IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON, :

Appellant, :

vs. : Case No. 78,337

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, Emanuel Johnson, has two cases pending before this Court. References in this brief to the record in case number 78,336, in which the victim was Iris White, will be designated by "W," followed by the appropriate page number. References to the record in case number 78,337, in which the victim was Jackie McCahon, will be designated by "M," followed by the page number.

Appellant also has two appeals pending in the Second District Court of Appeal. In case number 91-2368, in which the victim was Kate Cornell, Appellant was convicted of attempted murder, armed burglary of a dwelling and armed robbery. In case number 91-2373, in which the victim was Lawanda Giddens, Appellant was convicted of battery, burglary of an occupied structure and robbery.

Appellant will rely upon his initial brief in reply to the arguments presented in the State's supplemental answer brief as to Issues II, III.C., III.D., IV, and V.

STATEMENT OF THE CASE AND FACTS

Appellee refers to the testimony of the medical examiner, Dr. William Pearson Clack, regarding the injuries to Iris White, who was the victim in the other capital case in which Appellant was convicted of first degree murder. (Supplemental Brief of the Appellee, pp. 1-2) Dr. Clack's testimony came in over defense objections. (M 5855-5856, 5877-5878) Furthermore, Dr. Clack's testimony that Iris White was found with "her legs slightly spread," and that she had injuries to her genital area, specifically, "scratches and abrasions around the openings to the vagina and the anus," prompted Appellant to move for a mistrial. (M 5879-5881, 5884)

The State's cross-examination of defense witness Jim Syprett, which is discussed on page 2 of Appellee's supplemental brief, regarding Syprett's lack of knowledge of the attacks on Lawanda Giddens and Kate Cornell, and that Appellant had killed Iris White and Jackie McCahon, was conducted over strenuous defense objections and motions for mistrial. (M 5912-5915)

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW MITIGATING EVIDENCE AND ARGUMENTS AND REFUSED TO ALLOW EVIDENCE THAT WOULD REBUT NONSTATUTORY AGGRAVATORS.

Appellee faults Appellant for including an "irrelevant" discussion of the Iris White case in his initial brief. (Supplemental Brief of the Appellee, p. 5) That case and the instant case share several issues in common, and Appellant felt that it would be useful for this Court to examine, compare and contrast the evidence that was allowed and disallowed in the two cases. (It is somewhat ironic that the State would complain about Appellant's discussion of the White case when below the State relied extensively upon the facts of that case at penalty phase in a successful effort to obtain a recommendation from Appellant's jury that he die in the electric chair for the homicide of Jackie McCahon.)

With regard to Defense Exhibit MM, the medical records from the jail concerning Appellant's slashing of his wrist and pulling out his stitches with his teeth, Appellee refers to the fact that Appellant was attempting to introduce these records while Wendy Fiata was on the stand. (Supplemental Brief of the Appellee, p. 12) This is true with regard to the Iris White trial, but in the instant case, defense counsel made it clear that he intended to seek to introduce these records through the testimony of Appellant's mother, Charlene Johnson. (M 5980) Although Appellee states that much of the records in question are "illegible and unintelli-

gible" (Supplemental Brief of the Appellee, pp. 11-12), Appellant does not feel that this characterization is accurate; the Court can judge for itself by examining the record on appeal herein at pages 8782-8789.

Appellant also vehemently disagrees with Appellee's assertion at page 12 of its brief that slashing one's wrist does not demonstrate remorse, but "only mild depression at [one's] present circumstances."

Appellee says that because Appellant "was suggesting residual doubt about the identity of the killer" of Jackie McCahon in his post-verdict sentencing memorandum, "it is difficult to envision remorse as a consistent mitigator." (Supplemental Brief of the Appellee, p. 12) Appellant was, of course, precluded by the trial court from presenting evidence and argument as to residual doubt to Appellant's penalty phase jury. (M 5840-5849) Even if he had been permitted to propound a case for residual doubt, this would not and should not have precluded him from arguing in the alternative that Appellant was remorseful over the homicide, if he had the evidence (such as the jail medical records which the court would not admit) to support his argument.

In Simmons v. South Carolina, 512 U.S. ___, 114 S. Ct. ___, 129 L. Ed. 2d 133 (1994), the Supreme Court of the United States recently recognized that due process is violated where a capital defendant is precluded from presenting information to the jury to rebut a factor that the jury may consider in aggravation of sentence. The Court decided that Simmons should have been

permitted to inform his jury of his ineligibility for parole in order to counteract the prosecutor's general argument regarding the defendant's future dangerousness. Appellant here similarly should have been permitted to present the evidence he proffered as to capital punishment's lack of deterrence and as to the fact that imposing the death penalty is more expensive than imprisoning a person for life in order to counteract incorrect opinions that the jurors may have held regarding these matters, and to prevent the jury from employing deterrence and cost of imprisonment as nonstatutory aggravating circumstances.

ISSUE III

APPELLANT'S CAUSE WAS SUBMITTED TO HIS SENTENCING JURY UPON INCOMPLETE AND MISLEADING INSTRUCTIONS, RESULTING IN AN UNRELIABLE PENALTY RECOMMENDATION AND AN UNCONSTITUTIONAL DEATH SENTENCE.

A. Instruction on "mental" mitigation

Appellee asserts at page 22 of its brief that Appellant's point is procedurally barred because he did not object to the given instruction on mitigating factors or request more appropriate instructions. However, in the Iris White case, which presented issues similar to those presented in the Jackie McCahon case, defense counsel did ask the court to delete the word "extreme" from the factor dealing with extreme mental or emotional disturbance, and to delete the word "substantially" from the factor dealing with impairment of the ability to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. (W 5864-5866, 6044-6047, 8488) The matter had already been extensively litigated before the same trial judge, and so for the defense to litigate it again would have been futile; counsel was not required to do something useless. See Thomas v. State, 419 So. 2d 634 (Fla. 1982) (No requirement to do a useless act.) Brown v. State, 206 So. 2d 377, 384 (Fla. 1968) ("A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless. [Citation omitted.]" Birge v. State, 92 So. 2d 819, 822 (Fla. 1957) ("It is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the trial judge.")

B. Failure to instruct on standard of proof by which jury should weigh aggravation and mitigation

As noted, in Appellant's initial brief, Appellant did raise the matter of the lack of instruction on burden of proof several times during the proceedings below. (Please see Appellant's initial supplemental brief at page 22.) Appellee argues, however, that Appellant is procedurally barred from making his argument in this Court because "he did not submit a proposed written instruction explaining his proposed standard of proof for the jury's consideration." (Supplemental Brief of the Appellee, p. 23)

Appellant's "Penalty Phase Special Requested Jury Instruction No. 6," which the trial court refused to give, read as follows (M 8505):

> You are to presume that life in prison without the possibility of parole for twenty-five (25) years is the appropriate penalty for First Degree Murder. Death, by electrocution, is reserved for the most aggravated and non-mitigated of all first degree murders. You may not consider death by electrocution as a possible penalty unless the prosecution proves, beyond a reasonable doubt, there is [sic] sufficient aggravating circumstances to justify the death penalty. If you are convinced, beyond a reasonable doubt, that such aggravating circumstances exist than [sic] you must weigh the mitigating circumstances against the aggravating circumstances.

Appellant's "Special Requested Penalty Phase Jury Instruction No. 13," which the trial court refused to give, read as follows (M 8512):

> Mitigating circumstances are those factors which in fairness and mercy may be considered as extenuating or reducing the degree of blame for the offense. Mitigating circumstances also include any aspect of Emanuel

> Johnson's background and life which may create a reasonable doubt about the question of whether death by electrocution is the only appropriate sentence for Emanuel Johnson.

And Appellant's "Special Requested Penalty Phase Jury Instruction No. 19," which the trial court refused to give, read as follows (M 8519):

> In order to render a verdict of death by electrocution upon Emanuel Johnson, you must be convinced beyond a reasonable doubt that death by electrocution is the only justified appropriate sentence in the circumstances. If you are not convinced beyond a reasonable doubt that death by electrocution, is the only justified and appropriate sentence in the circumstances, you must return a verdict of life imprisonment without the possibility of parole for twenty-five (25) years.

While Appellant may not have submitted a single instruction on standard of proof, the three proposed instructions set forth above, when taken together, clearly would have informed the jury that the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt before any juror would be justified in returning a death recommendation.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Emanuel Johnson, renews his prayer for the relief requested in his initial supplemental brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 2nd day of November, 1994.

Respectfully submitted,

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