IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-2219

EMANUEL JOHNSON,

Appellant,

v. **CAPITAL POSTCONVICTION CASE**
(Victim Jackie McCahon)

STATE OF FLORIDA,

Appellee.

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

CORRECTED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT ON REFERENCES

This is an appeal of the circuit court's denial of Emanuel Johnson's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851. The following format will be used when citing to the record. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "R." followed by the appropriate volume and page numbers. References to the postconviction record on appeal will be referred to as "PC-R." followed by the appropriate volume and page numbers.

REQUEST FOR ORAL ARGUMENT

Emanuel Johnson has been sentenced to death. Given the gravity of the case and the complexity of the issues raised herein, Mr. Johnson, through counsel, respectfully requests this Court grant oral argument.

REQUEST FOR CONSOLIDATION OF APPEALS

For the reasons stated below, this case is inextricably intertwined with CASE NO. SC10-2008 (Victim Iris White). Appellant moves that these cases be consolidated for the purpose of appeal.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE AND OF THE FACTS

The defendant was convicted in four cases of crimes that were committed within a nine month time span. Two involved first degree murders which resulted in death sentences; the other two noncapital cases involved violent felonies and resulted in prison sentences. The four cases were tried in sequence and eventually gave rise to postconviction proceedings which were deemed "inseparably intertwined" by the trial court. The noncapital convictions were used as aggravators in the capital cases. The victims in both of those cases testified in both of the penalty phases of the capital cases.

Mr. Johnson's convictions and sentence in this case were affirmed on direct appeal at *Johnson v. State*, 660 So.2d 648 (Fla. 1995) *cert. denied*, 517 U.S. 1159 (1996) (victim Jackie McCahon). The other capital case involved Iris White, and was reported at *Johnson v. State*, 660 So.2d 637 (Fla. 1995) *cert. denied*, 517 U.S. 1159 (1996). Many of the issues raised on appeal were the same in both cases. Although the four cases have never been formally consolidated, this Court determined to take judicial notice of both capital cases together. "We recognize that the lower court, in a spirit of judicial efficiency, combined hearings in Johnson's various cases. Moreover, we earlier granted a motion to take judicial notice of a portion of the record in Johnson's other death appeal, though in that portion the trial

court actually was addressing an issue in the present case. Nevertheless, this motion was granted before it became clear how extensively the two Johnson records pending in this Court have become intertwined. . . .. We have read the entire record in both cases together and *sua sponte* have determined their relevance to one another." *Johnson v. State*, 660 So.2d 648, 652.

A separate postconviction motion was filed by CCRC in each of the four cases, however many of the claims in all of the motions were the same. Although the cases were never formally consolidated, essentially all of the postconviction pleadings, responses, hearings, orders, and so on addressed all four cases simultaneously.

In a single final order denying postconviction relief in all four cases, the lower court summarized their facts and procedural history this way:

> BACKGROUND
>
> This case pertains to a number of convictions for crimes against four victims occurring between January and October 1988, and has a protracted and complicated history; two victims were murdered, and two were not. Their cases, listed below in chronological order, can be summarized as follows.
>
> A. 88 CF 3202 (Victim: Kate Cornell)
>
> Case Number 88 CF 3202 pertains to the attempted murder of Kate Cornell on or about January 17, 1988. On that date, Ms. Cornell was sitting and reading in her apartment after midnight. She got up to go into the bathroom, and while there, the Defendant, who had entered the apartment through a window in her roommate's bedroom, grabbed her by the arm, threatened her with a knife,

and demanded her money. When she gave him her money, he told her "that's not enough," pushed her on the bed, and stabbed her. When Ms. Cornell asked the Defendant what he had done with her roommate, the Defendant fled.

The Defendant was charged with attempted first-degree murder (Count I), burglary of a dwelling with a dangerous weapon (Count II), and robbery with a deadly weapon (Count III). After a trial in April 1991, a jury convicted him of all three counts, and the Court sentenced him to life on all three charges. On appeal, the Second District Court of Appeal affirmed per curiam. See *Johnson v. State*, 662 So. 2d 349 (Fla. 2d DCA 1995).

B. 88 CF 3246 (Victim: Lawanda Giddens)

This case pertains to the attempted murder of Lawanda Giddens on or about May 28,1988. On that date, Ms. Giddens was sitting at home while her children were sleeping and her husband went to the convenience store. Shortly after her husband left, someone knocked on the door. When she opened the door, Ms. Giddens realized she did not know the person and tried to shut the door. The Defendant pushed his way through, grabbed Ms. Giddens by the throat with both hands and began to choke her. The Defendant carried her by the throat through her apartment to the kitchen counter, where she handed him money. After that, the Defendant led her outside, where she eventually broke free and called 911.

The Defendant was charged with attempted murder (Count I), robbery (Count II), and burglary of an occupied structure (Count III). The jury convicted him of Counts II and III as charged, and found him guilty of the lesser-included offense of battery on Count I. The Court sentenced him to 6 months in the County Jail on Count I, and 15 years on Counts II and III. On appeal, the Second District Court of Appeal affirmed per curiam. See *Johnson v. State*, 662 So. 2d 349 (Fla. 2d DCA 1995).

C. 88 CF 3200 and 88 CF 3438 (Victim: Jackie McCahon)

These cases pertain to the murder of Jackie McCahon in September 1988. In Case Number 88 CF 3200 the Defendant was charged with first-degree murder, and in Case Number 88 CF 3438 he was charged with armed

burglary. The facts of that case are as follows:

> On September 22, 1988, Sarasota police found Jackie McCahon's body on a sidewalk in front of her residence. She had been stabbed nineteen times, and twelve of the wounds were fatal. A broken-off piece of a knife blade was found in her body. Blood spatter evidence suggested that McCahon had been attacked as she opened the door, or while inside a bathroom. Police at first suspected several men, but after turned their attention to a tenant of McCahon's named Emanuel Johnson. When first questioned, Johnson said he had heard police cars arrive and had gone out to see what was happening, but that he did not know McCahon was the victim until someone told him so the next day.
>
> After a lengthy police interrogation, however, Johnson confessed. He said he had gone to McCahon's residence to say he needed to use her phone because his wife was about to give birth. McCahon knew that Johnson's wife was pregnant. When McCahon let Johnson in the door, he grabbed her and choked her to semi-consciousness. Then he found a knife, stabbed her several times, cut the phone cord, then took twenty dollars he found. Later, Johnson stated that he then went across the street to his apartment, but saw McCahon stagger out of her residence on to the sidewalk. At this point Johnson said he took a knife from his apartment, went out, and stabbed McCahon repeatedly. Police later found a broken knife handle where Johnson said he had thrown the second knife. It matched the broken blade found in the body.

Johnson v. State, 660 So. 2d 648, 652 (Fla. 1995). After convicting the Defendant, the jury recommended the death penalty by a 10-to-2 vote. In sentencing the Defendant to death, the Court found that one of the aggravators was "prior violent felony," specifically:

> A) Capital felony.
>
> The Defendant has previously been convicted of the First Degree Murder of Iris White in Case No. 88-3199.
>
> B) Felonies involving the use of violence to persons.

The defendant has previously been convicted of Attempt to Commit Murder in the First Degree With a Weapon, Burglary of a Dwelling While Armed With a Dangerous Weapon, and Robbery While Armed With a Dangerous Weapon in Case No. 88-3202. The Defendant has previously been convicted of Robbery and Burglary of an Occupied Structure in Case No. 88-3246. The Defendant has previously been convicted of Armed Burglary in Case No. 88-3198.

Trial Court's Sentencing Order entered June 28, 1991. The Cornell and Giddens cases were included in the finding of this aggravator.

D. 88 CF 3198 and 88 CF 3199 (Victim: Iris White)

These cases pertain to the murder of 73-year-old Iris White in October 1988. In Case Number 88 CF 3198 the Defendant was charged with one count of armed burglary, and in Case Number 88 CF 3199 he was charged with first-degree murder. The facts in that case are as follows:

On October 4, 1988, police found the body of 73-year-old Iris White. She was naked from the waist down and had suffered twenty-four stab wounds, one incised wound, and blunt trauma to the back of the head. A variety of fatal wounds penetrated the lungs and heart. The body also showed evidence of defensive wounds and abrasions near the vagina and anus most likely caused by a forceful opening by hand or fingernails.

Police found a screen in the living room had been cut and the lower window raised. The fingerprints of Emanuel Johnson were recovered from the window sill. Police also found two pubic hairs that show the same microscopic characteristics as Johnson's, though an expert stated that an exact identification was not possible. Johnson had done yard work for White some years earlier.

After a lengthy interrogation on October 12, 1988, Johnson gave a taped confession to police. He stated that he knocked on White's door to talk about lawn maintenance. When she opened the door, he then grabbed her, choked her to unconsciousness, and then stabbed her several times. Johnson said he then left the house, locking the door behind himself, but forgot to take White's wallet. Twenty minutes later, he cut open the window screen, climbed in,

took the wallet, and left. Johnson said he later threw the wallet in an area where a road surveyor later found it.

Johnson v. State, 660 So. 2d 637, 641 (Fla. 1995). After convicting the Defendant, the jury recommended the death sentence by an 8-to-4 vote. In sentencing the Defendant to death, the Court found that one of the aggravators was "prior violent felony," specifically:

> A) Capital felony.
>
> The Defendant has previously been convicted of the First Degree Murder of Jackie McCahon in Case No. 88-3200.
>
> B) Felonies involving the use of violence to persons.
>
> The Defendant has previously been convicted of Attempt to Commit Murder in the First Degree With a Weapon, Burglary of a Dwelling While Armed With a Dangerous Weapon, and Robbery While Armed With a Dangerous Weapon in Case No. 88-3202. The Defendant has previously been convicted of Robbery and Burglary of an Occupied Structure in Case No. 88-3246. The Defendant has previously been convicted of Armed Robbery in Case No. 883438.
>
> Trial Court's Sentencing Order was entered June 28, 1991. The Cornell and Giddens cases were included in the finding of the aggravator.

McCahon PC-R19, 3291-95; White PC-R20, 3617-25.

Defense counsel presented the testimony of a number of family members and other lay witnesses at the penalty phase, but no mental health experts. The trial court's sentencing order with regard to mitigation reads:

MITIGATING CIRCUMSTANCES

The Court finds the following mitigating circumstances exist:

1. The Defendant was raised without a father in a single parent household.

2. The Defendant suffered a deprived upbringing in Mississippi.
3. The Defendant had an excellent relationship with other family members.
4. The Defendant was a good son who provided for his mother.
5. The Defendant has an excellent employment history.
6. The Defendant was a good husband and father who attempted to provide for the welfare of his family.
7. The Defendant is the father of two (2) children for whom he has demonstrated love and affection.
8. The Defendant cooperated with the police and confessed.
9. The Defendant has demonstrated artistic and poetic talents.
10. The age of the Defendant at the time of the crime.
11. The Defendant has potential for rehabilitation and productivity in the prison system.
12. The Court can punish the Defendant by imposing life sentences
13. The Defendant had no significant history of criminal activity before 1988.
14. The Defendant at all times during trial exhibited good conduct.
15. The Defendant suffered from mental pressure which did not reach the level of statutory mitigating factors.

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.

McCahon R50, 8792-94; *Johnson* 660 So.2d at 652; White R48, 8811-15. The advisory verdict in McCahon was 10-2, in White 8-4.

The following issues were raised on direct appeal in the McCahon case: 1) The arrest was illegal, and the judge should have suppressed its fruits. 2) The confessions should be suppressed. 3) A clerk improperly swore, qualified, and excused jurors in the absence of the judge. 4) The court should have dismissed the indictment or at least required an evidentiary hearing when the defense demonstrated that the grand jury was improperly qualified. 5) The trial court improperly delayed trial for weeks after the jury was selected, to allow other jury selections and trials to occur. 6) The judge should have excused for cause two jurors who had a preconceived opinion that death was the proper penalty for first degree murder. 7) The defense presented a prima facie case of racial discrimination when, in case after case, the venire did not include more than one black. 8) The trial court improperly consolidated charges, moved the trial dates forward by one month, denied motions for continuances, and forced the defense to go to trial when it had just had an expert appointed and had only recently received discovery, merely to give the state more convictions to use as aggravating circumstances. 9) This Court's page limits on briefs have unconstitutionally denied the appellant his right to effective assistance of appellate counsel. This Court also incorporated four issues from the White cases and recited its rulings from that case.

The issues raised on direct appeal in the White case, as described by this Court

were: 1) The confession was involuntary for a variety of reasons. 2) Material seized from Johnson's apartment pursuant to a search warrant should have been suppressed on grounds the officer's sworn affidavit was defective and also because the warrant did not describe with particularity the items to be seized. 3) Reversible error occurred because of the trial court's refusal to excuse for cause a juror who had expressed favor toward the death penalty. 4) The Court was asked to consider arguments raised in the McCahon case. 5) The trial court improperly limited the presentation of mitigating evidence in various ways. 6) Erroneous comments were made by the State. 7) The trial court improperly declined to find the statutory "mental mitigator" of extreme mental disturbance. 8) There were various errors in the jury instructions. 9) The felony-murder aggravator is an improper automatic aggravator. 10) The standard jury instruction on HAC is invalid.

Mr. Johnson's convictions and sentences were affirmed in both capital cases.

In its final order denying postconviction relief in all four cases, the lower court devised a chart which listed the postconviction claims presented in each of the four cases. McCahon PC-R19, 3296–98; White PC-R20, 3622-25.

As framed by the court the claims in the McCahon case are these:

I: Ineffective assistance of counsel for mishandling experts.

II: State failed to disclose timely exculpatory information, which rendered counsel ineffective in failing to diligently prepare for trial.

III: State engaged in prosecutorial misconduct by offering evidence and argument of sperm after the FBI reported that none had been found.

IV: Ineffective assistance of counsel for failure to call competent mental health experts in the penalty phase.

V: The aggravating circumstance of previous conviction of a violent felony was based solely on an invalid conviction.

VI: The rules prohibiting the Defendant's attorneys from interviewing jurors violate the constitution and deny him effective assistance of counsel.

VII: The death penalty statute is unconstitutional.

VIII: Mr. Johnson was denied due process when the Court did not allow him to inform the jury about his ineligibility for parole and the possible sentences he would likely receive.

IX: Mr. Johnson's death sentence is unconstitutional because the penalty phase jury instructions were incorrect.

X: Lethal injection constitutes cruel and unusual punishment.

XI: Mr. Johnson's convictions are unreliable because of cumulative effects of all errors.

XII: Mr. Johnson's right against cruel and unusual punishment will be violated because he may be incompetent at the time of execution.

XIII: The State engaged in misconduct by presenting false evidence in the suppression hearings, and counsel was ineffective for failing to challenge the misconduct.

XIV: He was denied due process when the State destroyed potentially useful evidence in bad faith.

XV: "The arrest, search and seizure" were based on an affidavit that contained

false statements, and counsel was ineffective for failing to challenge them.

As framed by the court the claims in the White case are these:

> I: Ineffective assistance of counsel for mishandling mental health experts, i.e. Dr.Maher and Dr. Afield.
>
> II: State failed to disclose timely exculpatory information, which rendered counsel ineffective in failing to diligently prepare for trial
>
> III: State engaged in prosecutorial misconduct by offering evidence and argument of sperm after the FBI reported that none had been found
>
> IV: Ineffective assistance of counsel for failure to call competent mental health experts in the penalty phase
>
> V: The aggravating circumstance of previous conviction of a violent felony was based solely on an invalid conviction
>
> VI: The rules prohibiting the Defendant's attorneys from interviewing jurors violates the constitution and denies him effective assistance of counsel
>
> VII: The death penalty statute is unconstitutional
>
> VIII: He was denied due process when the Court did not allow him to inform the jury about his ineligibility for parole and the possible sentences he would likely receive in other cases.
>
> IX: His death sentence is unconstitutional because the penalty phase jury instructions were incorrect
>
> X: Lethal injection constitutes cruel and unusual punishment
>
> XI: His convictions are unreliable because of cumulative effects of all errors
>
> XII: His right against cruel and unusual punishment will be violated

because he may be incompetent at the time of execution

XIII: The State engaged in misconduct by arguing facts not in evidence and defense counsel was ineffective for failing to challenge that misconduct

XIV: The State engaged in misconduct by presenting false evidence in the suppression hearings and counsel was ineffective for failing to challenge the misconduct

XV: The State engaged in misconduct by presenting inconsistent theories and counsel was ineffective for failing to challenge that misconduct

XVI: Ineffective assistance of counsel for failure to "introduce evidence of [his] actual innocence"

XVII: The State used illegally-obtained fingerprints

XVIII: 'The arrest, search and seizure" were based on an affidavit that contained false statements, and counsel was ineffective for failing to challenge them

The first four postconviction claims in each of the capital cases were largely identical and a single evidentiary hearing was conducted on all of them together. Most of the testimony at the hearing and the postconviction court's analyses and conclusions addressed elements of first and fourth claims, along with components of some of the other claims. Evidence other than what was already cited from the direct appeal record was offered on only some of the allegations in Claims II and III. The court's order denying postconviction relief is structured around the testimony of the witnesses at the evidentiary hearing. The transcript of the evidentiary hearing

forms attachments 1 and 2 to the lower court's final order denying relief and is located at White PC-R19, 3339 through PC-R20, 3683 and White PC-R20, 3617 through PC-R22, 4010. The remaining claims had been summarily denied either in an order entered after the *Huff* hearing, PC-R13, 2329-36, or at other times during the proceedings.

Mr. Johnson has filed numerous *pro se* pleadings during the course of these proceedings. The lower court included as an attachment (#26) to its final order a copy of its previous order addressing (1) the Defendant's *pro se* Motion to Amend 3.851 Motion, and Additional Claims for which Evidentiary Hearing Required, filed on March 24,2008, (2) CCRC's Addendum to Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend, filed on September 16,2008, and (3) CCRC's Motion to Adopt Defendant's Recent Pro Se filings, filed on April 2,2009. PC-R27, 5081-88. It was apparently this order by which the court intended to address all of the defendant's *pro se* pleadings. Generally speaking, the court permitted CCRC to adopt and sometimes redraft the defendant's pro se claims but otherwise summarily denied them. *Id.*

The Postconviction Evidentiary Hearing

The court conducted the postconviction evidentiary hearing on August 3-4, 2009. The defense presented six witnesses and a variety of documentary exhibits, most of which were excerpts from the trial which were offered to refresh the witnesses' recollection. The witnesses in order of presentation were: Dr. John C. Brigham, an expert on eyewitness identifications; Marjorie Hammock, a mitigation expert; Adam Tebrugge, one of the three trial defense attorneys; Dr. Walter Afield, a neuropsychiatrist who was consulted but who did not testify at trial; and remaining trial attorneys Tobey Hockett and Elliott Metcalfe. The State did not call any witnesses, but did offer some documentary exhibits.

Dr. John C. Brigham

Dr. Brigham said that he primarily examined materials relating to the noncapital Kate Cornell case.[1] The State did not challenge Dr. Brigham's qualifications but objected to his testimony on relevancy grounds, arguing that it

[1] The trial record reflects that Lawanda Giddens and Kate Cornell testified for the State at the penalty phase of both capital cases. See testimony of Lawanda Giddens, R33 (White direct appeal), page 5803, testimony Kate Cornell Goodman, page 5810; Vol. 35 (McCahon direct appeal). The entire record in the Giddens and Cornell case were entered into the record of both capital cases in support of the contemporaneous conviction aggravators.

Ms. Giddens had provided an affidavit recanting her identification of Mr. Johnson early in the postconviction proceedings and the court had agreed to receive her testimony about it, but she could not be located by the time of the evidentiary hearing.

would invade the province of the jury had it been offered at trial. McCahon PC-R19 3351-55; White PC-R20, 3678-82. The Court allowed the examination to proceed, reserving any ruling on legal arguments until later in the proceedings. *Id.*

Dr. Brigham said that he had been contacted by trial counsel late in the spring of 1991 as a possible defense expert witness. He sent attorney Tobey Hockett a letter dated April 16, 1991, "explaining that he had begun examining the voluminous materials he had been sent, but that he would need more time to study them sufficiently. Exhibit B, PC-R44, 854. Dr. Brigham explained that he would not be able to assemble those groups of students until the summer session began:

> Thank you for sending me the photos from the photograph lineups, the enlarged composite drawing, the police reports, the case summary, and the 16 depositions from witnesses in the Emanuel Johnson case. To facilitate my study of the factors likely to affect the accuracy of eyewitness identifications, I have begun my analysis of the portion of the depositions that are relevant to the eyewitness aspects of the case.
>
> Given the volume of the transcripts and the number of lineups used, and the fact that this is the final week of classes and next week is exam week at FSU (I have 205 students in my class), it will take several weeks to complete my analyses of the trial materials. Further, in order to do a statistical analysis of lineup fairness, I will need to utilize a group of 20 to 30 students; such a group will not be available to me until summer classes begin at FSU on May 7. Therefore, realistically speaking the earliest my analyses can be completed would be May 15 (I will be out of the state from May 9-13). I hope that

> scheduling does not present a problem and I look forward to hearing from you.

Letter dated April 16, 1991, *Id.* He also proposed to conduct a test of the fairness of the lineups used in this case by showing them to groups of students, giving the students a description of the perpetrator, and measuring their responses. "[I]f everyone fits the description equally well those guesses should be randomly distributed across the six people. If the majority of the guesses focus on the defendant . . . that's an indication that it's not a fair lineup." McCahon PC-R19, 18; White 20, 3684.

Dr. Brigham also sent counsel a letter dated April 18 stating that his testimony might be "most useful" regarding the detrimental effects of repeated photopack lineups on the reliability of an eyewitness' eventual identification. Defense PC-R Exhibit C, (either case) PC-R44, 855). According to the case materials he had recently re-read, Ms. Cornell had been shown 40-50 photographs over a nine month period before she ultimately made an identification in October of 1991. He said that research has shown that repeated efforts to obtain an ID degrade the quality of the witness's memory. *Id.*

Dr. Brigham testified about the substantive evidence he would have been able to present at trial, if he had been asked to do so. With regard to each of his opinions, he explained that he would have been able to support them with detailed citations to

scientific articles and other research. McCahon PC-R19, 3368-72; White PC-R20, 3695-99.

He viewed the length of time between the event and the actual identification as being significant in this case for two reasons. The first reason is simply that people's memories fade as time goes on. The second reason is that intervening events, such as the repeated showing of photopacks has been shown to degrade the accuracy of a witness's memory. According to a 1980s statewide survey of attorneys and law enforcement officers in Florida, the usual time between a crime and a photo or live lineup was four to seven days. In this case it was nine months, considerably longer. Dr. Brigham discussed research into the relationship between a witness's personal certainty about an identification and its actual accuracy. Unlike most other areas of memory, research has shown that the correlation between certainty and accuracy is "very weak" in identification cases. *Id.* The relationship becomes even weaker where the identification is reinforced by trial preparation or confirmation or other factors. "So by the time someone testifies at a hearing or at trial, the level of certainty they express, while they truly believe it, is not an accurate indication of whether or not they're correct." *Id.*

The fact that the Cornell case involved a cross-race identification was also a factor which has been researched. Dr. Brigham explained that as of 1988-89, when

this case was being prepared for trial, there had already been significant studies of the effect of cross-race identification on the reliability of eyewitness testimony. "The results are that people are less accurate in identifying persons of another race than of their own race. That holds for whites trying to identify Blacks or Asians, it holds for Blacks trying to identify Whites or Asians, and so forth." *Id.*

With regard to each of these factors, Dr. Brigham would have been able to consult with counsel and assist in the presentation of the defense case even if he had not actually testified as an expert witness. *Id.*

The sequence of four trials, commencing with the noncapital cases began shortly thereafter. *See* McCahon R21, 3358 (hearing April 30, 1991, motion to continue trial in the McCahon case).

Dr. Brigham recalled being told around April of 1991 that he could not be used as a witness or consulting expert because the defense request for a continuance for that purpose had been denied.

Professor Marjorie Hammock

The defense called Marjorie Hammock, a Professor of Social Work at Benedict College. She has an extensive background in academia and clinical social work, and has testified with regard to mitigation as an expert witness in 16 death penalty cases. PC-R19, 3391-99; Defendant's PC-R Exhibit D (CV), PC-R44,

856-58. Her primary evaluation instrument is called a Biopsychosocial Assessment (BSA), which she described as "a tool for gathering information. It looks at the physical, the behavioral, and social work history . . . of a client. In . . . this kind of work it's used to take a look at the patterns and the experiences of the defendant, as a way of explaining how he got to be in this particular situation. . . . Social history is included in a [BSA], they are really synonymous terms." PC-R19, 55 et seq. She has conducted hundreds of such assessments. A BSA routinely requires a review of school, health and medical records, juvenile and adult correctional records if appropriate, and records of any kind of counseling or therapy that a client has received. It also requires a family history and interviews with significant people in the client's life. Ms. Hammock also consulted scholarly literature in the course of conducting her assessment. It common for psychologists and psychiatrists to rely on a BSA in conducting their own evaluations. The educational background for conducting BSAs involves a substantial number of hours in clinical practice under supervision and an approved course of study. Either BSAs or social history assessments have been around for at least 50 years, and they were a readily available tool when these cases were brought to trial. *Id.*

Ms. Hammock began her work in this case with a review of the defendant's records from the Department of Corrections, medical and mental health records,

elementary school records from Hollandale, Mississippi, interviews with family members and others conducted by the trial attorneys, and a review of mental health evaluations conducted by Drs. Ofshe and Afield. She personally interviewed Johnson's mother, Charlene Holiday, three maternal aunts, two brothers, four cousins, an uncle, and the defendant himself three times. McCahon PC-R19, 3402; White PC-R20, 3729.

She described Johnson as having grown up poor in a poor community in the Mississippi delta region, where the entire family subsisted by working as sharecroppers. Ms. Hammock said that "everyone" had a story about being sprayed randomly and without warning with pesticides and chemical fertilizers. He was born in 1963 and was one of seven siblings. His father abandoned the family when he was a baby, and a stepfather, who had a good relationship with Johnson, was killed by a drunken driver when Johnson was six years old. His mother struggled to raise the children. She left the family on a number of occasions to find employment, and at those times Johnson was described as being both inconsolable and also engaging in tantrums and head banging. About this time Johnson saw a family pet run over by some white males, who apparently taunted the children about it. One of his cousins was run over in a tractor accident, while another died from overexposure.

According to Ms. Hammock's interviews with Mr. Johnson, as well as corroborating data, he perceived himself and his family as being victimized. The community was segregated. Although the blacks were the majority, the whites were in control. The driver of the car that crashed into his stepfather was white, as were the drivers of the tractor that ran over one of his cousins and of the cars that ran over another cousin and his dog. He recalled being sprayed with chemicals in the field as well as one occasion where his family's house was sprayed without any warning.

Ms. Hammock described Johnson's behavior as deteriorating during his pre-adolescence. He was described as holding his breath until he passed out. There were numerous reported instances of head banging, increasing defiance, destructiveness, anger and mood swings. He would break things, smash windows and mirrors. He was described by "all family members" as being "crazy." McCahon PC-R19, 78; White PC-R20, 3743-45. He was threatened with being taken to the "crazy house." "[H]is stepfather and mother literally had him in the car." *Id.* On the other hand he was described as being "loyal to a fault." *Id.*

He was either truant from school or got into trouble when he did go. "He perceived that he was being picked on and ridiculed because of his clothes, because of the way he looked." *Id.* at 3419. He was especially resentful of what he

perceived to be slights of his family. He repeated two grades and apparently stopped going to school after the sixth grade, although he did eventually join Job Corps and obtain a GED.

Ms. Hammock said she had read Dr. Afield's report and believed that the findings in her assessment were consistent with his conclusions. Although she was not qualified to diagnose psychosis, her findings from Johnson's early childhood provided evidence of his difficulty relating to society and its demands, poor self-esteem, and paranoia, as well as some evidence of mental disorders. She also found some evidence of mental illness in Johnson's family. His mother was treated for depression, as well as another aunt. His mother's depression was problematic because she was less able to deal with him during these episodes, and he presented more of a problem for her than did the other children. A cousin was described as being "schizophrenic." There was also drug and alcohol addiction in the family. Johnson began smoking marijuana in his early teens and added alcohol later, but in the 1980s he began using crack cocaine "extensively." In 1977, he took 13 pills from his mother's anti-depressant medication in a suicide attempt, which resulted in having his stomach pumped. He later attempted suicide in 1989 while incarcerated. In 1986, he was present when his first child, a baby girl, was delivered stillborn. As a result of this he went into a deep depression increasing the use of drugs. "He went

to the funeral home and took a picture of the child and carried it around with him, and showed everyone." There was no intervention other than a time when his mother futilely tried to get him to see a counselor.

Attorney Adam Tebrugge

Mr. Tebrugge was one of the team of three attorneys with the 12th Circuit Public Defender's Office who represented Mr. Johnson at trial. These cases, brought to trial in the 1988-91 time frame, were Mr. Tebrugge's second capital case.

Mr. Tebrugge had primary responsibility for the penalty phase in both of Mr. Johnson's capital cases. "I was not as involved with the guilt/innocence issues of Mr. Johnson in either of the homicide cases. My focus was primarily on the penalty phase." McCahon PC-R19, 3462; White PC-R 21, 3789. He recalled that he was brought into these cases late, approximately three or four months prior to when they were tried.

Mr. Tebrugge generally recalled that he had argued for the extreme mental or emotional disturbance statutory mitigating circumstances in both cases. He did not offer any expert testimony in either penalty phase. The defense failure to do so was cited by the Court in rejecting those mitigators.

Dr. Afield was originally appointed via a form order to conduct a sanity and competency evaluation. He concluded that Mr. Johnson did not meet the criteria

for legal insanity at the time of the offense, although he suffered from profound mental illness. The insanity defense was withdrawn, and Dr. Afield was dropped as a witness. McCahon R19, 3453; White PC-R21, 3780-81. Mr. Tebrugge said:

> Q. [W]hether to proceed with an insanity defense during the guilt phase of the trial is an entirely separate question, at least legally, from the question of whether to present expert testimony in support of a mental or emotional statutory mitigating circumstance. You would agree with that statement, correct?
>
> A. Yes.
>
> Q. Okay. Distinguishing the two then, was a decision made with regard to Dr. Afield's testimony with regard to the possibility of using it during the penalty phase alone, was such a decision made without regard to the decisions that need to be made about the insanity defense.
>
> A. Well, I think that's a good question, and I'm not sure I know the answer to that. I think that possibly there were problems in our relationship with Dr. Afield prior to trial which led to us not using him for an insanity defense, and maybe we burned the bridges, I'm not really sure.
>
> Beyond that he did not offer any specific reasons why Dr. Afield was dropped as a witness . . . I just know there were difficulties in our relationship, and certainly potentially I was the source of some of those difficulties, possibly Dr. Afield was, but there were problems.

McCahon R19, 3484; White PC-R21, 3811.

During a scheduling discussion at beginning of the penalty phase in the McCahon case, the State summarized what Dr. Maher said in his deposition this

way:

> MR. DENNEY: Dr. Maher was listed by the Defense as a witness for mitigation purposes. Mr. Nales and myself took his deposition on May 15th, 1991.
>
> He interviewed Emanuel Johnson on April 10th, 1991, and at that time Emanuel Johnson told him that, one, he was a professional robber and he had done hundreds of homes; that, two, he had a problem, that his criminal activity was escalating to the point he became violent and it caused the death of these people; and, three, he said he had killed Iris White, which I think goes right to this so called residual doubt theory, that he had killed Iris White, that he needed money and that he went over to her house. He then again stated that he had killed Jackie McCahon, that he wanted money and he wanted part of his rent money back, they got in a yelling match and he choked her and he got knives and he killed her.
>
> So I think the Court should be aware that this type of evidence is going to come in. That the State not only wants to cross examine these officers to know whether they're aware that Dr. Maher had taken these statements from Emanuel Johnson and Emanuel Johnson had admitted that he had killed these people, that he had a cocaine problem and that's the reason he was in need of money, in addition we want to call Dr. Maher to testify to the extent of those conversations and his confession to him.

McCahon R35, 5845-49. In other words, after learning what Dr. Maher had to say when they took his deposition, the State threatened to call him as their witness for the prosecution. The trial record contains the following exchange:

> MR. TEBRUGGE: Psychological witnesses are retained by the Defense for very specific purposes, and the Defense decides whether or not to waive the psychotherapist patient privilege or

not.

> Now, for purposes of the deposition the privilege had to be waived under the circumstances of this case, but I just, I feel that it's inappropriate for Mr. Denney to make those comments when the Defense has not waived the privilege in any fashion in court, and we've not waived it by choosing not to present the testimony of Dr. Maher or the testimony of Dr. Afield, and I do feel that that's inappropriate.
>
> MR. DENNEY: Judge, I've never heard of a waiver for certain purposes. . . . They listed the man, they gave me information, we took his deposition. Once they do that they've waived any privilege they have.

McCahon R35, 5845-49. Mr. Tebrugge agreed in the evidentiary hearing that he was arguing that even after giving a discovery deposition Dr. Maher's confidential status could still be maintained. McCahon PC-R19, 3458; White PC-R21, 3785.[2]

Mr. Tebrugge was questioned about the excerpt from the trial proceedings contained in Defense Exhibit F (PC-R44, 867), which was an excerpt from the transcript in the Jackie McCahon case that reads as follows:

> MR. MORELAND; Yes, sir. Judge, I know the Defense is planning or anticipating putting on a case and the State would like to know basically whether they intend to call Dr. Ofshe in this case for the primary a couple of reasons.
>
> One, if they do, we want to have our own experts standing by. But secondly and probably most importantly, if they do, we're going to have Dr. Maher present, who is a Defense expert whom the Defendant also confessed to

[2]Ultimately, the defense never presented Dr. Maher as a witness in any of Emanuel Johnson's cases.

> about both the Iris White and the Jackie McCahon' cases, and anticipate some trouble in that and would like to have some time in order to do that, if they plan on using Dr. Ofshe.

McCahon R32, 5458-59. Mr. Tebrugge objected to the prosecutor's remarks, on the theory that Dr. Maher was "a Defense expert who at this point in time has not been called or presented to the Court in any fashion." *Id.* Dr. Ofshe could not testify to any admissions Johnson made about the killings. In fact, he deliberately avoided asking Johnson any questions that might result in such admissions. White R71168 et seq.

On direct appeal this Court noted:

> 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.
> * * * *
> 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. Psychological experts had testified extensively as to Johnson's mental state in the earlier suppression hearing, though counsel chose not to bring these same experts before the jury in the penalty phase.

Johnson v. State, 660 So.2d 637, 645-46 (Fla. 1995). When Mr. Tebrugge was asked about this 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.

McCahon PC-R19, 3466; White) PC-R21, 3793.

Dr. Walter Afield

Atty. Elliott Metcalfe was one of the three attorney team who represented Mr. Johnson through the trial proceedings. He was the Public Defender at the time and was on the case from the beginning. He recalled that he was the one who contacted Dr. Afield in the beginning of this case with regard to a possible insanity defense. McCahon PC-R20 3648; White PC-R21, 3875. The order appointing Afield dated October 24, 1988 expressly asserts his status as a confidential advisor under Rule 3.216. White R 36, 6262, paragraph 3.

Dr. Afield's credentials are impressive. He obtained his medical degree from Johns Hopkins, completed his residency in neuropsychiatry at Harvard Medical School and eventually taught there. In 1970 he chaired the Department of Psychiatry at the then new University of South Florida Medical School. He is certified by the American Board of Psychiatry in neurology and adult and child psychiatry and in different health care administration fields. He has been a senior examiner for the American Board of Psychiatry and Neurology since 1970. He has testified in courts and lectured extensively throughout the country, has been a visiting professor and a number of universities, consulted with the FBI, testified

before Congress, and so on. PC-R Exhibit I (CV & Resume).

Dr. Afield gave a pretrial discovery deposition and testified for the defense at the suppression hearing. To summarize, he said that Johnson was hearing voices and psychotic when he examined him, and was "well under the normal range of intelligence. He's in the retarded area." He was "Hearing voices and responding to them and listening to them and talking back to them." Johnson's responses to questions, including questions about the facts of the crimes and the police investigation were just "verbiage and rambling." Johnson had been prescribed Mellaril, an anti-psychotic depressant, by a jail staff doctor.[3] His history included headaches, head injuries, prior suicide attempts, and prior psychiatric treatment both as a child and when he had been in jail in Orlando. Dr. Afield's initial diagnosis was "Chronic undifferentiated schizophrenia barely under control with some sort of medication." Afield opined that Johnson "over the past year he has been actively psychotic and attempted to control it with illegal drugs which only accentuated the situation."

Dr. Afield's clinical impressions were that Johnson had been chronically retarded and that he had chronic undifferentiated schizophrenia. EH-169-74;

[3] Mellaril is a trade name for Thioridazine, an antipsychotic drug that was previously widely used in the treatment of schizophrenia and psychosis. Due to concerns about cardiotoxicity and retinopathy at high doses this drug is no longer commonly prescribed.

McCahon PC-R20, 3509-14; White PC-R21, 3839-44. There was evidence of learning disability. He had been psychotic over the past year. Johnson acknowledged that he had confessed to a number of crimes. "The bottom line is he was attempting to control his psychosis, sometimes with prescription medication but mostly with cocaine, or various other substances, which of course makes it worse, but he was psychotic." He had indicated in his correspondence to Mr. Hockett that he felt he needed to obtain significantly more information in the form of police records, previous medical records, school records if possible and additional testing. *Id.* Dr. Afield's overall conclusion that Johnson was psychotic has never changed. *Id.* Since then he has "seen many records over a long period, even things that [were] furnished to me currently. He's got chronic undifferentiated schizophrenia, and he's borderline retarded, with a probable learning disability." *Id.*

Dr. Afield first saw Mr. Johnson October 27, 1988. At the time, Johnson's speech pattern showed circumlocution, "speaking in circles," loose associations, and tangential thinking, the classic findings of schizophrenia. Dr. Afield had found Johnson to be "autistic, he was very withdrawn." Johnson also displayed signs of hallucinations and delusional thinking. *Id.*

Dr. Afield took a history from Johnson as part of the initial evaluation. It was necessarily based on self-reporting because Dr. Afield did not have any other

information at the time, but much of what Johnson said was later corroborated by police reports and additional background investigation. Consistent with what Marjorie Hammock found later, he admitted head-banging behavior and a fracture to the right orbit around his eye earlier in life. *Id.* Subsequent to the initial evaluation Dr. Afield reviewed a report from a Dr. Bernard O'Neil in March of 1989 about possible brain dysfunction. *Id.* He received the medical reports detailing Johnson's attempted suicide by slashing his wrist in April of 1989. Defense PC-R L is Dr. Afield's summary of the additional materials contained in a three volume set that he had reviewed by May 3, 1990. These included reports from various doctors, including Dr. Maher, brain scans, numerous crime and police reports, and a statement from Bridgett Chapman, which provided corroboration regarding the effect of the miscarriage of Johnson's first born child. During the miscarriage he would cry a lot and not talk. She thought he was going to break down. She also noticed mood swings. He complained of horrible headaches that would become so unbearable he would bang his head against the wall. He would say things like "When I'm gone you take care of my son." Henry Ben Johnson (Defendant's older brother) reported that Emanuel told him he started smoking crack to calm his mind down. The materials also included hospital reports and jail records corroborating the wrist slashing incident and treatment with "large doses" of an anti-psychotic

medication, Mellaril.

Dr. Afield's deposition on September 21, 1990 was admitted as PC-R Exhibit M and contains detailed information about Dr. Afield's findings and the status of his work on the case at that time. PC-R N was admitted. It is a report dated April 19, 1991, which Dr. Afield addressed "To Whom it Might Concern," stating that he had concluded that he did not believe that there was a basis for an insanity defense, and that he had told the defense attorneys that prior to April 15, 1991.

Dr. Afield was asked generally whether he remembered any discussions with the defense attorneys about legal strategy, but other than what is presently reflected in the documentary exhibits or otherwise in his testimony he did not. McCahon PC-R20, 3521-23; White PC-R 3848-51. Generally, he remembered specific discussions with Mr. Hockett about an insanity defense, and he remembered being questioned repeatedly about it during the deposition, which was attended by Mr. Hockett. As noted above, Dr. Afield was equivocal during the deposition about an insanity defense but was explicit and forthcoming about evidence of mental or emotional disturbance and mental capacity.

Atty. Tobey Hockett

Mr. Hockett did not participate in the penalty phases of the two capital cases, and did not recall participating in any discussions about whether to waive Dr.

Maher's confidentiality standards. In fact he did not participate in the penalty phases at all. McCahon PC-R20, 3583; White PC-R21, 3910. He did not know why no experts were called in the penalty phases. *Id.*

Mr. Hockett agreed that Mr. Tebrugge rather than he was primarily responsible for the penalty phase. "[U]sually in those cases Adam [Tebrugge] would be doing most of the preparation of the second-stage work to be necessary, and I was doing a lot of the – or most of the pretrial motion work, discovery stuff." McCahon PC-R20, 3556-58; White PC-R21, 3883-85. Mr. Hockett did not recall a discussion with Mr. Tebrugge about whether or not to rely on Dr. Afield or pursue an insanity defense. "[M]y recollection . . . is that that part of the case was being worked up by Adam. I may have signed the pleading, apparently I did, I don't recall it. But that he was the one who was lining up the doctors, or trying to find the doctors who were willing to work us on the case." *Id.* Mr. Hockett did not know whether Mr. Tebrugge had any discussion with Dr. Afield about whether he should give a deposition; he himself did not. McCahon PC-R20, 3578; White PC-R21, 3905.

Mr. Hockett's interview with Johnson, in which Johnson made numerous statements which were unhelpful to an insanity defense, took place 8/28 through 9/6/90. The defense had retained as a confidential advisor Dr. Richard Ofshe, a

professor of social psychology at the University of California with a subspecialty in techniques of influence, including police interrogations. McCahon R7, 1035. On 9/14/90, Dr. Ofshe interviewed the defendant. He deliberately avoided asking questions which might elicit admissions about the crime, however Mr. Johnson did admit that he had been behaving bizarrely in an effort to facilitate what he thought was some sort of deal with the police. About a week later, a week during which defense counsel was aware of at least a potential problem with inconsistent defenses and statements, Dr. Afield was deposed. During the Afield deposition, the prosecutor asked Afield to relate what Johnson had told him. Mr. Hockett objected. The prosecutor told defense counsel that his objection was noted, he could "take it to the judge," but took the position that any privilege had been waived and that the witness would have to answer his questions. Defense counsel then told the witness "I'm not your lawyer, so I can't tell you what to do or not to do . . . ." Dr. Afield then related an apparent admission to the crimes charged. See PC-R44, 910 through PC-R45, 1025 (Exhibit M, deposition of Afield, pp. 928-30) (McCahon & White, SC10-2008, 2219).

Mr. Hockett was questioned about these circumstances in the evidentiary hearing. He apparently maintains the view that admissions from Johnson made to Dr. Afield remained legally privileged during the deposition under a *Simmons*

theory (*Simmons v. United States*, 390 U.S. 377 (1968)). McCahon PC-R20, 3567-69; White PC-R21, 3893-95. The following exchange took place at the evidentiary hearing:

> Q. [I]n your experience with discovery depositions have you encountered a pattern where one attorney asks a question, the other attorney objects and instructs the witness not to answer the question, and the attorney propounding the question then certifies the question on the record, and then the attorneys move on to some other topic, and that certified question is then brought before the Judge on a motion to compel.
> A. Yes.
> Q. That was not employed here.
> A. I thought that's what we were doing in effect, by preserving the objection, without calling it -- being certified by the court reporter.
> Q. Well, also -- and you did not instruct the witness not to answer.
> A. I think that is clear from the record, that I didn't feel like I had the authority to do that.

Id.

Mr. Hockett said that the defense never considered using Dr. Ofshe at the guilt phase of any of the trials. His explanation was that the defense had sufficiently challenged the admissibility of Johnson's statements during the suppression hearing, "and that repeating a week's worth of suppression hearing all over again in front of the jury would not do us any good." PC-R20 3592-93. He agreed that the defense did challenge the reliability of the confession in front of the jury through

cross-examination as a strategic matter. He was asked whether the defense considered bolstering that strategy with expert testimony, and replied "I don't recall at this point." *Id.*

Mr. Hockett was questioned about PC-R Exhibit F, which is an excerpt from the record of the Jackie McCahon case. The State had rested and the Court had denied the defense motion for a judgment of acquittal. The discussion turned to what the defense would do in its case in chief, and the State threatened to call Dr. Maher if the defense called Dr. Ofshe to challenge the reliability of Johnson's confession. McCahon PC-R20, 3595-97; White PC-R21, 3922-24. Mr. Hockett did not recall being involved in any consideration about whether Dr. Maher would be allowed to give a deposition. *Id.* When questioned directly, he did not have any responsive memory about whether the State's threat to call Dr. Maher affected the decision not to call Dr. Ofshe. *Id.*

Atty. Elliott Metcalfe

Mr. Metcalfe was the third member of the defense attorney team who represented Mr. Johnson at trial. He was the Public Defender at the time and was on the case from the beginning. His testimony at the evidentiary hearing was somewhat more generalized than that of Mr. Tebrugge and Mr. Hockett.

He was asked about inconsistent defenses. He recalled that he was the one

who contacted Dr. Afield in the beginning of this case with regard to a possible insanity defense. McCahon PC-R20, 3648-57; White PC-R21-22, 3975-84. He said that over time, there were deteriorating communications with Dr. Afield with regard to the insanity defense, to the point that such a defense would no longer have been viable. According to Mr. Metcalfe, Dr. Afield was contacted primarily with regard to an insanity defense, a decision was reached that the insanity defense would not be pursued due to Dr. Afield's ambivalence on the subject, and because of that, the possibility of using Dr. Afield as a mitigation witness in the penalty phase was not even explored:

> Q. Do you recall . . . discussing with him the statutory mental mitigating circumstance of extreme mental or emotional disturbance?
> A. My recollection is that it had gotten to the point where we were not getting anything from Afield, and I was not comfortable using him for any purpose at all, period.

Id. Mr. Metcalfe was then asked about why Dr. Afield was allowed to be deposed. "I don't recall us sitting down and saying, okay, what are we going to do with Dr. Afield, is he going to be deposed or not. I know we had strategy sessions about him being a witness in the case at trial at some point, but I don't recall any discussions about the deposition." *Id.* He also did not recall any strategy decisions about whether to permit Dr. Ofshe to give a deposition. Id Again, "I don't recall any discussions about the deposition of Dr. Maher." *Id.* Mr. Metcalfe agreed that Mr.

Tebrugge was the lead attorney in both penalty phases, and he remembered discussions with Mr. Tebrugge about family and other lay witnesses who might be called. But, he said this:

> Q. Do you recall discussions within the defense team, particularly with Adam Tebrugge, about the use of expert testimony in the penalty phase of either capital case?
> A. I don't remember any discussions dealing with the use of expert testimony in the penalty phase.

Id. He did agree that the taking of an expert's deposition would be the triggering event with regard to waiver of the attorney-client privilege. *Id.*

As noted above, the State did not present any witnesses at the evidentiary hearing, although it did introduce some documentary exhibits which included the public defender investigative file to show that there had been an investigation into background mitigating information from the defendant's family members and other lay witnesses. The court requested written closing arguments and, after review, denied all relief. This appeal follows.

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). Under *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective

assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF ARGUMENT

There was no expert evidence of mental mitigation, statutory or otherwise, presented in this case. The lower court pointed that out in finding that the statutory mitigators did not exist. Dr. Afield should have been called as a witness to mental mitigation in the penalty phase. Although the defense expressly argued for the statutory mental mitigators, the trial judge found that they did not exist, explicitly pointing out that no expert testimony had been presented to support them. The judge who heard Dr. Afield's testimony at the pre-trial suppression hearing was not the judge who presided at the trial. Prior to the penalty phase in the McCahon case the trial judge said: "I can totally assure I would totally disregard the comments that were made outside the presence of the jury . . .." Thus neither the jury nor the sentencing judge heard or considered any of the expert testimony regarding mental mitigation that was available and which could have been presented to them. A close reading of the record shows that the defense attorneys retained Dr. Afield solely for competency and insanity issues, and they became disenchanted with his

ambivalence as to those issues. He was not considered at all as a possible mitigation expert.

The lower court found that counsel made a strategic decision not to offer Dr. Afield's testimony and that his conclusions would have been disputed by other experts. However, those "other experts" were precisely those who had been improperly disclosed by the defense.

Defense counsel repeatedly disclosed confidential mental health expert advisors due to counsels' misunderstanding of the law relating to such disclosures. As such they handed the prosecution potential rebuttal witnesses, offered conflicting strategies which they failed to resolve prior to unnecessary disclosures, and so undermined what defenses they tried to present.

A mental health expert who is hired solely to assist in the preparation of the defense and will not be called as a witness cannot be deposed by the state or called as a state witness since communications between the defendant and the professional are protected by the attorney-client privilege. However, where the defendant calls the confidential expert to testify, the privilege is waived. When an attorney unnecessarily discloses the confidences of his client he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation. Unnecessarily disclosure of the confidences of his client because of

a mistake of well established, that constitutes a specific omission or overt act which is a substantial and serious deficiency, measurably below that of competent counsel.

Dr. Maher was called in at the last minute specifically to provide mitigation testimony. He had nothing good to say, but the defense allowed him to be deposed anyway. The record speaks clearly. Defense counsel failed to steer Dr. Maher away from the circumstances of the crime prior to the evaluation despite the fact that Dr. Maher was brought in late in the proceedings and was the only expert expressly appointed to evaluate mitigation for the penalty phase, failed to have him conduct any meaningful inquiry into Johnson's background, and clearly failed to debrief him prior to waiving his confidential status by allowing him to be deposed. Dr. Maher was dropped as a witness after he gave a deposition and defense counsel asserted a legally erroneous ad hoc "limited waiver" of confidentiality theory when the State threatened to call him as their witness.

Actual prejudice under *Strickland* is shown by the fact that the defense lost both the testimony of Dr. Afield *and* Dr. Ofshe through premature disclosure. Here, the unnecessary disclosure of defense counsel's interviews with Johnson and the waiver of confidentiality of Drs. Ofshe, Afield and Sprehe resulted in counsel losing expert testimonial support for *either* an insanity defense or an attack on the credibility of the confession. Likewise, the defense was prevented from

introducing any mental mitigation in the penalty phase of the capital trials. Counsel was ineffective for failing to call Dr. Brigham as an expert in eyewitness identification to impeach the identification testimony in the Kate Cornell non-capital case. The conviction in the Cornell case was subsequently used in the penalty phase of the capital cases to establish the contemporaneous conviction aggravators.

The defense should have employed a mitigation expert for a variety of reasons, especially to provider a fallback when certain lay mitigation witnesses failed to appear for the second capital case and when counsel had failed to establish the predicate for introducing medical records which would have documented a suicide attempt and other symptoms of mental illness.

ARGUMENT

This appeal asserts the following claims of error:

ARGUMENT I

THE LOWER COURT ERRED IN DENYING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO PREJUDICIAL DISCLOSURE OF CONFIDENTIAL EXPERTS

This claim of error incorporates elements of Claims I and IV of the Rule 3.851 motion for postconviction relief. They alleged:

CLAIM I: Mr. Johnson received ineffective assistance counsel due to counsel's mishandling of mental health experts, in violation the fifth, sixth, eighth and fourteenth amendments

CLAIM IV: Mr. Johnson did not receive the effective assistance of counsel or the assistance of a competent mental health expert in the penalty phase of his trial in violation of fifth, sixth, eighth, and fourteenth Amendments to the United States Constitution

Waiver of confidentiality in general

Permitting a Rule 3.216 confidential defense expert witness to testify over defense objection violates a defendant's privilege not to incriminate himself or herself. Historically, the rule was a codification of *Pouncy v. State*, 353 So.2d 640 (Fla. 3d DCA 1977), and has since been interpreted to mean that "the state could not make a confidential expert its witness when the attorney/client privilege had not been waived." *Lovette v. State*, 636 So.2d 1304, 1307 (Fla.1994). The fact that the defendant lists the expert as a potential witness is not sufficient to waive the privilege. See *Ursry v. State*, 428 So.2d 713 (Fla. 4th DCA), *rev. denied*, 438 So.2d 834 (Fla.1983). A mental health expert who is hired solely to assist in the preparation of the defense and will not be called as a witness cannot be deposed by the state or called as a state witness since communications between the defendant and the professional are protected by the attorney-client privilege. *Lovette v. State*, 636 So.2d 1304, 1308 (Fla.1994). *See also*, *United States v. Alvarez*, 519 F.2d 1036 (3d Cir.1975). However, where the defendant calls the confidential expert to testify, the privilege is waived. *Sagar v. State*, 727 So.2d 1118, 1119 (Fla. 5th DCA 1999).

When an attorney unnecessarily discloses the confidences of his client he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (1977). *Com. v. Mitchell*, 2000 WL 33119695; Mass. Super., 2000; *Com. v. Spetzer*, 722 A.2d 702 (Pa. Super. Dec 17, 1998)(Counsel's failure to object to testimony of defendant's wife about her confidential communications with defendant was ineffective assistance of counsel, where numerous incriminating statements and commentary were presented to jury which should not have been presented, testimony might have been only evidence available to prove some of sex offense crimes charged, and counsel did not object because he believed that testimony was admissible). Doing so based on a mistake of well established, well known law, especially law that any criminal defense attorney employing the services of a confidential expert should be familiar with, constituted a specific omission or overt act which was a substantial and serious deficiency, measurably below that of competent counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Knight v. State*, 394 So.2d 997 (Fla.1981).

As discussed below, both attorneys Hockett and Tebrugge conflated the law regarding confidential advisor disclosures with that relating to panel experts appointed by the court to evaluate sanity or competency. They also erroneously

relied on *Simmons v. United States*, 390 U.S. 377 (1968). This exchange occurred with Mr. Tebrugge:

> Q. [Y]ou're saying that you still think that after the deposition . . . that you could take actions that would prevent the State from calling that witness . . .
> A. I would . . . argue that -- for instance communications made by a defendant to a mental health professional could not be introduced in the State's case in chief against him to establish the person committed the offense, for instance.
> Q. And you're talking about a confidential expert? Or a panel appointment.
> A. Well, either. If I file a potential notice of insanity, and the Judge appoints two experts to examine my client, and during the course of that admissions are made, and then I don't pursue the insanity defense, I am of the opinion that those admissions cannot be used by the State in their case against the defendant. And potentially they could be rebuttal if the defendant testified inconsistently. That's my opinion.

McCahon PC-R20, 3490-91; White PC-R21, 3817-18.

Mr. Hockett explained his views about Dr. Afield's deposition this way:

> A. My recollection, and I think it's shown in the deposition if I recall, that when the State wanted to ask the doctor specifically about any admissions from Mr. Johnson, I did object. And I think in your motion you pointed out that since I was not the lawyer for the doctor I could not tell him what to do or what not to do, that would have been beyond the scope of my assignment I think. But that we could at least preserve the objection and bring it before the Court at a later time, which I thought we did.
> * * *
> A. You know, in the Simmons case, as I recall, there was

> a discussion by the Court about things that are learned in a hearing or proceeding whereby one is trying to protect the constitutional right. That if the State had not — if that was the only way that the State could have gotten the information, that that was immune. In other words, that was not -- they could not use it, they would have to have obtained the information by an independent source other than that. And that -- you know, thinking back, that could have played into my thought process at the time.

McCahon PC-R20, 3567-69; White PC-R21, 3894-96.

In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled. *Simmons v. United States*, 390 U.S. 377 (1968) (no subsequent admission of testimony provided in suppression hearing); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) (Fifth Amendment bars use, in criminal processes, in other jurisdictions of testimony compelled pursuant to a grant of use immunity in one jurisdiction); *Adams v. Maryland*, 347 U.S. 179 (1954) ("[A] witness does not need any statute to protect him from the use of self incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute"); *see also*, *New Jersey v. Portash*, 440 U.S. 450 (1979); *Garrity v. New Jersey*, 385 U.S. 493(1967). *Simmons* and progeny deal with compelled testimony to establish standing or compelled admissions made in other settings. In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, (1981) the United States Supreme Court held that a Fifth Amendment

violation occurs where a defendant is compelled to submit to a court ordered mental health evaluation and the State later seeks to use his admissions against him. As pointed out by this Court in *Hargrave v. State*, 427 So.2d 713 (Fla.1983):

> As well as a fifth amendment violation, the United States Supreme Court also found a sixth amendment violation in *Estelle v. Smith*. Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.
>
> Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel.
> 451 U.S. at 470-71, 101 S.Ct. at 1877 (citations and footnotes omitted). Hargrave's claim of a sixth amendment violation, however, has no factual basis. He and his defense counsel decided to request the examination.

Hargrave, 427 So. 2d 713 at 716. Drs. Maher, Ofshe and Afield were appointed as confidential expert advisors and the defense was not legally "compelled" to make any disclosures.[4]

[4] Dr. Afield's preliminary reports, which also contain admissions, were evidently disclosed to the State prior to the deposition. The arguments made here

Dr. Walter Afield

Dr. Afield should have been called as a witness to mental mitigation in the penalty phase. Although the defense expressly argued for the statutory mental mitigators, the trial judge found that they did not exist, explicitly pointing out that no expert testimony had been presented to support them. The judge who heard Dr. Afield's testimony at the suppression hearing was not the judge who presided at the trial. Prior to the penalty phase in the McCahon case the trial judge said: "I can totally assure I would totally disregard the comments that were made outside the presence of the jury . . .." McCahon R32, 5459. The sentencing judge expressly found that, "[T]he Defendant was examined by numerous psychological experts but no psychological testimony from any experts was presented to the court." White R 48, 8815; R.50; McCahon R, 8793-94. Thus neither the jury nor the sentencing judge heard or considered any of the expert testimony regarding mental mitigation that was on the record or which could have been presented to them.

This Court did review Dr. Afield's testimony at the suppression hearing on direct appeal, but the testimony was being offered in support of the defense motion to suppress statements, not in support of mitigation.

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about the deposition apply to the reports as well. *Cf. Sagar v. State*, 727 So.2d 1118 (Fla. 5th DCA 1999); *Ehrhardt*, Fla. Prac., Evidence §§ 502.2 (2001 ed.)("When a lawyer dictates a letter to a client, the necessary confidentiality is not destroyed when a secretary transcribes it.").

According to Mr. Metcalfe, Dr. Afield was contacted primarily with regard to an insanity defense, the possibility of using Dr. Afield as a mitigation witness in the penalty phase was not even explored:

> Q. Do you recall . . . discussing with him the statutory mental mitigating circumstance of extreme mental or emotional disturbance?
> A. My recollection is that it had gotten to the point where we were not getting anything from Afield, and I was not comfortable using him for any purpose at all, period.
> * * *
> Q. Do you recall discussions within the defense team, particularly with Adam Tebrugge, about the use of expert testimony in the penalty phase of either capital case?
> A. I don't remember any discussions dealing with the use of expert testimony in the penalty phase.

McCahon PC-R20, 3649-52; White PC-R22, 3976-79.

Likewise, Mr. Hockett did not recall a discussion with Mr. Tebrugge about whether or not to rely on Dr. Afield or pursue an insanity defense. McCahon PC-R20 3557; White PC-R21, 3884: "[M]y recollection . . . is that that part of the case was being worked up by Adam [Tebrugge]. I may have signed the pleading, apparently I did, I don't recall it. But that he was the one who was lining up the doctors, or trying to find the doctors who were willing to work us on the case." *Id.*

The order appointing Afield dated October 24, 1988 expressly asserts his status as a confidential advisor under Rule 3.216. White R36, 6262, paragraph 3. He had not formed an opinion about whether or not the defendant was legally insane

at the time of the offense(s) at the time that defense counsel filed a notice of intent to rely on the insanity defense.

Mr. Hockett's interview with Johnson, in which Johnson made statements which were unhelpful to an insanity defense, took place 8/28 through 9/6/90. About a week later, a week during which defense counsel should have been aware of at least a potential problem with inconsistent defenses and statements, Dr. Afield was deposed. During the Afield deposition, Mr. Hockett asserted the "limited waiver" theory, also later asserted by Mr. Tubrugge (supra). The prosecutor asked Afield to relate what Johnson had told him. Defense counsel objected. The prosecutor told defense counsel that his objection was noted, he could "take it to the judge," but took the position that any privilege had been waived and that the witness would have to answer his questions. Defense counsel then told the witness "I'm not your lawyer, so I can't tell you what to do or not to do . . . ." The prosecutor continued asking questions. Dr. Afield then related an apparent admission to the crimes charged.

Mr. Hockett's statement to his confidential mental health expert, "I'm not your lawyer, so I can't tell you what to do or not to do . . . ." was deficient performance on its face. Defense counsel had both every right and every obligation to make an informed decision whether or not to instruct the expert to maintain

confidentiality. The confidential status of an expert appointed to assist defense counsel in a criminal case is embraced within the attorney-client privilege. *Tucker v. State*, 484 So.2d 1299, 1300 (Fla. 4th DCA 1986), *rev. den.*, 494 So.2d 1153 ("[C]ommunications from court appointed mental health experts that are assisting the defense fall within the attorney-client privilege."). As such, it was not personal to the expert.

Mr. Hockett was questioned about these circumstances in the evidentiary hearing. He maintained the view that admissions from Johnson made to Dr. Afield remained legally privileged during the deposition.

> Q. [I]n your experience with discovery depositions have you encountered a pattern where one attorney asks a question, the other attorney objects and instructs the witness not to answer the question, and the attorney propounding the question then certifies the question on the record, and then the attorneys move on to some other topic, and that certified question is then brought before the Judge on a motion to compel. That basic procedural pattern. Is that something you've encountered?
> A. Yes.
> Q. That was not employed here.
> A. I thought that's what we were doing in effect, by preserving the objection, without calling it -- being certified by the court reporter.
> Q. Well, also -- and you did not instruct the witness not to answer.
> A. I think that is clear from the record, that I didn't feel like I had the authority to do that.

Mr. Hockett then referred to *Simmons* and said that "that could have played into my

thought process at the time. McCahon PC-R20, 3568; White PC-R, 3895.

With regard to Dr. Ofshe's testimony to the effect that Johnson had been faking insanity as part of a perceived deal with the police, Dr. Afield said:

> A. There are possible elements of distortion, but I don't, because that's present with everybody, but I don't see that he was faking psychosis. He was psychotic that day [of the examination].
> Q. Even if he has admitted since then that he wasn't and that he was faking that?
> A. I don't care what he admits, he was psychotic on that day.
> Q. Even if he admits that he was faking?
> A. Absolutely, we have patients that say I don't have any heart pain and, you know, they've had a heart attack. Facts are facts.

White R5, 779 et. seq.[5] He said the same years later at the evidentiary hearing. The record confirms that Dr. Afield would have stuck to his guns.

The court found that counsel made a strategic decision not to offer Dr. Afield's testimony and that his conclusions would have been disputed by other experts. McCahon PC-R19, 3326-28; White PC-R 20, 3653. However, a close reading of counsels' testimony at the evidentiary hearing shows that their decision not to call Dr. Afield was because of their conflict with him about a guilt phase

[5]Note that the fact that what Mr. Johnson purportedly told Dr. Ofshe had the potential to undermine mental mitigating testimony by Dr. Afield does not equate to saying that Dr. Afield's testimony would have undermined what Dr. Ofshe said at the suppression hearing, namely that Johnson's statement was induced.

insanity defense, not because of any inconsistency on his part about the presence of profound mental disturbance. To the extent that "contrary" expert testimony was the result of defense counsel's disclosure of Drs. Maher and Ofshe based on a legally mistaken "limited waiver" theory, its existence is proof of ineffectiveness rather than evidence against it. Moreover, counsel repeatedly denied that the State's threat to use them - or any other expert -- influenced their decision not to call Dr. Afield. There was no competent substantial evidence that counsel made a strategic decision not to call Dr. Afield because it would "open the door" to adverse expert testimony.

With regard to "opening the door" also known as the "two edged sword" issue, *Porter v. McCollum*, 558 U.S. ——, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) is instructive. No expert testimony regarding mental health was offered at Porter's trial, however trial counsel did present some lay testimony with regard to his behavior when intoxicated and argued that he had "other handicaps that weren't apparent during the trial" and that Porter was not "mentally healthy." That is the situation here: Mr. Johnson's trial counsel did present lay testimony in mitigation, still this case presents the same scenario where expert mental mitigation was available but not presented at trial. The *Porter* Court found that, "[w]hile the State's experts identified perceived problems with the tests that Dr. Dee used and the

conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge." In fact, *Porter* represents a common scenario where postconviction counsel offers expert mental health testimony that "would have come with a price," as the judge here put it. The sentencing orders in Mr. Johnson's cases do show some consideration of nonstatutory mental mitigation, in that the Court considered whether "the defendant suffered from mental pressure which did not reach the level of statutory mitigating factors." However it was in that context that the sentencing order speaks of the absence of expert testimony. The *Porter* Court remanded, observing that "[w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish "a probability sufficient to undermine confidence in [that] outcome," citing *Strickland*.

Ineffectiveness with regard to Dr. Maher and Ofshe

Dr. Ofshe was trial counsels' only real shot at discrediting the defendant's confession at the guilt phase of the trial. Mr. Hockett's comment at the evidentiary hearing, that "repeating a week's worth of suppression hearing all over again in front of the jury would not do us any good," suggests that counsel had decided to wager everything on an appellate reversal of the trial court's denial of the suppression

motion and was merely going through the motions at trial. Dr. Ofshe deliberately avoided eliciting any responses from Mr. Johnson that could be construed as admissions. His testimony was that the confession was "induced," which speaks to voluntariness. His testimony would have fit well with the standard jury instruction. Finally, different standards apply to the way a judge evaluates a confession in a pretrial suppression hearing and a jury evaluates the statement as one of pieces of evidence offered at trial. A judge is confronted with the all or nothing decision of whether to admit or exclude the evidence. The jury can decide to give it more or less weight depending on its concerns about whether it was voluntary. Counsel's dismissive explanation that repeating the suppression testimony "all over again" would not do any good ignores the difference between the two situations.

Defense counsel could have provided the jury with Dr. Ofshe's expert testimony that Johnson's statement was the product of threats and promises, and should therefore be disregarded in accordance with Florida Standard Jury Instruction 2.04(e). Defense counsel lost the ability to present this evidence because they unnecessarily waived the confidential status of Drs. Maher and Afield.[6]

[6]Drs. Afield and Maher were confidential advisors whose confidentiality was waived. Dr. Ofshe deliberately avoided asking the defendant anything that might lead to an admission. Dr. Sprehe and any other mental health expert appointed on

Dr. Maher was a confidential expert advisor appointed expressly for the purpose of assisting defense counsel with regard to mitigating evidence. McCahon R44, 7645; White R44, 7918; Deposition of Dr. Maher, page 14. The order of appointment is dated March 22, 1991, about one month prior to the commencement of the trials.

Dr. Maher was permitted to give a deposition to the State and what he had to say was not helpful to the defense. When the State threatened to call Dr . Maher as their own witness, defense counsel revealed his misunderstanding of the law with this exchange:

> MR. TEBRUGGE: Psychological witnesses are retained by the Defense for very specific purposes, and the Defense decides whether or not to waive the psychotherapist patient privilege or not.
>
> Now, for purposes of the deposition the privilege had to be waived under the circumstances of this case, but I just, I feel that it's inappropriate for Mr. Denney to make those comments when the Defense has not waived the privilege in any fashion in court, and we've not waived it by choosing not to present the testimony of Dr. Maher or the testimony of Dr. Afield, and I do feel that that's inappropriate.
>
> MR. DENNEY: Judge, I've never heard of a waiver for certain purposes. They listed this man as a witness, we took his deposition, they were present there, the court reporter was present. I've got a copy of his deposition

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the initiative of the court or retained by the state would have been subject to different rules whereby the defense could have opposed any admissions.

> right here and I ask the Court to review it if need be.
>
> They listed the man, they gave me information, we took his deposition. Once they do that they've waived any privilege they have. If they want to come in here and parade this residual doubt theory in front of the jury then the jury's entitled to know that Emanuel Johnson himself made these statements to Dr. Maher. I think that's important for them to know.
>
> So I don't see any privilege, and maybe Mr. Tebrugge knows of a case that says we can waive it one time and it's no longer waived for the next circumstance. I don't know of any.

McCahon R35, 5845-49. Mr. Tebrugge agreed in the postconviction evidentiary hearing that he was arguing that even after giving a discovery deposition Dr. Maher's confidential status could still be maintained. McCahon PC-R19, 3458; White PC-R21, 3785. Later in the hearing he said:

> A. To the best of my recollection we would list the witness, the State Attorney would have the right to take their deposition. But I continue to believe that if I wasn't going to call the witness for an insanity defense or for a mental mitigation or for whatever purpose, I'm still not so sure that the State could then call my expert to make their case. . . .
>
> Q. And you're saying that you still think that after the deposition that . . . you could take actions that would prevent the State from calling that witness?
>
> A. I certainly would be willing to litigate that point extensively and argue that . . . communications made to a mental health professional could not be introduced against him to establish the person committed the offense, for instance.

McCahon PC-R 20, 151/ 3490; White PC-R21, 3817. He also said:

> Q. Do you recall a specific discussion about whether or not to give a deposition? Or to assert confidentiality and in so many words bury the witness.
> A. I really don't, I really don't necessarily recall discussing that with Mr. Metcalfe or Mr. Hockett. I think it's likely we had those conversations.
> Q. But you don't recall.
> A. I don't.

McCahon PC-R19, 3487; White PC-R 21, 3814.

Mr. Hockett was questioned about the PC-R Exhibit F, which is an excerpt from the record of the Jackie McCahon case. The State had rested and the Court had denied the defense motion for a judgment of acquittal. The discussion turned to what the defense would do in its case in chief, and the State threatened to call Dr. Maher if the defense called Dr. Ofshe to challenge the reliability of Johnson's confession. McCahon PC-R20, 3595-97; White PC-R21, 3922-24. Mr. Hockett did not recall being involved in any consideration about whether Dr. Maher would be allowed to give a deposition. *Id.* When questioned directly, he did not have any responsive memory about whether the State's threat to call Dr. Maher affected the decision not to call Dr. Ofshe. *Id.*

Mr. Hockett reviewed Exhibit Q, which was a transcript of a hearing which took place on April 17, 1991. It reflects that the State had subpoenaed Dr. Ofshe to testify in rebuttal if Dr. Afield were called by the defense, and it also shows that the

Court was encouraging the defense to reach a decision about using the insanity defense. Mr. Hockett agreed that Dr. Afield at no time in the progress of these cases had affirmatively stated that there was a viable insanity defense.

In fact, the record speaks clearly. Defense counsel failed to steer Dr. Maher away from the circumstances of the crime prior to the evaluation despite the fact that Dr. Maher was brought in late in the proceedings and was the only expert expressly appointed to evaluate mitigation for the penalty phase, failed to have him conduct any meaningful inquiry into Johnson's background, and clearly failed to debrief him prior to waiving his confidential status by allowing him to be deposed. Dr. Maher was dropped as a witness after he gave a deposition and defense counsel asserted a legally erroneous ad hoc "limited waiver" of confidentiality theory when he demonstrated his intentions not to use Dr. Maher by moving to strike the prosecutor's generally accurate account of what Dr. Maher had to say.

All of the disclosures were made before the defense was even capable of making an informed strategic decision about which defense to pursue, and defense counsel repeatedly gave stated reasons for the disclosures which were legally flawed.

The sentencing judge expressly found that, "[T]he Defendant was examined by numerous psychological experts but no psychological testimony from any

experts was presented to the Court." White R48, 8815; McCahon R50, 8793-94. The Court did not merely find that the statutory mental mitigating circumstances should not be given much weight, rather the Court found that defense counsel had not made the threshold showing that they even existed. As shown at the evidentiary hearing, such evidence did exist. It cannot now be said that counsel made a strategic decision not to pursue the mental mitigators because counsel did argue that they existed.

In *United States v. Levy*, 577 F.2d 200 (3d Cir.1978), and *Briggs v. Goodwin*, 698 F.2d 486, 493-94 (D.C.Cir.1983) the court presumed prejudice because a government informant was privy to conversations between defendant and his attorney and disclosed some of that information to the government. The Levy court held that prejudice is presumed "at the point where attorney- client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case," *Levy*, 577 F.2d at 209; the defendant need not show the information was actually used by the prosecutors or of benefit to them. While other courts have held that actual prejudice must be shown, Johnson asserts that the particular facts shown here should be governed by the presumed prejudice rationale of *United States v. Cronic*, 104 S. Ct. 2039 (1984).

Actual prejudice arising in part from the unnecessary disclosure of Dr.

Afield's testimony is shown by the way defense dealt with inconsistent defenses, infra.

Inconsistent defenses

Actual prejudice under *Strickland* is shown by the fact that the defense lost both the testimony of Dr. Afield *and* Dr. Ofshe through premature disclosure. In the ordinary course of things, lawyers are frequently called on to choose between inconsistent strategies, and an informed reasoned choice normally does not constitute ineffective assistance of counsel. Here, the unnecessary disclosure of defense counsel's interviews with Johnson and the waiver of confidentiality of Drs. Ofshe, Afield and Sprehe resulted in counsel losing expert testimonial support for *either* an insanity defense or an attack on the credibility of the confession. Likewise, the defense was prevented from introducing any mental mitigation in the penalty phase of the capital trials.

From 8/28/90 through 9/6/90, defense counsel conducted an extended interview of his client which was taped, transcribed, and eventually entered into the record. That in itself is an unusual and risky practice. The statement was taken to help Dr. Ofshe, and portions of it were disclosed to the State during Dr. Ofshe's deposition, well before defense counsel withdrew its notice of intent to rely on an insanity defense.

During the interview, Johnson described numerous times how he was persuaded to go along the police officers' suggestion of insanity defense.

> He go into details about the burglaries and tells me how it would be to my advantage to - to take this stuff - to take the rap for Iris and Jackie and plead insanity and be out in two or three years, but he could go throw all these burglaries at me. . . ..

White R45, 8066

> I'm trying to keep the insanity defense going until I - I finally come to the realization that these guys weren't going to help me at all. That I had been - they had reneged on their - what was supposed to take place after I had been arrested there.
>
> * * * *
>
> [W]hen I was first arrested I was - I had two white attorneys and I'm accused of killing two white people . . . I didn't have enough faith in the judicial system or I didn't think I would get a proper representation by you all, at that time, so I figured the insanity plea would be the best thing to try. . . .

Id. at 8167-68. These statements are not helpful to an insanity defense.

Dr. Ofshe's testimony in his deposition and at the suppression hearing was consistent with Johnson's statements:

> [B]y the end of this period of the interrogation Mr. Johnson had the belief that he had the option of pleading insanity, and that if he exercised that option that he would get support for doing it from Detective Sutton, and that the consequences of exercising that option would be a two or

> three year stay in a mental hospital, and that somehow the system would accept that.

White R7, 1104.

> A He described, he described to me attempting to simulate being insane until he lost faith in the fact that the police would cooperate in this insanity defense that he thought he was going to be able to float, at which point he realized that he had no deal and abandoned the insanity defense.
>
> Q How did this lack of faith, as you call it, come about? What was it?
>
> A Mr. Johnson I believe told me that it was basically in response to reading the depositions of the detectives I believe at least a year after his incarceration and discovering that they were not doing anything to support the fact that he was insane.

White R7, 1119; *see also Id.* at 1154, 1175. This again is not helpful to an insanity defense.

Dr. Ofshe could not testify to any admissions Johnson made about the killings. In fact, he deliberately avoided asking Johnson any questions that might result in such admissions. White R7, 1168 *et seq*. Defense counsel could have provided the jury with Dr. Ofshe's expert testimony that Johnson's statement was the product of threats and promises, and should therefore be disregarded in accordance with Florida Standard Jury Instruction 2.04(e). For example:

> Q. Okay. Based on your analysis, what is your expert opinion as to the single most important factor that caused

> Emanuel Johnson to confess?
>
> A. The fact that Mr. Johnson believed that he had an option, that is could accept a deal in which if he would accept responsibility and offer insanity as an explanation, that that would be supported, and that would result in a minimal term, two to three years in a state mental hospital.
>
> Q. Okay. And is this, does this have a classification in the scheme of analyzing coerced confessions?
>
> A. I would call it an induced confession, that it was induced by a promise, and also there was the presence of threat, the threat of the burglary prosecutions if he did not accept responsibility for the murders.

White R7, 1120. Defense counsel lost the ability to present this evidence because they unnecessarily waived the confidential status of Drs. Maher and Afield, and that was because of an error of law.

With regard to any argument that prejudice cannot now be shown because the cat is out of the bag, consider *Knowles v. State*, 800 So.2d 259 (Fla. 2n DCA, 2001) (Defendant did not waive his privilege against self-incrimination as a result of calling his expert witness, a clinical psychologist, to testify at sentencing hearing regarding his sanity at time of murder; defendant's plea was rendered involuntary due to ineffective assistance of counsel, and because plea had been set aside, former sentencing hearing was rendered a nullity, along with everything that occurred at that hearing. U.S.C.A. Const. Amend. 5; West's F.S.A. Const. Art. 1, §§ 9; West's

Fla. R.Cr.P. 3.172, 3.216(a)). Should a new trial or sentencing hearing be granted, the State will not be able to use any of the disclosures made in the original proceedings unless preceded by a new and valid waiver of confidentiality.

Defense counsel lost the ability to present an insanity or impairment defense in the guilt/innocence phase and mental mitigation in the penalty phase because they waived confidentiality across the board. All of the disclosures were made before the defense was even capable of making an informed strategic decision about which defense to pursue, and defense counsel repeatedly gave stated reasons for the disclosures which were legally flawed. Relief should be granted.

ARGUMENT II

THE COURT ERRED IN DENYING THE CLAIM OF INEFFECTIVE ASSISTANCE BY WAITING UNTIL THE LAST MINUTE BEFORE CONTACTING AN EYEWITNESS IDENTIFICATION EXPERT

This was a subclaim of Claim I in the postconviction motion.

Dr. Brigham

According to the court's order:

> The Defendant argues that his counsel was ineffective for failing to call Dr. Brigham as an expert in eyewitness identification to impeach the identification testimony in the Kate Cornell non-capital case. The conviction in the Cornell case was subsequently used in the penalty phase of the capital cases to establish the contemporaneous conviction aggravators.

> * * *
> A review of the record shows the following. Dr. Brigham was first contacted by the defense in late spring of 1991, and he informed them that he was very interested in participating, but would not be able to do so for a few weeks. Defense counsel furnished him various materials, and he did some work on the Defendant's case. However, in April 1991 he informed the defense that he would need to conduct tests, which would take time.
>
> * * *
> On April 17,1991, the defense asked the Court for a continuance for purposes of obtaining the expert opinion of Dr. Brigham.
>
> * * *
>
> The Court denied the motion to continue: "The case has been proceeding for two and a half years . . . both sides have had an ample opportunity to be prepared."

PC-R19, 3304-06

The court denied this claim on three grounds. "First, defense counsel specifically made several requests for continuance in order to accommodate Dr. Brigham's schedule and need to conduct testing - the Court denied each of those requests." Of course, that ruling avoids the point that defense counsel waited for over two years and until the cases were set for trial before even contacting the proposed expert. Dr. Brigham was well known to the defense bar at that time, and the motion for a continuance came only after the defense had filed a demand for speedy trial in the White case. Assuming their representations about the need for a

continuance and their intention to present Dr. Brigham's testimony were made in good faith, their failure to call him cannot be dismissed as a strategic decision.

The second reason for denying the claim was that "even if the Court had granted a continuance and defense counsel had called Dr. Brigham, it is not guaranteed that the Court would have allowed him to testify on the subject matter he offered." The court cited *McMullen v. State*, 714 So.2d 368 (Fla. 1998) and *Simmons v. State*, 934 So.2d 1100 (Fla.2006) for that proposition.

The same judge, Judge Owens, has presided at both the trials in these cases and during all of the postconviction proceedings. The statement that "it is not guaranteed that the Court would have allowed him to testify" is not a "finding" or a ruling in and of itself. *Simmons v. State*, 934 So.2d 1100 (Fla. 2009) held that the admissibility of such testimony was within the discretion of the trial court depending on the facts of the case, and always had been. *See McMullen v. State*, 714 So.2d 368, 370 (Fla. 1998) ("At the outset, it must be understood that there are three differing views as to the admissibility of an expert witness's testimony regarding the reliability of eyewitness identification. The first is the "discretionary" view, which provides that the admission of expert testimony regarding eyewitness identification is in the discretion of the trial judge. An overwhelming majority of both federal and state courts that have addressed this issue have adopted this view. The second view

is the "prohibitory view," which expressly prohibits the use of this type of expert testimony. Finally, some jurisdictions have adopted the "limited admissibility" view, finding it to be an abuse of discretion to exclude this type of expert testimony in cases where there is no substantial corroborating evidence. We have adopted the majority "discretionary" view in this state.") Counsel could have proffered the testimony if he had it and thus preserved for review the proper exercise of the court's discretion if the evidence had been disallowed. Nor does the court's order speak to the point that Dr. Brigham said he could have assisted counsel even if he were not permitted to testify.

Finally, the court reasoned that "there was no prejudice" because the defense attorneys "challenged Ms. Cornell's identification intensely . . . there is no doubt Ms. Cornell's identification of the Defendant was a central focus of the defense." Essentially the same thing could be said whenever counsel fails to obtain expert assistance on any topic no matter how arcane. That observation merely underscores the point that the failure to present available expert testimony on the "central focus of the defense" cannot be dismissed as a strategic decision. Counsel cannot be deemed to have chosen not to use expert assistance as a strategic matter because they manifestly tried to do so. They were unable to do so because they waited until after the eleventh hour and after they filed a demand for speedy trial.

Their failure to pursue the use of an expert witness until it was too late despite having ample time to do so was a deficiency, not a strategic decision. See *Wiggins v. Smith*, 539 U.S. 510 (2003), in which the Court rejected arguments that Wiggins' defense team made a strategic decision based on the limited investigation they had conducted not to introduce mitigation, commenting that "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 2538.

ARGUMENT III

A. THE COURT ERRED BY DENYING THE CLAIM OF INEFFECTIVENESS WITH REGARD TO A MITIGATION EXPERT GENERALLY

B. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING REPEATEDLY TO PROPERLY AUTHENTICATE MEDICAL RECORDS

Mitigation Expert

Beyond the substantive evidence presented through Ms. Hammock's testimony, there is the point that mitigation can be presented through a mitigation or mental health expert as well as by calling various family members and other lay witnesses to testify in person. It is not an either/or proposition. Being prepared to do so provides defense counsel with fail safe in case lay witnesses fail to show up for

court. As Mr. Tebrugge said, the defense had to perpetuate the testimony of some of the lay witnesses who testified in the Iris White penalty phase when the Jackie McCahon case came to trial. EH-122.

Hearsay testimony is admissible in a penalty phase, and factual data, including interviews of family members and others close to the defendant, are admissible as the basis of an expert's opinion. Moreover, a mitigation expert will invariably be more articulate, more forthcoming and comfortable on the stand, more informed about what does and does not constitute relevant mitigating evidence, and more objective and thus more credible than family members and other lay witnesses. While mental health experts who are willing and able to conduct such interviews might be able to substitute for a mitigation expert, they are at least more expensive for performing the same task and more often than not will lack the skills and patience for it.

The American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases 11.4.1 provides in part as follows:

> D. Sources of investigative information may include the following . . .
> ****
> C. [Counsel should] Collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance

> and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and Juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.
>
> ****
>
> [(D)(3)(C)] Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. ***Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.***

Id. (Emphasis added.)

Likewise, the Guidelines state:

> 11.4.1(D)(7) Expert Assistance . . . Counsel should secure the assistance of experts . . . for . . . D. presentation of mitigation.
> 11.8.6 C. Counsel should consider all potential methods for offering mitigating evidence . . . including witnesses, affidavits, reports . . .
> 11.8.3(F)(2) "Preparation for the sentencing phase . . . 2. [Counsel should obtain] Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. . ."

Id. These are the ***1989*** Guidelines.

Medical records

With regard to the particular circumstances of this case, a mitigation expert or another mental health expert would have been able to supply the predicate for the suicide attempt in April of 1989. Part of the bread and butter of being a mitigation expert is to acquire a client's institutional records, especially records reflecting various mental health issues, emotional problems, family concerns and so on. As noted by this Court, "[t]he record, however, indicates that Johnson's counsel attempted to introduce these records without authenticating them, which is required under the evidence code. Moreover, the trial court found that the records were not complete in themselves and required interpretation to be understood by the jury."[7] This Court's substantive ruling - verbatim in both capital cases, was:

> 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. s. 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

[7]MR. TEBRUGGE: I would like to proffer Defense Exhibits LL and NN. These are medical records revolving around two apparent suicide attempts by the defendant. The Court may recall case 88-3199 I proffered the same materials and the Court sustained objections to the materials, and at this time I am reproffering those two documents.

> 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

Id., 660 So.2d at 645-646 (Fla.l995); *Johnson v. State*, 660 So.2d 648 (1995) at 662-63. The situation in the McCahon case is especially egregious because it was the last of the four cases to be tried. The same objection had been raised in the White case and had been sustained. When Mr. Tebrugge was asked at the evidentiary hearing why he did not do what was necessary to establish a predicate for admission of these documents he said only that "I do not know the answer to that question." "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."

Use of a mitigation expert would have met these objections to admissibility and would have directly responded to the Court's observation that the records required interpretation to be understood by the jury. While hearsay is admissible in the penalty phase only if the opposing party has a fair opportunity to rebut the

evidence, there is nothing in Ms. Hammock's testimony that would not have met that test. In due course she would have been listed as a witness and have been made available for a deposition, as was the case in this evidentiary hearing. Mitigation experts routinely have been employed as expert witnesses by the defense in capital cases.

SUMMARILY DENIED CLAIMS

The court summarily denied the claims set out below.

ARGUMENT IV

THE AGGRAVATING CIRCUMSTANCE OF PREVIOUS CONVICTION OF A VIOLENT FELONY IS BASED ON INVALID CONVICTIONS. APPLICATION OF THIS AGGRAVATING CIRCUMSTANCE VIOLATES *JOHNSON V. MISSISSIPPI*

This claim is being asserted because of the possibility that postconviction relief will be granted on the two noncapital cases. The lower court's denial of postconviction relief is presently on appeal to the Second District Court of Appeal.[8] In *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 LED.2d 575 (1988), a death sentence had been imposed on the basis of three aggravating circumstances,

8 That court has granted the State's motion to discharge CCRC from the two noncapital cases pursuant to State v. Kilgore, 976 So.2d 1066 (2008) and has remanded them to the trial court to determine if counsel should be appointed, and if so, to do so.

one of which was a prior New York conviction of a violent felony. In state collateral proceedings, Johnson challenged his death sentence on the ground that the New York Court of Appeals had subsequently held that the prior conviction was invalid. The United States Supreme Court held that the Eighth Amendment prohibits the imposition of a sentence of death based upon a conviction no longer in existence.

ARGUMENT V

THE RULES PROHIBITING MR. JOHNSON'S LAWYERS FROM INTERVIEWING JURORS IS UNCONSTITUTIONAL

To the extent it precludes undersigned counsel from investigating and presenting claims that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional.[9] Mr. Johnson should have the ability to interview the jurors in this case but, because he is on death row, he must rely upon counsel provided by the State of Florida. This prevents Mr. Johnson from interviewing the jurors, because the attorneys provided to Mr. Johnson

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9 The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that: A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.
Rule 4-3.5(d) (4), R. Regulating Fla. Bar.

are prohibited from contacting the jurors in his case. The State's action of providing Mr. Johnson with counsel who cannot fully investigate his well-recognized claims for relief denies Mr. Johnson due process, equal protection, and access to the courts of this state guaranteed by Article I, Section 21 of the Florida Constitution, and the fundamental right of access to courts guaranteed by the United States Constitution and the Eighth Amendment.

ARGUMENT VI

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS CONSTRUED BY THE UNITED STATES SUPREME COURT IN *RING V. ARIZONA*

This claim is reasserted for preservation purposes.

ARGUMENT VII

MR. JOHNSON WAS DENIED DUE PROCESS PURSUANT TO *SIMMONS v SOUTH CAROLINA*

Mr. Johnson sought to inform the jury about his ineligibility for parole and the possible sentences he would likely receive in three other criminal cases pending in the courts in the Iris White case. White R31, 5869-86. The Court denied his request.

Johnson raised this claim as the first issue in his supplemental brief on direct

appeal. When the opinion in *Simmons v. South Carolina*, 512 U.S. 154 (1994) was released, Johnson cited the case in his supplemental reply brief. The Court disposed of it this way:

> In supplemental briefing, Johnson's fifth issue is that the trial court improperly limited the presentation of mitigating evidence. Johnson argues that the trial court erred in not permitting his counsel to inform the jury about the possible sentences he might receive in three other criminal cases pending in the courts. While this argument would have some merit if all such cases were consolidated for trial, *Jones v. State,* 569 So.2d 1234 (Fla.1990), there is no merit where, as here, consolidation has not occurred. *Marquard v. State,* 641 So.2d 54 (Fla.1994), *cert. denied,* 513 U.S. 1132, 115 S.Ct. 946, 130 L.Ed.2d 890 (1995); *Nixon v. State,* 572 So.2d 1336 (Fla.1990), *cert. denied,* 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991).

Johnson (Emanuel) v. State, 660 So.2d 637, 645 (Fla. 1995). Thus although the issue was raised at trial and on appeal, the Court did not address the issue of parole ineligibility on the McCahon murder charge at all.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court held that capital defendants have a due process right to rebut a prosecution claim of future dangerousness by providing truthful information to the jury about the defendant's ineligibility for parole. The court reaffirmed its holding in *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001) rule by a solid 7- 2 margin in *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001). But see *Ramdass v. Angelone*,

530 U.S. 156 (2000). Under the particular circumstances of this case, the failure of the jury to have accurate information regarding the potential for future release was a failure of due process.

ARGUMENT VIII

MR. JOHNSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT AND SHIFTED THE BURDEN TO MR. JOHNSON TO PROVE THAT DEATH WAS INAPPROPRIATE

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). See also *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

This straightforward standard was never applied at the penalty phase of Mr. Johnson's capital proceedings. The instructions given to Mr. Johnson's jury were inaccurate and dispensed misleading information regarding who bore the burden of proof as to whether a death or a life recommendation should be returned.

The court unconstitutionally shifted to Mr. Johnson the burden of proving whether he should live or die by instructing the jury that it was their duty to render an opinion on life or death by deciding "whether mitigating circumstances exist that outweigh the aggravating circumstances."

After erroneously instructing the jury, the trial court then employed the erroneous standard in sentencing Mr. Johnson to death. *See Zeigler v. Dugger*, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard effectively shifted the burden to Mr. Johnson to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation.

ARGUMENT IX

FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT.[2]

The Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, (1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F. 3d 1029, 1033 (9th Cir. 2004).

[2]Counsel acknowledges that this claim is not supported by current case law.

The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S. Ct. 1183 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590 (1958) (plurality opinion)). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930 (1890), are not permitted.

Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U. S. Constitution and the Florida Constitution prohibition against cruel and unusual punishment. This claim is evidenced by the botched execution in Florida of Angel Diaz on December 13, 2006. As such, the defendant requests that the death sentence be vacated or that this Court order that any execution be stayed.

ARGUMENT X

MR. JOHNSON'S CONVICTIONS ARE MATERIALLY UNRELIABLE DUE TO CUMULATIVE ERROR

Even if one or more of the claims asserted herein are denied, on any or all

remaining claims the factual basis underlying all past and present claims should be considered in assessing overall prejudice. *Strickland*, "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." 466 U.S. at 695-96, 104 S.Ct. at 2069; *Friedman v. United States*, (5th Cir. 1979) 588 F.2d 1010, 1016 ("A review of Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record."); *Griffin v. Wainwright*, 760 F.2d 1505 (11th Cir.1985)(In resolving [ineffective assistance] claim, we must examine the totality of the circumstances and the entire record. *Palmes v. Wainwright*, 725 F.2d 1511, 1519 (11th Cir.1984) (citing *Goodwin v. Balkcom*, 684 F.2d 794, 804 (11th Cir.1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 LED.2d 364 (1983)).) Moreover, even if not one single act or omission is deemed sufficient to warrant relief, the cumulative effect of two or more of them may do so. Cf. *Cherry v. State*, 659 So.2d 1069 (Fla.1995) (cumulative effect of numerous errors in counsel's performance may constitute prejudice); *Harvey v. Dugger*, 656 So.2d 1253 (Fla.1995) (same); *Jackson v. State*, 498 So.2d 906, 910 (Fla.1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Counsel repeatedly failed to object during the prosecutor's closing argument in the Iris White case. The prosecutor argued the uncharged sexual battery, denigrated the mitigating evidence that was introduced by the defense, characterized that evidence as a nonstatory aggravating circumstance, and argued that the jury had a duty to return a death sentence, all of which was improper.

Defense counsel failed to hire an expert to examine the physical evidence in the White case until two weeks before the trial, by which time it was too late for the expert to do anything.

Defense counsel failed to retain an expert on cross race identification in the noncapital cases until it was too late.

In the McCahon case, defense counsel failed to object to the State's incorporation of argument made in the White case, thereby waiving the issue on appeal.

Although defense counsel may have waived meritorious issues by failing to object or make the appropriate motions for direct appeal purposes, those very omissions are now instances of ineffective assistance cognizable in a motion for postconviction relief. *Mannolini v. State*, 2000 WL 763764, 25 Fla. L. Weekly D1428 (Fla. App. 4 Dist. Jun 14, 2000) (NO. 4D99-4266); *Jackson v. State*, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998); *Davis v. State*, 648 So.2d 1249, 1250 (Fla.

4th DCA 1995); *Vento v. State*, 621 So.2d 493, 495 (Fla. 4th DCA 1993).

ARGUMENT XI

MR. JOHNSON'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

A prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399 (1986). The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. *Poland v. Stewart*, 41 F.Supp.2d 1037 (D. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998) (respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time).

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition.

ARGUMENT XII

THE COURT ERRED IN DENYING MR. JOHNSON'S *PRO SE* CLAIMS

As noted above, Mr. Johnson has filed numerous *pro se* pleadings during the course of these proceedings. The lower court included as an attachment (#26) to its final order a copy of its previous order addressing (1) the Defendant's *pro se* Motion to Amend 3.8S1 Motion, and Additional Claims for which Evidentiary Hearing Required, filed on March 24, 2008, (2) CCRC's Addendum to Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend, filed on September 16, 2008, and (3) CCRC's Motion to Adopt Defendant's Recent *Pro Se* filings, filed on April 2, 2009. PC-R27, 5081-88. It was apparently this order by which the court intended to address all of the defendant's *pro se* pleadings. Generally speaking, the court permitted CCRC to adopt and sometimes redraft the defendant's *pro se* claims but otherwise summarily denied them. *Id.* They are reasserted here as grounds for relief on appeal.

ARGUMENT XII(A)

THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE THAT MISCONDUCT IN VIOLATION OF MR. JOHNSON'S RIGHTS AS GUARANTEED BY THE FOURTH, FIFTH, SIXTH,

EIGHTH, AND FOURTEENTH AMENDMENTS

The prosecution never introduced into evidence hairs and fibers from the crime scene it claimed could have originated from the Defendant.

At the trial, a major feature of the state's case was the contention that this case was a sexual battery/murder and that Johnson was the person who committed both the sexual battery and the murder. In opening and closing argument, the prosecutor argued at length that hair and fiber evidence proved that Johnson had sexually battered the victim. *E.g*. Opening statement, White R28, 4712**;** state closing argument: ("[A]fter all the trauma that the vaginal area went through, and you heard about that and you saw that picture. The only two items found in that area, the only two items found in that area went to one man, that man right over there."). In the penalty phase the prosecutor argued inter alia that Johnson "attacked White's pubic area and left his pubic hair in hers." White R35, 6090. The argument was that hair and fiber were deposited when the attacker "raised her dress, took off her panties and forcibly caused injuries." White R32, 5681.

FBI Agent Paul Bennett was a witness for the prosecution as an expert in hair and fiber identification. Specifically he testified about 1) debris removed from the victim's bedspread, 2) vacuumings from the floor of the crime scene, and 3) a hair found in pubic hair combings.

The State introduced a pill box (referred to as State's exhibit 55) that contained debris taken from the bedspread. Bennett said that the debris that was examined was placed on microscopic slides. Neither the slides nor whatever was on them were ever placed in evidence. White R29 5056-65. The defense initially objected to the introduction of the pill box that now contained only unidentified and unexamined debris. *Id.* at 5066-67. During the ensuing colloquy, the prosecutor represented that he had no intention of introducing the slides. *Id.* at 5067. In fact, the prosecutor said that "The slides aren't usable . . ." *Id.*

Without objection, Bennett then testified that he found three pubic hairs and one pubic hair fragment that could have come from the defendant. *Id.* at 5068-69. As indicated, however, these particular hairs were never offered into evidence.

Likewise, the State introduced [State's exhibit 44], a manila envelope containing a glassine envelope which in turn contained the vacuumings that were submitted to him for analysis, but the actual items that Bennett examined and testified about were never admitted into evidence. Without objection, Bennett testified that he found two pubic hairs that were consistent with known pubic hairs of the defendant. *Id.* at 5071-73. The same goes for State's exhibit 38, an envelope purported to contain pubic hair combings from the victim. Bennett indicated that he believed that the envelope contained only one pubic hair, which he said was

consistent with that of the defendant. The State then moved State's exhibit 38, which by then was simply an empty envelope, into evidence without objection. *Id.* at 5074.

The same pattern was followed with regard to Bennett's fiber testimony. Bennett referred to debris taken from State's exhibit 45, the victim's dress, and exhibits 44 and 38 which were the envelopes containing the vacuumings and pubic hair combings respectively. He then testified without objection that they contained fibers which were consistent with a sample taken from a red shirt which had been taken from the defendant's residence. At no time however, were the slides with the actual fibers on them introduced into evidence. *Id.* at 5082-90.

The prosecution further engaged in misconduct by using offensive photographs to imply that a sexual battery had occurred when in fact there was no evidence of semen and the sexual battery count had been dropped. The State sought to introduce highly inflammatory photographs of victim White's anal and vaginal areas. White R31, 5418 *et seq*. In response to a general defense argument that they lacked any probative value, the prosecutor argued that they were relevant to prove identity "particularly in light of the fact that pubic hair was found in her pubic hair combings to help explain that, particularly in light of the defense that this is the wrong man." *Id.* at 5419. The Court ruled them admissible "based upon the other

evidence that's been presented concerning the pubic hairs and the fibers that were found." *Id.* at 5425.

In light of the fact that the prosecution never produced or introduced the hairs and fibers it used as the predicate for the use of the photographs and the court's ruling on that basis, the only functions these photographs served was to inflame the passions of the jury and give the prosecution a basis to argue that the defendant committed an uncharged sexual battery.

It was error to predicate the defendant's conviction on physical evidence that was never introduced at any time during the proceedings. The State's failure to produce at trial the evidence that it used to obtain a conviction was prosecutorial misconduct, and defense counsel's failure to challenge testimony and argument based on evidence that was never offered into evidence was ineffective assistance. The defendant relies on the following authority:

In re Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional statute of the reasonable doubt standard, we explicitly hold the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *United States v. Candelario*, 240 F.3d 1300 (11th Cir.), *cert. denied*, 533 U.S. 922, (2001) (Defendant's failure to raise constitutional objection to

district court's failure to require jury to determine drug quantity does not waive government's burden of alleging and proving every element of offense); *United States v. Feliciano,* 223 F.3d 102 (U.S. 2d Cir.2000) (Conviction cannot stand when government has not introduced sufficient evidence to sustain each essential element of crime charged beyond a reasonable doubt); *Brown v. Wainwright,* 459 F. Supp. 244 (U.S.M.D.Fla.1978) (Unequal access to opposing parties' information prior to trial may deprive defendant of a fair trial; such requirement should be no less stringent in regard to presentation of evidence during trial); *State v. Sigerson,* 282 So.2d 649 (Fla. 2d DCA 1973) (Hearing on motion to suppress, while not deciding guilt or innocence of defendant, is a critical stage of prosecution and confrontation clause of Sixth Amendment to United States Constitution guarantees defendant right to confront witnesses against him); *United States v. Nixon*, 94 S.Ct. 3090, 3093 (1974) (Need to develop all relevant facts in adversary system of criminal justice is fundamental and comprehensive; ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of facts) (It is manifest duty of courts to vindicate guarantees of confrontation, compulsory process, and due process clauses, and to accomplish that it is essential that all relevant and admissible evidence be produced).

ARGUMENT XII (B)

THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT BY PRESENTING FALSE EVIDENCE IN THE SUPPRESSION HEARINGS AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE THAT MISCONDUCT IN VIOLATION OF MR. JOHNSON'S RIGHTS AS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Evidence from the crime scene in the Iris White case, particularly hairs from the victim's from the victim's inner left arm inner left thigh, were first submitted to FDLE, where they were matched to the defendant, and then to the FBI, which concluded that they could not have come from the defendant. Despite knowledge of the FBI results, the State argued the contrary FDLE results in the consolidated suppression hearings held on all four cases.

The subject hairs were first examined by FDLE analyst Yvette McNab. They were given FDLE identification numbers 33 (inner left arm), and 35 (inner left thigh). White R1, 161. McNab reported that both contained hairs that were suitable for identification purposes and had the characteristics of Negroid pubic hairs. This information was included in the affidavit for search warrant. White R37, 6457-49, paragraph 5.

These items were forwarded to the FBI, where they were analyzed by Paul

Bennett. The FBI assigned them identification numbers Q15 and Q17 respectively. Bennett examined these items and did not report a match to the defendant. The FBI report was dated August 31, 1989. In a deposition dated April 24, 1990, Bennet said point blank that these hairs were unlike the known hairs from the defendant. This information was known to both the State and the defense prior to the hearings on the motions to suppress, which took place in 1991.

Nevertheless, at the motion to suppress the search, the State argued that McNab's results provided substantive evidence of the defendant's guilt: e.g. "Now, we knew that the pubic hair from the F.D.L.E. analysis was that of a Negroid pubic hair, so now we know that our suspect is a black male." White Rl, 1261.

This was false or so highly misleading as to consider such because the FBI had established that these hairs could not have come from the defendant. The State violated due process by arguing facts known to be false, and defense counsel was ineffective in failing to challenge this argument. Prejudice is demonstrated by the fact that the motion to suppress was denied, and the results of the search were used against the defendant at trial.

ARGUMENT XII(C)

THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT BY PRESENTING INCONSISTENT THEORIES AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY

FAILING TO CHALLENGE THAT MISCONDUCT IN VIOLATION OF MR. JOHNSON'S RIGHTS AS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Evidence from the crime scene in the Iris White case, particularly hairs from the victim's from the victim's inner left arm inner left thigh, were first submitted to FDLE, where they were matched to the defendant, and then to the FBI, which concluded that they could not have come from the defendant. Despite knowledge of the FBI results, the State argued the contrary FDLE results in the consolidated suppression hearings held on all four cases. However at trial, the prosecution responded to the defense argument about this evidence by saying that it "proves nothing." White R32, 5681.

The prosecution cannot be allowed to benefit from such conflicting theories within the same criminal proceeding. One theory was employed to secure the use of the defendant's confession in all four of the pending cases, the contrary theory was then advanced as a reason to find the defendant guilty at trial.

The use of conflicting theories was prosecutorial misconduct. As authority the defendant relies on: *Garcia v. State*, 622 So.2d 1325 (Fla.1993), (While state is free to argue to jury any theory of crime that is reasonably supported by evidence, it may not subvert truth-seeking function of trial by obtaining conviction or sentence based on obfuscation of relevant facts.).

ARGUMENT XII(D)

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INTRODUCE EVIDENCE OF MR. JOHNSON'S ACTUAL INNOCENCE

Throughout the White trial, the prosecution offered evidence and argument that the perpetrator caused injuries to the victim's vagina and anus with his fingernails. E.g. Opening statements, White R28, 4717; closing argument, White R 32, 5682; and especially the medical examiner's testimony to that effect. White R 31, 5439. The medical examiner opined that, because they were fresh, the scratches were caused at the time of death. *Id.*

The Defendant could not have caused the injuries to Iris White's vagina and anus because he was a chronic nail biter and did not have any fingernails beyond the quick. This fact is corroborated by the body search warrant which authorized the collection of fingernail scrapings. None were taken because there was nothing to scrape. This fact also could have been established by the defendant's family members and medical and psychological records, thus obviating any need to have the defendant testify.

Counsel rendered ineffective assistance by failing to investigate and present this evidence. If the jury in the White case accepted both the testimony that the perpetrator caused the injuries with his fingernails and testimony that the defendant

was unable to cause those injuries, then the result of the trial would have been different. If there had been an acquittal in the White case then could not have been used as an aggravator in the Cornell case or as a sentencing enhancement in the two noncapital cases. That either alone or cumulated with the errors in those cases would within a reasonable probability have resulted in a different outcome in those cases as well.

ARGUMENT XII(E)

THE STATE USED ILLEGALLY OBTAINED ROLLED PRINTS IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 AND SECTION 23 OF THE FLORIDA CONSTITUTION

On October 12, 1988, the morning after the defendant was arrested, Sarasota Police Department Crime Scene Technician Virginia Casey executed a body search warrant on the Defendant. The scope of the warrant was specific: 1) samples of fingernail and cuticle scrapings, 2) head and pubic hair, 3) saliva, 4) blood. What Casey collected was: 1) eight photographs, 2) fingerprints, 3) palm prints, 4) two vials of blood, 5) foot prints, 6) pubic hairs, 7) head hairs. The search was conducted in furtherance of the Iris White investigation.

The search exceeded the scope of the warrant. The Fourth and Fourteenth

Amendments to the United States Constitution and Article I, section 12, Florida Constitution require that search warrant "particularly" describe the thing or things to be seized. The good faith doctrine of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), only applies where the officers act in an objectively reasonable fashion in executing a search warrant. "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Horton v. California*, 496 U.S. 128, 140, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). The rolled fingerprints exceeded the scope of the warrant and their subsequent use was unconstitutional.

Although trial counsel moved to suppress the prints prior to trial, the motion was based on other grounds. This did not qualify as an objection to the use of the prints on the ground stated herein. This constituted ineffective assistance of counsel. The prints were admitted into evidence. White R29, 5001-02. Prejudice is demonstrated by the fact that FBI Agent Dreibelbis testified that they matched the latent prints lifted from a possible point of entry at the crime scene. White R30, 5216-17.

The rolled prints were also used to convict the defendant in the Kate Cornell case. Agent Tutsock testified in that case that he found a latent palm print on

Cornell's windowsill. White R17, 2718-19. He specifically identified the rolled print that he used to make an identification as the one that was obtained by Casey. *Id.*

The defendant relies on the following authority: *Dale v. Bartels*, 732 F.2d 278, 284 n. 9 (2d Cir.1984); *United States v. Robbins*, 21 F.3d 297, 298-99 (8th Cir.1994) (Generally, police may seize only items described in search warrant, absent exception to warrant requirement); *United States v. Coleman*, 805 F.2d 474 (3rd Cir.1986); *U.S. v. Foster*, 100 F.3d 846, 849-50 (10th Cir.1996).

ARGUMENT XII(F)

THE ARREST, SEARCH AND SEIZURE WERE BASED ON A DEFECTIVE AFFIDAVIT WHICH CONTAINED FALSE STATEMENTS. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO PRESENT THESE FACTS AT THE SUPPRESSION HEARINGS

The State's case in all four of the cases which are the subject of these proceedings was ultimately based on a probable cause arrest affidavit. From this, the police obtained a warrant, arrested the defendant, interrogated him and got admissions, and obtained search warrants which produced further physical evidence. The adequacy of the original warrant was litigated prior to trial and on direct appeal, however counsel failed to raise the following grounds for suppression of the arrest

and all evidence derived therefrom.

The event that led to Johnson's arrest and everything that flowed from it was a fingerprint comparison by Crime Scene Technician Virginia Casey between a latent print lifted from the Iris White crime scene to a known print taken from Johnson in a prior suspended license case. The affidavit of Crime Scene Technician Virginia Casey regarding the fingerprint match was attached to the search warrant affidavits obtained by Sgt. Lacertosa. See body search affidavit (White R36, 6320-23); residence (White R36, 6329-33).

The key piece of evidence supporting the affidavit for the arrest is the following:

> On 10/11/88 Technician Virginia Casey compared the latent prints from the point of entry to the known prints of Emanuel Johnson, black male, DOB: 9/18/63. Johnson's prints had been rolled on 3/11/88 by Sarasota Sheriff's Detention Officer #675. Technician Casey positively identified, with eight or more points of identification, the latent prints lifted as being the prints of Emanuel Johnson's left ring finger. This positive identification was verified by SPD Technician Madelyn Luzier, and SSO Technician Mike Zagorski.
>
> It is your affiant's opinion that based upon positive fingerprint identification of Emanuel Johnson probable cause exists for Johnson's arrest . . . .

White R36, 6256.

> Casey's affidavit reads in pertinent part:
>
> 5. After comparing the above-described latent fingerprints

> obtained from the homicide crime scene to the known fingerprints of Emanuel Johnson, it is my expert opinion that the above-described latent fingerprints are positively identified as those of Emanuel Johnson. In addition, this comparison conclusion was verified by Technician Madelyn Luzier and Technician Hike Zagorski in the affiant's presence.
>
> Signature of Affiant [s/ Virginia Casey]
> Sworn to and subscribed before me this [11th] day of [October], 19 [88].

The document is notarized. White R6, 6327

Both affidavits were false. In the White case, Luzier testified that she had no further involvement with the prints after she collected them. White R29, 4965. Casey testified that, after she made the comparison, she reported it to her superiors, Capts. Hickock, Baty and Sgt. Lacertosa. White R1, 168. Thereafter, she signed the affidavit cited above, however she did not prepare the affidavit herself. *Id.* Nor did she recall taking an oath to the truth of the affidavit's contents. *Id.* at 169. Casey never testified that Luzier confirmed the identification, nor was Luzier called during the suppression hearing to confirm or deny any verification. Nor is there any testimony by Casey or anyone else that Zagorsky ever verified the comparison.

Because all of the search warrant affidavits and applications were incorporated Casey's affidavit, and because the affidavit was unsworn and contained false information, all of the evidence obtained therefrom should have been

suppressed. The use of such evidence violated Mr. Johnson's rights under the Fourth, Fifth and Fourteenth Amendments and corresponding Florida Constitutional provisions. Counsel provided ineffective assistance in failing to raise this challenge and there is a reasonable probability that the outcome of the suppression hearing and subsequent trials would have been different.

As authority the defendant relies on: *Collins v. State*, 465 So.2d 1266, 1268 (Fla. 2d DCA 1985) ("A sworn statement requires an oath"). In Collins, 465 So.2d at 1266, this court rejected the state's argument that an affidavit which was unsupported by an oath was a mere technicality that "good faith" could have cured. *Franks v. Delaware*, 438 U.S. 154 (1978)

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 Corrected Initial Brief of Appellant has been furnished by e-mail and United States Mail, first class postage prepaid, to all counsel of record and the Defendant on this 31st day of January, 2012.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Corrected Initial 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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