNA. The trial court shall hold the hearing within thirty days of the date

> of this Order. If the trial court determines that DNA testing is possible on any clothing, any such testing shall be completed, and the parties shall report the results to this Court, within 180 days of the date of this Order.

Id. at 230, Fn.2.

In Duckett, unlike Mr. Johnston's case, the language is clear from the order that this Court was simply addressing the determination as to whether DNA testing was possible and the results from any testing, not any subsequent proceedings. The quoted language from Duckett fails to even reference the possibility of any proceedings subsequent to any DNA results being obtained. This is in stark contrast to this Court's order relinquishing jurisdiction in Mr. Johnston's case that clearly references the possibility of proceedings subsequent to any DNA testing results.

Further distinguishing Duckett from Mr. Johnston's case is the fact that it involved the testing of items not mentioned in this Court's order.[6] In Mr. Johnston's case, unlike Duckett, prior to this Court's order it was already known which items were available for testing as this had been investigated and considered pursuant to prior proceedings on Mr. Johnston's motion for DNA testing considered in the trial court. Therefore, this Court clearly contemplated that DNA testing would be conducted and that subsequent proceedings could possibly be necessary to litigate the import of those results.

ARGUMENT II

ASSUMING *ARGUENDO* THAT THE CIRCUIT COURT WAS CORRECT IN ITS FINDING THAT IT WAS WITHOUT JURISDICTION TO HEAR MR. JOHNSTON'S SUCCESSIVE MOTION TO VACATE, THIS COURT MUST REMAND TO THECIRCUIT COURT FOR CONSIDERATION OF THE MOTION OR BE IN VIOLATION OF MR. JOHNSTON'S RIGHT TO DUE PROCESS UNDER THE FIFTH, EIGHTH,AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

[6] That is similar to the issue clearly considered by this Court upon Mr. Johnston filing his motion for clarification of this Court's order relinquishing jurisdiction as to the specific items to be tested.

Assuming, *arguendo*, that the circuit court was correct in its determination that it did not have jurisdiction to consider Mr. Johnston's successive motion to vacate, this Court should relinquish jurisdiction for the circuit court to consider the motion and the newly discovered evidence claim therein. It defies logic that newly discovered evidence resulting from DNA testing conducted by a State laboratory (FDLE), at the State's insistence, that directly contradicts evidence produced at trial should now not even be considered. Mr. Johnston is entitled to proper consideration of his motion and the newly discovered evidence claim regarding this exculpatory evidence. To turn a blind eye to the motion and deny any consideration of it would not only violate Mr. Johnston's right to procedural and substantive due process, but also result in a manifest injustice and fundamental error.

ARGUMENT III

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

The circuit court rendered an alternative finding when it stated:

> 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.

Appendix A at 4.

This statement demonstrates that the trial court failed to

analyze Mr. Johnston's successive motion to vacate under the proper standard. Mr. Johnston's claim involved newly discovered evidence and as such it should have been considered under that standard[7] and rule 3.851, not rule 3.853.

Proper consideration of the successive motion to vacate would have been for the court first to require the State to file its answer pursuant to rule 3.851(f)(3). The State has not filed an answer in this case. Thereafter, the court should have determined, "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). Since Mr. Johnston's motion is not conclusively refuted by the record, the court should have conducted a full evidentiary hearing.

However, the circuit court never engaged in such a process. Instead, it outright decided that it did not have the jurisdiction to consider Mr. Johnston's successive motion to vacate and, alternatively analyzed the claim under the standard for motions brought pursuant to rule 3.853. Unfortunately, the

[7]In Jones, this Court adopted the standard for evaluating claims of newly discovered evidence. Jones v. State, 591 So. 2d911 (Fla. 1991). A standard never considered nor applied to Mr. Johnston's claim of newly discovered evidence currently under appeal to this Court. The standard under Jones is that newly discovered evidence of innocence warrants a new trial where it establishes that had the jury known of the new evidence it probably would have acquitted. Jones v. State, 591 So. 2d 911(Fla. 1991). Here, the new evidence of innocence establishes that the jury probably would have acquitted had all of the newly discovered evidence been known.

circuit court even considered the wrong test results in conducting its flawed analysis. LABCORP was not the entity that produced the test

results in question; FDLE produced the results. Therefore, the circuit court's alternative finding was hopelessly flawed, applying the wrong standard and considering the wrong evidence.

Clearly, the circuit court failed to properly consider Mr. Johnston's successive motion to vacate and relief should issue.

CONCLUSION AND RELIEF SOUGHT

Mr. Johnston requests that this Court remand to the circuit court for an evidentiary hearing to be held, for the circuit court to properly consider his motion under the applicable legal standards and subsequently vacate his judgment and sentence in the above-styled cause.

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 September 28, 2009.

CERTIFICATE OF FONT

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

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