PLEASE RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION,
AND YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN,
THE FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> Good morning and welcome to the Supreme Court.
The first case on our docket today is Johnson versus the state of Florida.
>> Good morning.
May it please the court.
I am with Mark Gruber, CRC representing Emanuel Johnson.
What I would like for the court to address are the first thing naturally in the reply brief to lay a predicate for the introduction of out-of-court documents in the Sarasota jail records and the suicide attempt by Mr. Johnson, where he slashed his wrist after he was back in the jail and also a previous suicide attempt and other matters.
In that situation defense counsel tried to introduce these documents during the penalty phase for the capital trials and the state objected because he had a predicate which he had not.
The same objection came up again later on in the second trial and there was a reference to the previous record.
The other thing if we get to it is I have an argument in here about inconsistencies and I listed five things that the defense was trying to present and that ties in with what I argue is disclosure in certain cases of confidential and expert advisers.
It wound up to the point where

the state on a couple of occasions was threatening to call one confidential adviser. He at one point was being called crazy because of his behavior. There are outbursts in socializing.
>> Was the testimony about the suicide attempt?
>> Yes, it was.
>> Was that contested in any way?
>> No.
>> There was testimony about -- I am having a hard time seeing anything would be added by the record.
I can understand why they couldn't get him in but the fact that they didn't come and and the context, how that would undermine it seems to me to be pretty hard to put that together.
Help me.
>> In and of themselves, that would be a point but it also needs to be considered that there is evidence, there was evidence on the record from Dr. Afield that the defendant was psychotic.
There is the fact that the defense strategy was to argue for the mental mitigators. These records would have at least taken a step in that direction.
>> You make arguments with the mitigation specialist.
That person is not an expert. To gather information that the judge found on that.
Basically, there was an investigator who went out and essentially obtain the same information that they found mitigation expert looked at so now we are looking to me at a hindsight case.
There were several mental health experts that were hired and the experienced defense counsel made a strategic decision not to use them.

I know you argue if they hadn't done this, this wouldn't have happened, for the guilt phase but the judge again the postconviction court made findings on this.
There is not another mental health expert that somehow would put this whole case in a different light and the judge in the original trial found that any one of the aggravators in this case really outweighed the mitigation.
You are dealing with a case of serious, serious weighty aggravation so I'm just -- I understand you are representing your client and doing the best job in under the circumstances, but I don't see anything that is just you know -- if this had come in, the case would have been a different case.
>> I am maintaining that there was evidence -- there was greater testimony presented from Dr. Afield at the evidentiary hearing then there was in a trial proceedings.
>> But how do you get around the finding that it was tactical and there was a reasonable decision? It's not like they didn't hire mental health experts or have them but they made a decision not to use them.
And it's not that they didn't investigate.
They did and they presented a lay witness.
Now I know that we set on direct appeal that it was shaky testimony or corroborated or whatever and it is certainly there, but I don't see that there is a new picture being presented at the evidentiary hearing that would say that these lawyers were deficient in what they did.
>> Because of the age of the case, alright, there is a twist in this case.
There was a pre-spencer at the

time of trial and the judge who heard the penalty phase evidence, which was only the lay witnesses, there was no expert analysis of that information at all -- it was not a judge who heard testimony from Dr. Afield. He explicitly said he would not consider that evidence in passing sentence.
There was also not a perceiving where defense counsel could've presented certain evidence to a judge.
>> I guess what I'm looking for is a picture of what is now their back, if the jury had heard it, or the judge had heard it, that the whole equation of whether to impose the death penalty would have been dramatically different.
You know this.
That is what we look for in these cases.
Whether its deficiency and I'm not sure I see it but even assuming it, where is that dramatically different picture?
>> That was what I was trying to get that is what the judge and the jury heard was no expert testimony.
Nothing about any expert testimony backing up any mental health facts other than lay testimonies that essentially said well, there were these problems, suicide attempts and things of that sort.
None of that was presented at the trial court level or considered by trial court level in the context of the penalty phase and in the context of the statutory or nonstatutory mitigation.
Of course the trial court did not find there was evidence to support statutory mitigation and as far as the mental mitigation the only cases the court found Ford was the defended themselves during the statement in which he felt pressured and I believe he

commented that there was
corroboration of that evidence.
So the evidence for mental
mitigation presented at the
trial level was very close.
It was very minimal.
What I am arguing is that what
has been presented since then
and should he considered in the
penalty phase context is
evidence of autism backed up by
expert testimony.
I hope that is an answer.
What also feeds into this is the
fact that the insanity defense
was filed very early on.
Dr. Afield was retained by
defense counsel and it's
impossible to conduct an
evaluation with regard to
insanity at the time of the
offense with regards to
statutory mental mitigators
without making an inquiry of
what the state of the mind of
the defendant at the time of the
offense.
Later on virtually a year later,
the defense focused on the
statement -- these are fourth
Amendment issues, Fifth
Amendment issues and that
resulted in a number of hearings
to suppress the statements,
suppress evidence and during the
course of those hearings with
regard to the interrogation of
the defendant, the defense
presented expert testimony with
regard to that.
They also presented Dr. Afield.
Dr. Afield was originally a
confidential adviser and he was
disclosed.
The circumstances of his
disclosure are a claim of
assisting counsel because the
way it was done and because of
the fact that you have really
inconsistent defense and as I
said earlier we saw to the point
where he had one confidential
adviser.
This day was threatening to call
won if the other testified and

that happened a couple of times during the course of this.
>> Counselor, you are well into your rebuttal time.
>> I will reserve that time, thank you.
>> May it please this honorable court.
My name is Deborah Brueckheimer and I am representing the State of Florida.
>> Can you explain why this case was done on direct appeal in 1995 and now coming up in two cases, coming up in 2012?
>> Your Honor I have looked at the record.
To try and explain what was the delay in the particular case.
I believe part of it is largely attributable to the fact that CCR was representing the defendant in the non-capital cases and the state repeatedly asked the trial court to disqualify CCR with the argument that CCR was not statutorily authorized.
Essentially all four cases were in mind for consideration at the hearings, for hearings throughout several years.
The state does -- successful in having the trial court level and postconviction.
When Kilgore came out of the state renewed that objection and presented a renewed motion before the trial judge in the trial judge denied it so some of that delay was attributable in fact to the fact that CCR was representing the defendant on the non-capital cases without authorization and the state went to the second district at one point to try and get an order in forcing what to leave with the requirement.
This court has ultimately gone with Kilgore.
>> It is probably not at this point worth going through all of it.
The court has two very

significant murders and these
are cases that require the
utmost attention to the court
and we would hope the Attorney
General's office is moving it
along but let's go to these
cases.
Are we talking about two
separate murders?
>> We have two separate murders,
two separate trials.
They were tried closely in
chronological order with respect
to the way they were committed.
The non-capital case, the
defense had filed a motion for a
speedy trial which accelerated
that before the Jackie McCahon
case.
>> We are only here on just the
murder.
>> Just here on the murders and
not the capital cases.
>> It is that same argument
about whatever a trial counsel
did not do in one the exact same
argument of what trial counsel
did not do in the other's?
>> Is that the exact same
lawyers?
>> The same lawyers.
>> In this exact same way they
presented mitigation, nothing
different?
>> There are slight differences
and perhaps Mr. Gruber can
clarify that on his rebuttal but
my reading of the case is that
for example they have a claim
that relates to the non-capital
cases before this court but the
bulk of their complaints are
that trial counsel, the three
trial attorneys which is the
public defender, Elliott and
Metcalfe, chief Defense Public
Defender Tobey Hockett and
Public Defender Adam Trebrugge,
that they mishandled three of
their extra witnesses, not all
of them but three of their
expert witnesses.
That is the argument and it
applies to both cases.
>> But in neither case was there

expert mental health mitigation.
>> Well there was much attempt to have doctors examined the defendant.
It was not presented with an expert witness.
>> But the statement that the court made on direct appeal, well maybe it was the state's comment, but the evidence of Johnson's mental disturbance in the penalty phase came largely from anecdotal lay testimony, rarely correlated the actual issue.
Is that the case for both of them, that it was anecdotal lay testimony that was really not correlated with defense?
Does that accurately characterize both of the murder case is?
>> That was this court's finding, Your Honor.
>> What I'm asking is that is the same characterization in both cases?
>> Was lay witness testimony.
>> And again the question I would always have and I have not analyzed each one, what was the jury vote in both cases?
>> You had 8-4 and 10-2.
The first one tried because of a speedy trial motion.
It was a 73-year-old victim, over 20 stab wounds.
>> What was the jury vote on that?
[INAUDIBLE]
>> So the issue about how you present the case was there any discussion that after we defended this case and put on the penalty phase we now really looked at it and thought we better change the strategy?
I did not see any of that is there any of that discussion that we have to take a different tact, we have the judge's sentencing order.
We know that delay testimony is not going to fly so we had better find another expert.

Anything like that?
You know, I can see it.
I'm just trying to understand.
>> Defense counsel testified uniformly on their strategy for the penalty phase was to get as much background information as they could on this particular defendant.
They sent their in-house mitigation specialist, Beverly Ackerman.
>> So the answer is no, didn't change from one trial to the other?
>> It remains a lay witness testimony that you honor the sentences were not entered at the time of the trial.
The sentencing was deferred so what you have is an emphasis certainly on the mental health mitigation that there is one thing I would like --
>> What do you mean an emphasis on the mental health mitigation?
>> Well the defense emphasize mental health mitigation in the sense that they said in his closing argument at the penalty phase, look, all of these witnesses say the man that they know could not have done this type of offense.
If he did, he must have snapped.
This is not the man they no.
>> I guess the question I have, and I'm not sure they will put on postconviction anything that would help in the end but how do you make that argument without having a mental health expert pull it together?
>> Because you make it by virtue of the defendant's own statement as to the pressure that he was under.
Remember they do have the defendant statement.
There was interrogation of the defendant, there was a transcribed tape-recorded interrogation.
The pressure, trying to bring it into some point in time as to

what was going on at the time of the crime.
But I would like to just briefly respond, I believe to complete the record because Justice Pariente you asked me about the anecdotal lay testimony, and in this court's opinion, this court goes on to say about the psychological experts that had testified to the mental state and the earlier suppression hearing, trial counsel chose not to bring those forward.
Even then Johnson's mental case for disturbance was partially controverted and is itself consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator.
Mr. Gruber has argued this morning that Dr. Afield really should have been called at the penalty phase.
Trial counsel and postconviction uniformly confirmed that a decision was made not to use Dr. Afield for any reason.
Now, as to the inquiry with regards to the medical record, Mr. Gruber's first argument had to do with the medical records that were not submitted and he candidly admits that lay testimony was presented as a suicide attempt.
The medical record, Your Honor, wasn't just a predicate objection.
There was also an objection that the -- and they required interpretation to be understood.
That is not change.
The medical records, and I actually have the direct appeal 78.336, they are not very lengthy.
I think you have a total of seven pages to which are legible with respect to someone's statement.
One is a hospital, excuse me, statement by an LPN on page 8677

of the record and then page 8678
is the statement by another RN.
The statements indicate that the
defendant was taken to the
Memorial Hospital during the
night.
He had slashed his wrists on the
left arm.
The subject will be moved to the
infirmary jail and observed
because justice Pariente you had
a question with respect to the
timeline.
The first report was April 15 of
1989 in the second was April 18
of 1999 and the defendant was
arrested in April of 1988.
This is our mark, and made old
stitches out of his left wrist
with his teeth.
The wound is wide open.
Inmate does not want any more
stitches.
Butterfly-closed and dressings
applied.
We will change the dressing on a
daily basis.
That is what we are talking
about.
What did they mean?
[INAUDIBLE]
The state says they require
explanations to it -- obtain a
suicide attempt if someone wants
to get a field trip to the
hospital because it's much nicer
there than sitting in the county
jail.
We have to look back at what the
defense knew new at this time
they decided not to choose
Dr. Afield.
[INAUDIBLE]
They argue he should have been
called to get these records in.
We do have the 1990 deposition
of Dr. Afield which the trial
court conviction included in the
postconviction record volume 31
of Dr. Afield so we knew when
Dr. Afield knew about this.
He was asked was there any
indication whatsoever that there
was any brain damage?
The answer is no.

On page 5914, Dr. Afield is asked, to what he has reviewed. He says the report of one -- January 15, 1981.
This is after he has been arrested?
Yes and Dr. Afield says is asked if what?
What bearing did that have on your ultimate opinion?
The same thing I told you, the guy is depressed and suicidal and that is all it is.
Question, does that give you any bearing to what you are thinking of?
The statutory mental mitigators are going after mental health.
Answer no --
[INAUDIBLE]
So that is what the defense new at the time he made the decision not to call Dr. Afield.
The trial court post-conviction says Dr. Afield --
[INAUDIBLE]
The possibility that you get contrary expert opinion and you have a report from Dr. Merin to that is in the record.
>> The issue that you might get contrary opinion between the experts?
>> This was not a defense expert.
This was a quarter patent -- court-appointed expert.
The contrary opinion would come from Dr. Merin and Dr. Syprett who were not confidential experts.
>> In every case --
The defendant puts on a mental health expert and the state often puts on their own.
The idea that you would not call somebody because you might have a contrary expert when you are faced with the her rant as murders that are, as you mentioned stabbed 19 times, you know, and he said the 73-year-old woman, it's just, to say that is a reason took not to call somebody I can't imagine

that alone been a very good
tactical reason.
>> The decision was made not to
call Dr. Afield in part because
they found he was a
flip-flopper.
At least that was trial
counsel's assessment.
On cross-examination --
>> We don't have now another new
expert that comes into kind of
put this all together to explain
how or if Emanuel Johnson
flipped on the days of --
I mean there is no other mental
health expert.
The people they had were
questioning whether they should
have been called.
Is that what we are dealing
with?
>> You are dealing with the
experts they had because
Dr. Afield was the only expert
called.
He was the expert, one of the
defense experts, one of the
half-dozen defense experts.
They consulted with numerous
mental health experts so it was
not just Dr. Afield.
There were many that made the
decision, tactical decision that
this mental health testimony was
not going to be strong enough to
outweigh whatever other problems
would come up, correct?
>> That is correct Your Honor.
We have a note in our brief that
lists --
But one other thing I would like
to point out, the medical
records and what does that mean
that the defendant slit his
wrists?
You have on February 4, 1991
report that's in the record and
the direct appeal record,
believe it's also won her
postconviction record.
But Dr. Merin and the
Dr. Syprett called by the state.
While in the Sarasota county
jail they revealed --
With regard to why he had not

done so the subject stated he lost his family and his girlfriend and his girlfriend was seeing someone else.
Thus he had no reason to go on.
He felt it was unfair that he was in his present legal predicament and felt he had no hope.
Those records come in and this report comes and so certainly the notion that it supported statutory mitigator is not well-founded.
The fact that it would be subject to impeachment on the record, the defense counsel had at the time when they made the tactical decision not to call Dr. Afield.
I believe, in my assessment Your Honor, second-guessing what trial counsel said, conducted extensive exploration of mental health defenses, mental health theories.
These experts at the suppression hearing.
They had a suppression hearing.
The defense called expert witnesses.
They included bringing Dr. Ofshe from California and included Dr. Afield and the state called Dr. Syprett so the defense was well aware of the ability to use that expert and made a concerted effort before the penalty phase to focus in getting as much information as they could about his background.
The mitigation specialist that was called in postconviction, this Hammock is asked and admits that she could not find anybody that agreed with Dr. Afield.
And so on the ballot, there was much more harm that could come from calling Dr. Afield as well because of the admissions.
At the beginning of the penalty phase defense counsel approach the subject of presenting residual doubt.
They acknowledge the contrary

that residual doubt was a
non-statutory mitigator but
reserve the record on that
point.
In response to that, when
defense counsel said well, I
would like to present residual
doubt and ultimately did not do
that and follow the court's
ruling, if he had tried to
pursue some convoluted theory of
residual doubt is certainly was
by Dr. Afield his own witness
had been called in light of the
position of Dr. Afield.
The court has no further
questions I would ask the court
to affirm the trial court --
[INAUDIBLE]
Thank you.
>> The McCahon case and the
White case was the one that led
to the defendant's arrest so as
a result the white case has a
number of postconviction claims
that are focused very much on
the fourth amend the type issues
regarding evidence and so forth.
Those were either not granted at
the evidentiary hearing or the
evidentiary so there is a
difference in that regard.
The claims, which were the focus
of the evidentiary hearing of
course dealt with the experts we
have already talked about.
I want to talk about two things
were quickly here.
One is the notion that defense
counsel had an abundance of
expert witnesses and chose not
to call them.
A lot of these names defense
tried to and got the initial
consultation in the court said
no, you have had enough so you
are done.
As far as Dr. Afield being a
flip-flopper, the defense, I
have the argument in there and
there are some handwritten
scrawled notes that would
suggest that there was at least
casual conversation to defense
counsel and Dr. Afield about the

penalty phase but all of the record points to the idea that Dr. Afield was brought in on the issue of insanity and the defense kept the issue of insanity right up until the trials began and way past the point where Dr. Afield said, look, I will testify about the defendant but I will not go that far.
Dr. Afield said that on the stand.
That is what they were then and that is what they are now and they have not changed.
>> We thank you both for your arguments.