IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-2008

EMANUEL JOHNSON,

Appellant,

v. **CAPITAL POSTCONVICTION CASE**
(Victim Iris White)

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT FOR SARASOTA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT REGARDING CONSOLIDATION AND ORAL ARGUMENT

Undersigned counsel agrees with the State's position that these two cases, SC10-2008 and SC10-2219, should be considered together without need for formal consolidation.

ARGUMENT IN REPLY

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

APPELLANT'S ARGUMENT III(b): THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING REPEATEDLY TO PROPERLY AUTHENTICATE MEDICAL RECORDS

The State argued on direct appeal that the trial court did not err when it declined to admit certain medical records which would have documented two suicide attempts and otherwise have provided some evidentiary support for mental mitigation. To the extent that is relevant to Johnson's claim that counsel provided ineffective assistance by failing to authenticate the records and otherwise lay a proper predicate for their admission, the State's brief is cited here:

> Since both appellant and the trial court and parties below relied on the ruling of the lower court in the earlier White trial, appellee will do likewise. At pages 5985 - 88 of the record in Appeal No. 78,336 pending before this Court, this colloquy is reported:

THE COURT: All right, sir. Than I have a Exhibit LL, which is a discharge summary which relates to Emanuel Johnson, April 9th, 1977, treated in the emergency room, for a reason which I don't really know.

MR. DENNY: Judge, my objection to those, obviously, they came from the medical records, and only part of a medical record, that does not fully explain what it was.

Under the circumstances, by allowing those documents in through this witness, who obviously cannot establish that she's custodian of those records, there is the possibility of misleading this jury, because we don't know whether those drugs were something which was prescribed to him, a doctor did something improper or whether he did something improper.

We don't know what that drug is, and the jury would not know what that drug is, because she's not qualified to testify what this drug is.

My concern is that we will mislead the jury, so I object to those documents.

THE COURT: Mr. Tebrugge?

MR. TEBRUGGE: Your Honor, we had the defendant sign a medical release, which we sent to the hospital in Mississippi, and in return, we received what's been marked as Defense Exhibit LL.

MR. TEBRUGGE: We also received the following letter:

Dear sir:
Emanual Johnson's chart has been microfilmed, so we could not send you copies of his chart. We took what was on the microfilm and retyped it. This is the only time the patient had been in our hospital. If we can be of more help, please feel free to contact us.

Sincerely,
Eugene Keith, Medical Records Clerk.

So, that's the evidence that's available.

MR. DENNEY: What's the date on that letter?

MR. TEBRUGGE: November 3rd, 1988.

MR. DENNEY: See, that's my problem. Judge. They have now had almost three years to bring this custodian of records down here to bring the entire records down, and clearly, there was plenty of time to get the microfilm and have it produced.

What they gives us is a partial record, which this jury cannot decipher as far as what it means, because, obviously, this witness here will not be able to lay a foundation, so, it's up to the jury to guess or conjure up some sort of reasoning for this incident to occur.

So, for that reason. I'm going to object.

THE COURT: I have no idea what Etrafon is.[1] I'm

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[1]See postconviction evidentiary hearing testimony from Marjory Hammock, LCSW, who obtained and explained all the medical records on Mr. Johnson in existence. In 1977, when the defendant was 14, he attempted suicide by taking 13 pills of Etrafon, which was his mother's prescribed sleeping medication. PC-R Vol. 20, 83-84, either case. Etrafon was the brand name for a medication used to treat

> not sure that's the way you pronounce it. Do you know what it is?
>
> MR. TEBRUGGE, Judge, it is my understanding, based on speaking with the mother, it's some sort of sleeping medication.
> The medical records tend to confirm that, indicating that when the patient was brought to the hospital, he was unconscious and responded only to painful stimuli, and after a period of time he woke up. Mrs. Johnson would testify as to the circumstances of this event. The medical records are offered to corroborate her testimony and show the incident was serious enough to require medical treatment for the defendant.
>
> THE COURT: I would exclude those records. I don't know what she's going to testify to, but if she does so testify, she may testify about his life and all, but I don't think the medical records would add any significant value or in any way assist in explaining her testimony.

The lower court did not err. Neither Exhibit LL nor the testimony of Charlene Johnson establish a suicide attempt in 1977; for whatever reason he took too many pills and had his stomach pumped. Moreover, the prosecutor did not contest Ms. Johnson's testimony on this score, asking no cross-examination questions (R 5993) and making no reference to it in closing argument (R 6038 - 6056). At best. Exhibit LL constituted merely cumulative evidence to an undisputed point. [Citations omitted.]

(A) (2) Exhibit MM - As mentioned previously, the state objected (in the McCahon case) to the introduction of Exhibit MM, noting that they were only partial records

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depression, anxiety, and at higher dosages, schizophrenia.

and that no one from the jail could testify to their accuracy and the circumstances surrounding the documents. The prosecutor and court relied on the earlier argument and ruling (R 5979).

In the earlier (White trial) proceeding this colloquy occurred at R 6011 - 6013 of appeal case no. 78,336:

> MR. DENNEY: I don't now how this witness will introduce the medical records from the jail, which are part of this.
>
> MR. TEBRUGGE: She's aware of Mr. Johnson's experience in the jail. I was going to seek to introduce medical records and have her describe to the Court briefly my effort to introduce other medical records about another incident.
>
> MR. DENNEY: This woman is not the custodian of the records. She cannot verify the record.
>
> THE COURT: I agree she's not the person who handled the medical reports. You don't want it in?
>
> MR. DENNEY: I don't want it in, because they are not a complete and accurate description of what took place. This woman obviously can't verify these records or explain what they mean or thinks.
>
> THE COURT: I don't think she can, so I would deny the introduction of the medical records.
>
> [MR. TEBRUGGE]: I offer them just on their own merits. Judge. I believe the documents themselves are authenticated. I believe they are relevant. That's all I possess about the incident, and I think at this time to be considered in mitigation, I offer them just on their own.

MR. DENNEY: I just don't think they speak for themselves. It has vague references that the jury is supposed to take quantum leaps on as to what they mean.

THE COURT: I will deny admission of Defendant's Exhibit MM, the Sarasota County Sheriff's Department.

MR. TEBRUGGE: I would proffer those.

THE COURT: That's fine.

MR. DENNEY: For the record, I would state if he wanted to bring over the custodian or whatever, possibly the record would be admissible, but at this point, he has not offered to do that or saying to the Court that he would do it.

THE COURT: If you want to do that, you can have them bring them over.

MR. TEBRUGGE: Judge, I don't really think that's the basis for an objection myself.

In the Rules of Evidence, in this case hearsay is not admissible in this phase [sic].

If the Court says that this will overcome the objection, then that's what we'll do.

MR. DENNEY: Judge, my objection is not that they are hearsay. There's no way of explaining what the documents mean or how they interpret the documents, so by themselves, they mean nothing.

> THE COURT: I think the record custodian doesn't even have to be a nurse.
>
> MR. DENNEY: I would agree they would have to have the total records if shown to the jury to possibly explain what went on. All we know is that there was a slashing of his wrists. We don't know if he did it or someone attacked him and who did it. We don't know anything. So, it would mislead the jury into guessing what happened.

Exhibit MM (R 8782 - 8789) is a composite exhibit consisting on the first two pages of memoranda from one Diana Ready and one Cathy Toundas. The remaining seven pages are purported medical records, much of it illegible and unintelligible. While appellant in his brief refers to the Ready-Toundas memoranda in the exhibit, he does not address the concerns in the prosecutor's objection, that the medical record section of the exhibit could not be introduced from the witness on the stand (Wendy Fiati) who was not a custodian of the record and there's no way of explaining what the documents mean (quite apart from hearsay).

The defense indicated that if it could cure the problem by producing the custodian "then that's what we'll do." (R 6013) But it never did. If the complaint now is that the two memoranda should have been separated from the medical records, appellant made no such request below and we should not presume error on the lower court for an argument not advanced. [Citation omitted.]

On direct appeal in the White case this Court held:

> Johnson further contends that the trial court improperly refused to admit medical records about various psychological problems he had over many years,

> including suicide attempts and treatment by medication. The record, however, indicates that Johnson's counsel attempted to introduce these records without authenticating them, which is required under the evidence code. §§ 90.901-902, Fla.Stat. (1987). The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored. Moreover, the trial court found that the records were not complete in themselves and required interpretation to be understood by the jury. The judge even offered to admit them if defense counsel laid the proper predicate, which counsel did not do. Accordingly, there was no error in declining the request in light of counsel's actions.

Johnson v. State, 660 So.2d 637, 645-46 (Fla. 1995) (White). This holding was reproduced verbatim in the McCahon case. *Johnson v. State*, 660 So.2d 648, 662-63 (Fla. 1995).

When Mr. Tebrugge was asked about these records at the evidentiary hearing the exchange went as follows:

> Q. Why didn't you do what was necessary to introduce them.
>
> A. I don't know. Perhaps I thought I had laid a sufficient predicate and disagreed with the judge. I don't know.
>
> Q. What was the purpose of introducing that evidence at all . . .
>
> A. To document Mr. Johnson having an ongoing history potentially of a mental illness nature.
>
> Q. Would you agree that these are the type of

> records - that is, jail records and hospital records - that are typically reasonably relied on by mental health experts when they're testifying? In the context of a penalty phase at a capital trial?
>
> A. Yes.
>
> Q. And that as such at least the information contained in them could have been provided to a jury through a mental health expert.
>
> A. Yes, potentially.
>
> Q. And particularly with regard to the McCahon case, that was the last case that was done, is there any particular reason why you did not either obtain a living [sic] custodian of records or a jail nurse or someone of that sort to authenticate the records, since you basically knew the objection was coming.
>
> A. I do not know the answer to that question.

SC10-2219 (McCahon), PC-R19, 3466; SC10-2008 (White), PC-R21, 3793.

In sentencing the defendant to death, the trial court found very little in the way of mental or emotional mitigation:

> The Court finds that the evidence did not establish the existence of the mitigating circumstance that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. At no time was any evidence presented to the Court that the Defendant had ever discussed any emotional pressures with his family members as alleged in his confession. Additionally, the Defendant was examined by numerous

> psychological experts but no psychological testimony from any experts was presented to the Court. The Court did consider the statements in the Defendant's confession that he was suffering from a great deal of pressure and further, his treatment with an antipsychotropic medication during his initial incarceration. These factors convinced the Court to consider that the Defendant was suffering mental problems that did not rise to the level of extreme mental or emotional disturbance.

SC 78,337, Vol. 50, 8792-94 (McCahon); SC 78,336 Vol. 48, 8811-15 (White); *Johnson v. State*, 660 So.2d 648, 652. The trial court had declined to incorporate the evidence of the mental health experts who testified during the pretrial suppression hearing. On appeal this Court did consider their testimony with regard to an argument that "the trial court applied the wrong standard in gauging mitigating evidence of emotional disturbance" The Court did not find any error in that regard, but the issue here is whether there was deficient performance, and, if so, whether there was sufficient prejudice.

Deficiency under the first prong of Strickland is clear. Counsel attempted to introduce the records in question, he had three years to do what was necessary to lay a sufficient predicate for their admission, he knew in the McCahon case that an objection was coming, both the prosecutor and the judge offered him the opportunity to call the records custodian, he even said he was going to do it, but he never did. Given the opportunity to explain his actions at the evidentiary hearing,

he had no explanation to offer.

Prejudice is also shown. This was not a minor slip. No expert testimony about mental mitigation was presented to the judge or jury in the penalty phase. As stated by this Court: "The record reflects that the evidence of Johnson's disturbance in the penalty phase came largely from anecdotal lay testimony poorly correlated to the actual offense at issue." As far as the poor correlation between the actual offense and the expert testimony that was presented at the suppression hearing, it should be noted that the defense expert, Dr. Ofshe, deliberately avoided asking Johnson anything about the offense because his role was to evaluate psychological factors affecting the validity of the confession, not to form an opinion about his state of mind at the time of the offense. Likewise, all of the expert testimony at the suppression hearing was geared to the proceeding at hand, not to mitigation at a possible future penalty phase. The fact remains that no expert testimony was presented during the sentencing proceedings. Documentary evidence in the form of medical records would have helped to shore up the "anecdotal lay testimony" with some needed, independent corroboration. Relief should be granted.

CONCLUSION

Based on the foregoing, the circuit court improperly denied Mr. Johnson relief on his 3.851 motion. Relief is warranted in the form of a new trial, a new

sentencing proceeding, a remand to the trial court with directions that Mr. Johnson's sentences be reduced to life, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by electronic transmission and United States Mail, first class postage prepaid, to all counsel of record and the Defendant on this ___ day of November, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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