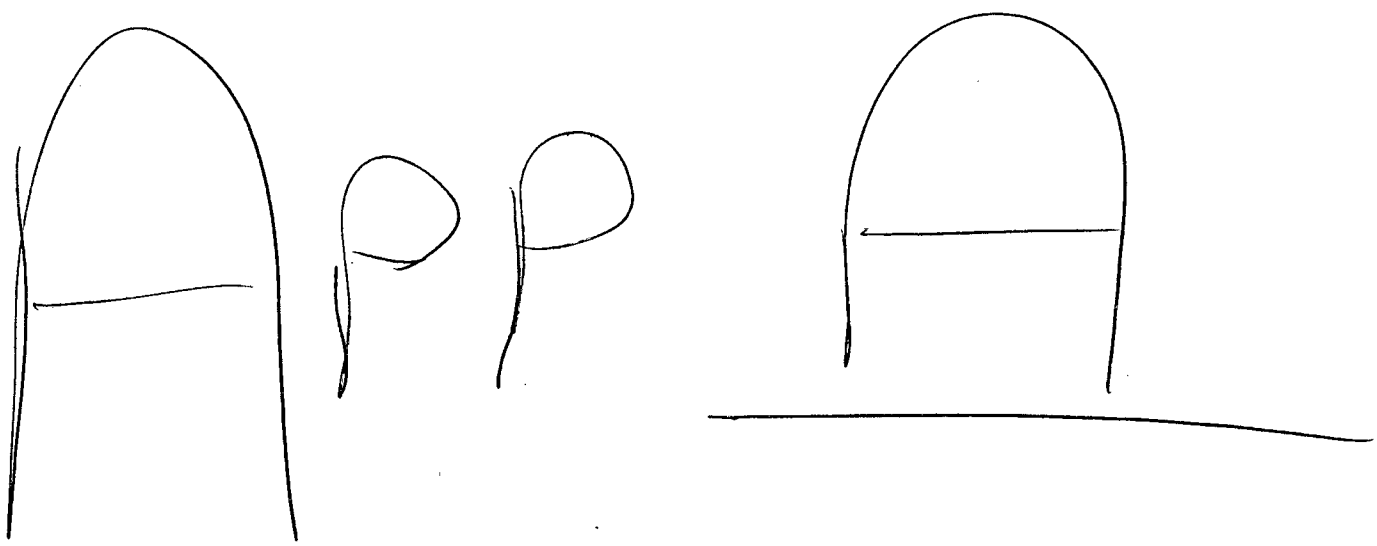

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SUPREME COURT TO THE UNITED STATES

Shawn Henry,
Petitioner,

vs. Case NO.: _____

State of Florida,
Respondent.

APPENDIX TO WRIT OF CERTIORARI

APPENDIX A	Opinion of State Appellate Court
APPENDIX B	State Appellate Court denial of Rehearing
APPENDIX C	State Court denial of Rule 3.850
APPENDIX D	Post Conviction Pleading Rule 3.850(b)(i)
APPENDIX E	State Response to Post-Conviction Motion
APPENDIX F	Defense Motion for Rehearing/Clarification in L.T.
APPENDIX G	Appellant's Initial Brief
APPENDIX H	Appellee's Answer Brief
APPENDIX I	Appellant's Reply to Appellee's Response

Third District Court of Appeal

State of Florida

Opinion filed November 10, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D22-1067
Lower Tribunal No. F93-18103

Shawn Henry,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Carmen R. Cabarga, Judge.

Thomas Neusom (Fort Lauderdale), for appellant.

Ashley Moody, Attorney General, and Sandra Lipman, Assistant Attorney General, for appellee.

Before LOGUE, SCALES, and HENDON, JJ.

PER CURIAM.

Affirmed.

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

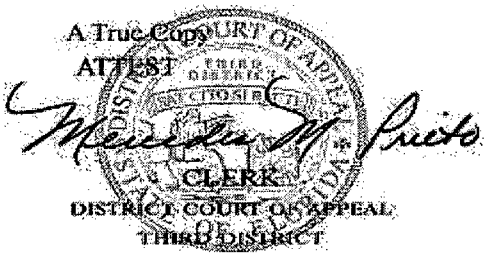
This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Ivan F. Fernandez, Chief Judge of the District Court of Appeal of the State of Florida, Third District, and seal of the said Court at Miami, Florida on this day.

DATE:	December 20, 2022
CASE NO.:	**22-1067**
COUNTY OF ORIGIN:	**Dade**
T.C. CASE NO.:	**F93-18103**

STYLE: **SHAWN HENRY,** **v.** **THE STATE OF FLORIDA,**



ORIGINAL TO: **Miami-Dade Clerk**

cc: Office of Attorney General Sandra Lipman Thomas G. Neusom

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App B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

DECEMBER 02, 2022

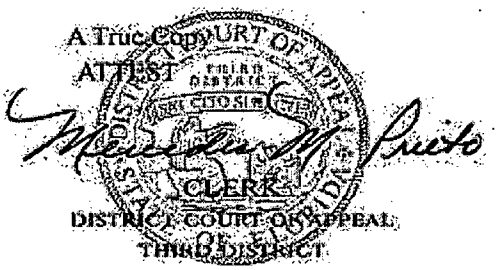
SHAWN HENRY,
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA,
Appellee(s)/Respondent(s),

CASE NO.: 3D**22-1067**

L.T. NO.: F93-18103

Upon consideration, Appellant's Motion for Rehearing is hereby denied.

LOGUE, SCALES and HENDON, JJ., concur.



cc: Office of Attorney General Sandra Lipman Thomas G. Neusom

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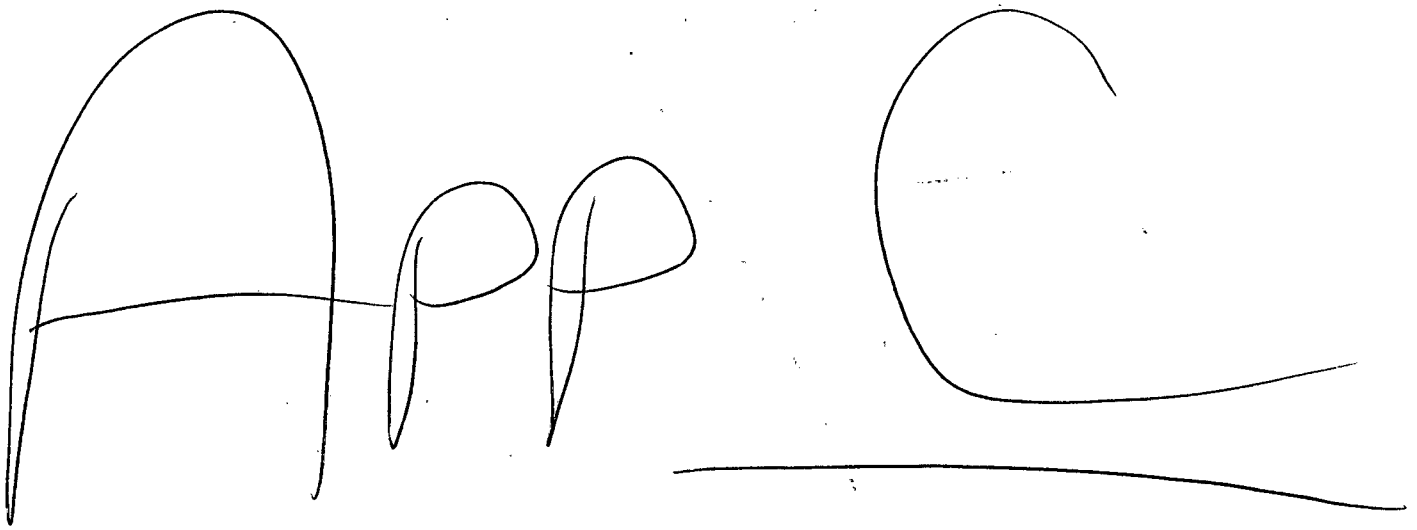
App C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA v. Case No. F93-18103

Shawn Marcos Henry, Defendant Judge Carmen Cabarga

ORDER DENYING DEFENDANT'S
FIRST AMENDED MOTION FOR POST CONVICTION RELIEF
FILED ON NOVEMBER 22, 2021

THIS CAUSE was heard upon the defendant's amended motion for post-conviction relief, filed on November 22, 2021, pursuant to Florida Rule of Criminal Procedure 3.850. The defendant has filed at least six (6) prior motions for post-conviction relief which were denied by the Court. In his most recent pleading with the Court, the defendant claims that there is newly discovered evidence which entitles him to post-conviction relief. Specifically, the defendant claims that he has learned the identity of a new witness, Jerome Morris, hereinafter referred to as "Morris", that could have exonerated him, had that witness been called to testify at trial. For the reasons given below, this Court hereby DENIES the defendant's most recently filed motion for post conviction relief because the defendant has failed to show that this information, assuming *arguendo* that it truly is "newly discovered," would probably produce an acquittal in the case at a retrial. See Lowe v. State, 673 So.2d 927, 928 (Fla. 5th D.C.A. 1996) (In order to prevail on his motion for post-conviction relief, the defendant was required to establish that the evidence asserted as newly-discovered was (1) not known to the defendant or his counsel at the time of trial and could not have been ascertained by the exercise due diligence; and (2) of such nature that it would probably produce an acquittal on retrial.); Jones v. State, 591 So.2d 911 (Fla. 1991); Clugston v. State, 765 So.2d 816 (Fla. 4th D.C.A. 2000).

PROCEDURAL BACKGROUND

1. On June 3, 1993, the defendant was arrested for the First-Degree Murder of the victim, Vincent Patrick Johnson, hereinafter referred to as "Victim", which had occurred on May 31, 1993. See attached copy of Arrest Affidavit.
2. On June 22, 1993, the defendant was indicted for the offenses of First-Degree Murder and Armed Burglary. See attached copy of Indictment.
3. On December 22, 1993, the defendant was found guilty by a jury of the crimes of First-Degree Murder and Armed Burglary. (T. 434-35).

4. On January 7, 1994, the defendant was sentenced to life in prison with a mandatory twenty-five (25) year sentence on Count I of the Indictment, and to a concurrent seventeen (17) year sentence on Count II of the Indictment.

5. The defendant's judgment and sentence were affirmed on appeal in Henry v. State, 650 So.2d 707 (Fla. 3d D.C.A. 1995).

6. The defendant has filed at least six (6) prior motions for post-conviction relief with this Court, which were denied.

7. The defendant now files this current first amended motion for post-conviction relief, claiming that there is "newly discovered evidence" (Jerome Morris' October 25, 2021 affidavit) which should lead to this Court granting the defendant a new trial.

FACTUAL BACKGROUND

1. At trial, the State presented the testimony of the following witnesses:

   a. Samuel Adderly

      Mr. Adderly testified that on the night of the shooting, he saw two (2) black males running from the area of the shooting. (T. 115-17).

   b. Gregory Decimis

      Mr. Decimis testified that on the night of the shooting, he heard four (4) gunshots in the area of the shooting, and that he saw two (2) black males running from that area toward a white Honda. (T. 123-26).

   c. Detective Reichardt

      Detective Reichardt testified that he was the lead crime scene detective assigned to this case (T. 148), that upon responding to the scene of this shooting, he saw a deceased black male inside the residence on a mattress (T. 143), there were no guns located in the residence (T. 144), that he recovered six (6) casings from within the residence (T. 145), and that he discovered a hole under the mattress where the victim had died which was apparently caused by a gunshot (T. 156-60).

   d. Hilroy Johnson

      Mr. Johnson testified that he was the victim's brother (T. 174-75), that he rented a home (where the shooting occurred) that he allowed his brother to live in (T. 176, 177-78), and that on the day of the shooting, several hours prior to the shooting, he observed his brother and the defendant get into an argument during which the victim fired a handgun (T. 178, 181-182), and that was the last he ever saw his brother alive (T. 184-86).

   e. Courtney McCurdie

Mr. McCurdie testified that the victim lived in the apartment where the shooting occurred (T. 195), that prior to the shooting the victim and defendant had gotten into an argument in which the victim fired one shot from a firearm (T. 197-98), that later that same night the defendant entered the victim's home and shot the victim until he "emptied his gun" (T. 199-202), that the victim was lying down and unarmed at the time the defendant shot him (T. 201, 203), and that he asked the defendant why he had killed the victim and the defendant did not respond (T. 204).

f. Gregory Queeley

Mr. Queeley testified that he lived at the scene of the shooting along with the victim (T. 229), that he had witnessed an argument between the victim and the defendant prior to the victim's death in which the victim had fired a handgun into the air (T. 231), that the victim gave him the weapon after shooting it so that it could be hidden away from the apartment (T. 232), that at the time of the shooting, he was in the apartment along with the victim and three (3) other people, including Courtney McCurdie (T. 235), and that while he was not in the room where the shooting took place at that time, he was in a nearby bedroom, heard shots being fired, then saw the defendant fleeing from the apartment (T. 235-36), and that he asked the victim who had shot him, and the victim said it was "Shawn" (T. 237).

g. Dr. Lew

Dr. Lew testified that she was the medical examiner assigned to this case (T. 248); that the cause of the victim's death was multiple gunshot wounds, and the manner of death was a homicide (T. 253); that the victim had sustained seven (7) gunshot wounds, labeled A through G (T. 248 and 255); that gunshot wound A was consistent with being a defensive wound (T. 265-66); and that the gunshot wounds suffered by the victim were consistent with him having been lying down at the time he was shot (T. 266).

h. Robert Kennington

Mr. Kennington testified that he was the firearms examiner assigned to this case (T. 277); that the six (6) casings which were collected in this case and submitted to him in this case were all fired from the same weapon (T. 277-80); and that the six (6) projectiles which had been collected from the victim's body were all fired from the same weapon (T. 283-84).

i. Officer Duncan

Officer Duncan testified that she worked in the crime scene unit of the police department, and that she had been the person responsible for painting an orange arrow next to the address featured in an aerial photograph (T. 297-98).

j. Detective Hoadley

Detective Hoadley testified that he was the lead investigator assigned to this case (T. 299); and that among the other work done in this case, he interviewed the defendant post-Miranda about the shooting at the Northside police station (T. 312-14), and that during that brief interview the defendant stated that he was the one who had shot and killed the victim because the victim had pulled a gun on him (T. 316). Detective Hoadley also testified that he interviewed the defendant post-Miranda at the police headquarters building (T. 317), and that during that interview, the defendant stated that earlier on the evening of the shooting, the victim had fired a weapon near him (T. 323), that he was "fine" after the victim had fired the shot and went to a friend's house and to a club (T. 325), that he then went back to the victim's home to look for a friend there (T. 326). The defendant further told Detective Hoadley that upon entering the victim's home, the victim made an antagonistic comment (T. 327), and that the victim reached down for a gun (T. 327), and that as the victim pointed his gun at the defendant, the defendant reached over and grabbed a firearm on the couch and used it to shoot the victim four (4) times (T. 329-30), and after the shooting, he walked out of the apartment and left the scene (T. 330).

2. The defendant did not testify, nor did the defense present any witnesses (T. 353-54).
3. The trial court judge instructed the jury that the defendant could be found guilty under the Premeditation theory of First Degree Murder (T. 415-16), or under the Felony Murder theory of the charge, with the underlying felony being Burglary (T. 416).
4. The jury found the defendant guilty of both First Degree Murder and Armed Burglary with an Assault Therein (T. 434-35).

DEFENDANT'S ALLEGATIONS

The defendant claims that Morris stepped forward for the first time and gave sworn affidavit testimony making two claims: first, that the house in which the victim was shot and killed was an abandoned house which was a hangout spot and not a living residence where tenants had paid rent and that the house was used by Morris, Hilroy Johnson, the victim, and Gregory Queely to sell marijuana. See Morris Affidavit. And second, that Morris was inside the house and saw when the victim went for his gun prior to defendant grabbing a gun from the sofa. See Morris Affidavit. The defendant claims that based off Morris' sworn affidavit testimony, that one, the victim did not legally rent the abandoned house on the day of the shooting to support the elements of armed burglary, and two, that the defendant was acting in self-defense. See Defendant's Motion.

First, the defendant made a similar argument regarding "ownership" of the apartment in which the homicide occurred in a previously filed motion for post-conviction relief on or about June 10, 2003. This Court previously rejected the defendant's claim and stated:

> The Court rejects this claim because... the element of "ownership" for the purposes of charging burglary is not the same as ownership in property law, and that "the purposes of ownership element are to prove the accused does not own the property and to sufficiently identify the offense to protect the accused from a second prosecution for the same offense." D.S.S. v. State, 850 So.2d 459 (Fla. 2003). In this case, the victim's brother, Hilroy Johnson, testified that he had been renting the apartment in which the victim was shot, and that he sublet the apartment to a number of other people, including the victim. (T. 176-78). Additionally, both witnesses McCurdy and Queeley testified that the victim lived at the apartment in which he was shot (T.195 and T. 229). Finally, according to the defendant's own statements to Detective Hoadley, he referred to the place where the shooting occurred as the "victim's residence" (T. 326); and he specifically told the detective that his address at the time of the showing was 500. N.W. 24th Street, which was not the scene of the shooting. (T. 334). Thus, given the uncontroverted testimony that the time of the shooting, the victim was living in the apartment where the shooting took place, and that the defendant did not live there, the State sufficiently proved the "ownership" element of the crime of Burglary, and there is no probability at all that Taylor's testimony on this issue would have resulted in an acquittal of the defendant on Count II of the Indictment, or that it would have vitiated the underlying crime of Burglary in the charge of Felony Murder as charged in Coun1 of the Indictment.

See Judge Israel Reyes Order Denying Motion for Post-Conviction Relief dated July 23, 2004.

The defendant appealed Judge Israel Reyes' denial of his post-conviction relief motion and The Third District Court of Appeal affirmed the Court's decision *per curiam*. See Henry v. State, Appellate Case No. 3D04-2115 (Fla. 3d D.C.A. 2004).

Given that the Court has previously denied a similar claim made by the defendant and the Court's Order was affirmed *per curiam* by the Third District Court of Appeal, this Court finds that the defendant's claim that Morris' newly discovered testimony regarding "ownership" of the apartment in which the homicide occurred has no merit. In addition to the testimonies of Hilroy Johnson, McCurdy, and Queeley, the Defendant's own statements to Detective Hoadley established that the victim lived in the apartment in which the homicide occurred, and that defendant did not, and as such, this Court finds that Morris' newly discovered testimony would have no probability of resulting in an acquittal of either charge for the defendant at a retrial.

However, even if this Court were to find merit in the defendant's argument that the State cannot establish the "ownership" element for the underlying crime of Burglary in the charge of Felony Murder, this Court finds that there was sufficient evidence to convict the defendant for first-degree murder under the premeditated theory and that the Third District Court of Appeal has already affirmed the defendant's convictions on the ground that there was sufficient evidence for the defendant's conviction under either theory of first-degree murder (premeditation or felony murder). See Henry v. State, 650 So.2d 707 (Fla. 3d D.C.A. 1995) citing Holton v.State, 573 So.2d 284, 289 (Fla. 1990). As such, this Court finds that there is no reason for an evidentiary hearing as to the defendant's first claim and that Morris' newly

Please see Holton V. State it does not address the dual theories of premeditated or Felony murder. It does not apply

discovered testimony would have no probability of resulting in an acquittal of either charge for the defendant at a retrial.

Second, the defendant claims that Morris' testimony would result in an acquittal of the defendant at a retrial because it would have corroborated the defendant's theory of self-defense. See defendant's motion for post-conviction relief. This Court finds that Morris' newly discovered testimony would not probably result in an acquittal for defendant for two reasons: one, all the other witness testimony and physical evidence is contradictory to a self-defense claim and two, Morris' testimony would be impeached because of his prior inconsistent statement to Detective Hoadley.

The testimonies of Detective Reichardt, Courtney McCurdie, and Dr. Emma Lew, all proved that victim was lying down on a mattress unarmed at the time of the homicide. Detective Reichardt testified that he was the lead crime scene detective assigned to this case (T. 148), that upon responding to the scene of this shooting, he saw a deceased black male inside the residence on a mattress (T. 143), there were no guns located in the residence (T. 144), that he recovered six (6) casings from within the residence (T. 145), and that he discovered a hole under the mattress where the victim had died which was apparently caused by a gunshot (T. 156-60). Courtney McCurdie testified that the victim lived in the apartment where the shooting occurred (T. 195), that prior to the shooting the victim and defendant had gotten into an argument in which the victim fired one shot from a firearm (T. 197-98), that later that same night the defendant entered the victim's home and shot the victim until he "emptied his gun" (T. 199-202), that the victim was lying down and unarmed at the time the defendant shot him (T. 201, 203), and that he asked the defendant why he had killed the victim and the defendant did not respond (T. 204). Dr. Lew testified that she was the medical examiner assigned to this case (T. 248); that the cause of the victim's death was multiple gunshot wounds, and the manner of death was a homicide (T. 253); that the victim had sustained seven (7) gunshot wounds, labeled A through G (T. 248 and 255); that gunshot wound A was consistent with being a defensive wound (T. 265-66); and that the gunshot wounds suffered by the victim were consistent with him having been lying down at the time he was shot (T. 266).

The crime scene evidence, in addition to the forensic pathology evidence, corroborated McCurdie's testimony that the victim was lying down unarmed at the time defendant shot him. This Court finds that Morris' newly discovered testimony that defendant was acting in self-defense is not supported by the crime scene and forensic pathology evidence, and as such, would not be credible to the jury and would not probably result in an acquittal for the defendant.

In addition to Morris' newly discovered testimony not being supported by the crime scene and forensic pathology evidence, Morris' newly discovered testimony would be impeached by the State at trial. Morris gave a statement to Detective Hoadley on June 9, 1993 (approximately ten days after the homicide) which was completely consistent with Courtney McCurdie's testimony and completely contradictory to Morris' October 25, 2021 testimony. According to Detective Hoadley's deposition, he

interviewed Nigel Jacobs on June 9, 1993.[1] According to Detective Hoadley, Jacobs stated that he was sitting in the living room of the apartment when Shawn (defendant) and Kimba walked into the house. He told Detective Hoadley that Hookwa (victim) was laying on the green foam mattress on the floor watching television. He told Detective Hoadley that he heard Shawn say something like "Hey, Hookwa" and then he heard Hookwa respond "What you're going to do, shoot me?". He then told Detective Hoadley that he heard several shots and looked up and saw Shawn holding a gun in his hand pointing directly at the victim, almost standing on top of the victim. See Hoadley Deposition Transcript at 39-40.

Morris' October 25, 2021 testimony is completely contradictory to his prior June 9, 1993 statement to Detective Hoadley, and to the crime scene and forensic pathology evidence, while Morris' June 9, 1993 statement was completely consistent with McCurdie's testimony and with the crime scene and forensic pathology evidence. If Morris were to testify consistently with his October 25, 2021 affidavit, he would be heavily impeached by his prior inconsistent statement and by the crime scene and forensic pathology evidence. Thus, this Court finds that Morris' newly discovered testimony that defendant was acting in self-defense would not be credible to the jury and would not probably result in an acquittal for the defendant at a retrial.

CONCLUSION

WHEREFORE, because the defendant fails to establish Morris' newly discovered evidence would result in a probable acquittal in this case, this Court hereby DENIES the defendant's motion, without need for an evidentiary hearing.

The defendant has 30 days to file a notice of appeal from this Order.

The Clerk of Courts shall provide Assistant State Attorney Johnathan Nobile, defense attorney Thomas Neusom, and the defendant a copy of this Order forthwith and shall attach copies of the Arrest Affidavit, Indictment, Judgment and Sentence, and cited portions of the trial transcripts to this Order.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this the ___ day of February, 2022.

CARMEN CABARGA
CIRCUIT JUDGE

c: The Office of the State Attorney
Thomas Neusom, attorney for defendant
Shawn Marcos Henry, defendant

[1] It is important to note that Jerome Morris went by Nigel Jacobs and in his October 25, 2021 affidavit, Morris identified himself as "Jerome Morris aka Nigel Jacobs". See Morris Affidavit.

Additional material from this filing is available in the Clerk's Office.