CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

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APPENDIX A

Opinion of the Florida Supreme Court

Windom v. State, SC2025-1179 & SC2025-1182, 2025 WL _____ (Fla. August 21, 2025)

Supreme Court of Florida

No. SC2025-1179

CURTIS WINDOM,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC2025-1182

CURTIS WINDOM,
Petitioner,

vs.

SECRETARY, DEPARTMENT OF CORRECTIONS,
Respondent.

August 21, 2025

PER CURIAM.

Thirty-three years ago, in 1992, a jury convicted Curtis Windom of three counts of first-degree murder and one count of attempted first-degree murder. The trial court sentenced Windom

to death for the former convictions, and to twenty-two years' imprisonment for the latter one. We upheld his convictions and sentences in *Windom v. State* (*Windom I*), 656 So. 2d 432 (Fla. 1995).

On July 29, 2025, Governor DeSantis signed Windom's death warrant, with a scheduled execution date of August 28, 2025. Windom then filed his fifth[1] successive motion for postconviction relief, raising two claims: (1) that he was unconstitutionally deprived of his right to competent trial counsel, and (2) that he was deprived of his right to due process by the postconviction court's scheduling order. The postconviction court summarily denied these claims, as well as Windom's "emergency motion for stay" in which he raised an additional newly discovered evidence claim. Windom timely appealed. We have jurisdiction, *see* art. V, § 3(b)(1), Fla. Const., and affirm the postconviction court's summary denial of Windom's successive postconviction motion. And we further deny

1. Though Windom filed multiple pro se postconviction motions that were stricken, this appears to be his fifth successive postconviction motion.

Windom's petition for writ of habeas corpus, *see id.* § 3(b)(9), and motions for stay and oral argument.

I.

We recounted the horrific facts of this case in great detail in Windom's direct appeal:

> Jack Luckett testified that he had talked with the Defendant the morning of the shootings. In their discussion, the Defendant asked Jack if Johnnie Lee had won money at the dog track and Jack said, "Yes, $114." The Defendant said Johnnie Lee owed him $2,000. When the Defendant learned Johnnie had won money at the track, he said to Jack, "My nigger, you're gonna read about me." He further said that he was going to kill Johnnie Lee. That same day at 11:51 a.m. (per the sales slip and the sales clerk) the Defendant purchased a .38 caliber revolver and a box of fifty .38 caliber shells from Abner Yonce at Walmart in Ocoee. Mr. Yonce remembered the sale and recalled there was nothing unusual about the Defendant and that he was "calm as could be."
>
> Within minutes of that purchase, the Defendant pulled up in his car next to where Johnnie Lee was standing talking to two females and Jack Luckett on the sidewalk. All three testified that the Defendant's car was close and the Defendant leaned across the passenger side of the vehicle and shot Johnnie Lee twice in the back. (Johnnie Lee's back was towards the Defendant and there was no evidence he even saw the Defendant.) . . . After the victim fell to the ground, the Defendant got out of the car, stood over the victim and shot him twice more from the front at very close range. . . . The Defendant then ran towards the apartment where Valerie Davis, his girlfriend and mother of one of his children, lived. (The Defendant lived with Valerie Davis off and on.) She was

> on the phone, and her friend Cassandra Hall had just arrived at the apartment and was present when the Defendant shot Valerie once in the left chest area within seconds of arriving in the apartment and with no provocation. . . .
>
> From the apartment, the Defendant went outside, encountered Kenneth Williams on the street, and shot him in the chest at very close range. Mr. Williams saw the gun but did not think the Defendant would shoot him. Right before he was shot, he turned slightly and deflected the bullet somewhat. Although he was in the hospital for about 30 days and the wound was serious, he did not die. He said the Defendant did not look normal—his eyes were "bugged out like he had clicked." . . .
>
> From there, the Defendant ended up behind Brown's Bar where three guys, including the Defendant's brother, were trying to take the weapon from him. By that time, Valerie's mother [Mary Lubin] had learned that her daughter had been shot, so she had left work in her car and was driving down the street. The Defendant saw her stop at the stop sign, went over to the car where he said something to her and then fired at her, hitting her twice, and killing her.

Windom I, 656 So. 2d at 435 (omissions in original).

After convicting Windom of the crimes indicated above, the jury unanimously recommended sentences of death. And in sentencing Windom as recommended by the jury for the first-degree murders, the trial court specifically found two aggravators for each murder conviction: (1) the cold, calculated, and premeditated (CCP) aggravator, and (2) the prior violent felony conviction aggravator.

While we affirmed the judgments and sentences on direct appeal, *see Windom I*, 656 So. 2d at 440, *cert. denied*, 516 U.S. 1012 (1995), we struck the circuit court's finding that the CCP aggravator was applicable to the murders of Valerie Davis and Mary Lubin.

Windom then filed his initial postconviction motion, followed by an amended motion, raising twenty-one claims. Following an evidentiary hearing on multiple claims, the postconviction court denied relief. We affirmed, and we also denied an accompanying petition for writ of habeas corpus. *See Windom v. State* (*Windom II*), 886 So. 2d 915 (Fla. 2004).

Of particular relevance here, we affirmed the postconviction court's conclusion that trial counsel's decision not to present mental health evidence was not prejudicial because it foreclosed the prosecution from presenting highly prejudicial evidence of Windom's drug dealing and motive to murder Davis and Lubin, both of whom may have been police informants. *Id.* at 922-24, 928. Additionally, we affirmed the summary denial of Windom's claim that Florida's lack of standards for capital counsel led to the trial court's tolerance of an incompetent attorney. *Id.* at 920 n.5.

Later, and also relevant to the instant proceeding, we affirmed the denial of a successive postconviction motion in which Windom raised an untimely and procedurally barred *Brady*[2] claim concerning his discovery that State's witness Jack Luckett had a pending felony charge when he testified. *Windom v. State* (*Windom III*), No. SC16-1371, 2017 WL 3205278, at *2 (Fla. July 28, 2017).

A flurry of other state and federal challenges by Windom ensued over the years. *See Windom v. Sec'y, Fla. Dep't of Corr.*, No. 6:04-cv-1378-ORL-28KRS, 2007 WL 9725062 (M.D. Fla. Nov. 1, 2007) (denying federal habeas relief, including ineffective assistance of trial counsel claims considered in *Windom II*); *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227 (11th Cir. 2009) (affirming denial of habeas following oral argument), *cert. denied*, 559 U.S. 1051 (2010); *Windom v. State*, 160 So. 3d 901 (Fla. 2015) (dismissing pro se appeal); *Windom v. State*, 234 So. 3d 556 (Fla.) (denying *Hurst*[3] claim), *cert. denied*, 586 U.S. 860 (2018); *Windom v. State*, No.

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2. *Brady v. Maryland*, 373 U.S. 83 (1963).

3. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So. 3d 487 (Fla. 2020).

SC18-1923, 2018 WL 6326237 (Fla. Dec. 4, 2018) (dismissing pro se appeal); *In re Curtis L. Windom, Sr.*, No. 13-12004-P (11th Cir. June 3, 2013) (denying permission to file successive habeas to raise the *Brady* claim considered in *Windom III*); *In re Curtis L. Windom, Sr.*, No. 14-12411-P (11th Cir. June 26, 2014) (same); *In re Curtis L. Windom, Sr.*, No. 19-11357-P (11th Cir. May 1, 2019) (same). Each time, his challenges failed.

The instant appeal follows.

II.

We review de novo the postconviction court's summary denial of Windom's successive Florida Rule of Criminal Procedure 3.851 motion. "Summary denial of a successive rule 3.851 motion is appropriate if 'the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *Rogers v. State*, 409 So. 3d 1257, 1262 (Fla. 2025) (citation omitted), *cert. denied*, No. 24-7169, 2025 WL 1387828 (U.S. May 14, 2025). We will affirm the denial of successive claims that are procedurally barred, untimely, legally insufficient, or refuted by the record. *See Hutchinson v. State*, No. SC2025-0517, 50 Fla. L. Weekly S71, S72, 2025 WL

1198037, at *3 (Fla. Apr. 25, 2025), *cert. denied*, 145 S. Ct. 1980 (2025).

With limited exceptions, rule 3.851(d)(1) imposes a one-year time limitation on any motion to vacate a final judgment and sentence of death.

Windom attempts to avail himself of two exceptions to this one-year limitation: the new, retroactive constitutional right exception—"the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively," Fla. R. Crim. P. 3.851(d)(2)(B); and the newly discovered evidence exception—"the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," Fla. R. Crim. P. 3.851(d)(2)(A). The postconviction court correctly summarily denied the successive motion.

A.

(1)

First, Windom argues that evolving standards of decency should have been applied to his Sixth Amendment right to counsel.

He asserts that his trial counsel lacked the competence to represent him because, unlike the more exacting standards today, back then, the only standards counsel had to satisfy were the minimums of being licensed and in good standing with The Florida Bar to represent a capital defendant. Windom specifically cites to the adoption of rule 3.112 of the Florida Rules of Criminal Procedure in 1999, which sets forth minimum standards for attorneys in capital cases. *See In re Amend. to Fla. Rules of Crim. Proc.-Rule 3.112 Min. Stds. for Att'ys in Cap. Cases*, 759 So. 2d 610 (Fla. 1999). Rule 3.112 was extended to apply to privately retained counsel[4] in 2002. *In re Amend. to Fla. Rules of Crim Proc.-Rule 3.112 Min. Stds. for Att'ys in Cap. Cases*, 820 So. 2d 185 (Fla. 2002).

But as the postconviction court properly determined, this claim is untimely.[5] Windom cannot avail himself of the benefit of rule 3.851(d)(2)(B)'s new, retroactive constitutional right exception to the one-year time limit. Any argument that constitutional

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4. Windom's trial counsel, Ed Leinster, was privately retained.

5. Windom does not challenge the postconviction court's conclusion that this claim does not satisfy the newly discovered evidence exception in rule 3.851(d)(2)(A).

provisions should be construed based on "evolving standards of decency" is unavailing because, as acknowledged by Windom, that reasoning has never been applied to the Sixth Amendment right to counsel. It has only been applied to the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments. *See Trop v. Dulle*s, 356 U.S. 86, 100-01 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop*, 356 U.S. at 100-01). And Windom cannot use the timeliness exception in rule 3.851(d)(2)(B) to affirmatively establish a new and retroactive constitutional right. *See Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013) ("What Carroll is seeking is the recognition of a new fundamental constitutional right, which is not properly pled under rule 3.851(d)(2)(B)." (citing *Waterhouse v. State*, 82 So. 3d 84, 97 (Fla. 2012))).

We thus affirm the postconviction court's finding that Windom's first claim is untimely.

(2)

Windom's arguments are also procedurally barred. In 2004, in his first postconviction motion, he raised the claim that Florida lacks standards for counsel in capital cases, violating the Fifth, Sixth, Eighth, and Fourteenth Amendments. *See Windom II*, 886 So. 2d at 920 n.5. We affirmed the postconviction court's 2001 summary denial of this argument in its entirety on appeal. *See id.* at 926, 931. We also addressed, and rejected, other claims Windom now raises again—that trial counsel, Ed Leinster, rendered ineffective assistance for failing to investigate mental health experts and fact witnesses for both the guilt and penalty phases, and that Leinster was allegedly intoxicated at trial. *Id.* at 921-29.

The postconviction court properly characterized Windom's current arguments as a "repacking of claims." We agree. As we recently reiterated in *Barwick v. State*, "using 'a different argument to relitigate the same issue' . . . is inappropriate." 361 So. 3d 785, 793 (Fla. 2023) (quoting *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990)). So, this claim was properly denied as procedurally barred.

But even if Windom's current argument regarding counsel's lack of competency based on "evolving standards of decency" could

overcome the re-litigation bar, it is nonetheless still procedurally barred because he could have raised this claim as early as 2002, when rule 3.112 was extended to privately retained counsel and required greater capital counsel qualifications. *See id.* at 795 ("Even if this claim had not been raised in a prior proceeding, it is still procedurally barred because it could have been raised previously." (citations omitted)).

For all these reasons, we affirm the postconviction court's finding that Windom's first claim is procedurally barred.

(3)

Finally, Windom's claim is meritless. The committee's comments to the standards announced in rule 3.112 reflect that the rule is "not intended to establish any independent legal rights" and that the *Strickland v. Washington*, 466 U.S. 668 (1984), standard would still apply to claims of inadequacy of representation by counsel. *In re Amend. to Fla. Rules of Crim. Proc.-Rule 3.112*, 820 So. 2d at 198. And we have since relied on this language in rejecting a claim of per se ineffectiveness. *See Cox v. State*, 966 So. 2d 337, 358 n.10 (Fla. 2007) ("Cox asserts that defense counsel failed to meet the minimum requirements for death penalty co-

counsel outlined in . . . [rule] 3.112 . . . . Although it is true that one attorney did not meet the minimum standards . . . this does not amount to per se ineffective assistance of counsel. The comment to rule 3.112 demonstrates that the rule was not intended to create an independent cause of action . . . .").

In this case, Windom's ineffective assistance claims were fully litigated in *Windom II* and found meritless under the *Strickland* standard. Nothing else is required.[6]

The postconviction court also properly rejected Windom's argument that rule 3.112 should be retroactively applied. Windom's retroactivity argument is contrary to the text of rule 3.112, which states that it applies to "*all* defense counsel handling capital trials and capital appeals, who are appointed or retained *on or after July 1, 2002*." Fla. R. Crim. P. 3.112(c) (emphasis added). The requirements in rule 3.112 were not extended to privately

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6. We also reject Windom's invitation to extend the application of the "evolving standards of decency" doctrine. *Trop* made it clear that the doctrine applies to the Eighth Amendment, and no other court, to our knowledge, has yet extended the doctrine to interpret the Sixth Amendment. Windom candidly acknowledges this as well. We decline to be the first.

retained counsel until 2002. *See In re Amend. to Fla. Rules of Crim. Proc.-Rule 3.112*, 820 So. 2d at 195. Thus, the rule was clearly intended to have *prospective* application.

Windom counters that fundamental fairness supports the retroactive application of the rule's standards to his trial representation, citing *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) ("Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.' " (citation omitted)). But his fundamental fairness argument fails because, as we said above, the rule 3.112 standards were not intended to establish any independent legal rights.

Framing Leinster's alleged deficiencies as resulting from lack of proper qualifications to represent a capital defendant, Windom again argues, as he did in previous cases before this Court, that the outcome of his trial and penalty phase would have been different had Leinster developed and presented additional witnesses and evidence to show that Windom had brain damage and was legally insane at the time of the shootings.

But as we held in *Windom II*, had Leinster put on evidence in the guilt phase to support an insanity defense, he would have opened the door to highly damaging testimony and evidence that Windom was a drug dealer and that his drug operations may have motivated at least two of the murders, as some or all of his victims were police informants. 886 So. 2d at 923. Also, evidence of Windom's conduct and planning on the day of the murders refuted rather than supported the argument that the acts were the product of brain damage or delusion. *Id.* at 926. Windom also was not prejudiced by Leinster's failure to put on additional mental health mitigation in the penalty phase because this evidence would have opened the door to, and been overwhelmingly rebutted by, the State's evidence of Windom's drug enterprise. *Id.* at 928.[7]

Finally, Windom again claims that the outcome would have been different had the jury heard about Luckett's undisclosed pending felony given the State's allegedly weak case for

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7. The postconviction court's order does not address Windom's argument that Leinster was "actually incompetent" under the standards now embodied in rule 3.112. However, Windom has not shown that he suffered prejudice from the alleged deficiencies he identifies in Leinster's performance.

premeditation. Again, this information had no reasonable likelihood of changing the outcome. As we said in *Windom III*, Luckett's testimony was largely corroborated by other witnesses and evidence, and Windom did, in fact, impeach him with three other prior felonies. 2017 WL 3205278, at *1-2. Additionally, had the evidence of Luckett's pending charge been introduced, the State could have rehabilitated Luckett with prior consistent statements. *Id.*

Accordingly, we affirm the postconviction court's denial of Windom's "evolving standards of decency" claim as untimely, procedurally barred, and meritless.

B.

Windom next argues that the postconviction court's abbreviated scheduling order—and now, this Court's scheduling order, too—violates his right to due process. As evidence of this due process violation, Windom argues that he only learned of "newly discovered evidence" at the *Huff*[8] hearing—to wit, statements from some of the victims' family members from his 2013 clemency

8. *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

hearing that they opposed Windom's death sentence—and had to raise this claim in an emergency motion for stay below. The postconviction court was right to summarily deny this claim.

(1)

The crux of Windom's argument on this issue is that he was denied a meaningful opportunity to be heard. Over his counsel's objection and request for one more day, the postconviction court required the successive postconviction motion to be filed by August 3, 2025, at 11:00 a.m., less than five days after notice of the death warrant. Noting that visits to inmates awaiting execution were partially curtailed by the upcoming execution of another inmate, counsel argued that the proposed deadline would not allow her enough time to interview Windom or to review pleadings with him after their August 1 meeting at the prison.[9]

The postconviction court denied this claim on the merits, explaining that Windom was given notice of the schedule, had an

9. Below, counsel also argued that this time would be insufficient to allow mental health expert Dr. Hyman Eisenstein to interview Windom and provide an affidavit of his findings. However, this argument has not been raised on appeal.

opportunity to respond, and, in fact, did so by objecting. Further, the postconviction court found that the expedited schedule did not violate Windom's right to due process by obstructing his ability to present evidence. We agree. In warrant proceedings, "[d]ue process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016) (citing *Huff*, 622 So. 2d at 983). Windom was given notice and a full opportunity to be heard regarding the deadlines in the scheduling order.

Importantly, we have rejected similar claims to this one and found that an expedited warrant litigation schedule does not deprive a defendant of his right to due process. *See Zakrzewski v. State*, No. SC2025-1009, 50 Fla. L. Weekly S218, S220, 2025 WL 2047404, at *5 (Fla. July 22, 2025) (rejecting claim that expedited process of warrant litigation deprived defendant of his due process rights), *cert. denied*, No. 25-5194, 2025 WL 2155601 (U.S. July 30, 2025); *Bell v. State*, No. SC2025-0891, 50 Fla. L. Weekly S155, S163, 2025 WL 1874574, at *17 (Fla. July 8, 2025), *cert. denied*, No. 25-5083, 2025 WL 1942498 (U.S. July 15, 2025); *Tanzi v. State*, 407 So. 3d 385, 393 (Fla.), *cert. denied*, 145 S. Ct. 1914 (2025).

After over thirty years of litigation, Windom has been heard and his case has been thoroughly and conscientiously reviewed at every stage, including this one. Thus, we reject his claim.

(2)

Undeterred, Windom asserts that he established a due process violation in his scheduling order by virtue of his "motion for emergency stay of execution," in which he raised claims based on mitigating information presented at his 2013 clemency hearing[10]—that the victims' families wished for Windom's life to be spared from the death penalty.[11] He alleges he only learned of this information for the first time at the *Huff* hearing, and, thus, this is newly

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10. Windom raised three claims below: (1) the information from the three victims' families is newly discovered evidence; (2) the State violated its obligations under *Brady* during postconviction by failing to disclose the victims' family members' wishes; and (3) the newly discovered evidence establishes that the death penalty as applied to Windom is unconstitutional. On appeal, Windom does not challenge the postconviction court's conclusion on claim (2), that the State has no obligation under *Brady* in postconviction proceedings. *See Dailey v. State*, 279 So. 3d 1208, 1217 (Fla. 2019) (citing *Dist. Att'y Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009), for the proposition that the Supreme Court rejected "*Brady*'s applicability at the postconviction stage").

11. These statements are video recordings and letters that were prepared in support of Windom's bid for clemency.

discovered evidence requiring additional time. The State argued below that Windom's newly discovered evidence claim is untimely.

Recognizing the motion is controlled by rule 3.851, the postconviction court analyzed it as a newly discovered evidence claim under the two-factor test reiterated in *Dailey v. State*, 279 So. 3d 1208, 1212-13 (Fla. 2019) ("In order to set aside a conviction based on newly discovered evidence . . . [1] the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence . . . [and 2] the evidence must be of such nature that it would probably produce an acquittal on retrial." (internal quotation marks and citations omitted)). Based on caselaw, the postconviction court agreed with Windom that this evidence was "new" under the first prong because it could not have been known at the time of trial, but found it would probably not produce an acquittal on retrial under the second prong because the evidence was probably inadmissible. *Id.* ("However . . . 'no relief is warranted' unless the evidence would be admissible at trial." (quoting *Sims v. State*, 754 So. 2d 657, 660 (Fla. 2000))).

From our de novo review of the record, we conclude that Windom's claim is untimely because the allegedly "new" information was ascertainable long ago by the exercise of due diligence. *See* Fla. R. Crim. P. 3.851(d)(2)(A). Windom offers no convincing argument why either he or his attorney could not have attempted to ascertain those views at least a decade before his death warrant was signed.

But even assuming this claim were timely and that this "evidence" is "new," Windom argues that the postconviction court failed to consider that it would be admissible as mitigation at the penalty phase and, thus, be "of such a nature that it would . . . probably yield a less severe sentence." *Davis v. State*, No. SC2024-1128, 2025 WL 1970014, at *5 (Fla. July 17, 2025) (citations omitted).

We disagree. The facts as firmly established at Windom's guilt phase were that Windom went on a shooting spree, shooting four people and killing three. Thus, at the penalty phase, the prior violent felony aggravator—which is "one of the most weighty aggravating circumstances in Florida's statutory sentencing scheme," *Bright v. State*, 299 So. 3d 985, 1011 (Fla. 2020) (citations

omitted)—was more than supported in regard to each of the three murder victims. Further, the evidence also showed that Windom planned the murder of the first victim, Lee, because Lee owed Windom money, thus supporting the finding of the CCP aggravator.

Given this significant aggravation, even adding the victims' families' preferences to Windom's mitigation presented during his original penalty phase,[12] we reject the argument that it would probably have produced a less severe sentence. As we said in *Windom I*, "we conclude that the existence of the one aggravator of the conviction of two other capital offenses and one violent felony against a person in each instance is sufficient to outweigh the little weight given to the mitigating factors set forth in the sentencing order." 656 So. 2d at 440 (citations omitted). "It is well settled that

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12. *See Windom I*, 656 So. 2d at 435 n.3 ("In mitigation the [sentencing] court found the following statutory factors: (1) Windom had no significant history of prior criminal activity . . . ; (2) the capital felony was committed while Windom was under the influence of extreme mental or emotional disturbance . . . ; and (3) Windom acted under extreme duress or under the substantial domination of another person . . . . The following nonstatutory mitigators were considered: (1) Windom assisted people in the community; (2) Windom was a good father; (3) Windom saved his sister from drowning; and (4) Windom saved another individual from being shot during a dispute over $20.").

it is not the number of aggravating and mitigating circumstances that is critical but the weight to be given each of them." *Id.* (citations omitted).

Thus, we affirm the postconviction court's denial of Windom's newly discovered evidence claim raised in his "emergency motion to stay," and decline to find this to be "evidence" of a due process violation in the postconviction court's scheduling order. We likewise affirm the postconviction court's denial of Windom's piggyback claim, that Florida's sentencing scheme is unconstitutional as applied to him, as procedurally barred.

III.

Finally, Windom petitions this Court for a writ of habeas corpus, raising two claims for equitable relief. First, he claims a manifest injustice will occur if this Court does not reconsider *Windom II*, 886 So. 2d 915, and conclude that he was deprived of Sixth Amendment counsel at trial due to his counsel's inexperience and failure to investigate Windom's mental health for possible defenses and mitigation. Windom raises multiple subclaims as well, including a *Brady* violation that appears to be materially the

same claim as the one raised and rejected in his second successive postconviction motion. *See Windom III*, 2017 WL 3205278, at *2.

We deny this claim and all subclaims as procedurally barred. "[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion." *Mann v. State*, 112 So. 3d 1158, 1164 (Fla. 2013) (quoting *Wyatt v. State*, 71 So. 3d 86, 112 n.20 (Fla. 2011)); *Gaskin v. State*, 361 So. 3d 300, 309 (Fla. 2023) ("Habeas corpus is not to be used to litigate or relitigate issues which could have been, should have been, or were previously raised." (citing *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992))).

Furthermore, as explained above and in *Windom II*, because Windom's trial counsel did not present mental health evidence, the State was ultimately foreclosed from presenting even more prejudicial evidence of Windom's drug dealing and motive to murder his girlfriend and her mother, both of whom he suspected were police informants. "Trial counsel is not deficient for failing to present additional testimony that would have informed the jury of

negative information about the defendant." *Windom II*, 886 So. 2d at 923 (citing *Breedlove v. State*, 692 So. 2d 874, 878 (Fla. 1997)).

Likewise, Windom's second claim, that a manifest injustice will occur because the death penalty is unconstitutional as applied to him, is procedurally barred. Windom asserts, among other things, that the prior violent felony aggravator should not have been applied to the murder of Johnnie Lee. But this claim was previously raised and rejected on direct appeal. *See Windom I*, 656 So. 2d at 440 (rejecting Windom's argument and reaffirming prior holdings that "contemporaneous convictions prior to sentencing can qualify as previous convictions in multiple conviction situations" (citations omitted)); *see also Gonzalez v. State*, 136 So. 3d 1125, 1151 (Fla. 2014) ("Under Florida law, such contemporaneous convictions can serve as an appropriate basis for the prior violent felony aggravator." (citations omitted)). Further, as already noted, "the prior violent felony aggravator is one of the most weighty aggravating circumstances in Florida's statutory sentencing scheme." *Bright*, 299 So. 3d at 1011.

We thus remain confident in the outcome of Windom's trial and penalty phase and deny his petition as procedurally barred.

IV.

We affirm the summary denial of Windom's successive motion for postconviction relief and deny his petition for writ of habeas corpus. We also deny his motions for stay of execution and oral argument. No petition for rehearing will be entertained by this Court. The mandate shall issue immediately.

It is so ordered.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.

An Appeal from the Circuit Court in and for Orange County,
Michael Kraynick, Judge – Case No. 481992CF001305000AOX
And an Original Proceeding – Habeas Corpus

Eric Pinkard, Capital Collateral Regional Counsel, Ann Marie Mirialakis, Assistant Capital Collateral Regional Counsel, and Melody Jacquay-Acosta, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant/Petitioner

James Uthmeier, Attorney General, Tallahassee, Florida, Rick A. Buchwalter, Senior Assistant Attorney General, and Timothy A. Freeland, Special Counsel, Assistant Attorney General, Tampa, Florida,

for Appellee/Respondent

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX B

Order of the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida, denying postconviction relief (August 7, 2025) – SPCR.1292-1496

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case No.: Case No. 1992-CF-1305
FSC No. SC1960-80830

v.

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
August 28, 2025 at 6:00 p.m.

CURTIS WINDOM,

Defendant.
_____/

FINAL ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH

THIS CAUSE came before the court on "Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death," filed on August 3, 2025. After reviewing the Motion, the State's Response to Defendant's Successive Motion For Postconviction Relief filed on August 4, 2025, the relevant case law, and having considered the legal argument of counsel made at the August 5, 2025 *Huff*[1] hearing, the Court finds as follows.

PROCEDURAL HISTORY

On March 3, 1992, a grand jury indicted Defendant on three counts of murder in the first degree (counts one – three) and attempt to commit murder in the first

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

degree (count four). On August 28, 1992, a jury found Defendant guilty of all counts. Following the penalty phase, the jury unanimously recommended a death sentence. On November 10, 1992, the court sentenced Defendant to death on counts one, two, and three.[2] On April 27, 1995, the Florida Supreme Court affirmed the convictions and sentences. *Windom v. State*, 656 So. 2d 432 (Fla. 1995) (rehearing denied June 29, 1995). On December 4, 1995, the U.S. Supreme Court denied Defendant's petition for writ of certiorari. *Windom v. State*, 516 U.S. 1012 (1995).

Defendant filed his initial postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850 (later renumbered to 3.851) on March 19, 1997. He filed an amended motion on August 7, 2000. The Court held an evidentiary hearing on June 7, 2001 and denied the amended motion on November 1, 2001. Defendant appealed and petitioned for a writ of habeas corpus. The Florida Supreme Court affirmed and denied the petition on May 6, 2004. *Windom v. State*, 886 So. 2d 915 (Fla. 2004) (rehearing denied July 8, 2004).

On September 20, 2004, Defendant filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The U.S. District Court for the Middle District of Florida denied the petition on November 2, 2007. *Windom v. Sec'y, Fla. Dep't*

[2] The Court sentenced Defendant to 22 years with a three-year minimum mandatory on count four.

Corr., No. 04-cv-01378-ORL, 2007 WL 9725062 (M.D. Fla. Nov. 2, 2007). Defendant's Application for Certificate of Appealability in the United States District Court for the Middle District of Florida was granted as to two issues. Following oral argument, the Eleventh Circuit Court of Appeals affirmed the denial of Defendant's federal petition for writ of habeas corpus. *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d. 1227 (11th Cir. 2009). The United States Supreme Court denied certiorari review. *Windom v. McNeil*, 559 U.S. 1051 (2010).

On August 17, 2007, Defendant filed his first successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. The Court summarily denied Defendant's motion on January 8, 2008. Defendant did not appeal.

On October 15, 2014, Defendant filed a "Successior (sic) Motion for New Trial Pursiant (sic) to Rules 3.851 and 3.852." The Court denied Defendant's successive motion on July 5, 2016. Defendant appealed. The Florida Supreme Court affirmed the trial court's order. *Windom v. State*, No. SC16-1371, 2017 3205278 (Fla. July 28, 2017).

On January 5, 2017, Defendant filed a successive motion for postconviction relief based on *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). The Court summarily

denied the motion on March 7, 2017. Defendant appealed. The Florida Supreme Court affirmed the summary denial. *Windom v. State*, 234 So. 3d 556 (Fla. 2018). On October 1, 2018, the U.S. Supreme Court denied Defendant's petition for writ of certiorari. *Windom v. State*, 586 U.S. 860 (2018).

On July 28, 2025, Governor Ron DeSantis signed a death warrant. Defendant's execution is currently scheduled for August 28, 2025 at 6:00 p.m. Also on July 28, 2025, the Florida Supreme Court directed that any further postconviction motions be heard and decided on an expedited basis. Defendant filed the instant Motion on August 3, 2025. Following a Huff hearing on August 5, 2025, this Court determined that an evidentiary hearing was not warranted to rule on Defendant's claims.

This order follows.

ANALYSIS

Florida Rule of Criminal Procedure 3.851 "applies to all postconviction motions filed on or after January 1, 2015, by defendants who are under sentence of death." Fla. R. Crim. P 3.851(a). "Any motion to vacate judgment of conviction and sentence of death must be filed by the defendant within 1 year after the judgment and sentence become final." Fla. R. Crim. P. 3.851(d)(1).

Subsection (d)(2) states that no motion will be considered beyond one year from the date the judgment and sentence become final unless the motion alleges (1) newly discovered evidence that could not have been discovered through the exercise of due diligence, (2) a newly established and retroactive constitutional right or (3) postconviction counsel, through negligence, failed to file the motion. *James v. State*, 404 So. 3d 317, 324 (Fla. 2025) (outlining these exceptions in a post-warrant context); *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023) (finding that successive postconviction claim of exemption from death penalty due to mental deficiencies was procedurally barred because it was substantially argued at trial or could have been raised previously).

A postconviction motion filed after a death warrant has been signed is an expedited proceeding. Fla. R. Crim. P. 3.851(h)(3). Summary denial is appropriate where successive postconviction claims are refuted by the record. Fla. R. Crim. P. 3.851(f)(5)(B). Summary denial of purely legal claims is also appropriate where such claims are without merit under controlling precedent. *See Mann v. State*, 112 So. 3d 1158, 1162-63 (Fla. 2013). A trial court should summarily deny "successive claims where those claims are untimely, procedurally barred, legally insufficient, or

refuted by the record." *Hutchinson v. State*, No. SC2025-0517, No. SC2025-0518, 2025 WL 1198037, at *3 (Fla. Apr. 25, 2025) (citation omitted).

Defendant's successive motion raises two arguments. In Claim One, he argues that the Eighth Amendment's evolving standards of decency test should be extended to apply to all constitutional principles, including the Sixth Amendment's right to effective counsel, and that under current standards, his trial counsel was not competent. In Claim Two, Defendant argues that the trial court's scheduling order violates his due process right as it does not provide him notice and an opportunity to be heard.

For the reasons stated below, the Court summarily denies Defendant's Motion.

CLAIM ONE: APPLYING EVOLVING STANDARDS OF DECENCY, CURTIS WINDOM DID NOT RECEIVE HIS RIGHT TO COMPETENT COUNSEL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS PURSUANT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Defendant argues that the application of the Eighth Amendment "evolving standards of decency" test should be extended to the Sixth Amendment and that, under the current standards, including those outlined in rule 3.112, Florida Rules of

Criminal Procedure, he did not receive competent counsel that the Sixth Amendment guarantees.

In his Motion, Defendant details the history of Florida's requirements, or lack thereof, for attorneys in capital cases. When Defendant's case went to trial, Florida had no enshrined rules or regulations regarding the minimum standards an attorney must possess to litigate capital cases. It was not until 1997 that the Florida Supreme Court established the Committee on Minimum Standards for Attorneys in Capital Cases. This committee was tasked with studying and recommending, for the Court's review, minimum standards to ensure the competency of court-appointed counsel in death penalty cases. In 1999, the Florida Supreme Court adopted rule 3.112, Florida Rules of Criminal Procedure, which set minimum standards for attorneys in capital cases. *See In re Amend. to Fla. Rules of Crim. Proc.-Rule 3.112 Minimum Standards for Att'ys in Cap. Cases*, 759 So. 2d 610 (Fla. 1999). Over time, the rule was amended to extend the application to private counsel, the Offices of Criminal Conflict and Civil Regional Counsel, and eventually to postconviction counsel. *See In re Amend. to Fla. Rules of Crim. Proc.--Rule 3.112 Minimum Standards for Att'ys in Cap. Cases*, 820 So. 2d 185 (Fla. 2002); *In re Amends. to Fla. Rule of Crim. Proc. 3.112-Minimum Standards for Att'ys in Cap. Cases*, 993 So. 2d 501, 502 (Fla.

2008); *In re Amends. to Fla. Rules of Jud. Admin.; £Florida Rules of Crim. Procedure*; *and Fla. Rules of App. Proc.--Cap. Postconviction Rules,* 148 So. 3d 1171, 1178 (Fla. 2014).

Based on the minimum standards set in rule 3.112, Defendant argues that his trial counsel was incompetent to take on a capital case.

In it's Response, the State argues that Defendant's claim is time barred, procedurally barred, and meritless. The State contends that the committee comment following the proposed rule changes in rule 3.112 confirms that the rule does not create an independent legal right. *See In re Amendment to Florida Rules of Criminal Procedure–Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185, 198 (Fla. 2002) ("These standards are not intended to establish any independent legal rights."). It also argues that his Sixth Amendment right could not have been violated, as counsel was retained.

First, the Court finds that Defendant's claim is time barred. As stated above, Florida Rule of Criminal Procedure 3.851 prohibits, with certain exceptions, claims made more than one year after the judgment and sentences at issue become final. Defendant's judgment and sentences became final on December 4, 1995, when the

U.S. Supreme Court denied his petition for writ of certiorari. *Windom v. State*, 516 U.S. 1012 (1995).

Defendant's claim that the current minimum standards for attorneys on capital cases should be applied to his case comes over two decades after rule 3.112 was adopted. As highlighted above, rule 3.112 was adopted in 1998 and was extended to apply to privately retained counsel in 2002. Defendant fails to demonstrate why he could not have raised this claim in the 20 years that followed the adoption of the rule.[3]

Defendant goes on to argue that his claim is timely filed pursuant to rule 3.851(d)(2)(B), which allows motions to be filed beyond the one-year time limit if a newly established and retroactive constitutional right applies. The Court disagrees.

[3] Defendant provided the Court the "Agenda, Death is Different FACDL's 30th Death Penalty Seminar" for his contention that the Florida Association of Criminal Defense Lawyers has been providing death penalty training since 1994. *See* Index To Appendix, Appendix C p. 28. Defendant's Motion avers that "The training seminars that attorneys now attend to learn how to defend a capital case, Death Is Different, for instance, did not become available until 1995, according to the Florida Association of Criminal Defense Attorneys ("FACDL")." (*See* Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death p. 3). At the *Huff* hearing held on August 5, 2025, Attorney Mirialakis argued Appendix C was the "30-year anniversary" of the Death Penalty Seminar. *See* Huff Hearing Transcript filed August 7, 2025 p. 11 and p. 13.

Defendant fails to establish that there is an established fundamental right. He argues that the "evolving standards of decency" test should be extended to the Sixth Amendment; however, as he admits in his Motion, no court has extended the application beyond the Eighth Amendment. (*See* Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death p. 5). Instead of arguing that there is now a fundamental constitutional right that had not been previously established, he is asking the Court to create a fundamental right. (*See* Huff Hearing Transcript pp. 5-6 and p. 20). This is not cognizable under rule 3.851(d)(2)(B). *See Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013).

Defendant has not established that his claim falls within any of the exceptions provided in rule 3.851(d)(2); therefore, this claim is untimely.

Not only is Defendant's claim untimely, but it is also procedurally barred. The Florida Supreme Court has consistently held that claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion. *See Carroll*, 114 So. 3d at 886 (claims that either were raised and rejected on direct appeal or could have been raised on direct appeal or in other postconviction motions are procedurally barred); *See also Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014); *Owen v. State*, 364 So. 3d 1017, 1022 (Fla. 2023); *Cole*

v. State, 392 So. 3d 1054, 1060 (Fla.), *cert. denied sub nom.*,145 S. Ct. 109, 219 L. Ed. 2d 1355 (2024).

This claim is a repacking of claims Defendant raised in his "Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," filed on August 7, 2000, which is inappropriate. *Barwick*, 361 So. 3d at 793 (Fla. 2023) ("Barwick acknowledges in his second successive motion that he previously 'has raised the factual basis of [this] claim.' Barwick is admittedly using 'a different argument to relitigate the same issue which is inappropriate. The circuit court was correct in denying this claim as procedurally barred because versions of it were raised in prior proceedings." (internal citation omitted)).

In this Amended Motion, Defendant argued that Florida's lack of standards for counsel in capital cases led to the trial court's tolerance of an attorney who was patently unqualified to serve as defense counsel. In summarily denying this claim, the Court found that such a claim was not cognizable in a postconviction motion and that the issue had already been raised on direct appeal. (*See* Order Denying Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence Pursuant to Rule 3.850 p. 3).

Defendant also argued that trial counsel was ineffective in both the guilt and penalty phases for failing to investigate and prepare a defense and to present mitigation. (*See* Amended Motion to Vacate Judgments of Conviction and Sentence pp. 13-34). After an evidentiary hearing, the Court denied these claims, finding that trial counsel's performance did not fall below the range of reasonable representation. The Court specifically found that trial counsel's strategy of keeping mental health evidence out in fear of opening the door to testimony about Defendant's violent past as a drug dealer was reasonable. (*See* Order Denying Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence Pursuant to Rule 3.850 pp. 3-33). The Court's Order denying Defendant's motion was affirmed on appeal. *Windom v. State*, 886 So. 2d 915 (Fla. 2004).

Even if Defendant's claim was not time barred and/or procedurally barred, which it is, it is meritless. Defendant's argument is that rule 3.112, specifically section (f), should apply retroactively. Defendant relies on the current provisions of rule 3.112(f), which were initially only applicable to "conflict attorneys … to … ensure that competent representation will be provided to indigent capital defendants." *See In re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610, 617 (Fla.

1999). In this case, Defendant was not utilizing a conflict attorney as Defendant had privately retained trial counsel. (*See* Transcript of Record V.16 p. 314). The standards of counsel for capital cases did not apply to "all attorneys who handle capital cases" until the 2002 revisions. *In re Amendment to Florida Rules of Criminal Procedure--Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185, 186 and 195 (Fla. 2002).

Defendant's retroactive application argument is contrary to the text of rule 3.112. Rule 3.112(c), which, per the 2002 revisions,[4] "applies to all lawyers handling capital trials and capital appeals, who are appointed or retained on or after July 1, 2002," and per the 2008 revisions, which are still in effect today,[5] "applies to all defense counsel handling capital trials and capital appeals, who are appointed or retained on or after July 1, 2002."

If the Florida Supreme Court had intended this rule to have retroactive application, it would have made that clear.[6] *See Dettle v. State*, 395 So. 3d 1054,

[4] *See In re Amendment to Florida Rules of Criminal Procedure--Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185, 195 (Fla. 2002)

[5] *See In re Amendments to Florida Rule of Criminal Procedure 3.112-Minimum Standards for Attorneys in Capital Cases*, 993 So. 2d 501, 502 (Fla. 2008)

[6] The Florida Supreme Court specifically declined "to adopt a 'grandfather clause' that would allow attorneys who do not meet the new standards, but who previously have handled capital cases, to continue to represent capital defendants." *See In re Amendment to Florida Rules of Criminal*

1057 (Fla. 2024) ("'[n]ew rules of law announced by this Court or the United States Supreme Court generally apply to all cases that are pending on direct review or are otherwise not final' —they do not, normally, apply retroactively.")

Lastly, Defendant's argument would essentially make the issue of ineffective assistance of counsel always ripe for review, as "evolving standards of decency" are ever-changing. This is at odds with the finality interests served by rule 3.851(d). *See Sliney v. State*, 362 So. 3d 186, 189 (Fla. 2023).

The balance of the arguments in Claim One could have been raised or were previously raised and denied on November 1, 2001 and affirmed on May 6, 2004. *See Windom v. State*, 886 So. 2d 915 (Fla. 2004) (rehearing denied July 8, 2004).

Accordingly, the Court finds that Defendant is not entitled to relief on Claim One, and that the claim is **SUMMARILY DENIED.**

CLAIM TWO: THE CIRCUIT COURT'S SCHEDULING ORDER DENIES MR. WINDOM NOTICE AND OPPORTUNITY TO BE HEARD IN VIOLATION OF DUE PROCESS RIGHTS AFFORDED TO HIM BY THE FLORIDA AND U.S. CONSTITUTION

Defendant argues that this Court's scheduling order signed on July 30, 2025, which adopted the State's Motion for Scheduling Order, precluded him from a

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Procedure--Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 192 (Fla. 2002).

meaningful opportunity to be heard in violation of his right to due process afforded to him by the Florida and U.S. Constitution. Defendant claims that his counsel was not served with the State's Motion for Scheduling Order and that the abbreviated schedule set by the Court precludes him from a meaningful opportunity to develop claims appropriate for post-warrant successive motions. The Court disagrees.

"Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016) (citing *Huff*, 622 So. 2d at 983).

In his Motion, Defendant makes general claims that he has been denied notice and an opportunity to be heard. The only allegation of a specific instance of failure to provide notice is that he was not provided notice of the State's Scheduling Order Motion.[7] For due process purposes, notice must be "fair," meaning it must reasonably convey the required information and afford a reasonable time for the defendant to respond. *See Garrison v. Williamson*, 372 So.3d 1275 (2023) (citing *State ex rel. Gore v. Chillingworth*, 126 Fla. 645, 171 So. 649, 657 (1936)).

[7] The State filed the *State's Motion For Scheduling Order* on July 30, 2025 at 9:01 a.m. Ali A. Shakoor, Assistant CCRC-M, Office of Capital Collateral Regional Counsel-Middle, was listed on the certificate of service. Ann Marie Mirialakis has been representing Defendant since at least March 29, 2016. *See* Motion to Allow Counsel to Argue Motion Filed by Prior Defense Counsel, filed March 29, 2016.

While Defendant's counsel was not included on the certificate of service for the Case Management Conference held on July 30, 2025, counsel was present. During the conference, the Court read the deadlines identified in the State's Motion for Scheduling Order. (See Case Management Conference Hearing Transcript pp. 5-7). Attorney Mirialakis objected to the proposed deadline for filing her client's successive motion and requested that the deadline be moved to August 4th instead of August 3rd. This objection is noted on the Order on Case Management Conference. Ultimately, the Court denied defense counsel's request and ordered any successive postconviction motions to be filed no later than Sunday, August 3, 2025 at 11:00 a.m.

Fair notice of all deadlines was provided, the deadlines reasonably conveyed the required information about those deadlines, and Defendant was given an opportunity to respond and did so respond by objecting.

Lastly, Defendant argues that the abbreviated schedule obstructed his ability to properly develop and present evidence of his mental health and intellectual functioning. This claim is meritless. The Florida Supreme Court has repeatedly held that the expedited warrant litigation schedule does not violate a defendant's due process rights. *See Zakrzewski v. State*, SC2025-1009, 2025 WL 2047404 at *5 (Fla.

July 22, 2025), *cert denied*, No. 25-5194—— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2025 WL 2155601 (U.S. July 30, 2025); *see also Bell v. State*, No. SC2025-0891, 2025 WL 1874574, at *17 (Fla. July 8), *cert. denied*, No. 25-5083, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2025 WL 1942498 (U.S. July 15, 2025); *Tanzi v. State*, 407 So. 3d 385, 390-91 (Fla. 2025),*cert. denied*, —— U.S. ——, 145 S. Ct. 1914, 225 L.Ed.2d 654 (2025).

Moreover, Defendant's reliance on *Roberts v. State*, 840 So. 2d 962, 970 (Fla. 2002), *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994); *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999)), and *Provenzano v. State*, 751 So. 2d 37, 40 (Fla. 1999) are misplaced as each is factually distinguishable. In *Roberts* there was a witness that was identified with known important information; an affidavit that claimed that the State pressured Haines into her trial testimony and promised to help her with pending charges in exchange for her testimony. *See* 840 So. 2d at 971. Similarly, in *Johnson* there were affidavits of four persons that were obtained. *See* 647 So. 2d at 111. In *Provenzano*, counsel for Provenzano submitted an affidavit from Dr. Fleming as to his unavailability for a scheduled evidentiary hearing. *See* 750 So. 2d. at 599.

In the instant case, no such affidavits or proffered testimony addressing any evidence relevant to Defendant's alleged mental health and/or intellectual functioning were provided, and no amended motion was ever filed.[8]

Accordingly, the Court finds that Defendant is not entitled to relief on Claim Two, and that the claim is **SUMMARILY DENIED.**

REQUEST FOR STAY OF PROCEEDINGS

Defendant seeks a stay of execution. In his Motion and at the Huff hearing held on August 5, 2025, Defendant failed to outline specific facts that would necessitate a stay.

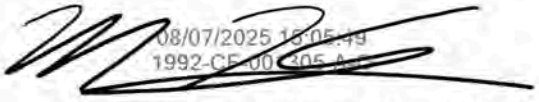
"[A] stay of execution on a successive motion for postconviction relief is warranted only where there are substantial grounds upon which relief might be granted." *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla.), *cert. denied sub nom*. *Dillbeck v. Fla.*, 143 S. Ct. 856, 215 L. Ed. 2d 93 (2023) (quoting *Davis v. State*, 142 So. 3d 867, 873-74 (Fla. 2014) (citing *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998)). Because the Court has summarily denied each of Defendant's claims, there is no basis for a stay of these proceedings. As such, Defendant's request is **denied**.

[8] At the *Huff* hearing held on August 5, 2025, counsel for Defense argued that Art. I, § 16(c) of the Florida Constitution required an evidentiary hearing because the victims have a right to be heard. *See* Huff Hearing Transcript filed August 7, 2025 pp. 25-26 and p. 30-31. This was not included or raised in Defendant's Motion; so, the Court will not address it. *See* rule 3.851(e)(2) and (h)(5).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. "Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death," filed on August 3, 2025, **DENIED**.
2. Defendant's request for a Stay of Execution is **DENIED**.

DONE AND ORDERED on this 7TH day of August 2025 in Orlando, Orange County, Florida.



MICHAEL KRAYNICK
Circuit Judge
Ninth Judicial Circuit

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX C

Windom v. State, SC80,830, 656 So. 2d 432 (Fla. April 27, 1995)

Supreme Court of Florida

ORIGINAL

No. 80,830

CURTIS WINDOM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

[April 27, 1995]

PER CURIAM.

Curtis Windom appeals his convictions of three counts of first-degree murder and one count of attempted first-degree murder, and his sentences of death for each of the murder convictions with a consecutive term of twenty-two years' imprisonment for the attempted first-degree murder charge. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

In her sentencing order, the trial judge set out the details of this tragic event, which occurred in the City of Winter Garden in west Orange County, Florida on February 7, 1992. Before the event was over, defendant, armed with a gun, had murdered three people and seriously wounded a fourth. The pertinent facts taken from the trial record and stated in the trial judge's order are as follows:

> Jack Luckett testified that he had talked with the Defendant the morning of the shootings. In their discussion, the Defendant asked Jack if Johnnie Lee had won money at the dog track and Jack said, "Yes, $114." The Defendant said Johnnie Lee owed him $2,000. When the Defendant learned Johnnie had won money at the track, he said to Jack, "My nigger, you're gonna read about me." He further said that he was going to kill Johnnie Lee. That same day at 11:51 a.m. (per the sales slip and the sales clerk) the Defendant purchased a .38 caliber revolver and a box of fifty .38 caliber shells from Abner Yonce at Walmart in Ocoee. Mr. Yonce remembered the sale and recalled there was nothing unusual about the Defendant and that he was "calm as could be."
>
> Within minutes of that purchase, the Defendant pulled up in his car next to where Johnnie Lee was standing talking to two females and Jack Luckett on the sidewalk. All three testified that the Defendant's car was close and the Defendant leaned across the passenger side of the vehicle and shot Johnnie Lee twice in the back. (Johnnie Lee's back was towards the Defendant and there was no evidence he even saw the Defendant.) . . . After the victim fell to the ground, the Defendant got out of the car, stood over the victim and shot him twice more from the front at very close range . . . . The Defendant then ran towards the apartment where Valerie Davis, his girlfriend and mother of one of his children, lived. (The Defendant lived with Valerie Davis off and on.) She was on the phone, and her friend Cassandra Hall had just arrived at the apartment and was present when the Defendant shot Valerie once in the left chest area within

> seconds of arriving in the apartment and with no provocation. . . .
>
> From the apartment, the Defendant went outside, encountered Kenneth Williams on the street, and shot him in the chest at very close range. Mr. Williams saw the gun but did not think the Defendant would shoot him. Right before he was shot, he turned slightly and deflected the bullet somewhat. Although he was in the hospital for about 30 days and the wound was serious, he did not die. He said the Defendant did not look normal--his eyes were "bugged out like he had clicked." . . .
>
> From there, the Defendant ended up behind Brown's Bar where three guys, including the Defendant's brother, were trying to take the weapon from him. By that time, Valerie's mother had learned that her daughter had been shot, so she had left work in her car and was driving down the street. The Defendant saw her stop at the stop sign, went over to the car where he said something to her and then fired at her, hitting her twice, and killing her.

Windom was charged and convicted of three counts of first-degree murder and one count of attempted first-degree murder. The jury unanimously recommended death, and the judge followed the recommendation, sentencing Windom to death for all three counts of first-degree murder. Windom was also sentenced to a consecutive term of twenty-two years' imprisonment for the attempted first-degree murder charge.

In support of each death sentence, the trial judge found two aggravating factors: (1) the defendant had been previously convicted of another capital offense or felony involving the use of threat or violence to the person;[1] and (2) the crime was cold,

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[1] § 921.141(5)(b), Fla. Stat. (1991).

calculated, and premeditated.[2] The court also found a number of statutory and nonstatutory mitigating factors[3] but determined they were not of sufficient weight to preclude the death penalty.

Windom appeals his convictions and sentences, raising thirteen claims. We find that only the following nine merit discussion:[4] (1) the prosecutor's discriminatory use of peremptory challenges denied Windom his right to an impartial jury; (2) the trial court erred in allowing the State to introduce irrelevant, prejudicial evidence of a nonstatutory aggravating factor; (3) the trial court erred in failing to conduct an adequate hearing concerning the competency of trial counsel; (4) the trial court erred in allowing the introduction of prejudicial photographs of the victims; (5) the trial court

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[2] § 921.141(5)(i), Fla. Stat. (1991).

[3] In mitigation the court found the following statutory factors: (1) Windom had no significant history of prior criminal activity (§ 921.141(6)(a), Fla. Stat. (1991)); (2) the capital felony was committed while Windom was under the influence of extreme mental or emotional disturbance (§ 921.141(6)(b), Fla. Stat. (1991)); and (3) Windom acted under extreme duress or under the substantial domination of another person (§ 921.141(6)(e), Fla. Stat. (1991)). The following nonstatutory mitigators were considered: (1) Windom assisted people in the community; (2) Windom was a good father; (3) Windom saved his sister from drowning; and (4) Windom saved another individual from being shot during a dispute over $20.

[4] The remaining four claims are as follows: (1) the trial court erred in its instruction on reasonable doubt; (2) the trial court erred in denying defendant's requested special jury instructions at the penalty phase; (3) the trial court improperly rejected mitigating evidence by giving such little, if any, weight; and (4) section 921.141, Florida Statutes is unconstitutional.

erred in denying defendant's attempt to call a witness; (6) the trial court erred in its instruction on cold, calculated, and premeditated; (7) the trial court erred in finding that the crimes were committed in a cold, calculated, and premeditated manner; (8) the trial court erred in finding the prior violent felony aggravating factor; and (9) the death penalty is disproportionate in this case.

First, we address Windom's contention that the State's discriminatory use of peremptory challenges to exclude minorities from the jury denied him an impartial jury. Defendant argues that he is entitled to a new trial based upon Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Alen, 616 So. 2d 452 (Fla. 1993); State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988); and State v. Neil, 457 So. 2d 481 (Fla. 1984). We conclude that the record does not support defendant's assertion.

For the defendant's trial, the jury was selected after some individual and some collective voir dire. The parties examined juror questionnaires prior to questioning in order to determine which of the venire persons were to be questioned individually. During the questioning, the trial court granted and denied cause challenges from both sides. At the end of voir dire, each side exercised peremptory challenges.

The State exercised the first peremptory challenge which defense counsel questioned as a "race issue." The trial court,

in accord with Neil, followed the procedure required pursuant to State v. Johans, 613 So. 2d 1319 (Fla. 1993), and inquired as to the reason for the challenge. The State expressed a race-neutral reason to which the defendant did not object.

Defendant next exercised a peremptory challenge on a venireman who was African-American. The State questioned this challenge on the basis of Neil, noting that all the murder victims were African-American. Defense counsel then stated a race-neutral reason for the challenge to which the State had no further objection.

The State then exercised a challenge in respect to a prospective juror which initiated a debate between both sides' counsel and the court concerning the ethnicity of the particular juror. When the prosecutor announced his intent to challenge this person the following dialogue ensued:

> [DEFENSE COUNSEL]: I'd like to question that choice, too, assuming she is black.
>
> [PROSECUTOR]: I don't believe she is.
>
> THE COURT: It says Hispanic.
>
> [PROSECUTOR]: I think she is actually Indian.

With this uncertainty, the court and counsel agreed to inquire of the person further:

> THE COURT: Hi. What is your nationality?
>
> [JUROR]: East Indian.
>
> THE COURT: Okay. That's all we need to know. Thank you. She is definitely not a recognized

minority. She's East Indian.

[DEFENSE COUNSEL]: Everybody in Trinidad is black.

[PROSECUTOR]: Not everybody because she is, obviously, not.

[DEFENSE COUNSEL]: She may be Indian.

THE COURT: All right. She's Indian but I'm going to let him strike her if that's what he wants to do.

The defendant relies on this peremptory strike in alleging that it was reversible error for the trial court not to require the State to have and express a race-neutral reason for the challenge.

Consistent with what we have held in Alen and Johans, and from our review of the voir dire record, we conclude, in respect to this prospective juror, that the defendant's expressed objection did not make it necessary for the trial court to require the State to have and express a race-neutral reason for the challenge. We reiterate once again what we stated specifically in Neil: there is an initial presumption that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection which demonstrates on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. We followed this statement in Johans by requiring a Neil inquiry when an objection

is raised that a peremptory challenge is being used in a racially discriminatory manner. However, a timely objection and a demonstration on the record that the challenged person is a member of a distinct racial group have consistently been held to be necessary.

In Johans, the objection was timely and the factual demonstrations made. Johans, 613 So. 2d at 1321. Moreover, we pointed out in Alen that because the question of one's membership in a cognizable class is a matter of fact, the trial judge is granted discretion in making this determination when an objection is made to a peremptory challenge. Alen, 616 So. 2d at 456. Here, defense counsel did not make a timely objection in which it was demonstrated on the record that this venire person was a member of a cognizable class. We do not find that the trial court abused its discretion by sustaining the subject challenge, and thus reject defendant's first point on appeal.

Defendant claims that the trial court failed to conduct an adequate hearing regarding the competency of trial counsel. Defendant did not ask the trial court to discharge his counsel because of incompetence, and the record is unclear as to whether defendant in fact was dissatisfied with his counsel. We do not believe that any further inquiry by the trial court was necessary pursuant to Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988).

A third issue raised by defendant is that the trial court

denied his attempt to call a Sergeant Fusco as a witness. First, Sergeant Fusco was never called as a witness by the defense. When defendant announced an intent to call this witness the witness was not present, no attempt was made to locate him, and no testimony was proffered. There was no demonstration on the record that Fusco's testimony would be either relevant to any issue in the case or of probative value to the case. The trial court's ruling in respect to Sergeant Fusco was well within its discretion. Banda v. State, 536 So. 2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S. Ct. 1548, 103 L. Ed. 2d 852 (1989). In respect to the issue raised by the defendant pertaining to the admissibility of photographs of the victims, we likewise find that the trial court was within its discretion in admitting the photographs. Mordenti v. State, 630 So. 2d 1080 (Fla.) (where photographs of victim were admissible in murder prosecution in conjunction with medical examiner's testimony to show location of lethal wounds and how they were inflicted), cert. denied, 114 S. Ct. 2726, 129 L. Ed. 2d 849 (1994).

Although Windom does not challenge the sufficiency of the evidence in this case, our review of the record indicates that Windom's convictions are supported by competent, substantial evidence. We therefore affirm the convictions and move on to consider Windom's penalty phase claims.

Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police

officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived, and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

Defendant asserts, first, that this evidence was in essence nonstatutory aggravation, relying upon Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). Defendant does concede that subsequent to Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), this Court has held victim impact testimony to be admissible as long as it comes within the parameters of the Payne decision. See Stein v. State, 632 So. 2d 1361 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992). Both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7),

Florida Statutes (1993), instruct that in our state, victim impact evidence is to be heard in considering capital felony sentences. We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators which we approved in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case.

Rather, we believe that section 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla. Stat. (1993). Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the

community's members by the victim's death.

However, defendant did not object to this testimony specifically, and thus his objection on appeal is procedurally barred. Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Brown v. State, 596 So. 2d 1026 (Fla. 1992); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). Even if defendant's general objection to the police officer's testimony, made prior to her testimony before the jury, was found to reach this specific testimony, error in admitting it is harmless in this record. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this triple murder, the defendant made a knowing waiver of presenting any mitigating evidence to the advisory jury. The defendant did this in order to avoid any evidence being presented to the jury concerning the murders being related to the defendant trafficking in cocaine. The trial judge elicited a direct confirmation from the defendant that he understood that he was waiving his right to present mitigating evidence and that the reason was so that the "drug thing" would not be heard by the jury. Thus, with the aggravating circumstances which were before the jury and with no mitigating evidence presented to the jury, the complained-about testimony was harmless beyond a reasonable doubt.

Defendant's second attack on the victim impact evidence concerns the application of 921.141(7) to defendant's crime. He claims that such application was a violation of the ex post facto clauses of the United States and Florida Constitutions since the

murders were on February 7, 1992, and subsection seven of section 921.141 did not go into effect until July 1, 1992. We do not agree. To the contrary, we approve the Fourth District Court of Appeal's decision on this point in State v. Maxwell, 647 So. 2d 871 (Fla. 4th DCA 1994), in which the district court found our decision in Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S. Ct. 3219, 106 L. Ed. 2d 569 (1989), to be instructive. Section 921.141(7) only relates to the admission of evidence and is thus procedural. Id. at 215. Therefore, application of section 921.141(7) in the present case does not violate the prohibition against ex post facto laws.

Defendant on appeal argues that the jury instruction in respect to the aggravating factor of cold, calculated, and premeditated was deficient because it was vague. In the trial court, however, defendant did not object to the instruction on the ground that it was vague but on the ground that it was redundant. Defense counsel did state, "I would object to that on those grounds; constitutional grounds, basically."

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), we held that a general objection to a similar instruction was not sufficient and that a claim that the instruction is unconstitutionally vague is procedurally barred unless a specific objection on that ground was made at trial. Therefore, defendant's objection is procedurally barred.

Next, defendant contends that the trial court erred by

finding in its sentencing order that the crimes were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We affirm the trial court's sentencing order in respect to this aggravator as to the murder of Johnnie Lee. There was clearly sufficient evidence upon which to conclude, as the trial court did, that this murder was a product of a cool and calm reflection sufficient to be the heightened premeditation which is the element of this aggravator.

We cannot agree that the record is sufficient to conclude that the murders of Valerie Davis and Mary Lubin were similarly a product of cool and calm reflection. There is no evidence that when the defendant bought the gun and the bullets, he planned to shoot anyone other than Johnnie Lee. On the other hand, there is substantial evidence that after the murder of Johnnie Lee, the defendant had an abnormal appearance with his eyes bugged out. Defendant's physical and facial appearance was different than it had ever been as reported by witnesses who saw him during the occurrence and who had known him all their lives (in excess of 20 years). There was also evidence that the murder of Valerie Davis was a product of rage brought about by a combination of drug dealing, for which the two had been arrested a short time before the murders, and the separation between defendant and Davis after living together and having a child. There was evidence that the murder of Mary Lubin was a product of rage stemming from Mary Lubin not wanting the defendant to any longer live with her

daughter. For the reasons stated in Richardson v. State, 604 So. 2d 1107 (Fla. 1992) (where the element of calm and cool reflection was not present, the factor of cold, calculated premeditation was not permissible), we cannot affirm the cold, calculated, and premeditated aggravator in respect to the murders of Valerie Davis and Mary Lubin.

Defendant contends that the other aggravator found by the court, specifically that each capital felony served as a previous conviction for the others and each of the first-degree murder charges and the attempted first-degree murder charge was considered a felony involving the use of violence to the person for the purposes of aggravation of the other first-degree murder charges, should not be upheld on the basis that such aggravator, by its wording, requires previous convictions. We have previously rejected defendant's contentions and held that contemporaneous convictions prior to sentencing can qualify as previous convictions in multiple conviction situations. Zeigler v. State, 580 So. 2d 127 (Fla. 1991), cert. denied, 502 U.S. 946, 112 S. Ct. 390, 116 L. Ed. 2d 340 (1991); Wasko v. State, 505 So. 2d 1314 (Fla. 1987). We therefore reject defendant's contention and reiterate our prior holdings on this point.

The trial judge followed the requirements of our opinion in Campbell v. State, 571 So. 2d 415 (Fla. 1990), in which we specifically mandated that the sentencing court must expressly evaluate in its written order each mitigating circumstance

proposed by the defendant. The relative weight given each mitigating factor is within the judgment of the sentencing court. Id. at 420. It is the function of the sentencing court to then weigh the aggravating and mitigating circumstances against each other. While there was no mitigating evidence presented during the penalty phase, the trial court weighed the aggravators against the mitigating factors proven during the guilt phase and presented at the sentencing hearing, and decided to follow the twelve-to-zero advice of the advisory jury that death should be imposed for the murders of Johnnie Lee, Valerie Davis, and Mary Lubin.

Finally, defendant argues that the death penalty is not proportional in this instance. We disagree. The imposition of the death penalty is not disproportionate to other cases decided by this Court. See Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991).

We have carefully reviewed defendant's remaining claims and find them to be without merit.

We affirm the sentences of the trial court. While we cannot affirm the cold, calculated, and premeditated finding in respect to the murders of Valerie Davis and Mary Lubin, we conclude that the existence of the one aggravator of the conviction of two other capital offenses and one violent felony against a person in each instance is sufficient to outweigh the little weight given

to the mitigating factors set forth in the sentencing order. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993). It is well settled that it is not the number of aggravating and mitigating circumstances that is critical but the weight to be given each of them. Herring v. State, 446 So. 2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984), receded from on other grounds, Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988).

It is so ordered.

OVERTON, SHAW, HARDING and WELLS, JJ., concur.
KOGAN, J., concurs in part and dissents in part with an opinion, in which ANSTEAD, J., concurs.
ANSTEAD, J., concurs in part and dissents in part with an opinion, in which GRIMES, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

KOGAN, J., concurring in part, dissenting in part.

I generally agree with Justice Anstead's observations. I write separately because the use of victim-impact evidence can pose a constitutional problem if misused. While I agree with Justice Anstead that any error was slight and harmless here, I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victims' lives. All human life deserves dignity and respect, including in the penalty phase of a capital trial. This includes victims of high stature in the community as well as those in humbler circumstances. It would not be especially difficult for one or the other side in a criminal case to prey on the prejudices some jurors may harbor about particular classes of victims. Subtle appeals to racism, caste-based notions, or similar concerns clearly would undermine the fundamental objective of a criminal trial--achieving justice. If the effect is either to aggravate the case for one type of victim but mitigate it for another in similar circumstances, then the Constitution is violated. The victim's high stature in the community is not a legal aggravating factor, just as a victim's minority status does not lawfully mitigate the crime. In this sense, all human life stands at equal stature before the law. Courts must be vigilant to see that this equality is not undermined.

ANSTEAD, J., concurs.

ANSTEAD, J., concurring in part, dissenting in part.

I concur in the majority's affirmance of all of the convictions, and in the affirmance of the death penalty imposed as to the murder of Johnnie Lee. In that case we have upheld the finding by the trial court of the existence of substantial aggravation, including a finding that the murder was committed in a cold, calculated, and premeditated manner. However, having eliminated that aggravation as a valid factor in the other murders, I do not agree that we can conclude beyond a reasonable doubt that the death penalty is the only possible sentence, especially in view of the substantial mitigation noted in the majority opinion. On this issue, this case is similar to Crump v. State, 622 So. 2d 963 (Fla. 1993), where we also struck the cold, calculated, and premeditated aggravation, leaving only the aggravation of a prior murder, and remanded for resentencing.

I also concur in the majority's holding that any error in the admission of victim impact evidence was harmless in this case. I do so for two main reasons. First, this evidence was slight, consisting of only five pages of transcript. Second, defense counsel's approach to the jury at sentencing was tantamount to a concession of the existence and validity of the State's case for aggravation. The only substantial appeal to the jury by defense counsel was directed to the efficacy of the death penalty, rather than the merits of its invocation in this particular case.

GRIMES, C.J., concurs.

An Appeal from the Circuit Court in and for Orange County,

Dorothy J. Russell, Judge - Case No. CR92-1305

James B. Gibson, Public Defender and Christopher S. Quarles, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Margene A. Roper, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX D

Windom v. State, SC01-2706 & SC02-2142, 886 So. 2d 915 (Fla. May 6, 2004)

Supreme Court of Florida

Nos. SC01-2706 & SC02-2142

CURTIS WINDOM,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CURTIS WINDOM,
Petitioner,

vs.

JAMES V. CROSBY, JR., etc.,
Respondent.

[May 6, 2004]

PER CURIAM.

Curtis Windom appeals an order of the circuit court denying a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Windom also petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the circuit

court's order denying Windom's rule 3.850 motion, and we deny Windom's petition for a writ of habeas corpus.

BACKGROUND

The facts of this case, as set forth in this Court's direct appeal opinion, are as follows:

> In her sentencing order, the trial judge set out the details of this tragic event, which occurred in the City of Winter Garden in west Orange County, Florida on February 7, 1992. Before the event was over, [Windom], armed with a gun, had murdered three people and seriously wounded a fourth. The pertinent facts taken from the trial record and stated in the trial judge's order are as follows:
>
> > Jack Luckett testified that he had talked with [Windom] the morning of the shootings. In their discussion, [Windom] asked Jack if Johnnie Lee had won money at the dog track and Jack said, "Yes, $114." [Windom] said Johnnie Lee owed him $2,000. When [Windom] learned Johnnie had won money at the track, he said to Jack, "My nigger, you're gonna to read about me." He further said that he was going to kill Johnnie Lee. That same day at 11:51 a.m. (per the sales slip and the sales clerk) [Windom] purchased a .38 caliber revolver and a box of fifty .38 caliber shells from Abner Yonce at Walmart in Ocoee. Mr. Yonce remembered the sale and recalled there was nothing unusual about [Windom] and that he was "calm as could be."
> >
> > Within minutes of that purchase, [Windom] pulled up in his car next to where Johnnie Lee was standing talking to two females and Jack Luckett on the sidewalk. All three testified that [Windom's] car was close and [Windom] leaned across the passenger side of the vehicle and shot Johnnie Lee twice in the back. (Johnnie Lee's

> back was towards [Windom] and there was no evidence that he saw [Windom].) . . . After the victim fell to the ground, [Windom] got out of the car, stood over the victim and shot him twice more from the front at very close range. . . . [Windom] then ran towards the apartment where Valerie Davis, his girlfriend and mother of one of his children, lived. ([Windom] lived with Valerie Davis off and on.) She was on the phone, and her friend Cassandra Hall had just arrived at the apartment and was present when [Windom] shot Valerie once in the left chest area within seconds of arriving in the apartment and with no provocation. . . .
>
> From the apartment, [Windom] went outside, encountered Kenneth Williams on the street, and shot him in the chest at very close range. Mr. Williams saw the gun but did not think [Windom] would shoot him. Right before he was shot, he turned slightly and deflected the bullet somewhat. Although he was in the hospital for about 30 days and the wound was serious, he did not die. He said [Windom] did not look normal—his eyes were "bugged out like he had clicked." . . .
>
> From there, [Windom] ended up behind Brown's Bar where three guys, including [Windom's] brother, were trying to take the weapon from him. By that time, Valerie's mother had learned that her daughter had been shot, so she had left work in her car and was driving down the street. [Windom] saw her stop at the stop sign, went over to the car where he said something to her and then fired at her, hitting her twice, and killing her.

Windom v. State, 656 So. 2d 432, 435 (Fla. 1995).

The jury convicted Windom of three counts of first-degree murder and one count of attempted first-degree murder, and unanimously recommended that Windom be sentenced to death. The trial court followed the jury's

recommendation, finding two aggravating factors,[1] three statutory mitigating factors,[2] and four nonstatutory mitigating factors.[3] State v. Windom, No. CR 92-1305 (Fla. 9th Cir. Ct. order filed Nov. 10, 1992). Windom appealed his convictions and sentences to this Court, raising thirteen issues.[4] This Court

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1. The aggravating factors were: (1) Windom had been previously convicted of another offense or felony involving the use of threat or violence to the person; and (2) the crime was cold, calculated, and premeditated (CCP).

2. The statutory mitigating factors were: (1) Windom had no significant history of prior criminal activity (some weight); (2) the capital felony was committed while Windom was under the influence of extreme mental or emotional disturbance (very slight weight); and (3) Windom acted under extreme duress or under substantial domination of another person (little weight).

3. The nonstatutory mitigating factors were: (1)Windom assisted people in the community (little weight); (2) Windom was a good father (little weight); (3) Windom saved his sister from drowning (very little weight); and (4) Windom saved another individual from being shot during a dispute over twenty dollars (very little weight).

4. On direct appeal, Windom asserted: (1) the prosecutor's discriminatory use of peremptory challenges denied Windom his right to an impartial jury; (2) the trial court erred in allowing the State to introduce irrelevant, prejudicial evidence of a nonstatutory aggravating factor; (3) the trial court erred in failing to conduct an adequate hearing concerning the competency of his trial counsel; (4) the trial court erred in allowing the introduction of prejudicial photographs of the victims; (5) the trial court erred in denying defendant's attempt to call a witness; (6) the trial court erred in its instruction on the CCP aggravating factor; (7) the trial court erred in finding that the crimes were committed in a CCP manner; (8) the trial court erred in finding the prior violent felony aggravating factor; (9) the death penalty was disproportionate in this case; (10) the trial court erred in its instruction on reasonable doubt; (11) the trial court erred in denying Windom's requested special jury instructions at the penalty phase; (12) the trial court improperly rejected mitigating evidence by giving such little, if any, weight; and (13) section

affirmed Windom's convictions and sentences. Although this Court found that the evidence was not sufficient to support the cold, calculated, and premeditated (CCP) aggravator with regard to the murders of Valerie Davis and Mary Lubin, it affirmed Windom's death sentences with respect to these two murders, finding that the existence of the one aggravating factor was sufficient to outweigh the little weight given to the mitigating factors found by the trial court. This Court denied Windom's remaining arguments. Windom thereafter filed a petition for writ of certiorari in the United States Supreme Court, which was denied. Windom v. Florida, 516 U.S. 1012 (1995).

Windom thereafter filed an amended motion for postconviction relief, raising twenty-one claims.[5] The postconviction court held a Huff[6] hearing and

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922.141, Florida Statutes (1991), was unconstitutional.

5. The claims raised by Windom were: (1) Florida's lack of standards for counsel in capital cases led to the postconviction court's tolerance of an incompetent attorney; (2) his trial counsel was ineffective for failing to adequately investigate and present evidence at the guilt phase of his trial; (3) his trial counsel was ineffective for failing to adequately investigate and present evidence at the penalty phase of the trial; (4) Windom was denied his rights under Ake v. Oklahoma, 470 U.S. 68 (1985), at the guilt and penalty phases because his trial counsel failed to obtain an adequate mental health evaluation and to provide necessary background information to the mental health expert; (5) his trial counsel affirmatively harmed his case by making damaging statements to the court and conceding the State's case; (6) Windom was denied a fair trial due to impermissible considerations and misstatements of law made by the prosecutor, and Windom's trial counsel was ineffective for failing to object; (7) Windom's

summarily denied several of Windom's claims. The court granted an evidentiary hearing on claims 2, 3, 4, 5, 6, 8, and 10. Following the evidentiary hearing, the postconviction court entered a final order denying all relief. State v. Windom, No. CR92-1305 (Fla. 9th Cir. Ct. order filed Nov. 1, 2001) (postconviction order). Windom now appeals the postconviction court's denial of his rule 3.850 motion.

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constitutional rights were violated by the failure of the trial court, prosecutor, and defense counsel to understand and correctly apply the Sixth Amendment requirements of Batson v. Kentucky, 476 U.S. 79 (1986); (8) Windom's convictions are unreliable because of the cumulative effect of his trial counsel's ineffectiveness, improper prosecutorial argument, and improper rulings of the trial court; (9) Windom is innocent of first-degree murder and innocent of the death penalty; (10) Windom was absent from critical stages of the trial; (11) Windom's death sentences are unconstitutional because the trial court improperly shifted the burden of proof to Windom during the penalty phase, and his trial counsel was ineffective for failing to object; (12) Windom's death sentences are premised upon fundamental error because the trial court's instruction as to the CCP aggravating factor was vague; (13) Windom's death sentences are unconstitutional because they are predicated on an automatic aggravating circumstance, and his trial counsel was ineffective for failing to object; (14) the rules prohibiting Windom's lawyers from interviewing jurors to determine the presence of error are unconstitutional; (15) Florida's capital sentencing statute is unconstitutional; (16) execution by lethal injection is a form of cruel and unusual punishment; (17) Windom was denied a proper direct appeal because portions of the record were omitted and counsel failed to raise this argument; (18) the Florida Supreme Court erred in failing to conduct a harmless error analysis after striking an aggravating factor; (19) Windom was denied access to his own trial files; (20) Windom was denied his right to adequate representation because of the lack of funding available to fully investigate and prepare his case; and (21) Windom was denied his constitutional right to public records.

6. Huff v. State, 622 So. 2d 982 (Fla. 1993).

He also petitions this Court for a writ of habeas corpus.

RULE 3.850 APPEAL

Windom's rule 3.850 appeal asserts that (1) his trial counsel was ineffective for failing to present an insanity defense during the guilt phase of the trial; (2) his trial counsel was ineffective for failing to investigate and present mitigating evidence during the penalty phase of the trial; (3) his trial counsel affirmatively harmed his case by making damaging statements to the court and conceding the State's case; and (4) the postconviction court erred in summarily denying his remaining postconviction claims.

Issue 1: Ineffective Assistance of Guilt-Phase Counsel

To prove a claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown of the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

This Court reviews a postconviction court's Strickland analysis as follows:

> [T]he performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but . . . the trial court's factual findings are to be given deference. See Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Porter v. State, 788 So. 2d 917, 923 (Fla. 2001).

Windom argues that his trial counsel, Ed Leinster, was ineffective for failing to investigate and present evidence during the guilt phase of the trial that Windom was insane at the time of the shootings and that he shot the last victim, Mary Lubin, in self-defense. After holding an evidentiary hearing on this issue, the postconviction court denied this claim, providing over twenty pages of analysis in its order.

A. Failure to Investigate Mental Health Experts

Windom's first claim of ineffective assistance of guilt-phase counsel contends that his trial counsel was ineffective for failing to present expert testimony to support an insanity defense. At the evidentiary hearing, Windom presented the testimony of Dr. Jonathan Pincus, Dr. Craig Beaver, and Dr. Robert Kirkland. The State presented the testimony of Dr. Sidney Merin. Dr. Pincus, a

neurologist, concluded that Windom was psychotic at the time of the shootings and that Windom suffers from brain damage to the frontal lobe of his brain. Dr. Beaver, a licensed psychologist and clinical neurologist, testified that Windom experienced an acute psychotic episode when he shot the victims. Although he could not reach a specific diagnosis, Dr. Beaver stated that Windom's psychosis was probably caused by bipolar disorder in a psychotic manic phase, depressive disorder with a mood congruent psychotic feature, or schizophrenia paranoid type.

Dr. Robert Kirkland, a psychiatrist, testified that he evaluated Windom at the time of the trial to determine whether Windom was competent to stand trial and his mental condition at the time of the crimes. He stated that he was not given sufficient information to determine whether Windom was sane at the time he committed the crimes, but there was no indication that Windom had brain damage. Finally, Dr. Sidney Merin, a clinical and neuropsychologist, testified that Windom was not insane at the time of the shootings and that Windom did not have brain damage.

In its detailed order denying relief, the postconviction court discussed and weighed the expert testimony presented. With regard to the deficient performance prong of the Strickland analysis, the postconviction court stated:

> A strategic or tactical decision is not a valid basis for an

ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. See White v. State, 729 So. 2d 909 at 912 [Fla. 1999] (citing Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)). Mr. Leinster clearly faced a dilemma in this matter. He could attempt to introduce mental health testimony suggesting that Mr. Windom was not of sound mind and that he was unable to formulate criminal intent. However, knowing of Mr. Windom's past, Mr. Leinster knew that the introduction of this evidence would open the door to Mr. Windom's activities as a successful drug dealer in his community and what prosecutor Jeff Ashton described as "operation cookie monster." Mr. Ashton testified that "operation cookie monster" was a large scale drug investigation that was going on in Mr. Windom's community at the time of the murders. In this investigation, Mr. Ashton learned about possible motives for two of the murders, and the fact that the victims were cooperating with authorities in this drug investigation. Additionally, Mr. Ashton testified that he made this clear to Mr. Leinster, along with the fact that he was anxious to put this information into evidence should Mr. Leinster put on mitigation.

This evidence would have been extremely detrimental to Mr. Windom's interests. The jury would have certainly thought less of Mr. Windom as a person if they knew he was a drug dealer. Additionally, the evidence that Mr. Windom was a drug dealer would have provided a more sensible motive for his shootings. Mr. Ashton's memorandum, prepared ten days after Mr. Windom's arrest, indicated that some or all of Mr. Windom's victims were police informants. In both deposition and mitigation hearing testimony, witness Mary Jackson testified that Mr. Windom was concerned that Valerie Davis was about to inform on him. The record on appeal supports Mr. Ashton's testimony that Mr. Windom was involved in large scale drug sales. Mr. Windom and his girlfriends were in possession of large amounts of money at any given time. He and Valerie Davis bought a car for $8,500 in cash. His sister Gloria was able to come up with $15,000 in cash to engage Mr. Leinster. Further, Mr. Windom had $10,000 in cash in a safe located at the apartment of another girlfriend, Julie Harp. This safe was apparently stolen by someone before the murders. These are fairly staggering

> amounts of money considering the uncontradicted fact that Mr. Windom had never been gainfully employed. The state argues that such large amounts of money obviously could be the source of serious disagreements between Mr. Windom and his fellow drug dealers.
>
> If the jury had heard this evidence, Mr. Leinster would have been unable to present the shootings as senseless acts committed by a person in an altered mental state. The record is clear that Mr. Leinster attempted to buttress his argument that defendant was in an altered mental state at the time of the murders by Dr. Kirkland's testimony. Dr. Kirkland suggested the possibility that Mr. Windom might have been suffering from a fugue state at the time of the murders, but it did not include or rely on Mr. Windom's background history. Mr. Leinster attempted to limit Dr. Kirkland's testimony so as to allow him to attack the intent element of the crimes without opening the door to evidence of Mr. Windom's bad character, and potential motives for committing the murders. The record shows that this was Mr. Leinster's strategy throughout the guilt phase trial. Mr. Leinster emphasized in both the opening statement and in closing argument that the shootings were "a senseless act of violence" and that the jury should determine from the acts themselves, the inherent bizarreness of the acts.

Postconviction order at 11-13 (record citations omitted).

Windom contends that the postconviction court erred in finding Leinster's strategy reasonable because Leinster did not have a tactical reason for not presenting evidence that Windom was insane. Windom claims that Leinster simply did not investigate this evidence and did not know it was available. We reject this argument. The postconviction court's findings of fact are supported by competent, substantial evidence. These findings of fact indicate that Leinster's

strategy to prevent the State from introducing damaging evidence of Windom's motive for shooting the victims was reasonable. Trial counsel is not deficient for failing to present additional testimony that would have informed the jury of negative information about the defendant. Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997).

With regard to the prejudice prong of the Strickland analysis, the postconviction court stated:

> Mr. Windom has not met his burden to show a reasonable probability that the strategy he now claims Mr. Leinster should have employed regarding guilt phase mental health experts would have produced a different outcome at the guilt phase trial. It is clear that Mr. Leinster acted as he did to prevent the introduction of evidence about Mr. Windom's criminal drug activities, along with his potential motive to kill certain victims for being informers. Had he introduced such evidence, prosecutor Ashton would have had the platform he needed to build a different model of Mr. Windom. The notions suggested now by the collateral counsel, that Mr. Windom was a simple, humble man who was mentally incompetent and unaware of the nature and consequences of his actions, would have been countered with the state's evidence showing that Mr. Windom was a remorseless killer bent on revenge for those who informed on him for illicit drug activities.

Postconviction order at 14. Moreover, the court further stated that while the testimony of the experts presented by Windom were authoritative, their opinions were based on facts not entirely supported by the evidence. Postconviction order at 15. The court concluded that the evidence surrounding the shootings presented

at trial directly negated the experts' opinions at the evidentiary hearing. The court reasoned:

> Dr. Pincus testified that Mr. Windom did not have any plan to do what he did, and that he simply took a gun, shot his best friend, shot at somebody in the street that he happened to casually meet, killed his girlfriend, and then shot her mother, all in the mistaken belief that they were after him, or that there was some kind of conspiracy. He further testified that the killings were a series of chance encounters. However, the evidentiary hearing evidence and trial record suggests that the first three persons were shot over drug money and in revenge for Mr. Windom's belief that these people were police informers.
>
> At least an hour before he shot Johnnie Lee, Mr. Windom told Jack Luckett that he was angry with Mr. Lee because Mr. Lee owed him money for another reason. Mr. Windom told Mr. Luckett that he was going to kill Mr. Lee, and that Mr. Luckett would read about him in the paper. A few minutes later Mr. Windom went to a local Wal Mart, and cooly bought the ammunition used to shoot Mr. Lee and the other victims. Within minutes of the ammunition purchase, Mr. Windom drove up to Mr. Lee, who was standing with his back to Mr. Windom, talking to friends. Mr. Windom stopped, aimed out of his car window, and shot Mr. Lee twice in the back. He then got out and shot the prone, motionless victim again and walked off. Witness [Pamela] Fikes, who was talking to Mr. Lee just before his murder recalled that just before Mr. Windom fired the first shot, he said, "my mother-fucking money, nigger?" This comment precisely matched the reason Mr. Windom had given earlier that day for planing to kill Mr. Lee.
>
> . . . .
>
> With respect to the shooting of Mary Lubin, Dr. Pincus expressed a view of the facts which conflicted with the testimony given at the hearing by defense witness Eddie James Windom. Dr. Pincus proposed that defendant shot Mary Lubin as part of a series of chance encounters. However, Eddie James Windom stated that when he saw Ms. Lubin drive up, he jumped into the bushes in such a hurry that he did not even see whether Ms. Lubin had a gun. Eddie James

Windom logically concluded that either Mary Lubin or Mr. Windom was going to start shooting, and he fled for his own safety. When directly asked about this, Dr. Pincus conceded that Mr. Windom's apprehension that Mary Lubin might have been armed was founded in logic and was not a paranoid delusion.

. . . .

While I found both Dr. Pincus and Dr. Beaver to be bright, articulate, and authoritative witnesses, their conclusions were drawn from facts not supported by the evidence. . . . While there is a wealth of evidence to suggest that Mr. Windom suffered from low IQ, depression, and a bipolar disorder, there is virtually no evidence to suggest that Mr. Windom had any trouble functioning prior to the date of these murders. Virtually no medical records existed to verify either of the head injuries now claimed by Mr. Windom. Mr. Windom's family says that after his vehicle injury at the age of 16, he became more paranoid and failed to interact much with anybody. This appears to be part of what the doctors based their conclusions upon. Yet in the evidentiary hearing, Mr. Windom's family testified that prior to this event, he was well-groomed, affable, and took pride in his appearance. One story seems to contradict the other.

. . . .

. . . I agree with the state that the doctors did not have a grasp of the violent social setting within which Mr. Windom lived at about the time the shooting occurred. Neither doctor knew of the fact that Mr. Windom's drug partner, Kenny Thames, was tortured and murdered within months of Mr. Windom's murders. The doctors never conversed with Mr. Leinster about Mr. Windom's lifestyle prior to these murders. With additional information, such as Mr. Ashton's testimony about "operation cookie monster," they might have believed that Mr. Windom's "edgy" demeanor was more likely a realistic assessment of the setting in which he lived, rather than a product of irrational paranoia or delusion.

Both doctors seemed to have ignored Mr. Windom's own statements on the day of the murders, which would seem to belie Dr. Pincus' conclusions that these murders were merely a series of chance encounters with Mr. Windom acting out of momentary impulse. As previously noted, Mr. Windom suggested to one witness to be sure

> and read the papers the next day because his name would be in it. He was correct. The totality of the circumstances surrounding these events suggest to me in no uncertain terms that Mr. Windom's actions were knowing and premeditated. . . . Perhaps with additional medical testimony, well prepared, Mr. Leinster could have done more to obfuscate the facts by presenting the mitigation of brain damage. Given the other facts which could have and would have surfaced, however, I doubt it.
>
> The testimony of Dr. Sydney Merin seemed more logically based and consistent with the facts. He did not find that Mr. Windom was suffering from a mental impairment which would have supported an insanity defense for his acts on the day of the shootings. He did feel that Mr. Windom had a personality disorder and that some of his low sub-test results were the product of the fact that he suffered from a learning disorder . . . .
>
> There is no reasonable probability that the guilt phase would have resulted in a different outcome if experts such as Dr. Pincus and Dr. Beaver had been prepared and called by Mr. Leinster. Their conclusions seem contrived, and were based upon speculation about Mr. Windom's state of mind on the day of the shooting. Their conclusions ignored much of the trial record evidence of Mr. Windom's statements on the day of the shootings which indicated that he knew what he was doing and had motives for his shooting the victims.

Postconviction order at 15-20 (reference citations omitted).

As the foregoing demonstrates, the postconviction court extensively weighed the evidence presented at the evidentiary hearing and concluded that the experts' testimony that Windom was insane at the time of the shootings was contradicted by the circumstances surrounding the shooting and the evidence presented both at the evidentiary hearing and at trial. These findings are supported

by competent, substantial evidence and show that even had Leinster presented evidence of mental deficiency, there is no reasonable probability that the outcome of the trial would have been different. Such evidence would have been undermined by the State's damaging and directly contradictory evidence that Windom was more than capable of functioning as a normal person. See Spencer v. State, 842 So. 2d 52, 62 (Fla. 2003) (finding that trial counsel was not ineffective for making a strategic decision not to present evidence relating to defendant's guilt because such evidence would have opened the door to damaging and prejudicial evidence). We therefore affirm the postconviction court's denial of Windom's claim of ineffectiveness with regard to this issue.

B. Failure to Investigate Fact Witnesses

Windom contends that his trial counsel was ineffective for failing to present fact witnesses during the guilt phase of the trial that would have shown a marked change in Windom's behavior in the weeks preceding the shootings, which would have supported his assertion that he was insane at the time of the crime. At the evidentiary hearing, Windom presented the testimony of five family members, a childhood friend, and a neighbor. These witnesses testified generally as to Windom's poor childhood and upbringing, and his demeanor in the weeks prior to the shootings. They testified that Windom, who had always been well groomed

and neatly dressed, had become disheveled. He began walking around in public with no shirt or shoes, or wearing the same clothes for days at a time. They further stated that Windom had not bathed and that he had an odor. Windom's mother and sister testified that Windom had suffered two brain injuries as a child.

The postconviction court denied this claim, finding that the lay witness testimony would likely not have changed the outcome of the trial because Windom's trial counsel did in fact present evidence of Windom's demeanor at the time of the crime during the guilt phase. Trial counsel presented testimony that Windom looked wild on the day of the shootings and completely out of character. The jury heard testimony that Windom had been upset in the days leading up to the shootings and that Windom had never been a violent person.

With regard to evidence of brain damage from head injuries Windom suffered as a child, the postconviction court found:

> The central theme to Mr. Windom's attack in this matter centers around Mr. Leinster's lack of investigation into Mr. Windom's mental health, and whether he suffered brain damage from two events described during the hearing. The most notable event described was Mr. Windom's "rollover" traffic accident wherein Mr. Windom alleges he lost consciousness and was hospitalized for a couple of days. Indeed, the defense's medical experts (Pincus and Beaver) draw a great deal of their conclusions based upon what they felt was one undeniable aspect of [Windom's] past: that he suffered permanent brain damage from the traffic accident Mr. Windom described. While Mr. Barch was somewhat unsure of the doctor's

> name, he did remember speaking to him before the trial, and posing the question to him regarding whether Mr. Windom had sustained any brain damage as a result of his traffic accident. The doctor (who Mr. Barch seemed to think was named Khouzoum) apparently stated unequivocally to Mr. Barch that Mr. Windom suffered no lasting damage from this accident.
>
> Additionally, Mr. Barch specifically asked Mr. Windom's mother and sister about any incident in his life which may have caused brain damage. They provided no information to Mr. Barch about any other head injuries including birth trauma.

Postconviction order at 5-6 (record citations omitted).

The postconviction court's findings of fact are supported by competent, substantial evidence. We find no legal error in the postconviction court's denial of relief on this issue.

C. Trial Counsel's Substance Abuse

Windom argues that trial counsel Ed Leinster was ineffective at trial because he was intoxicated. At the evidentiary hearing, Windom presented the testimony of three lay witnesses who stated that they smelled alcohol on Leinster's breath during the trial. The State, in turn, presented the testimony of Judge Dorothy Russell, the trial judge who presided over Windom's trial; Jeff Ashton, who prosecuted Windom's case; Janna Brennan, who assisted Ashton at trial; and Kurt Barch, who assisted Leinster at trial. These witnesses testified that they had extremely close contact with Leinster throughout the trial and did not smell

alcohol on his breath or believe that he was intoxicated. Each of these witnesses further testified that Leinster vigorously and consistently defended Windom's case and exhibited no signs of alcohol abuse.

The postconviction court weighed the testimony of these witnesses and concluded that there was no record evidence to support Windom's allegation that Leinster was intoxicated during the trial. Postconviction order at 21.

> During the hearing, some evidence was presented by Mr. Windom's relatives that Mr. Leinster smelled of alcohol during the trial. However, Mr. Barch, the presiding judge, and both prosecutors testified that they saw absolutely no evidence of alcohol use or abuse. Further, they each alleged that, based upon Mr. Leinster's reputation (he had several alcohol and drug related arrests), they were looking for any signs of impairment. On this issue, I accept their testimony over that of Mr. Windom's relatives.

Postconviction order at 8.

This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence. Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). The postconviction court's findings with regard to this issue are supported by competent, substantial evidence. Based on these factual findings, we find no legal error in the postconviction court's denial of this claim.

D. Denial of Right to Competent Medical Assistance

Windom argues that Leinster's failure to investigate and present evidence regarding Windom's mental state denied him his right to competent assistance by a mental health expert. The postconviction court denied this claim, explaining that it harbored grave reservations about whether Windom ever suffered any sort of meaningful head injury prior to the murders.

> Even though [Dr. Pincus and Dr. Beaver] had an opportunity to review a far more extensive background record than did Dr. Kirkland, I cannot accept their opinions. Specifically, Mr. Windom's conduct on the day of the murders refutes rather than supports their opinions that his acts were the product of brain damage or delusion.

Postconviction order at 31. Dr. Kirkland further testified that Windom showed no significant signs of brain damage.

The trial court's findings of fact and weight given to the evidence is supported by competent, substantial evidence. Based on these findings, Windom has failed to demonstrate that his defense was "devastated by the absence of a psychiatric examination and testimony [and that] with such assistance, the defendant might have [had] a reasonable chance of success." Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

Issue 2: Ineffective Assistance of Penalty-Phase Counsel

Windom argues that his trial counsel was ineffective for failing to

investigate and present mitigating evidence during the penalty phase of the trial. This argument is based upon the same evidence Windom presented at the evidentiary hearing in support of his claim of insanity discussed above. Specifically, Windom argues that the mental health experts' testimony at the evidentiary hearing regarding Windom's mental health should have been presented at the penalty phase. Windom also presented the testimony of his family members, who discussed Windom's poor upbringing, his childhood bladder control problem, and two head injuries he sustained as a child.

In its detailed order, the postconviction court denied this claim for reasons similar to its denial of Windom's guilt-phase ineffectiveness claim. The court found that counsel was not deficient in failing to present this evidence before the jury because the evidence that would have been presented in rebuttal greatly outweighed any value of the mental health expert and lay witness testimony. We find that the postconviction court's findings of fact are supported by competent, substantial evidence. Prosecutor Jeff Ashton testified at the evidentiary hearing regarding the rebuttal evidence that he would have introduced had defense counsel presented its intended mitigation evidence. This rebuttal evidence would have directly countered any assertion of brain damage by showing that Windom was capable of running a successful drug enterprise and that his everyday functioning

was not impaired. The record supports the postconviction court's conclusion that Leinster's strategy to prevent the jury from hearing such damaging evidence was reasonable. See Gaskin v. State, 822 So. 2d 1243, 1248 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony."); Medina v. State, 573 So. 2d 293, 298 (Fla. 1990) (holding that trial counsel was not ineffective for failing to investigate and present evidence that would have presented the defendant in an unfavorable light).

Windom further contends that his trial counsel was ineffective for causing Windom to involuntarily waive his right to present mitigating evidence before the jury. Prior to the penalty phase, trial counsel Kurt Barch announced the witnesses that the defense intended to present in mitigation. Upon the conclusion of the State's presentation at the penalty phase, however, Kurt Barch and Ed Leinster did not believe that Windom should present his mitigation witnesses before the jury because to do so would open the door to damaging evidence of Windom's involvement in drugs. Windom therefore waived his right to present mitigating evidence before the jury, and his trial counsel instead presented such evidence before the trial judge alone.

Windom now contends that his waiver of the presentation of mitigating evidence before the jury was involuntary because he was not aware of what could have been presented. The postconviction court found that Windom failed to prove this claim at the evidentiary hearing. We agree. Before a defendant may waive his right to present mitigating evidence, counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision. State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002). The record in this case reveals that Windom's waiver was knowing, intelligent, and voluntary. At the time Windom waived his right to present mitigating evidence before the jury, the trial court, trial counsel Leinster, and prosecutor Ashton questioned Windom with respect to the voluntariness of this decision. The record indicates that Windom was indeed aware of the evidence that could have been presented before the jury and voluntarily waived his right to present it. We therefore affirm the postconviction court's denial of this claim.

Issue 3: Trial Counsel's Comments to the Jury During Closing Argument of the Penalty Phase

Windom argues that trial counsel Ed Leinster conceded the State's case at the penalty phase of trial by pointing out that he was unsuccessful at the guilt

phase, that Windom does not deserve pity for what he did, and that Windom's actions were cold. The postconviction court found that Windom was not prejudiced by Leinster's remarks.

> Mr. Windom had already been convicted of first-degree premeditated murder, and counsel was attempting to restore credibility with the jury in order to make an argument for saving his client's life. There was no harm in conceding the validity of the jury's verdict during the penalty phase, and it was reasonable trial strategy for Mr. Leinster to be realistic about the facts of the case in order to restore a measure of credibility to the defense as it moved into the penalty phase.
>
> . . . [T]he apparent concession that Mr. Windom deserved the death penalty was not a concession at all. Mr. Leinster's comments conceding that Mr. Windom deserved the death penalty and conceding the existence of the CCP aggravator are taken entirely out of context. Mr. Windom had already been convicted of first-degree premeditated murder, and Mr. Leinster was faced with a daunting task. As he stated matter-of-factly, "My job is to try to save a man's life, end of story." It would have strained his credibility, thereby contributing to the difficulty of his task, to argue the verdict was unjust to the same jury which would be imposing a sentence. It was a reasonable trial strategy for Mr. Leinster to be realistic about the facts of the case in order to restore a measure of credibility to the defense. The record also demonstrates that he argued vigorously <u>against</u> the death penalty in general and argued that executing Mr. Windom would just be another act of murder.

Postconviction order at 33.

The postconviction court's conclusions with regard to Leinster's comments at the penalty phase are supported by the record. At the evidentiary hearing, Leinster and Barch made clear that their strategy was to convey that Windom was

not acting like himself that day and that he did not deserve the death penalty. Leinster stated that he did not want to lose credibility with the jury by speaking in terms of innocence since the jury had just found Windom guilty. We find no legal error in the postconviction court's decision and therefore affirm the court's denial of this claim.

Issue 4: The Trial Court's Summary Denial of Windom's Claims

Windom argues that the postconviction court erred in summarily denying the following claims: (1) Windom is innocent of first-degree murder and innocent of the death penalty because the jury was given unconstitutionally vague instructions with regard to the CCP aggravating factor and because Windom's death sentences are disproportionate; (2) Windom's death sentences are unconstitutional because the penalty-phase jury instructions improperly shifted the burden of proof to Windom; (3) Windom's death sentences are premised on fundamental error because the jury was not given adequate guidance with regard to the CCP aggravating factor; (4) Windom's death sentences are predicated upon an automatic aggravating circumstance because Windom's jury was instructed that it could find the prior violent felony aggravator based on his contemporaneous convictions; and (5) Windom's constitutional rights were violated by the rules prohibiting Windom's lawyers from interviewing jurors to determine if

constitutional error existed with respect to their verdict.

We find no error in the postconviction court's summary denial of these claims. All of these claims are procedurally barred because they either were raised and rejected on direct appeal or could have been raised on direct appeal. See Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (stating that issues that could have been but were not raised on direct appeal or issues that were raised and rejected on direct appeal are not cognizable through collateral attack).

PETITION FOR WRIT OF HABEAS CORPUS

In his petition for writ of habeas corpus, Windom asserts: (1) Windom's death sentence is unconstitutional based on Ring v. Arizona, 536 U.S. 584 (2002); (2) Windom's death sentence is rendered invalid because necessary elements of the offense were not charged in the indictment; and (3) appellate counsel was ineffective for failing to assert fundamental error on direct appeal with regard to improper statements made by the prosecutor at trial.

Habeas Issues 1 and 2: Validity of Windom's Death Sentence

Windom asserts that his death sentence is unconstitutional in light of the United States Supreme Court's decisions in Ring v. Arizona and Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court considered similar claims and denied postconviction relief in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied,

537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002); and Porter v. Crosby, 840 So. 2d 981 (Fla. 2003). Moreover, the jury in this case recommended that Windom be sentenced to death by a unanimous vote, and one of the aggravating circumstances found by the trial judge was that Windom had been convicted of a prior violent felony. We deny relief in this case.

Habeas Issue 3: Appellate Counsel's Ineffectiveness

Windom argues that appellate counsel was ineffective for failing to assert fundamental error with respect to instances during which the jury was permitted to hear improper prosecutorial arguments. When evaluating an ineffective assistance of appellate counsel claim raised in a writ of habeas corpus, this Court must determine

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986). The defendant must allege a specific, serious omission or overt act upon which the claim of ineffective assistance can be based. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000).

Fundamental error is error that "reaches down into the validity of the trial itself to the extent that the verdict of guilty could not have been obtained without the alleged error." Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). Windom's appellate counsel was not ineffective for failing to assert fundamental error with regard to the prosecutor's statements during trial. The record does not support Windom's contentions that the prosecutor's comments were improper. Appellate counsel is not ineffective for failing to raise nonmeritorious claims. Moore v. State, 820 So. 2d 199, 209 (Fla. 2002). We therefore deny this claim.

CONCLUSION

Accordingly, we affirm the postconviction court's denial of Windom's rule 3.850 motion and deny Windom's petition for writ of habeas corpus.

It is so ordered.

WELLS, PARIENTE, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.
WELLS, J., concurs with an opinion, in which CANTERO and BELL, JJ., concur.
PARIENTE, J., concurs specially with an opinion.
CANTERO, J., concurs specially with an opinion, in which WELLS and BELL, JJ., concur.
ANSTEAD, C.J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., concurring.

I fully concur in the majority opinion.

I do join in Justice Cantero's excellent opinion on the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), and on Teague v. Lane, 489 U.S. 288 (1989). Justice Cantero has done great service with this work. I point out that my joining in Justice Cantero's opinion is not a variance from the views that I have expressed in Bottoson, King, and Duest v. State, 855 So. 2d 33 (Fla. 2003), cert. denied, No. 03-8841 (U.S. Apr. 19, 2004), that Florida courts are to continue to follow the United States Supreme Court's precedent expressly approving the constitutionality of Florida's capital sentencing statute. In initial proceedings, trial courts are to continue to apply the capital sentencing statute, which has now been in effect for twenty-nine years. I join Justice Cantero's opinion because I agree with his opinion that retroactivity is a threshold issue and recognizing that Ring is not retroactive will serve to reduce the presentation and argument of other issues related to Ring in postconviction proceedings in this Court and in the trial courts.[7]

I further agree with Justice Cantero that the adoption of the Teague analysis for retroactivity in postconviction collateral proceedings would serve the interests of the proper administration of justice in Florida.

CANTERO and BELL, JJ., concur.

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7. However, again I stress that it is for the United States Supreme Court to determine Ring's retroactivity, and to this date, the Court has not held Ring to apply retroactively.

PARIENTE, J., specially concurring.

I concur in the majority opinion, and write separately in response to Justice Cantero's specially concurring opinion to explain why I would not address the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), in this case. First, I believe that deciding the issue now is unnecessary in light of our consistent rejection of Ring claims. Second, deciding retroactivity is premature because we have not determined whether Ring has any applicability to Florida's capital sentencing scheme, and a proper retroactivity analysis would need to take into account the substance of any new principle of law. Third, and related to the second point, this Court has never before decided retroactivity before deciding the applicable principle of law, and there is no sound reason for taking this step in this case when there is another basis for denial. Fourth, deciding retroactivity will not save us judicial labor because the issue of retroactivity is also pending before the United States Supreme Court. Lastly, since we can decide this case on other grounds without deciding retroactivity, this appears to me to be an inappropriate case in which to reconsider our precedent of Witt v. State, 387 So. 2d 922 (Fla. 1980). I address each of these points in turn.

First, because a majority of this Court has been able to dispose of postconviction Ring claims on other grounds, there is no need to decide

retroactivity now. In every postconviction appeal in which a Ring claim has been raised and discussed, this Court has determined on the merits that Ring did not warrant reversal of the defendant's sentence of death. This very case serves as an example of a consensus on Ring claims. Six of us have concurred in the majority opinion's rejection of Windom's Ring claim in reliance not only on the decisions in Bottoson and King but also on the prior violent felony aggravator and the unanimous death recommendation. See majority op. at 27.

Majority decisions of this Court in other cases reflect the same or a similar consensus. See Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (holding that "prior violent conviction [aggravator] alone" satisfies the mandate of Ring), cert. denied, 72 U.S.L.W. 3598 (U.S. Mar. 22, 2004); Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003) (relying in part on unanimous death recommendation and prior violent felony conviction to reject Ring claim), cert. denied, 72 U.S.L.W. 3598 (U.S. Mar. 22, 2004); Belcher v. State, 851 So. 2d 678, 685 (Fla.) (concluding that aggravators of prior violent felony conviction and murder in the course a felony supported by separate guilty verdict exempt sentence from holding in Ring), cert. denied, 124 S. Ct. 816 (2003)). Whether one concludes that Ring has no application in Florida and that an other-conviction aggravator is a

supplemental basis to deny relief under Ring,[8] or that Ring applies and that an other-conviction aggravator is the sole reason for denial of relief under Ring in the absence of a unanimous death recommendation,[9] the fact remains that this Court has reached a consensus that has resulted in the denial of Ring relief in the vast majority of cases.[10] Because a majority of the members of this Court appears to have reached a bottom-line determination that has resulted in the denial of Ring claims without reliance on the decisions in Bottoson and King, I conclude that at this point, we need not take the next step and determine whether Ring applies to

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8. See Davis v. State, 28 Fla. L. Weekly S835, S839 (Fla. Nov. 20, 2003) (Wells, J., concurring, joined by Cantero and Bell, JJ.) (adopting Justice Wells' concurring opinion in Duest v. State, 855 So.2d 33, 50 (Fla. 2003), in regard to the Ring claim).

9. See Duest, 855 So. 2d at 50 (Pariente, J., specially concurring).

10. As part of that consensus, I have dissented from the denial of Ring relief in only two cases, both direct appeals, in which the death sentence was not supported by either an "other-conviction" aggravator or a unanimous death recommendation. See Davis v. State, 859 So. 2d 465, 485-86 (Fla. 2003) (Pariente, J., dissenting); Butler v. State, 842 So. 2d 817, 835 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part). Of the current members of the Court, it appears that only Chief Justice Anstead is of the view that a prior conviction aggravator alone is insufficient to satisfy Ring. See Duest, 855 So. 2d at 54 (Anstead, C.J., concurring in part and dissenting in part) ("I do not believe the Sixth Amendment requirements announced in Ring and Apprendi allow a trial judge alone to find additional aggravating circumstances to be utilized in imposing a death penalty just because a prior violent felony aggravating circumstance need not be found by the jury.").

cases in which the sentence of death is final.

Second, we should not address retroactivity until and unless any part of Florida's death penalty scheme is declared unconstitutional. Deciding retroactivity before applicability would be putting the proverbial cart before the horse. This is because under Witt an essential consideration in determining retroactivity is whether the decision is of fundamental significance. See Witt, 387 So. 2d at 931.[11] We explained:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice.

Id. at 925. A determination that the standard jury instruction that informs the jury that its role is only advisory may be erroneous under Ring but might not trigger retroactivity. On the other hand, a determination that a defendant has been denied the Sixth Amendment right to a unanimous determination of an aggravating factor might trigger application of the Witt factors, especially in light of the repeated

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11. The federal test under Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion), requires a similar determination whether the decision "alter[s] our understanding of the bedrock procedural elements" necessary to the fundamental fairness of a proceeding. Sawyer v. Smith, 497 U.S. 227, 242 (1990) (majority opinion quoting Teague).

recognition that death is different. Thus, too many questions that would critically affect the retroactivity analysis remain unanswered at this point.

Third, this Court has never before decided retroactivity as a threshold matter before deciding the merits of the substantive issue. To do so now when it is unnecessary to reach the issue in this case would not be sound precedent because the nature of the new principle of law and the issue of whether that principle should be given retroactive effect are interrelated. In short, we cannot determine whether Ring constitutes a "development of fundamental significance," Witt, 387 So. 2d at 931, until we have ascertained its effect, if any, on Florida's capital sentencing scheme. In other situations in which we have addressed retroactivity of a new rule of law, we knew precisely what rule of law we were applying. See, e.g., State v. Stevens, 714 So. 2d 347, 348 (Fla. 1998) (holding that decision limiting sentence enhancement for attempted murder of a law enforcement officer to attempted first-degree murder was retroactive); State v. Woodley, 695 So. 2d 297, 298 (Fla. 1997) (determining that decision holding that attempted felony murder was a nonexistent crime was not retroactive). In contrast, because we cannot yet ascertain the effect of Ring in Florida, we cannot yet reliably determine retroactivity. If and when either this Court or the United States Supreme Court determines in a specific case that Ring has invalidated a Florida death sentence in

some respect, it is that decision's retroactivity that will be in issue, not Ring itself, which did not directly apply to the Florida death scheme.

Further, there is scant precedent in the decisions of other courts for determining the retroactivity of a new rule of law before deciding whether the rule would apply in a particular case. Justice Cantero cites to Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), cert. denied, No. 03-9251 (U.S. May 3, 2004), as a case in which the court decided that Ring was not retroactive without determining whether it applied to Florida's death scheme. See specially concurring op. at 46. However, the Eleventh Circuit in Turner decided nonretroactivity as an alternative to its holding that the claim was procedurally barred when presented initially in a federal habeas petition, arguably making the discussion of retroactivity dicta. See 339 F. 3d at 1282 ("Alternatively, if Turner is not procedurally barred from bringing a Ring claim, Ring does not apply retroactively to Turner's § 2254 petition in any event.").[12]

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12. Justice Cantero also cites to Zeigler v. Crosby, 345 F.3d 1300, 1312 n.12 (11th Cir. 2003), in which the Eleventh Circuit, citing to Turner, rejected a challenge to the prior violent or capital felony aggravator under Apprendi and Ring on grounds that those decisions did not apply retroactively on collateral review to convictions that are final. Because a majority of this Court considers that aggravator to be an exception to Ring and thus would not grant relief on this ground even in a direct appeal, the footnote in Zeigler is not persuasive authority for nonretroactivity.

Fourth, a decision by this Court that Ring is not retroactive will not promote greater judicial efficiency. The issue of the retroactivity of Ring is presently pending review in the United States Supreme Court. See Summerlin v. Stewart, 341 F.3d 1082 (9th Cir.), cert. granted in part sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003). While Summerlin is pending, defendants will continue to raise the issue at the state level to preserve it for eventual federal review.[13] In his specially concurring opinion, Justice Cantero suggests that deciding retroactivity now will clarify the Court's position to the growing number of appellants who have argued that this Court has already decided that Ring applies retroactively. The fact that some defendants have made this assertion incorrectly should not press us into deciding retroactivity prematurely.

Finally, and for some of the same reasons discussed above, I do not consider this the appropriate case in which to reconsider our decision in Witt. Although I am not averse to revisiting the proper retroactivity standard in applying precedent from the United States Supreme Court, I think it prudent to await a case in which

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13. I do not suggest that Summerlin will answer the question of Ring's retroactivity in Florida, as Justice Cantero asserts. See specially concurring op. at 48. But neither would a decision in Summerlin be irrelevant under the Witt test, in which the consideration of the purpose to be served by the new rule overlaps with the prong of Teague that assesses whether the new rule is substantive or procedural.

retroactive application would require either that a conviction be reversed or a sentence vacated. Because a majority of this Court would deny Ring relief to Windom even if we were to conclude that Ring applies retroactively, this is not the proper case to revisit Witt.

In conclusion, I believe that because of the uncertainties in the law created by Ring and yet to be resolved in this State, we would be acting unnecessarily, prematurely, and with no significant conservation of judicial resources in determining at this point whether Ring is retroactive.

CANTERO, J., specially concurring.

I concur in the majority's opinion. I write separately because the appellant, like many others before him (and many others that will follow), argues that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), renders unconstitutional Florida's death penalty sentencing scheme. I believe we should finally decide the question of whether, even if Ring did apply in Florida (members of this Court disagree on whether it does, and under what circumstances), it would apply retroactively. I would hold that it does not.

I also write separately because I believe that we should answer questions about the retroactivity of decisions of the United States Supreme Court based on

that Court's own standards, as articulated in Teague v. Lane, 489 U.S. 288 (1989), and not based on the now-outmoded test we announced in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980).

I discuss below (I) the history of Ring and our discussions about whether it applies in Florida; and (II) whether Ring should apply retroactively, by (A) explaining the different standards for determining retroactivity, and then analyzing the retroactivity of Ring under (B) the Teague standard or (C) the Witt standard.

I. Lord of the Ring: The Supreme Court's Decision and Our Cases Interpreting It

I begin by analyzing the decision in Ring and our subsequent interpretations. In June 2002, the United States Supreme Court decided Ring v. Arizona, in which it held that a jury, not a judge, must determine facts relevant to whether the death penalty is the appropriate punishment. This decision affected the death penalty law of many states. All states where, in capital cases, a judge was partially or totally responsible for the sentencing decision had to determine whether and under what circumstances Ring applied and whether it required anywhere from a slight change to a total revamping of the sentencing process. In this Court, no majority view has emerged. We have not considered, however, whether, if Ring did apply, it would apply retroactively. In my view, this is a

threshold issue that should precede any discussion of Ring's applicability.

A. The Fellowship of the Ring: The Supreme Court's Decisions in Apprendi and Ring

The Supreme Court's decision in Ring merely applied another case, Apprendi v. New Jersey, 530 U.S. 466 (2000), decided two years earlier, to death penalty cases. Therefore, to understand Ring and its holding, we must first analyze Apprendi. The defendant in Apprendi was charged with possession of a firearm for an unlawful purpose, which under New Jersey law carried a maximum sentence of ten years' imprisonment. 530 U.S. at 468-70. The trial court also found, however, that the defendant committed the offense while motivated by racial bias. The judge therefore imposed an enhanced eighteen-year sentence under the state's "hate crime" statute. The issue in the case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Id. at 469. The Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

Two years after Apprendi, the Supreme Court decided Ring, which applied Apprendi to death penalty cases. Although the Court in Apprendi had excluded death penalty cases from its holding, 530 U.S. at 497, in Ring it retreated from that position. The Court instead stated that under the Sixth Amendment right to a jury trial, "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

B. The Two Towers: Our Decisions in Bottoson and King Considering Whether Ring v. Arizona Applies in Florida

We first analyzed the effect of Ring on Florida law in two cases decided four months after Ring. See Bottoson v. Moore, 833 So. 2d 693, 695 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002). Neither case commanded a majority, however. In Bottoson, three justices joined the per curiam opinion denying relief. That opinion noted that the United States Supreme Court has repeatedly upheld Florida's capital sentencing statute.[14] It then cited that court's admonition that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in

14. See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242 (1976).

some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989), quoted in Bottoson, 833 So. 2d at 695.

Several justices wrote separate opinions in Bottoson explaining their concerns with Ring, some believing that Ring may apply to Florida's sentencing scheme in some circumstances. No majority view emerged, however.

In King, 831 So. 2d at 143, decided the same day as Bottoson, the Court was similarly splintered. This time, the per curiam opinion, based on essentially the same reasoning as the one in Bottoson, garnered only two votes.[15] Again, the justices filed separate opinions, but no majority view prevailed.

C. The Return of the King: Our Subsequent Jurisprudence and Failure to Forge a Majority View

Neither Bottoson nor King, therefore, finally settled the question of whether Ring applies in Florida. As if to emphasize that fact, virtually every postconviction appeal filed in this Court continues to raise the Ring issue. In the ensuing months, we have repeatedly denied relief under Ring in both direct

15. Justice Quince, who joined the plurality opinion in Bottoson, was recused in King.

appeals and postconviction cases, relying for the most part on citations to Bottoson and King.[16] Chief Justice Anstead has reminded us, however, that neither Bottoson nor King garnered a majority.[17]

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16. See, e.g., Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003); Jones v. State, 855 So. 2d 611, 619 (Fla. 2003); Conde v. State, 860 So. 2d 930, 959 (Fla. 2003), cert. denied, No. 03-8759 (U.S. Apr. 5, 2004); McCoy v. State, 853 So. 2d 396, 409 (Fla. 2003); Owen v. Crosby, 854 So. 2d 182, 193 (Fla. 2003); Fennie v. State, 855 So. 2d 597, 607 n.10 (Fla. 2003); Caballero v. State, 851 So. 2d 655, 663-64 (Fla. 2003); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003); Allen v. State, 854 So. 2d 1255, 1262 (Fla. 2003); Nelson v. State, 850 So. 2d 514, 533 (Fla. 2003); Wright v. State, 857 So. 2d 861 (Fla. 2003), cert. denied, No. 03-8419 (U.S. Mar. 29, 2004); Blackwelder v. State, 851 So. 2d 650, 653-54 (Fla. 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003), cert. denied, No. 03-8841 (U.S. Apr. 19, 2004); Cooper v. State, 856 So. 2d 969, 977 n.6 (Fla. 2003), cert. denied, 124 S.Ct. 1512 (2004); Pace v. State, 854 So. 2d 167, 181(Fla. 2003), cert. denied, 124 S.Ct. 1155 (2004); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003); Taylor v. State, 855 So. 2d 1, 13 n.11 (Fla. 2003), cert. denied, 124 S. Ct. 1605 (2004); Banks v. State, 842 So. 2d 788, 793 (Fla. 2003); Spencer v. State, 842 So. 2d 52, 72 (Fla. 2003); Grim v. State, 841 So. 2d 455, 465 (Fla.), cert. denied, 124 S.Ct. 230 (2003); Lucas v. State, 841 So. 2d 380, 389 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122, 1136 (Fla. 2002); Marquard v. State, 850 So. 2d 417, 431 n.12 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485, 492 (Fla. 2002), cert. denied, 124 S.Ct. 100 (2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla.), cert. denied, 124 S.Ct. 392 (2003); Doorbal v. State, 837 So. 2d 940, 963 (Fla.), cert. denied, 123 S. Ct. 2647 (2003); Anderson v. State, 841 So. 2d 390, 408-09 (Fla.), cert. denied, 124 S.Ct. 408 (2003); Conahan v. State, 844 So. 2d 629, 642 n.9 (Fla.), cert. denied, 124 S.Ct. 240 (2003).

17. See, e.g., Conde, 860 So. 2d at 959 n.18 (Anstead, C.J., concurring in part and dissenting in part); Caballero, 851 So. 2d at 664 n.7 (Anstead, C.J., concurring in part and dissenting in part); Fennie, 855 So. 2d at 611(Anstead, C.J., concurring in part and dissenting in part); Nelson, 850 So. 2d at 535 (Anstead, C.J., concurring in part and dissenting in part); Duest, 855 So. 2d at 57 n.25 (Anstead, C.J., concurring in part and dissenting in part).

Despite the ever-growing mountain of cases raising this issue, we have come no closer to forging a majority view about whether Ring applies in Florida than we did in Bottoson and King. See Allen v. State, 854 So. 2d 1255, 1263 (Fla. 2003) (noting that "we have not yet as a Court determined whether Ring has any applicability to Florida's death penalty scheme or if so, whether any aspect of that holding would be retroactive to cases already final") (Pariente, J., specially concurring). Some of us, however, have staked out clear positions. For example, Justice Wells, Justice Quince, and I rely on the United States Supreme Court's admonition not to assume that the Court has overruled its prior decisions unless it does so explicitly.[18] Chief Justice Anstead, on the other hand, believes that Ring applies in Florida and that it requires a jury to determine all aggravating factors.[19] And Justice Pariente believes that Ring applies but that its requirements are satisfied as long as the jury finds one aggravating factor—which in most cases will

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18. See Bottoson, 833 So. 2d at 695 (per curiam opinion); Duest, 855 So. 2d at 50 (Wells, J., concurring).

19. See, e.g., Caballero, 851 So. 2d at 664-65 (Anstead, C.J., concurring in part and dissenting in part); Duest, 855 So. 2d at 54-56 (Anstead, C.J., concurring in part and dissenting in part); Fennie, 855 So. 2d at 611 (Anstead, C.J., concurring in part and dissenting in part); Nelson, 850 So. 2d at 535 (Anstead, C.J., concurring in part and dissenting in part); Allen, 855 So. 2d at 1263 (concurring in part and dissenting in part); Bottoson, 833 So. 2d at 703 (concurring in result only).

be the prior violent felony aggravator—because that finding renders the defendant eligible for the death penalty.[20]

Curiously, although both Bottoson and King involved postconviction relief—that is, the convictions of both defendants had become final—and although the State contended that Ring did not apply retroactively, only Justice Shaw, in his separate opinion in Bottoson, has analyzed whether Ring applies retroactively. 833 So. 2d at 711-19. Even after Bottoson and King, none of our cases have addressed that issue; and neither Chief Justice Anstead nor Justice Pariente, who believe that Ring requires a Florida jury to determine either some (J. Pariente) or all (C.J. Anstead) aggravators, has analyzed whether such requirements apply

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20. See, e.g., Davis v. State, 859 So. 2d 465, 485-86 (Fla. 2003) (Pariente, J., dissenting); Duest, 855 So. 2d at 50-51 (Pariente, J., specially concurring); Caballero, 851 So. 2d at 664 (Pariente, J., specially concurring); Cooper, 856 So. 2d at 980-81 (Pariente, J., specially concurring); Nelson, 850 So. 2d at 534-35 (Pariente, J., specially concurring); Butler, 842 So. 2d at 835 (Pariente, J., concurring in part and dissenting in part); Anderson, 841 So. 2d at 409 (Pariente, J., concurring in conviction and concurring in result only on sentence); Cole v. State, 841 So. 2d 409, 431 (Fla. 2003) (Pariente, J., concurring in result only); Fotopoulos, 838 So. 2d at 1137 (Pariente, J., concurring in result only); Israel v. State, 837 So. 2d 381, 394 (Fla. 2002) (Pariente, J., concurring in result only), cert. denied, 123 S. Ct. 2582 (2003); Doorbal, 837 So. 2d at 964 (Pariente, J., concurring as to the conviction and concurring in result only as to the sentence); Lawrence v. State, 846 So. 2d 440, 456 (Fla.) (Pariente, J., concurring in result only), cert. denied, 124 S.Ct. 394 (2003); Porter v. Crosby, 840 So. 2d 981, 987 (Fla. 2003) (Pariente, J., concurring in result only); Bottoson, 833 So. 2d at 723 (Pariente, J., concurring in result only).

retroactively.

The United States Supreme Court has long considered retroactivity a threshold issue, which must be considered first in determining whether a defendant seeking postconviction relief is entitled to the benefits of a new decision. In Teague v. Lane, 489 U.S. 288 (1989), in which the Supreme Court changed the standard for determining whether a newly created criminal rule should be applied retroactively, the Court noted that retroactivity "is properly treated as a threshold question." Id. at 300 (plurality opinion).[21] Florida courts, too, consider the issue of retroactivity as a threshold matter. See State v. Will, 645 So. 2d 91,

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21. See also Horn v. Banks, 536 U.S. 266, 272 (2002) (holding that "a federal court considering a habeas petition must conduct a threshold Teague analysis when the issue is properly raised by the state"); Goeke v. Branch, 514 U.S. 115, 117 (1995) (noting that "[t]he application of Teague is a threshold question in a federal habeas case"); Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (holding that "[a] threshold question in every habeas case, therefore, is whether the court is obligated to apply the Teague rule to the defendant's claim" and that, "if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply Teague before considering the merits of the claim"); McCoy v. United States, 266 F.3d 1245, 1255 (11th Cir. 2001) (noting that "judicial economy counsels that we determine first whether the Apprendi rule even applies retroactively"), cert. denied, 536 U.S. 906 (2002); United States v. Walls, 215 F.Supp.2d 159, 162 n.3 (D. D.C. 2002) (noting that "Apprendi's retroactivity is a 'threshold question' that must be determined before reaching the merits of Walls's claim," and citing Caspari); People v. Kizer, 741 N.E.2d 1103, 1113 (Ill. App. Ct. 2000) (recognizing that "[r]etroactivity of a proposed rule is a threshold question that must be decided before the merits of a defendant's claim").

94 (Fla. 3d DCA 1994); Dupont v. State, 514 So. 2d 1159, 1160 (Fla. 2d DCA 1987).

Recently, the Eleventh Circuit considered retroactivity as a threshold issue. On appeal from denial of federal habeas relief, the court refused to consider whether Florida's capital sentencing scheme violates Ring because it determined the issue was procedurally barred and that under Teague, Ring did not apply retroactively anyway. See Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), cert. denied, No. 03-9251 (U.S. May 3, 2004).[22]

Considering retroactivity first makes sense because, if we address the merits of a claim in a postconviction case but then decide that a prior case does not apply retroactively, our discussion of the merits becomes mere dictum. Yet by discussing the merits, we risk creating confusion in the bench and bar because many—perhaps even we—will interpret our discussion as a holding or will

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22. Turner's retroactivity analysis is not dictum, as Justice Pariente suggests. Specially concurring op. at 35. The court made it clear that it would not reach the merits of Turner's Ring claim "because (1) Turner is procedurally barred from bringing a Ring claim for the first time in this § 2254 appeal and, alternatively, (2) Ring does not apply retroactively to Turner." 339 F.3d at 1280 (emphasis added). Then in Zeigler v. Crosby, 345 F.3d 1300, 1312 n.12 (11th Cir. 2003), the Eleventh Circuit rejected a Florida death-sentenced defendant's habeas challenge under Ring, holding that "neither Apprendi nor Ring applies retroactively on collateral review to convictions that became final before they were decided" and citing its decision in Turner.

assume that we have implicitly held the prior decision retroactive.[23] We should not announce broad statements of law, or even address such issues—as we did in Bottoson and King—unless and until we decide that such a discussion would apply to the case under review.

That this Court has not routinely addressed retroactivity first, as Justice Pariente contends, specially concurring op. at 34, provides no justification for continuing the practice. Before considering the merits of any claims raised in the appeals and petitions before it, this Court generally addresses a number of asserted procedural and jurisdictional bars. We determine whether the issue was preserved, whether a claimed error constitutes fundamental error that may be raised for the first time on appeal, or whether notice of appeal was timely filed. The retroactivity of new decisions presents a similar procedural issue.

Nor does it matter, as Justice Pariente suggests, specially concurring op. at 36, that the issue of Ring's retroactivity is currently pending in the United States

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23. This has happened before. In State v. Hudson, 698 So. 2d 831, 833 (Fla. 1997), we held that sentencing under the habitual offender statute extended to imposition of a mandatory minimum term. In Newell v. State, 714 So. 2d 434, 434-35 (Fla. 1998), we granted postconviction relief under Hudson because in a prior case we had "implicitly acknowledged" that a Hudson issue could be raised in a postconviction motion. Yet later we expressly held that Hudson did not apply retroactively. See New v. State, 807 So. 2d 52, 53 (Fla. 2001), cert. denied, 536 U.S. 942 (2002).

Supreme Court. Unless this Court adopts my view that we should apply a Teague analysis to retroactivity issues (see part II A below), that case will not determine Ring's retroactivity under this Court's Witt analysis (which is precisely why I believe we should adopt the same test the Supreme Court uses).

Because we continue to address the Ring issue on the merits, even in postconviction appeals, a growing number of petitioners have argued that we already have decided that Ring applies retroactively. Of course that is not the case. As I stated earlier, only one justice on this Court has even addressed the issue of retroactivity. But the fact that we have not addressed it, coupled with our repeated discussion of the merits of Ring claims, apparently has created this impression. Therefore, because many postconviction appeals we decide raise the Ring issue, because the issue of retroactivity should be a threshold question in a postconviction case determining the applicability of a new case, and because a majority of this Court thus far has been unable to agree on whether Ring applies to Florida's death penalty scheme, we should address whether Ring would apply retroactively. I now turn to that issue.

II. Is Ring Retroactive?

When the United States Supreme Court or this Court renders a decision that affects criminal defendants, the question becomes: who may benefit from the decision? We have held that such decisions apply in all cases to convictions that are not yet final—that is, convictions for which an appellate court mandate has not yet issued. Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) (holding that "any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final"), limited by Wuornos v. State, 644 So. 2d 1000, 1007 n.4 (Fla. 1994) (reading Smith "to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise").

Once a conviction is final, however, the state acquires an interest in the finality of the convictions. In Witt, we emphasized the importance of finality:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate

> review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

387 So. 2d at 925; see also United States v. Addonizio, 442 U.S. 178, 184 n.11 (1979) (noting that "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures"); State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995) (noting that "the fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases").

Therefore, the issue is whether such cases can be applied to defendants whose convictions already were final when the decision was rendered. Both federal and state courts, sometimes using different standards for determining retroactivity, have divided on whether Ring applies retroactively. The Seventh and Eleventh Circuits, as well as four state supreme courts, have held that Ring does not apply retroactively. See Turner, 339 F.3d at 1284; Lambert v. McBride, No. 03-1015, 2004 WL 736876 (7th Cir. Apr. 7, 2004); State v. Towery, 64 P.3d 828, 836 (Ariz.), cert. dismissed, 124 S.Ct. 44 (2003); Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003); State v. Lotter, 664 N.W.2d 892, 908 (Neb. 2003), petition for cert. filed, No. 03-7361 (U.S. Nov. 7, 2003); Colwell v. State, 59 P.3d 463, 471

(Nev. 2002), cert. denied, 124 S.Ct. 462 (2003). The Ninth Circuit, and one state supreme court, have held that it does. See Summerlin v. Stewart, 341 F.3d 1082, 1121 (9th Cir.) (en banc), cert. granted, 124 S.Ct. 833 (2003); State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003).

In part II A below, I analyze which standard for retroactivity should apply: the Witt standard we have been using, or the Teague standard the United States Supreme Court adopted nine years after Witt. In parts II B and II C, I conclude that under either standard, Ring does not apply retroactively.

A. Which Standard Should We Use for Determining Retroactivity?

The first question in determining retroactivity is which standard should apply. Although we have long used the standard announced in Witt, valid reasons exist for reconsidering it. Witt was based on then-existing United States Supreme Court jurisprudence on retroactivity. Since Witt, however, that jurisprudence has drastically changed.

1. Linkletter and Stovall

In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court first attempted to establish some standards for determining the retroactivity of new

rules. The issue was whether Mapp v. Ohio, 367 U.S. 643 (1961), which made the exclusionary rule for evidence applicable to the states, applied retroactively. 381 U.S. at 636-40. To answer the question, the Court adopted a three-part test that considered (a) the purpose to be served by the new rule, (b) the extent of reliance on the prior rule, and (c) the effect retroactive application of the new rule would have on the administration of justice. Using that standard, the Court held that Mapp would only apply to trials commencing after that case was decided. 381 U.S. at 636-40. Two years later, in Stovall v. Denno, 388 U.S. 293 (1967), the Court applied the Linkletter factors and held that the rule requiring exclusion of identification evidence tainted by exhibiting the accused for identifying witnesses before trial in the absence of counsel also did not apply retroactively. 388 U.S. at 300. Stovall also held that the new rule would not apply even to cases pending on direct review. Id. at 300-01.

2. Witt

In Witt, decided in 1980, we adopted the Linkletter standards. In that case, we held that a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental

significance." 387 So. 2d at 931. As to consideration (c), we stated that most major constitutional changes fall into one of two categories: (1) changes "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) those "which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter" (the Linkletter factors). 387 So. 2d at 929.[24]

In Witt, we were concerned that an expansive view of retroactivity would undermine the finality of judicial decisions. We noted that "[t]he reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice." 387 So. 2d at 925 (quoting Addonizio, 442 U.S. at 184). We also warned that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." Id. We "declare[d] our adherence to the limited role for post-conviction relief proceedings, even in death penalty cases." Id. at 927 (emphasis added). Although when we decided Witt the United States Supreme Court's jurisprudence of retroactivity was extremely complex, we distilled the three essential factors outlined above as stated in Stovall

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24. Although in Witt we referred to the three-fold test of Stovall and Linkletter, see 387 So. 2d at 929, it was Linkletter that established the test. Therefore, in the remainder of this opinion I refer to them as the Linkletter factors.

and Linkletter.

Essentially, then, in Witt we adopted a narrow standard for the retroactivity of decisions, limiting retroactivity to cases involving constitutional issues of fundamental significance.

3. Teague

Nine years after we adopted the Linkletter factors in Witt, the United States Supreme Court revamped its retroactivity analysis. The plurality recognized that "[t]he Linkletter retroactivity standard has not led to consistent results," 489 U.S. at 302, and that "commentators have 'had a veritable field day' with the Linkletter standard, with much of the discussion being 'more than mildly negative.'" Id. at 303. Much of the criticism concerned the Court's refusal to apply new rules even to cases still pending on direct review. See, e.g., Johnson v. New Jersey, 384 U.S. 719, 733-35 (1966) (holding that under the Linkletter standard Miranda v. Arizona, 384 U.S. 436 (1966), applied only to trials commencing after that decision had been announced). Therefore, by the time it decided Teague, the Court already had rejected that part of Linkletter in favor of applying new rules to cases pending on direct review. See Griffith v. Kentucky, 479 U.S. 314 (1987).

But, as the Supreme Court recognized in Teague, 489 U.S. at 305, the

problems with Linkletter were not limited to its refusal to apply new rules to cases pending on direct review. The Linkletter standard also led to disparity in the treatment of similarly situated defendants collaterally attacking their convictions.[25] Whether a defendant received the benefit of a particular decision often depended on the jurisdiction. Id. In addition, the Linkletter factors are, to an extent, vague and malleable. The extent to which courts and the public have relied on a prior rule is difficult to calculate, and the effect retroactive application of a new rule will have on the administration of justice can sometimes be unpredictable.

To resolve these criticisms of Linkletter, in Teague the Supreme Court adopted the approach of Justice Harlan, expressed in cases such as Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in judgments in part and dissenting in part), and Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). Under that approach, new rules should be applied to all cases pending on direct review and generally not be applied to cases on collateral review.[26] The Court therefore held that decisions announcing new constitutional

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25. The plurality attributed the disparity in results under the Linkletter standard to its own "failure to treat retroactivity as a threshold question and the Linkletter standard's inability to account for the nature and function of collateral review." 489 U.S. at 305.

26. Although Teague garnered only a plurality, a majority of the Court soon adopted the plurality's approach in Penry v. Lynaugh, 492 U.S. 302 (1989). In

rules would only be applied retroactively on collateral review under two circumstances: (1) decisions placing conduct beyond the power of the government to proscribe; and (2) decisions announcing a "watershed" rule of criminal procedure that is "implicit in the concept of ordered liberty." 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. at 693 (Harlan, J., concurring in judgments in part and dissenting in part). In other words, a rule "must implicate the fundamental fairness of the trial." Id. at 312.[27]

The new standard in Teague substantially narrowed the circumstances in which the Supreme Court's adoption of new criminal rules apply retroactively. After Teague, such rules are presumed not to.

4. What Happened to Witt after Teague?

Although under Teague state courts are free to adopt more expansive standards for retroactivity, 28 state supreme courts, as well as the District of Columbia, have adopted the Teague standard at least to cases stemming from a

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Penry, the Court also confirmed that the retroactivity standards adopted in Teague applied in the context of capital sentencing. Id. at 313-14.

27. The Court subsequently explained that the watershed exception requires two showings. First, "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction." Tyler v. Cain, 533 U.S. 656, 665 (2001) (emphasis added). Second, "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Id.

federal constitutional right, and the vast majority to all questions of retroactivity.[28] Only six state supreme courts have decided against adopting Teague's retroactivity standards to questions of federal constitutional law.[29] The remaining states have

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28. See, e.g., State v. Towery, 64 P.3d 828, 836 (Ariz. 2003); People v. Monge, 941 P.2d 1121, 1131 (Cal. 1997); Jurgevich v. Dist. Court, 907 P.2d 565, 567 (Colo. 1995); Duperry v. Solnit, 803 A.2d 287, 318 (Conn. 2002); Bailey v. State, 588 A.2d 1121, 1127 (Del. 1991); Davis v. Moore, 772 A.2d 204, 230 (D.C. 2001); Harris v. State, 543 S.E.2d 716, 717 (Ga. 2001); People v. Flowers, 561 N.E.2d 674, 682 (Ill. 1990); Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990); Brewer v. State, 444 N.W.2d 77, 81 (Iowa 1989); State v. Neer, 795 P.2d 362, 366-67 (Kan. 1990); Taylor v. Whitley, 606 So. 2d 1292, 1296 (La. 1992); Commonwealth v. Bray, 553 N.E.2d 538, 540 (Mass. 1990); Nixon v. State, 641 So. 2d 751, 753 (Miss. 1994); State v. Egelhoff, 900 P.2d 260, 267 (Mont. 1995), rev'd on other grounds, 518 U.S. 37 (1996); State v. Lotter, 664 N.W.2d 892, 904 (Neb. 2003); State v. Tallard, 816 A.2d 977, 979-81 (N.H. 2003); People v. Eastman, 648 N.E.2d 459, 465 (N.Y. 1995); State v. Zuniga, 444 S.E.2d 443, 444 (N.C. 1994); State v. Berry, 686 N.E.2d 1097, 1107 (Ohio 1997); Commonwealth v. Blystone, 725 A.2d 1197, 1202 (Pa. 1999); Pailin v. Vose, 603 A.2d 738, 741 (R.I. 1992); Gibson v. State, 586 S.E.2d 119 (S.C. 2003); Mueller v. Murray, 478 S.E.2d 542, 544 (Va. 1996); In re St. Pierre, 823 P.2d 492, 494 (Wash. 1992); State v. Blake, 478 S.E.2d 550, 562 (W.Va. 1996); State v. Lo, 665 N.W.2d 756, 772 (Wis. 2003); see also Colwell v. State, 59 P.3d 463, 471 (Nev. 2002) (adopting Teague for determining the retroactivity of Ring but reserving discretion in its application to state cases); State v. Purnell, 735 A.2d 513, 521 (N.J. 1999) (using a Teague analysis for determining the retroactivity of federal constitutional rights).

29. See, e.g., Ex parte Coker, 575 So. 2d 43, 52 (Ala. 1990); Pohutski v. City of Allen Park, 641 N.W.2d 219, 233 (Mich. 2002); State v. Whitfield, 107 S.W.3d 253, 267 (Mo. 2003); Cowell v. Leaply, 458 N.W.2d 514, 518 (S.D. 1990); Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 912 (Utah 1993); Farbotnik v. State, 850 P.2d 594, 602 (Wyo. 1993); see also Meadows v. State, 849 S.W.2d 748, 755 (Tenn. 1993) (declining to apply Teague to a new state constitutional rule).

not reassessed their standards for retroactivity in light of Teague.

Florida is one of those states that have not addressed Teague in the fourteen years since it was decided. As several district courts of appeal have noted,[30] even after Teague this Court has continued to apply the Linkletter factors. We have never consciously considered Teague, however. In fact, we have only mentioned the case once, in describing the Eleventh Circuit's denial of habeas relief to a defendant sentenced to death. See Glock v. Moore, 776 So. 2d 243, 248 (Fla. 2001).[31]

We should now adopt Teague in cases considering the retroactivity of decisions of the United States Supreme Court. We should not apply a different standard for determining the retroactivity of United States Supreme Court decisions than that Court itself applies. Consistency among the states—and between the state and federal courts—in applying decisions of the United States Supreme Court demands that, to the extent possible, standards for retroactivity be uniform. Otherwise, the retroactivity of a decision of the Supreme Court will depend on the

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30. See Figarola v. State, 841 So. 2d 576, 577 (Fla. 4th DCA 2003); House v. State, 696 So. 2d 515, 518 n.8 (Fla. 4th DCA 1997); Gantorius v. State, 693 So. 2d 1040, 1042 n.2 (Fla. 3d DCA 1997); Logan v. State, 666 So. 2d 260, 262 (Fla. 4th DCA 1996); State v. Kamins, 666 So. 2d 235, 236 n.1 (Fla. 4th DCA 1996).

31. Justice Shaw also mentioned Teague in his separate opinion in Bottoson. 833 So. 2d at 711.

jurisdiction in which the defendant was prosecuted. Although such a result is sometimes unavoidable, we should attempt as much as possible to limit such lack of uniformity. Also, even more than Linkletter, the Teague standards respect the finality of decisions, a concept we considered of utmost importance in Witt.

The Court's decision to alter its retroactivity standard in Teague was based on two overriding considerations: the interests of comity and finality. 489 U.S. at 308. Although the concept of comity is not relevant to our analysis, the concept of finality is. Regarding the importance of finality, the Court noted that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Id. at 309. See also Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation . . . ."), quoted in Teague, 489 U.S. at 309.

Of course, this compelling interest in finality applies just as strongly to state court determinations of retroactivity. In fact, it is the very foundation of our

analysis in Witt. As we acknowledged there, Florida Rule of Criminal Procedure 3.850 was originally patterned after the federal habeas corpus rule and was promulgated to provide "a method of reviewing a conviction based on a major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside." Witt, 387 So. 2d at 927. In Witt, we recognized that only "a sweeping change of law . . .[that] drastically alter[s] the substantive or procedural underpinnings of a final conviction and sentence," id. at 925, should be applied retroactively because applying any other standard would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Id. at 929-30. Clearly, our interests in finality and the narrow retroactive application of new legal principles coincides with the interests the Supreme Court articulated in Teague. As illustrated in section II A of this opinion, however, the Supreme Court has found that the Linkletter factors, the underpinning of our retroactivity analysis in Witt, do not well serve these interests. Therefore, I believe we should adopt the retroactivity analysis announced in Teague in determining whether we should retroactively apply new constitutional rules emanating from the United States Supreme Court.

As I demonstrate below, although I believe we should adopt the Teague

standard, I do not believe it ultimately matters in determining whether Ring applies retroactively. Whether we analyze the issue under Teague (as I do in part II B below) or under Witt (as I do in part II C), the result is the same: Ring does not apply retroactively.

B. Application of the Teague Standard Dictates that Ring Not Be Applied Retroactively

In Teague, the Supreme Court held that new constitutional rules of criminal procedure would not apply to final cases, with two exceptions. 489 U.S. at 311. Thus, the first consideration is whether Ring announced a new constitutional rule and, if so, whether the rule is procedural or substantive. See Bousley v. United States, 523 U.S. 614, 620 (1998) (stating that Teague "by its own terms applies only to procedural rules" and that the "distinction between substance and procedure is an important one in the habeas context"). If the rule is substantive, it must be applied retroactively. If it is procedural, it will not be applied retroactively unless (1) it places conduct beyond the power of the government to proscribe; or (2) it announces a "watershed" rule of criminal procedure that is "implicit in the concept of ordered liberty." 489 U.S. at 311 (quoting Mackey, 401 U.S. at 693 (Harlan, J., concurring in judgments in part and dissenting in part)).

Of course, by overruling its prior decision in Walton v. Arizona, 497 U.S.

639 (1990), to apply its more recent decision in Apprendi to death penalty cases, the Court necessarily issued a new constitutional rule. See Teague, 489 U.S. at 301 (explaining that for retroactivity purposes a new rule "breaks new ground or imposes a new obligation on the States or the Federal Government," i.e., "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final"). Therefore, the remaining questions are (1) whether the rule is procedural or substantive; and if procedural, (2) whether one of the two exceptions to the rule of nonretroactivity applies. 489 U.S. at 311. I address these questions below.

1. Is Ring Substantive or Procedural?

The next step is to determine whether the new constitutional rule in Ring is procedural or substantive. The decision in Ring, however, simply applied the Court's decision in Apprendi to the death penalty context. Therefore, before considering whether Ring created a substantive rule, I will first discuss whether Apprendi did.

The Supreme Court in Apprendi acknowledged that it was addressing New Jersey's criminal procedure, and not its substantive law. See Apprendi, 530 U.S. at 475 ("The substantive basis for New Jersey's enhancement is thus not at issue; the

adequacy of New Jersey's procedure is."). The effect of its rule was solely to shift factfinding responsibility from the judge to the jury and to increase the burden of proof for those facts that increase the penalty for a crime beyond its statutory maximum.

Several federal and Florida appellate courts have concluded that Apprendi's holding constituted a new procedural rule that did not apply retroactively.[32] In Curtis v. United States, 294 F.3d 841, 843 (7th Cir.), cert. denied, 537 U.S. 976 (2002), for example, the court noted that "Apprendi is about nothing but procedure—who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt)." In Figarola v. State, 841 So. 2d 576 (Fla. 4th DCA 2003), notice invoking discretionary jurisdiction filed, No.

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32. See Sepulveda v. United States, 330 F.3d 55, 60 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77, 90 (2d Cir.), cert. denied, 124 S.Ct. 840 (2003); United States v. Swinton, 333 F.3d 481, 491 (3d Cir.), cert. denied, 124 S.Ct. 458 (2003); United States v. Brown, 305 F.3d 304, 309 (5th Cir. 2002), cert. denied, 123 S.Ct. 1919 (2003); Goode v. United States, 305 F. 3d 378, 382-85 (6th Cir.), cert. denied, 537 U.S. 1096 (2002); United States v. Sanchez-Cervantes, 282 F.3d 664, 671 (9th Cir.), cert. denied, 537 U.S. 939 (2002); Curtis v. United States, 294 F.3d 841, 843-44 (7th Cir.), cert. denied, 123 S.Ct. 451 (2002); United States v. Mora, 293 F.3d 1213, 1218-19 (10th Cir.), cert. denied, 537 U.S. 961 (2002); United States v. Moss, 252 F.3d 993, 998 (8th Cir. 2001), cert. denied, 534 U.S. 1097 (2002); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002); United States v. Sanders, 247 F.3d 139, 146 (4th Cir.), cert. denied, 534 U.S. 1032 (2001); Gisi v. State, 848 So. 2d 1278, 1282 (Fla. 2d DCA 2003); Hughes v. State, 826 So. 2d 1070, 1074-75 (Fla. 1st DCA 2002), review granted, 837 So. 2d 410 (Fla. 2003).

SC03-586 (Fla. Apr. 7, 2003), the Fourth District Court of Appeal recently noted that the Supreme Court itself characterized Apprendi as a procedural rule. Id. at 577 n.3.

In Ring, the Court merely extended Apprendi to the death penalty context to hold that the Sixth Amendment requires that the aggravating factors in capital cases be found by a jury, not a judge alone. See 536 U.S. at 609. The Court itself described the question before it in Ring as "who decides, judge or jury." 536 U.S. at 605. Therefore, as the Eleventh Circuit recently acknowledged, "[j]ust as Apprendi 'constitutes a procedural rule because it dictates what fact-finding procedure must be employed,' Ring constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing." Turner, 339 F.3d at 1284 (citations omitted). The Eleventh Circuit "agree[d] with other courts who have concluded that because Apprendi was a procedural rule, it automatically follows that Ring is also a procedural rule." Id.; see also Lambert, 2004 WL 736876, at *3 ("Because the rule in Apprendi is not retroactive . . ., it stands to follow that the rule in Ring, an Apprendi child, is not retroactive for the same reasons."); Towery, 64 P.3d at 833 ("Logic dictates that if Apprendi announced a procedural rule, then, by extension, Ring . . . did also."); cf. Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002) (concluding, in the context of a

successive habeas petition, that "[i]t is clear . . . that Ring is simply an extension of Apprendi to the death penalty context"). In Turner, the Eleventh Circuit explained why Ring affected only procedure:

> Ring changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof. Ring affected neither the facts necessary to establish Florida's aggravating factors nor the state's burden to establish those factors beyond a reasonable doubt. Instead, Ring altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.

339 F.3d at 1284; see also Towery, 64 P.3d at 833 (noting that Ring only altered "who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings").

Only one court has held that Ring imposed a substantive rather than a procedural rule. In Summerlin, 341 F.3d at 1108, the Ninth Circuit recently concluded that Ring redefined Arizona's capital murder law, making murder and capital murder separate substantive offenses. The Ninth Circuit concluded that the rule in Ring is substantive and that Teague does not apply. In my opinion, Summerlin misinterprets the analysis in Ring.

The Supreme Court in Ring did not substantively change Arizona's death penalty law, as the Ninth Circuit claims. To the contrary, it deferred to the Arizona Supreme Court's interpretation of that law. The Court "[r]ecogniz[ed] that the

Arizona court's construction of the State's own law is authoritative." 536 U.S. at 603. Based on the Arizona Supreme Court's interpretation, the Court then stated, quoting from Apprendi, that "[b]ecause Arizona's enumerated aggravated factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (citation omitted). The Supreme Court's characterization of its holding in Apprendi, which it expressly stated addressed procedure, was no different. See id. at 602. The Court explained that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." Id. at 609. In other words, the Court's analyses in Apprendi and Ring are identical. The hate crime aggravator in Apprendi operated the same way the aggravator necessary for imposition of the death penalty operated in Walton and Ring. Thus, the Court's holding in both Apprendi and Ring only specified the procedure required for determining a fact that increases a defendant's punishment beyond the statutory maximum. See Summerlin, 341 F.3d at 1126 (Rawlinson, J., dissenting) ("The linkage in Ring of the Walton death penalty factors and the Apprendi hate crime aggravator is fatal to the majority's syllogism."). The rule of Ring is thus procedural, not substantive.

2. Does an Exception to Teague's General Rule of Non-Retroactivity Apply?

Because the rule in Ring is procedural and presumed not to be retroactive, the next step in the Teague analysis is to determine whether the rule falls within one of Teague's two exceptions: a rule that places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, or a rule that requires the observance of procedures implicit in the concept of ordered liberty. 489 U.S. at 307. Ring obviously does not fall within the first exception. Ring does "not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." McCoy, 266 F.3d at 1256-57. As I explain below, it does not meet the requirements of the second, either.

The Court in Teague explained that the second exception applies to a watershed rule "without which the likelihood of an accurate conviction is seriously diminished" and which alters our understanding of the bedrock procedural elements necessary to the fundamental fairness of a proceeding. 489 U.S. at 313. The Court emphasized that this was a narrow exception, noting that it was "unlikely that many such components of basic due process have yet to emerge." Id. at 313. Ring's effect at most is to place the responsibility for factfinding in the

penalty phase on a jury. It implicates neither the accuracy of the conviction nor the fundamental fairness of the process.

In Ring, Arizona contended that allowing a judge to find aggravating factors would better assure the fairness of the death penalty. The Court responded that "[t]he Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders." 536 U.S. at 607 (emphasis added). While allowing a judge to act as the factfinder "might be 'an admirably fair and efficient scheme of criminal justice,'" the Court commented, the Constitution grants a right to a jury trial. Id. at 607 (quoting Apprendi, 530 U.S. at 498) (Scalia, J., concurring)).

Because it relied solely on the Sixth Amendment right to jury trial, the Court did not even suggest that its holding reflected concerns for the accuracy of the factfinding or the fairness of the penalty phase proceeding. As the Eleventh Circuit stated in determining that Ring does not apply retroactively, "Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context." Turner, 339 F.3d at 1286. See also Colwell, 59 P.3d at 473 (noting that "we believe it is clear that Ring is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in

capital sentencings, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state").

The one court that has held Ring to apply retroactively under Teague overlooks this aspect of Ring. In Summerlin, the Ninth Circuit examined in detail Arizona's death penalty sentencing procedures and held that Ring created a watershed rule of procedure because a "requirement of capital findings made by a jury will improve the accuracy of Arizona capital murder trials" and that failure to have a jury act as factfinder during the penalty phase was a structural defect that affected the framework of the trial. 341 F.3d at 1116.[33] The Supreme Court's own statements in Ring, cited above, belie such an interpretation. The Supreme Court did not weigh the relative merits of judge and jury factfinding and conclude that jury trials produced more accurate results. It simply held that the Constitution granted the absolute right to jury factfinding (whenever particular facts increased the maximum penalty provided by statute) regardless of its fairness or accuracy.

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33. The court opined, for example, that Arizona's elected judges are more likely to be influenced by outside influences than juries and that penalty phases "are capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda." Summerlin, 341 F.3d at 1110. Thus, the "structure of Arizona capital sentencing allows extra-judicial factors to enter into the ultimate judgment such as the consideration of inadmissible evidence, political pressure, truncated evidentiary presentation, and prior experience with other capital defendants that would be absent from a jury's consideration of penalty-phase evidence." Id. at 1115.

Other decisions of the Supreme Court concerning the right to a jury trial confirm that it does not consider such decisions watershed rules that implicate the concept of ordered liberty. For example, the Supreme Court has not previously treated denial of the right to have a jury decide an element of an offense as structural error. See, e.g., Neder v. United States, 527 U.S. 1 (1999). In Neder, the defendant was convicted of tax fraud after trial by jury in which the judge, in accordance with extant law, refused to instruct the jury on the essential element of materiality and decided the question himself. Before Neder's conviction became final, the Court decided United States v. Gaudin, 515 U.S. 506 (1995), holding that materiality is an element that must be decided by the jury. In determining whether harmless error analysis applied to the trial court's undisputed error, the Court commented that structural error, which is not subject to such analysis, is a limited class of constitutional error that renders a trial fundamentally unfair, such that the trial cannot reliably serve as a basis for the determination of guilt or innocence or for criminal punishment. 527 U.S. at 8-9. The Court held that failure to submit an element to the jury did not constitute structural error and recognized that although failure to submit an element of an offense to the jury violates the right to a jury

trial, such error was subject to harmless error analysis. 527 U.S. at 9, 12.[34]

More recently, the Supreme Court held that an unpreserved Apprendi error did not constitute plain error. In United States v. Cotton, 535 U.S. 625 (2002), the federal indictment charged the defendants with drug offenses, without specifying an amount. At sentencing, the court found a quantity that permitted imposition of enhanced sentences. The Supreme Court recognized that Apprendi error occurred, but concluded that even if the error affected "substantial rights," it did not seriously affect the fairness, integrity, or public reputation of the proceedings. 535 U.S. at 633-34.

Finally, in yet another case, the Supreme Court held, under the less-stringent Linkletter standard, that its holding in Duncan v. Louisiana, 391 U.S. 145 (1968), that the basic Sixth Amendment right to a jury trial applies to the States through the Fourteenth Amendment, did not apply retroactively. See DeStefano v. Woods, 392 U.S. 631 (1968). The Court stated that "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons

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34. Relying on Neder, the courts of appeals have uniformly rejected the argument that Apprendi errors are "structural" and have applied harmless-error analysis to Apprendi claims. See, e.g., Coleman, 329 F.3d at 89-90; Sanchez-Cervantes, 282 F.3d at 670; United States v. Candelario, 240 F.3d 1300, 1307 (11th Cir.), cert. denied, 533 U.S. 922 (2001); United States v. Nance, 236 F.3d 820, 825-26 (7th Cir. 2000), cert. denied, 534 U.S. 832 (2001).

convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." Id. at 634. If the right to a jury trial itself does not implicate such fundamental rights as to apply retroactively, I fail to see how a mere subset of that right—the right to have a jury determine facts relevant to sentencing—can do so.

Even if the Ninth Circuit were correct in Summerlin that Ring addressed structural error—despite the cases contradicting such a conclusion—the Supreme Court has clarified that classifying an error as structural does not necessarily implicate the second Teague exception. See Tyler, 533 U.S. at 666-67 & n.7. The Court again emphasized that "the second Teague exception is reserved only for truly 'watershed' rules." Id. at 667 n.7.

In light of the Supreme Court's own precedent and its own analysis in Ring, which rested solely on the Sixth Amendment right to jury trial, the new procedural rule announced in Ring fails to meet the requirements of the second Teague exception. Therefore, Ring does not apply retroactively.

C. Even Under a Witt Analysis, Ring Still Does Not Apply Retroactively

Even if we ignore the United States Supreme Court's change of its own jurisprudence and continue applying the outdated Linkletter standard, the result is the same: Ring does not apply retroactively. As stated above, under that standard,

a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So. 2d at 931. Clearly, the holding of Ring meets the first two prongs of Witt, i.e., the United States Supreme Court issued a new rule that is constitutional in nature. See Witt, 387 So. 2d at 930. Therefore, the question of Ring's retroactive application rests on the third prong of Witt: whether the rule constitutes a development of fundamental significance.

In Witt, we stated that most major constitutional changes fall within one of two categories: changes "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and those "which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." 387 So. 2d at 929. The holding in Ring, like the holding in Apprendi, does not fall within the first category—it does not prohibit the government from criminalizing certain conduct. Therefore, the question is whether Ring is of sufficient magnitude to require retroactive application. This leads us to the Linkletter factors: (a) the purpose to be served by the new rule, (b) the extent of reliance on the prior rule, and (c) the effect retroactive application of the new rule would have on the administration of justice.

See Witt, 387 So. 2d at 926. I address each factor in turn.

1. The Purpose to Be Served by the New Rule

The first factor under the Linkletter test is the purpose the new rule is intended to serve. Witt, 387 So. 2d at 926. As I explained at section II B 1 above, Ring creates a rule of procedure. It merely applied the Apprendi rule to death penalty cases. Thus, Ring's holding, too, constitutes a procedural rule. See Turner, 339 F.3d at 1284 (noting that "because Apprendi was a procedural rule, it axiomatically follows that Ring is also a procedural rule"). This transfer of factfinding responsibility thus does not impugn the fairness of any prior penalty phase process in death penalty cases. See Witt, 387 So. 2d at 929 (stating that a change in law does not warrant retroactive application "in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding").

Other jurisdictions have arrived at the same conclusion. In Towery, 64 P.3d at 835, the Arizona Supreme Court examined Ring under the equivalent of the Linkletter test. Regarding the first prong of the test, the Arizona court concluded that because Ring was "not designed to improve [the] accuracy" of criminal trials, the rule's purpose did not support its retroactive application. Id. (citing Allen v.

Hardy, 478 U.S. 255 (1986), which stated that retroactive application is appropriate if a new rule is designed to enhance accuracy of criminal trials); accord Turner, 339 F.3d at 1286 (noting that "Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context").

The United States Supreme Court has held that the right to a jury trial alone is not a sufficient basis for retroactive application of a new rule. In DeStefano, 392 U.S. 633-34, the Court, in applying the Linkletter test, reiterated that it did not believe that trial before a judge alone is unfair. Both the Missouri and Arizona Supreme Courts relied on DeStefano in concluding that this factor weighs against retroactivity. See Towery, 64 P.3d at 834; Whitfield, 107 S.W.3d at 268.

For these reasons, I too conclude that this prong—the purpose to be served by the rule—weighs against the retroactive application of Ring.

2. The Extent of Reliance on the Old Rule

The second factor under the Linkletter test is the extent of reliance on the old rule. Witt, 387 So. 2d at 926. This factor, too, weighs against retroactivity. The United States Supreme Court has examined and upheld Florida's capital sentencing statute for over a quarter of a century. See Bottoson, 833 So. 2d at 695 (citing

cases). Literally hundreds of defendants have been sentenced to death, and 58 inmates executed, since reinstatement of Florida's death penalty in 1972.[35] In addition, as noted above, in Apprendi, decided in 2000, the Court held that the new rule did not apply in capital proceedings and specifically upheld its prior decision on the issue in Walton, 497 U.S. at 639, which it then overruled in part in Ring. See Towery, 64 P.3d at 835 (noting that "[c]ertainly the Arizona justice system acted in good faith in applying the holding of Walton until the Court overruled its decade-old decision"). Thus, the extent of the reliance on Florida's death penalty statute has been vast and in good faith.[36]

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35. See Florida Department of Corrections, Death Row Fact Sheet, available at http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics.

36. In Whitfield, the Missouri Supreme Court applied the Linkletter retroactivity test to Ring and held the case warranted retroactive application. Acknowledging that the purpose to be served by the rule was an insufficient basis alone to require this result, the court found that the second and third factors "clearly favor[ed] retroactivity," concluding that because Missouri's capital sentencing statute differs significantly from that of other states, the extent of reliance on the former rule and the effect on the administration of justice was extremely limited. 107 S.W.3d at 268-69. For example, the court had only identified five potential cases that would be affected. Id. at 269. That is obviously not the case in Florida.

3. The Effect of Retroactive Application of the New Rule on the Administration of Justice

The third and final factor is the effect of retroactive application on the administration of justice. Witt, 387 So. 2d at 926. In my opinion, applying Ring retroactively would have a potentially drastic effect on the administration of the death penalty in Florida. Over 360 inmates currently reside on Death Row.[37] Many of their convictions are decades old. The retroactive application of Ring would require consideration of each of these cases to determine whether Ring requires new penalty phase sentencing proceedings. A substantial percentage of those cases will require new proceedings. The difficulties of such an enormous undertaking include lost evidence and unavailable witnesses. In addition, new proceedings would cause the further painful disruption of the lives of the families and friends of victims and affect the finality of judgments. To apply Ring retroactively would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt, 387 So. 2d at 929-30.

Accordingly, none of the three Linkletter factors weighs in favor of the retroactive application of Ring. I would hold that Ring does not apply retroactively

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37. See Florida Department of Corrections, Death Row Fact Sheet, available at http://www.dc.state.fl.us/activeinmates/deathrowroster.asp.

and would deny relief as to any Ring claim presented in this case and all future postconviction proceedings on this basis alone.

CONCLUSION

I concur in affirming the trial court's denial of relief in this case. In addressing the Ring issue, given the number of petitions we regularly receive arguing violations of Ring, and given our prior lack of consensus about whether Ring applies in Florida, I would decide whether, even if Ring applied in Florida, it would apply retroactively to cases on collateral review. I would then adopt the standard for determining retroactivity enunciated in Teague and, applying that standard, hold that Ring does not apply retroactively. Even if we continue to apply the factors we adopted in Witt, however, the result would be the same.

WELLS and BELL, JJ., concur.

ANSTEAD, C.J., concurring in part and dissenting in part.

I concur in the majority opinion in all respects except for its discussion of the impact of the U.S. Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002).

Two Cases:

An Appeal from the Circuit Court in and for Orange County,
Stan W. Strickland, Judge - Case No. CR92-1305
and an Original Proceeding - Habeas Corpus

Jeffrey M. Hazen of Brody & Hazen, P.A., Registry Counsel, Tallahassee, Florida,

for Appellant/Petitioner

Charles J. Crist, Jr., Attorney General, and Scott A. Browne, Assistant Attorney General, Tampa, Florida,

for Appellee/Respondent

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX E

Windom v. State, SC16-1371, 2017 WL 3205278 (Fla. July 28, 2017)

Supreme Court of Florida

FRIDAY, JULY 28, 2017

CASE NO.: SC16-1371
Lower Tribunal No(s).:
481992CF001305000AOX

CURTIS WINDOM vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Curtis Windom, a prisoner under three sentences of death, appeals the circuit court's denial of his second successive motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. Windom was convicted of three counts of first-degree murder and one count of attempted first-degree murder in 1992. He was sentenced to death for each of the three murders and to a consecutive term of twenty-two years' imprisonment for the attempted murder. Windom v. State, 656 So. 2d 432, 434 (Fla.), cert. denied, 516 U.S. 1012 (1995). We affirmed his convictions and sentences in 1995. Id. at 438, 440. He filed his initial motion for postconviction relief in 1997 and amended it in 2000, and we affirmed the denial of that motion in 2004, Windom v. State, 886 So. 2d 915, 918 (Fla. 2004).

We now affirm the summary denial of Windom's second successive postconviction motion. The single Brady[1] claim presented could have been discovered with due diligence more than one year before the date this motion was filed. See Franqui v. State, 118 So. 3d 807 (Fla. 2013) (table); see also Fla. R. Crim. P. 3.851(d)(1), (2)(A). Therefore, it is procedurally barred.

Even if this claim were not procedurally barred, we would affirm because the circuit court correctly determined that the claim does not satisfy the prejudice prong of a Brady claim, which requires showing "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Mordenti v. State, 894 So. 2d 161, 170 (Fla. 2004) (quoting

1. Brady v. Maryland, 373 U.S. 83 (1963).

Strickler v. Greene, 527 U.S. 263, 280 (1999)). This standard is met when the alleged Brady material "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. (citing Allen v. State, 854 So. 2d 1255, 1260 (Fla. 2003)).

The claim at issue concerns Windom's discovery that State witness Jack Luckett was arrested two weeks before Windom's trial and had a pending felony charge at the time. At Windom's trial, Luckett's testimony was relevant to show that Windom shot and killed Johnnie Lee, his first in a series of four shooting victims, in a cold, calculated, and premeditated manner. See Windom, 656 So. 2d at 435, 439. Essentially, Luckett testified that Windom made statements in advance of the shooting indicating that he was going to kill Lee because Lee owed him money and had not paid it. Id. at 435. Luckett further testified that he saw Windom shoot Lee within a few hours of making that statement. See id. Luckett's testimony was largely corroborated by other witnesses, some of whom saw Windom shoot Lee multiple times, one of whom heard Windom reference his money as he began to shoot Lee, and another of whom testified that Windom calmly purchased ammunition minutes before the shooting. Id.; Windom, 886 So. 2d at 924. While Windom did not know that Luckett had a pending charge when he testified, he did know that Luckett had been convicted of three prior felonies, and he used those felonies as impeachment material.

Windom argues that, if he had known of Luckett's 1992 arrest, he could have more effectively impeached Luckett, which would have changed the strength of the State's case to such an extent as to create a reasonable probability of a different outcome in both the guilt and penalty phases. We disagree. Luckett was already impeached with prior felony convictions, and it is undisputed that if Windom had further impeached him with the new arrest and then-pending charge, then the State could have introduced prior consistent statements to rehabilitate him. Further, the additional impeachment evidence would not have changed the fact that Luckett's testimony was corroborated in significant part by other witnesses, who independently provided sufficient evidence to support Windom's convictions and

sentences. In sum, Luckett's 1992 arrest and then-pending charge could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in" the outcome. See Mordenti, 894 So. 2d at 170 (citing Allen, 854 So. 2d at 1260); Waterhouse v. State, 82 So. 3d 84, 107-08 (Fla. 2012) (holding that new impeachment evidence did not undermine confidence in the verdict when considered in light of the "other evidence of [the defendant's] guilt"); cf. Ponticelli v. State, 941 So. 2d 1073, 1086 (Fla. 2006) (finding no reasonable probability that the jury would have doubted a witness' testimony based on additional impeachment evidence where other trial evidence corroborated the witness' claim that the defendant confessed).

For the foregoing reasons, we affirm the summary denial of Windom's second successive postconviction motion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, C.J., and LEWIS, CANADY, POLSTON, and LAWSON, JJ., concur.
PARIENTE and QUINCE, JJ., concur in result.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

ERIC CALVIN PINKARD
SCOTT A. BROWNE
ALI ANDREW SHAKOOR

ANN MARIE MIRIALAKIS
HON. RENEE A. ROCHE, JUDGE
KENNETH SLOAN NUNNELLEY
HON. TIFFANY MOORE RUSSELL, CLERK
HON. FREDERICK JAMES LAUTEN, JR., CHIEF JUDGE

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX F

Order on Case Management Conference (Scheduling Order for Warrant),

filed July 30, 2025 – SPCR.1149-1153

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **Case No.: CR92-1305**

v. **DEATH WARRANT SIGNED**
EXECUTION SCHEDULED

CURTIS WINDOM, **August 28, 2025 at 6:00 p.m.**

Defendant.
_____/

ORDER ON CASE MANAGEMENT CONFERENCE

THIS CAUSE having come on to be heard before this court on a Case Management Conference pursuant to the Florida Supreme Court's order dated July 29, 2025, and directs the parties and agencies to proceed as follows:

(1) Florida Department of Corrections Updated Inmate Records

The Florida Department of Corrections is to provide updated inmate records to state postconviction counsel by Friday, August 1, 2025, at 12:00 p.m.

(2) Public Records Requests on all Agencies

Rule 3.852(h)(3) governs public records in warrant cases. The rule governing additional public records requests envisions only updates of prior requests, not entirely new requests. Counsel for the Defendant is to file any and all additional public records requests on all agencies by Thursday, July 31, 2025, at 4:00 p.m.

(3) Public Records Objections by the Agencies

Any objections from the agencies involved in the public records requests should be filed by Friday, August 1, 2025, at 12:00 p.m.

(4) Public Records Hearing

A hearing on all objections made by the agencies to the additional public records requests will be held on Friday, August 1, 2025, at 3:00 p.m. Counsel for the parties and counsel for the agencies may appear virtually or telephonically.

(5) Order on Public Records Objections

The Court will rule on the public records objections at the hearing and subsequently enter a written order by Friday, August 1, 2025, at 5:00 p.m.

(6) Public Records Compliance

The agencies are to comply with the production of records if the objections are overruled, by Saturday August 2, 2025, at 3:00 p.m.

Should the Defendant raise a medical or mental health claim in his successive motion, FDOC is authorized to release records relevant to those issues immediately upon the filing of the successive postconviction motion.

(7) Successive 3.851 Postconviction Motion

The Defendant's successive 3.851 motion shall be filed by Sunday, August 3, 2025, at 11:00 a.m[1]. The successive motion shall not exceed 25 pages. Fla. R. Crim. P. 3.851(e)(2).

(8) State's Answer to Successive Postconviction Motion

The State's answer to the successive postconviction motion is to be filed by Monday, August 4, 2025, at 3:00 p.m. The State's answer shall also not exceed 25 pages. Fla. R. Crim. P. 3.851(f)(3)(B).

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[1] Defense counsel's ore tenus request for an extension to file a successive postconviction motion on Monday was denied as was the request to file a supplemental expert report after the deadline indicated in this order for the reasons stated on the record.

(9) Case Management Hearing

The case management conference, commonly referred to as a *Huff*[2] hearing, will be held on Tuesday, August 5, 2025, at 10:00 a.m. The Court will hear the arguments of counsel regarding whether an evidentiary hearing is required on any of the claims raised in the successive postconviction motion. The Defendant's presence is not required at the *Huff* hearing. Fla. R. Crim. P. 3.851(c)(3). Counsel for the parties may appear virtually or telephonically.

(10) Order on *Huff* Hearing

This Court will enter a written order following the *Huff* hearing by Tuesday, August 5, 2025, at 5:00 p.m. determining which, if any, claims will be explored at an evidentiary hearing.

(11) Evidentiary Hearing

An evidentiary hearing, if an evidentiary hearing is to be determined to be required, is scheduled for Wednesday August 6, 2025, at 10:00 a.m. The Defendant's presence is required at any evidentiary hearing, Fla. R. Crim. P. 3.851(c)(3), and FDOC is ordered to transport Mr. Windom to Orange County at that date and time if an evidentiary hearing is to be held.

(12) Closing Arguments

Due to the time constraints, no written post-evidentiary hearing memorandums of law should be permitted. Any closing arguments should be presented orally at the end of the evidentiary hearing.

(13) Final Ruling

This Court will issue its final written order on the successive postconviction motion by Friday, August 8, 2025, at 11:00 a.m., as directed by the Florida Supreme Court.

(14) Clerk of Court and Record on Appeal

The Clerk of Court should have the record on appeal, including all warrant filings and complete transcripts of all hearings, filed in the Florida Supreme Court by 5:00 p.m. on August 8, 2025, as directed by the Florida Supreme Court.

It is further

ORDERED AND ADJUDGED all parties and agencies may appear at the hearings in this case via the virtual link to be provided by the court.

Additionally, all parties and agencies are to file all pleadings, responses, objections, and documents through the Florida e-filing portal and serve all counsel of record.

DONE AND ORDERED on this 30TH day of July 2025 in Orlando, Orange County, Florida.

07/30/2025 18:54:19
1992-CF-004405-A-O
eSigned by Michael Kraynick 07/30/2025 18:54:19 AgEB75mo

MICHAEL KRAYNICK
Circuit Judge
Ninth Judicial Circuit

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[2] *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

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Florida Supreme Court
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CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX G

Final Order Denying Defendant's Emergency Motion for Stay of Execution,

filed August 8, 2025 – SPCR.1556-1567

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CURTIS WINDOM,

Defendant.
_____/

Case No.: Case No. 1992-CF-1305
FSC No. SC1960-80830

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
August 28, 2025 at 6:00 p.m.

FINAL ORDER DENYING DEFENDANT'S EMERGENCY MOTION FOR STAY OF EXECUTION

THIS CAUSE came before the court on "Defendant's Emergency Motion For Stay Of Execution," filed on August 7, 2025. After reviewing the Motion, the State's Response To Defendant's Emergency Motion For Stay Of Execution filed on August 8, 2025, the relevant case law, the Court finds as follows.

PROCEDURAL HISTORY

The Court reincorporates the procedural history as set forth in the Final Order Denying Defendant's Successive Motion To Vacate Judgment Of Conviction And Sentence Of Death entered August 7, 2025.

ANALYSIS

Post-warrant motions are considered "successive and subject to the content requirement of subdivision (e)(2)" of Florida Rules of Criminal Procedure 3.851.

Fla. R. Crim. P. R. 3.851(h)(5). Subsection 3.851(d)(2) states that no motion will be considered beyond one year from the date the judgment and sentence become final unless the motion alleges (1) newly discovered evidence that could not have been discovered through the exercise of due diligence, (2) a newly established and retroactive constitutional right or (3) postconviction counsel, through negligence, failed to file the motion. *James v. State*, 404 So. 3d 317, 324 (Fla. 2025) (outlining these exceptions in a post-warrant context); *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023) (finding that successive postconviction claim of exemption from death penalty due to mental deficiencies was procedurally barred because it was substantially argued at trial or could have been raised previously).

Section 922.06(1), Fla. Stat. (2025) provides that "[t]he execution of a death sentence may be stayed only by the Governor or incident to an appeal." "A stay of execution pending the disposition of a successive motion for postconviction relief is warranted only when there are 'substantial grounds upon which relief might be granted.' " *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (citing to *Buenoano v. State*, 708 So.2d 941, 951 (Fla.1998) citing *Bowersox v. Williams*, 517 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996)).

Defendant's motion raises three arguments. First, the information from all three victims' families is newly discovered evidence. Second, the State violated their obligations under *Brady*[1] when the State failed to disclose during postconviction the victims' family members' wishes for Mr. Windom's life to be spared from the death penalty. Third, the newly discovered evidence establishes that the death penalty as applied to Curtis Windom is unconstitutional.

For the reasons stated below, the Court denies Defendant's Motion.

CLAIM ONE: INFORMATION FROM ALL THREE VICTIMS' FAMILIES IS NEWLY DISCOVERED EVIDENCE.

Post-warrant motions are considered "successive and subject to the content requirement of subdivision (e)(2)" of Florida Rules of Criminal Procedure 3.851. Fla. R. Crim. P. R. 3.851(h)(5). Newly discovered evidence fits squarely within the limitations of Rule 3.851(e)(2). Fla. R. Crim. P. R. 3.851(e)(2)(C).

Defendant argues that if the video recorded statements and letters had been presented to a jury or the court during Mr. Windom's trial or sentencing, it is more likely than not, that Mr. Windom would not have been sentenced to death. *See*

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Defendant's Emergency Motion For Stay Of Execution pp. 4-8). Defendant's argument fails.

To obtain relief where alleged newly discovered evidence relates to the penalty phase, "a defendant must establish: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably ... yield a less severe sentence on retrial." *Dailey v. State*, 329 So. 3d 1280, 1285 (Fla. 2021).

"First, in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.' " *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) citing to *Torres–Arboleda v. Dugger*, 636 So.2d 1321, 1324–25 (Fla. 1994).

There can be no question that the video recorded statements and letters were unknown by the trial court, by Defendant, or by counsel at the time of trial as it did not exist. This information was provided to the Clemency board in 2013; 21 years after trial was held. *See* Defendant's Emergency Motion For Stay Of Execution pp.

5-7; *see* also Exhibit List, Exhibit -1 Mitigation Video (Sent to the Clerk of Court for filing via FedEx and Exhibit -2 Various Letters p. 1 and pp. 3-31).

Based on when in time these records came about, it cannot appear that Defendant or his counsel could have known of it, by any use of diligence.

Moreover, clemency documents from the Florida Parole Commission and its Office of Executive Clemency are "confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution." *See Chavez v. State*, 132 So. 3d 826, 830 (Fla. 2014) and section 14.28, Fla. Stat. (2025)[2]. Clemency investigative files are not subject to public records laws or judicial discovery, as they are created pursuant to the executive's constitutional clemency powers. *See Chavez*, 132 So. 3d at 831 (Fla. 2014) and *see* also *Parole Com'n v. Lockett*, 620 So. 2d 153, 157-158 (Fla. 1993).

[2] Rule 16 of the Florida Rules of Executive Clemency provides "Due to the nature of the information presented to the Clemency Board, **all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff**. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials, as approved by the Governor, does not constitute a waiver of confidentiality." (emphasis added). *See* Rules Of Executive Clemency. https://fdc-media.ccplatform.net/content/download/32374/file/clemency_rules.pdf (last visited August 8, 2025).

"Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *See Jones*, 709 So. 2d at 521. "To reach this conclusion the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.' " *Id*. citing to *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). Newly discovered evidence satisfies the second prong of the test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id*. citing to *Jones v. State*, 678 So.2d 309, 315 (Fla.1996)).

Section 921.141(6), Florida Statutes (1991) provides for the following mitigating circumstances to be considered during the penalty phase of trial for capital felonies where the State is seeking the death penalty:

> (a) The defendant has no significant history of prior criminal activity. (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (c) The victim was a participant in the defendant's conduct or consented to the act. (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (e) The defendant acted under extreme duress or under the substantial domination of another person. (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

> impaired. (g) The age of the defendant at the time of the crime.

Under the current rendition of section 921.141, the legislature added an additional factor for courts to consider: "[t]he existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty." Section 921.141(7)(h), Fla. Stat. (2025).

The Court finds that the "newly discovered" video recorded statements and letters fail to meet the second prong of the test laid out in *Daily*. These records from Defendant's 2013 clemency proceedings do not go to any of the mitigating factors under the 1991 death penalty statute. While the statements may have marginal value under the 2025 version of section 921.141(7)(h), whether they would yield a lesser sentence is entirely speculative. "Postconviction relief cannot be based on speculative assertions." *Jones v. State*, 845 So. 2d 55, 64 (Fla. 2003).

Additionally, the statements as they are written and/or recorded now would most likely not be admissible at trial. Section 921.141, Florida Statutes (2025), prohibits victim impact statements from addressing what sentence a defendant should receive. Section 921.141(8), Fla. Stat. (2025) ("Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence."); *see Floyd v. State*, 569 So. 2d 1225,

1230 (Fla. 1990) ("We reject Floyd's third claim that the trial court erred in preventing Anderson's daughter from expressing her opinion that Floyd should not receive the death penalty. The trial court permitted Anderson to testify about her knowledge of Floyd's character, based upon her correspondence and visits with him in prison. The court's decision to prevent her from further testifying about her opinion as to whether Floyd should be executed was not an abuse of discretion.").

Accordingly, the Court finds that Defendant is not entitled to relief on the first claim, and that the claim is **DENIED.**

CLAIM TWO: THE STATE VIOLATED THEIR OBLIGATIONS UNDER BRADY WHEN THE STATE FAILED TO DISCLOSE DURING POSTCONVICTION THE VICTIMS' FAMILY MEMBERS' WISHES FOR MR. WINDOM'S LIFE TO BE SPARED FROM THE DEATH PENALTY

Defendant argues that the State violated their obligations under *Brady* and this failure undermines the confidence in Curtis Windom's sentence of death. *See* Defendant's Emergency Motion For Stay Of Execution pp. 8-9). Defendant's argument fails.

The Court reincorporates its findings above regarding the confidentiality of clemency records. Moreover, the State's responsibilities under *Brady* do not exist in postconviction. *See Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557

U.S. 52, 69 (2009) (recognizing "nothing" in Supreme Court precedent suggests *Brady's* "disclosure obligation continued after the defendant was convicted and the case was closed") and *see* also *Dailey v. State*, 279 So. 3d 1208, 1217 (Fla. 2019) (recognizing *Osborne* rejected "*Brady's* applicability at the postconviction stage").[3]

Even assuming *Brady* does apply, which it does not, '[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383–84, 87 L.Ed.2d 481 (1985), and *see* also *Gorham v. State*, 597 So. 2d 782, 785 (Fla.1992), and see also *Asay v. Fla. Parole Comm'n*, 649 So. 2d 859, 860 (Fla. 1994), and see also *Asay v. State*, 210 So. 3d 1, 9 n.3 (Fla. 2016).

As set forth above in the Court's analysis of the first claim, the evidence fails to address Defendant's factual guilt or innocence; it addresses punishment. The evidence is either not relevant or minimally relevant, depending on the use of the 1991 death penalty statute or the current rendition, and may not be admissible. In reviewing the totality of this evidence, it cannot be said this this evidence could undermine confidence in the verdict.

[3] The Court's findings here address all prongs under *Brady*, expect materiality. See also *Buenoano v. State*, 708 So. 2d 941, 948 (Fla. 1998).

Accordingly, the Court finds that Defendant is not entitled to relief on the second claim, and that the claim is **DENIED.**

CLAIM THREE: THE NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE DEATH PENALTY AS APPLIED TO CURTIS WINDOM IS UNCONSTITUTIONAL

The Court reincorporates its findings above regarding the first and second claims as to the third claim.

The third claim is also procedurally barred. The Florida Supreme Court has consistently held that claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion. See *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013). (claims that either were raised and rejected on direct appeal or could have been raised on direct appeal or in other postconviction motions are procedurally barred); See also *Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014); *Owen v. State*, 364 So. 3d 1017, 1022 (Fla. 2023); *Cole v. State*, 392 So. 3d 1054, 1060 (Fla.), cert. denied sub nom.,145 S. Ct. 109, 219 L. Ed. 2d 1355 (2024).

The balance of the arguments in this claim could have been raised or were previously raised and denied on November 1, 2001 and affirmed on May 6, 2004. *See Windom v. State*, 886 So. 2d 915 (Fla. 2004) (rehearing denied July 8, 2004).

Accordingly, the Court finds that Defendant is not entitled to relief on the third claim, and that the claim is **DENIED.**

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. "Defendant's Emergency Motion For Stay Of Execution," filed on August 7, 2025, **DENIED**.
2. Defendant's request for a Stay of Execution is **DENIED**.

DONE AND ORDERED on this 8TH day of August 2025 in Orlando, Orange County, Florida.

08/08/2025 11:15:50
1992-CF-001305-A-O

eSigned by Michael Kraynick 08/08/2025 11:15:50 maVoG1F8

MICHAEL KRAYNICK
Circuit Judge
Ninth Judicial Circuit

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX H

Sentencing Order, Filed November 10, 1992

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: CR 92-1305
DIVISION: 11

STATE OF FLORIDA,
Plaintiff,

VS

CURTIS WINDOM,
Defendant.

FILED IN OPEN COURT
THIS 10 DAY OF Nov, 1992
Fran Carlton, Clerk
BY D.C.

SENTENCING ORDER

The Defendant was tried before this Court on August 25, 1992 through August 28, 1992. The jury found the Defendant guilty of all four counts of the Indictment (Count I: Murder in the First Degree of Johnnie Lee; Count II: Murder in the First Degree of Valerie Davis; Count III: Murder in the First Degree of Mary Lubin; and Count IV: Attempt to Commit Murder in the First Degree of Kenneth Williams). The same jury reconvened on September 23, 1992, and evidence and argument in support of aggravating factors and arguments for mitigation were heard as to Counts I, II, and III. That same day, the jury returned a 12-0 recommendation that the Defendant be sentenced to death in the electric chair on each of the three counts. The Court received a written summary of the mitigating factors the Defense relies on for sentencing as well as a written Pre-Sentencing Argument. In addition, on November 5, 1992, the Court heard additional evidence presented by the Defense for purposes of mitigation. The Court set final sentencing for this date, November 10, 1992.

The Court, having heard the evidence presented in both the guilt phase and penalty phase in addition to the mitigation evidence offered at the separate hearing November 5, 1992, having had the benefit of argument both in favor of and in opposition to the death penalty, finds as follows:

A) AGGRAVATING FACTORS

1. The Defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

The Defendant killed three people and seriously wounded a fourth on February 7, 1992. He was found guilty as charged on all four counts on this indictment. Each capital felony serves as a previous conviction for the others and each of the First Degree Murder Charges and the Attempted First Degree Murder are considered felonies involving the use of violence to some person for purposes of aggravation of the other First Degree Murder Charges. This aggravating circumstance was proved beyond a reasonable doubt.

2. The capital crimes were homicides and were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Jack Luckett testified that he had talked with the Defendant the morning of the shootings. In their discussion, the Defendant asked Jack if Johnnie Lee had won money at the dog track and Jack said, "Yes, $114." The Defendant said Johnnie Lee owed him $2,000. When the Defendant learned Johnnie had won money at the track, he said to Jack, "My nigger, you're gonna read about me." He further said that he was going to kill Johnnie Lee. That same day at 11:51 a.m. (per the sales slip and the sales clerk) the Defendant purchased a .38 caliber revolver and a box of fifty .38 caliber shells from Abner Yonce at Walmart in Ocoee. Mr. Yonce remembered the sale and recalled there was nothing unusual about the Defendant and that he was "calm as could be."

Within minutes of that purchase, the Defendant pulled up in his car next to where Johnnie Lee was standing talking to two females and Jack Luckett on the sidewalk. All three testified that the Defendant's car was close and the Defendant leaned across the passenger side of the vehicle and shot Johnnie Lee twice in the back. (Johnnie Lee's back was towards the Defendant and there was no evidence he even saw the Defendant.) Pamela Fikes, one of the two

females standing with the victim heard the Defendant say, "...my motherfucking money, nigger," to the victim. After the victim fell to the ground, the Defendant got out of the car, stood over the victim and shot him twice more from the front at very close range. (The medical examiner testified that the shots in the back would have killed him almost instantly.) The Defendant then ran towards the apartment where Valerie Davis, his girlfriend and mother of one of his children, lived. (The Defendant lived with Valerie Davis off and on.) She was on the phone, and her friend Cassandra Hall had just arrived at the apartment and was present when the Defendant shot Valerie once in the left chest area within seconds of arriving in the apartment and with no provocation. Dr. Anderson testified that the bullet pierced both lobes of the heart chamber and exited her back. It was a fatal wound which caused rapid blood loss, and he estimated she would have had some function for one to two minutes after being shot. Ms. Hall said he clicked the gun at her as she ran from the apartment. She heard the Defendant say he couldn't take it any more and that he was through right before he fired the shot. Valerie had been on the phone with two other women at the time she was shot. The testimony from Latroxy Sweeting who was on the phone was that right before she heard the "bang" she heard the Defendant say, "I'm tired, I'm through," and then heard Valerie say, "What's wrong...." Maxine Sweeting who was the other woman on the telephone heard Valerie ask what was wrong with him and he said he cannot take it any more. She further recalled hearing Valerie say, "Curt, I'm on the phone with Troxy and Mother."

From the apartment, the Defendant went outside, encountered Kenneth Williams on the street, and shot him in the chest at very close range. Mr. Williams saw the gun but did not think the Defendant would shoot him. Right before he was shot, he turned slightly and deflected the bullet somewhat. Although he was in the hospital for about 30 days and the wound was serious, he did not die. He

said the Defendant did not look normal--his eyes were "bugged out like he had clicked." Another witness nearby heard the Defendant say right before he shot, "I don't like police ass niggers." Kenneth Williams had to be told by the police what happened to him, as the bullet knocked him down immediately. He said he and the Defendant had a good relationship; and, as with most of the witnesses who testified, had known the Defendant most of his life.

From there, the Defendant ended up behind Brown's Bar where three guys, including the Defendant's brother, were trying to take the weapon from him. By that time, Valerie's mother had learned that her daughter had been shot, so she had left work in her car and was driving down the street. The Defendant saw her stop at the stop sign, went over to the car where he said something to her and then fired at her, hitting her twice, and killing her.

After the fourth shooting, the Defendant's brother got the gun from the Defendant and put it in Mary Law's purse. Ms. Law had a serious drug problem at the time and didn't realize at first she had the gun. Ultimately, the police learned she had the gun and she turned it over to the officers.

There was never any question about who shot the four victims. There were numerous witnesses, most of whom had known the victims as well as the Defendant most of their lives. Identity was not an issue. Many of the witnesses testified that the Defendant was not himself, he looked confused, he was not a violent person, that he looked crazed when they saw him. This area of Winter Garden is a high drug area; however, evidence that these shootings might be drug related was kept from the jury based on defense motions.

Further, there was no evidence that any of the victims were armed or that any of them made any threatening motions towards the Defendant. In each case, the Defendant approached them and shot them at close range

with incredible accuracy. Those who died, were dead almost instantly. He had known them all well for many years. When there were several people present, he did not shoot randomly, but rather selected certain victims, and shot them with little or no warning in some cases saying just a few words which would indicate he had a reason for selecting each victim. Others he could have shot, such as his brother and others who were with the victims, he did not shoot. He had said he was going to shoot Johnnie Lee, bought a gun, and proceeded methodically on the brief shooting spree. He fired so many rounds, he had to reload. Each encounter was so brief the victim either did not even see the Defendant or had no time to react.

3. The State had asked the Court to find two additional aggravating factors--that the capital felony was especially heinous, atrocious, or cruel and that at least one of the capital felonies was committed to prevent lawful arrest. The Court found before the sentencing phase proceeded to the jury that these factors were not proved beyond a reasonable doubt; therefore, the Court did not allow Counsel to argue that to the jury and the Court neither finds, nor has it considered, either of these factors.

Victim Impact evidence was not considered as an aggravator and was given no weight.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court.

Nothing, except as previously indicated in paragraphs 1 and 2 above, was considered in aggravation.

B. MITIGATING FACTORS

STATUTORY MITIGATING FACTORS

The Defense has requested the Court to consider the following statutory mitigating circumstances:

1. **The Defendant has no significant history of prior criminal activity.** His mother said he was a good boy. The P.S.I. that was ordered for the non-capital offense (Attempted

Murder in the First Degree), shows he had been arrested for Battery on July 5, 1991, but that was Nolle Prossed on October 21, 1991; and he was arrested for Trafficking in Cocaine (with minimum mandatory penalties) and Delivery of Cocaine and Possession of Cocaine on December 6, 1991, but all of these charges were Nolle Prossed in State Court after his arrest for Murder. There was evidence he had been targeted as a suspect in a drug sweep, but that effort against him was stopped once he had the Murder charges against him. Except for these arrests, the Defendant's record was clean and the Court gave that mitigator some weight.

important →

(2.) **The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.** This appeared to be the thrust of the Defendant's defense. Dr. Robert Kirkland had been appointed to examine him and he testified at trial. Defense counsel elicited evidence of the psychiatric condition called a "fugue state." This state can last years, such as when an ordinary person disappears and ends up across the country four years later and then recalls his past. Or the "fugue state" can last seconds or minutes where there is short, frenzied, senseless behavior. It is a depersonalization because of stress or pressure. An example of this latter type of fugue is the young college student practicing his batting stroke and accidentally killing his father. He suffered a severe psychotic reaction (a fugue) wherein he then killed his mother and brother. The doctors determined the killing of his father set off the fugue state which led to the second killing which was done in a frenzy. However, it was determined the third killing was coldly thought out to conceal the crime. The violence lasted only minutes.

Doctor Kirkland testified he found no diagnostic finding to indicate the Defendant was in a fugue state, that it was not reasonable or likely, but that it was possible. No basis for any source of stress was presented at trial, and only through defense motions to exclude certain evidence regarding drugs, was there any indication of possible sources of stress. A video tape taken of the Defendant talking with his mother alone in a room at the Winter Garden Police Department (approximately 5 hours after the shootings) was played when the Defendant's mother testified for her son. (At the sentencing phase she was in the courtroom, but did not testify.) The tape shows the Defendant sitting there while his mother does most of the talking. She said she was "trying to get him back in his mind" as he was not himself and he was burning up with fever. His remarks that were audible were things like, "Mama, what have I done?" He also said he was hungry. He stretches and appears relaxed. The Court finds the possibility of the Defendant's being in a "fugue state" or suffering from any mental or emotional disturbance extremely

unlikely based on Dr. Kirkland's evaluation and the events that immediately preceded the shootings; however, the Court considered it and attempted to attribute such a condition to the Defendant, but it is just so far-fetched and inconsistent with the facts of this case that only very slight weight was given to this factor.

3. **The Defendant acted under extreme duress or under the substantial domination of another person.** The one victim and many of the witnesses did say the Defendant was not himself and was not acting the way he normally does when they saw him that day with the gun. There's no question he was upset about something or he would not have shot these victims, but it would be sheer speculation to determine what that was. There was no evidence any of these victims had threatened him, although the witnesses for mitigation on November 5, stated that Mary Lubin had said if he touched her daughter again she would retaliate. The testimony from them was that he had beat up Valerie Davis previously. He was not under the substantial domination of another person, however. The Court gave this mitigator little weight.

4. **The age of the Defendant at the time of the crime.** The Defendant was 26 at the time. Dr. Kirkland's examination indicated there was no brain impairment or history of thought disorder or depression. The Defendant's age at the time of the crime is not a mitigating factor, and is given no weight.

NON-STATUTORY MITIGATING FACTORS

The Defendant has asked the Court to consider the following non-statutory mitigating factors:

1) **That the Defendant assisted people in the community.** Julie Harp, Willie Mae Rich, Mary Jackson, Charlene Mobley all testified at the pre-sentence hearing on November 5th that the Defendant was a good father who supported his children and actively participated in their care and was never violent with them. Some of the Defense witnesses testified that he gave children and people in the community financial assistance, clothes, diapers, food, flowers for birthdays, donations to the church, etc. However, none of them knew of any job he had and said the only income they knew of was from betting on races and winning the lottery often. The Defendant (at a previous hearing several months before trial on his Motion to have the Defendant Declared Partially Insolvent for Purposes of Costs) said he had been unemployed over the last year. When asked how he had lived for the past year, he answered, "She (Valerie) had money." He did say, "I run across money." The only explanation he had for

how he runs across money when questioned was through gambling. He also testified that Valerie alone had paid for his car and that she had a lot of money before they ever got together. The Court finds it difficult to believe that the Defendant had enough income to support his own three children (two by Julie Harp, ages 1 and 3, and one child by Valerie Davis, age 17 months) much less to be as benevolent as described by the witnesses. The Court will accept he may have spent time with his children and may have provided them with some of their support, even though the source of that support is dubious. This Court gives this factor a little weight.

2) **That the Defendant is a good father and that he supported and took care of his children.** This is addressed in the previous non-statutory mitigator and the same weight given.

3) **That the Defendant saved his sister from drowning.** Jerline Windom, the Defendant's sister, testified that she was about 12 years old and the Defendant was 8 or 9 years old at the time. She was in a swimming pool with other people. She was drowning in 8 feet of water and the Defendant saved her. Although commendable, this occurred 17 years ago, and is given very little weight in mitigation of his sentence at age 26.

4) **That the Defendant saved another individual from being shot during a dispute over $20.** Defense presented Mr. Scarlet on November 10, 1992, to say Defendant stopped him from shooting Defendant's cousin over $20 by giving him $20. If true, this is given very little weight.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, CURTIS LEE WINDOM, is hereby sentenced to death for the murder of the victim, JOHNNIE LEE; sentenced to death for the murder of VALERIE DAVIS; and sentenced to death for the murder of MARY LUBIN. Each sentence is to run consecutive to each other. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED IN Orlando, Orange County, Florida this 10th day of November 1992.

DOROTHY J. RUSSELL
CIRCUIT JUDGE

COPIES FURNISHED TO:
Mr. Jeff Ashton, Assistant State Attorney, 250 N. Orange Ave., Orlando, Florida 32801
Mr. Ed Leinster, Esq., 1302 East Robinson Street, Orlando, FL 32801
Mr. Curtis Lee Windom, Defendant

Esta E. Pait
Judicial Assistant

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

CURTIS WINDOM,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH WARRANT SIGNED
Execution Scheduled: August 28, 2025, at 6:00 p.m.

APPENDIX I

Circuit Court for the Ninth Judicial Circuit, Orange County, Florida,

Transcript of Trial Proceedings, Vol. II – TrR.197-404

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: CR92-1305
SUPREME CT. NO. 80,830

INFORMATION FOR:
MURDER IN THE FIRST DEGREE
(3 counts)
ATTEMPTED MURDER IN THE FIRST DEGREE

STATE OF FLORIDA

Plaintiff,

-vs-

CURTIS WINDOM

Defendant,
_____/

TRANSCRIPT OF TRIAL PROCEEDINGS
VOLUME II

HONORABLE JUDGE DOROTHY RUSSELL

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: CR92-1305
SUPREME CT. NO: 80,830

INFORMATION FOR:
MURDER IN THE FIRST DEGREE (3 COUNTS)
ATTEMPT TO COMMIT MURDER IN THE FIRST DEGREE

STATE OF FLORIDA,

Plaintiff,

-vs-

CURTIS WINDOM

Defendant,

VOLUME I-IV

Transcript of Trial Proceedings held on February 25-28, 1992

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

Case No. CR92-1305
Division No: 11

CURTIS WINDOM,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee/Plaintiff.
_____/

ORIGINAL

IN RE:	JURY TRIAL - VOLUME II
BEFORE:	Hon. Dorothy J. Russell Circuit Judge
DATE:	August 25, 1992 and August 26, 1992
LOCATION:	Orange County Courthouse Courtroom Number 250 Orlando, Florida
REPORTED BY:	SARAH E. LIGHTSEY, RPR, CCR Official Court Reporter
ON BEHALF OF APPELLEE/ PLAINTIFF:	JEFF ASHTON, ESQUIRE and JANNA BRENNAN Assistant State Attorney 250 North Orange Avenue Suite 400 Orlando, Florida 32801
ON BEHALF OF DEFENDANT:	MR. ED LEINSTER, ESQUIRE and KURT BARCH, ESQUIRE 1302 East Robinson Street Orlando, Florida 32801

I N D E X

P R O C E E D I N G S

(The following proceedings commenced at 4:30 p.m.)

THE COURT: Okay. Good afternoon. The attorneys want to ask you some questions related to your feelings about the death penalty since that's a possible penalty in this case.

So, I'm going to let the attorneys question you just about that before we bring in any other jurors. Mr. Ashton -- before we go any further, while I am thinking about it, please don't discuss this case with anyone, the facts of the case, even among yourselves. And don't discuss your feelings about the death penalty as long as you're a potential juror in this case or a juror. Okay, Mr. Ashton.

MR. ASHTON: Good afternoon, ladies and gentlemen. We have separated you out and brought you in here as a group because it appears from the questionnaires you gave us, your opinions on the issue of the death penalty are relatively neutral; that you are not strong opponents, neither are you firmly in favor of it.

Would all of you agree your opinions are, basically, supporting the death penalty in appropriate circumstances? If anybody disagrees,

please raise your hands.

Are any of you opposed to the death penalty on philosophical or religious grounds? I see no hands. Would any of you have difficulty in being one of the people who is going to be asked to make a decision about whether another individual receives a death penalty or not, being a part of the process and make a very difficult decision?

If anyone has questions about that, please raise your hands and talk about it a little bit. All right.

Mr. Duke, how do you feel about that?

MR. DUKE: I can't say that I feel real comfortable about it. Whether I'm neutral or not doesn't mean I feel real good about whether, you know, I determine the person is guilty or not and giving the person a death penalty.

It's one thing to be neutral.

MR. ASHTON: That's a good point. It's another to be involved. That's why I asked the questions separately. Do you feel you would be comfortable being actually involved in the process and being one of the individuals who, if the facts and the law are correct, could say, "I believe that this person should receive the death penalty?"

It's an awesome personal responsibility, which is why I put it that way.

MR. DUKE: Yea. Until the questionnaire was passed out today, I never really thought about it before. I have to admit the whole thought of participating in a trial with respect to the possibility of murder makes me feel uncomfortable.

MR. ASHTON: Would the discomfort rise to the level that you might not be able to function as a juror and follow the law if, by following it, you felt it was necessary to recommend the death penalty?

MR. DUKE: Can you repeat the question?

MR. ASHTON: Let me do it better. As a juror you have to take an oath to follow the law wherever it leads you.

It's possible that, based on the facts in this case and the law, the law might lead you to recommend the death penalty. That may be your assessment of the law and the facts.

The question is: Could you take the oath knowing that there is a possibility that you might be recommending the death penalty?

MR. DUKE: I guess the answer to that question is yes. But I still approach the whole process with some trepidation.

MR. ASHTON: That's understandable. If you say you could take the oath and could follow the law, that's all we really need to have from anybody. Could you do that?

MR. DUKE: I believe so.

MR. ASHTON: Anybody else have any feelings about that that we should discuss? Because we don't want anybody to take an oath that they are not sure they can uphold. And, of course, I have to do that. Okay. That's all the questions I have of you. Thank you very much. Mr. Leinster may have a few.

THE COURT: Mr. Leinster.

MR. LEINSTER: We spent a lot of time today talking to people who filed out their forms in some questionable manner. And the fact that you folks are sitting in mass at this time may just mean that you didn't fill out your form as clearly or as candidly as some of the other people.

Now, the questions that we have been going back and forth with have gotten rather repetitious for us.

What I don't want to have happen is I don't want 12 good citizens on a jury who reach a verdict of guilty of first degree murder that -- now, there are three counts of first degree murder.

I don't want someone on that jury who says,

"Yes, I have found this man guilty of first degree murder. I have found no justification, no self-defense, no insanity. So, the verdict is guilty.

We've got that for starters. Now, using that as a starting point, we now go to what we call the penalty phase.

At the time of the penalty phase, then we start to get into things that you may or may not have heard during the trial, which will include sort of a profile of who the defendant is. This is any capital case.

Background, maybe whether he was a Boy Scout, what kind of movies he liked, was he kind to his dog, a million different things that you may hear that give you a slant on who that human being is that may have done the atrocious act that you do not condone. Now, are any of you emotionally the kind of person who is going to be almost immediately set on an electric chair vote for the death penalty because you found someone guilty of the crime; or are each of you capable of sitting back and saying, "Now, I will listen to what else is to be said about this human being that I am now being called on to judge, and I want to hear everything there is to be said before I

make that decision?"

Are all of you that kind of person, that latter person, that can sit back and say, "I want to hear the rest of who this man is before I make that decision?"

If you have any qualms about that, if you think, "If I find a guy that senselessly killed someone with gun, I'm going to be mad. You know, I'm in favor of the death penalty. We need it. It's the law in the State of Florida. And if the man is capable of doing that, I don't want to spend my taxpayers dollars for 50 or 25 years. I believe justice requires he should be given the death penalty."

MR. DUKE: I think I would have a hard time isolating an incident, regardless of the personal background. If someone committed a heinous crime, if the court would determine that person had, I would have a hard time separating that incident from any other biographical data that you could provide on that person.

MR. LEINSTER: That's exactly what I'm looking for. You would have made the decision that said enough about that person in your original verdict -- what I'm hearing you say, "I have heard enough. I have heard enough about him. I don't care,

basically, what he was in the past; what he might be in the future, and so forth. The act speaks for itself. Death is the appropriate penalty." That would be your position?

MR. DUKE: I would have a hard time separating those two things, right.

MR. LEINSTER: Okay. In line with Mr. Duke's thing, does that inspire anyone? Yes, I agree with Mr. Duke; that's the way I feel? I would have a tough time divorcing the act from the person?

MR. CHURCHILL: Yes, sir. I would have a hard time separating that if we found the individual guilty of a crime.

MR. LEINSTER: Now, I understand that all of us are human. It is predictable that anyone who sits throughout a murder trial and comes to the conclusion that someone is guilty inexcusably of committing murder is not going to want to go bowling with that fellow.

There's going to want to be another response to that person. The question is whether or not that response is so traumatic that you become, essentially, realistically incapable of listening to other things that might persuade you that he deserves to live or not -- die.

MR. CHURCHILL: Yes, it would.

MR. LEINSTER: It would difficult for you?

MR. CHURCHILL: Yes.

MR. LEINSTER: And it would be difficult for you, Mr. Duke?

MR. DUKE: (Nods head.)

MR. LEINSTER: And you would try to follow the law, I'm sure; and I'm sure you would too, Mr. Duke. But it would be difficult.

Now, that's the type of response I need from everyone. If you feel that way at all, let us know. This is the time to let us know. We have to know these things but we don't want to find out three or four days from now that you don't feel that way and didn't realize it at the time. Do I hear nothing? Everyone else says, "I can sit back, wait, and render a verdict as to the penalty phase, which is completely separate from the guilt phase?" Yes? Yes? Okay. Thank you.

MR. ASHTON: I would like to ask two more questions. Mr. Duke, I'm not sure I understood what you were saying. You said you would separate the crime from the individual and his background?

MR. DUKE: I don't want to over-intellectualize this process, but I want to take it seriously.

MR. ASHTON: Sure.

MR. DUKE: If I were participating in a jury that determined whether an individual committed a certain crime that perhaps deserved a particular penalty that I would have a hard time being influenced by that person's background, I would probably make a determination relative to the person based on the crime itself and try to isolate myself from that person's background.

MR. ASHTON: If the Judge instructed you as a juror that you were required to listen to that mitigating evidence, would you be able to follow that instruction and give your ear to that evidence?

MR. DUKE: I'm not saying I wouldn't listen and be sympathetic to it. I'm saying I would likely be influenced by the act it is and that may preclude being objective from background information.

MR. ASHTON: Certainly. It's the juror's thought process as to what weight to give those things. The Judge tells you that you are to weigh the aggravating circumstances against the mitigating.

Is what you're telling us at this point, you wouldn't even consider the mitigating circumstances or just that you might not give them very much weight

as compared to facts of the crime?

MR. DUKE: The latter. I may not give them sufficient weight.

MR. CHURCHILL: I agree with that.

MR. ASHTON: If the Judge instructs you to consider the mitigating circumstances, would you follow that instruction?

MR. CHURCHILL: Sure.

MR. ASHTON: Is what you're telling us is that you would totally disregard the mitigating circumstances or you might not give them as much weight as you would the facts of the case?

MR. CHURCHILL: I won't give as much weight.

MR. ASHTON: No further questions.

THE COURT: Okay. Counsel approach the bench please.

(The following is a bench conference.)

THE COURT: Any challenges for cause?

MR. LEINSTER: Yes. Mr. Churchill and Mr. Duke for what I think are obvious reasons, but I'll wait for Mr. Ashton's response.

MR. ASHTON: I don't have any objection to Mr. Duke, not for that reason but the response to my questions about being involved in the process. So, I'll not object to that.

As to Mr. Churchill, the question -- when it gets right down to it -- is what weight they will give particular kinds of evidence, and it's totally up to the juror as to what weight they give to different facts.

All they are required to do is listen to facts and weigh them. It's up to them what weight to give them. And the fact they say, "Well, I'll probably give more weight to the facts of the crime than the defendant's background," is, one, perfectly appropriate and, two -- well, within the discretion and not grounds for challenge for cause.

THE COURT: So, you agree with the first one?

MR. ASHTON: Based on the reasons I gave, yea. Our reasons are different, but we both want him off.

THE COURT: And Mr. Churchill said his background -- apparently, he was a police officer in some other life?

MR. ASHTON: I believe he may have been an Orange County deputy. His past is on the questionnaire.

THE COURT: He was, I think. He said he'd have a hard time separating good acts and the good part about the defendant from the crime.

MR. ASHTON: And that bothered me a little bit,

too, because they are really not to separate it; they are supposed to consider it altogether.

I don't know if they used the word separate the way I would use it.

MR. LEINSTER: I understood Mr. Churchill to be Tweedle Dumb to Mr. Duke. So, if we take Duke off, take Churchill off.

MR. ASHTON: I want to make it clear: I was not agreeing to take Churchill off for the reasons you stated. I don't believe the answer to your questions are sufficient for a challenge for cause.

THE COURT: Why don't you think he's got a challenge for cause?

MR. ASHTON: Honestly, just based on what he told me, I would not have moved for a challenge for cause. I want him off because of the statements he made. Since he is moving anyway, I'll agree to it. I want to make sure it wasn't because I thought the grounds were sufficient for cause.

MR. LEINSTER: Get to the meat of the matter. Mr. Churchill, regardless of how you construe it, I think, says, "By the time I find him guilty, I'm not really listening to the rest of it." And that's not appropriate.

THE COURT: He said he'd give it some weight.

MR. LEINSTER: To the extent anyone with an ear listens, he will listen; but he will not be hearing.

THE COURT: I'm going to challenge for cause. That's it.

(End of bench conference.)

THE COURT: At this time we'll excuse Mr. Churchill and Mr. Duke. And the rest of you, we're going to need to keep you and bring in the other members of the jury and proceed with the voir dire for the entire panel.

Some of you -- we need to bring in the other people and see if they need to make a phone call. We, obviously, are going to go past five o'clock.

Mr. Duke and Mr. Churchill, you're free to go to the jury room. Let's bring in the other jurors, not necessarily in the seats they are going to be in but to find out if people need to make phone calls to arrange for evening plans or pickup kids or whatever they do.

(Short Pause.)

THE COURT: Okay. I brought you in, and we don't have you in the seats we want you in ultimately for voir dire.

We are going to be going past five o'clock. If there are people who need to make phone calls or

arrangements -- is there anyone here who needs to call someone or do something in case we're going to be here close to 6:00 or 6:30?

Is this going to be a major problem for anybody? Okay. Why don't we talk -- how long do you need? Five minutes? Is that long enough for everybody?

Tell them where the phones are. When we come back, we'll have a seating chart for everybody to seat. It goes a little faster so the lawyers know who they are talking to.

We'll take five minutes, and then we'll start voir dire.

(Court recessed at 4:50 p.m. The following proceedings commenced at 5:00 p.m.)

THE COURT: We have already sworn the jury for all of those this morning. So, would the clerk please place the Case Number and case on the record?

MADAM CLERK: Case Number CR92-1305, State of Florida versus Curtis Windom.

THE COURT: Is the State ready to proceed?

MR. ASHTON: Yes, ma'am.

THE COURT: Defense?

MR. LEINSTER: Yes.

THE COURT: Okay. Since you have already been

sworn, let met welcome you again. As you know, this is a case that involves a first degree murder charge, actually three charges of first degree murder and one of attempted first degree murder.

Your duty as a juror is to sit in judgment of the facts in the case. And then, at the end of the trial after you have heard all the evidence and seen all the evidence that is going to be introduced, if any is, then at that time I will instruct you on the law applicable to this charge or these charges; and then you will go into deliberations to determine, first of all, the decision regarding guilt or not guilty.

And then if it is a guilty verdict, as we've said, if it's guilty of first degree murder, a capital offense, then at that point we would set a date for the jury to come back for deliberation on the penalty phase for your recommendation.

And that's the different part about a capital case, is that you do come back for the sentencing phase.

This is your chance to become a part of the judicial system, a means by which you determine the rights and liberties of fellow citizens. We anticipate this trial will go throughout the week.

And I have to ask you first: Is that going to be a major problem for anyone here? We very well could go into Friday. All of us are hoping we will finish on Friday. If we don't, we will go into Saturday. Is that a problem? Okay.

Let me introduce to attorneys involved. Some of you have already talked to them already. But let me introduce you officially now.

We have Jeff Ashton representing the State, and with him is co-chair, Janna Brennan.

Also we have next to them Ed Leinster, attorney for the defendant; and co-counsel with him is Kurt Barch.

Next to Mr. Leinster is his client, Curtis Windom.

Do you any of you represent -- recognize any of these five individuals that I have introduced you to so far?

Okay. In addition to those five people, we have the court deputies. That's your connection with the Court, and they are the people in the green outfits. They will change. There will be different people, but they will all look alike. They will be wearing the green outfits.

So, if you have a problem or need to get a

message to the Court, they are your connection to us. The attorneys can't talk to you. Of course, the defendant can't talk to you. Of course, the witnesses can't talk to you, and I don't talk to you outside the presence of everyone else.

But the court deputies are the people -- if you have some problem or you need to get a message to us, they are the ones you need to talk to.

Also we have the clerk of the court and Pat sits here and takes notes of the trial and keeps the minutes from the trial. And any evidence that might come into the trial, she would mark that as the exhibits for the trial.

Also the court reporter you have seen is Sally, and she's taking down everything verbatim of what we are saying. And if you are asked questions, please speak up. And if the attorneys should ask you questions or I ask you questions that require a yes or a no, please say yes or no, even though it's obvious to all of you; because she needs to take it down for the record.

Would the State, please, read the charging document, the indictment, for the jury at this time?

MR. ASHTON: Yes, Your Honor. Reads as follows: In the name and by the authority of the

State of Florida, the Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Orange, upon their oaths, do present that Curtis Windom did, on 7th day of February, 1992, in Orange County, Florida, in violation of Florida Statute 782.04, from premeditated design to effect the death of Johnny Lee, murder Johnny Lee in the County and State aforesaid by shooting him with a firearm.

And the Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Orange, upon their oaths do further present that Curtis Windom did, on 7th day of February, 1992, in Orange County, Florida, in violation of Florida Statute 782.04, from a premeditated design to effect the death of Valerie Davis, murder Valerie Davis in the County and State aforesaid by shooting her with a firearm.

Count III: And the Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Orange, upon their oaths do further present that Curtis Windom did, on the 7th day of February,

1992, in Orange County, Florida, did, in violation of Florida Statute 782.04 by a premeditated design to effect the death of Mary Lubin in the County and State of Florida aforesaid, murder Mary Lubin by shooting her with a firearm.

Count IV: And the Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Orange, upon their oaths do further present that Curtis Windom did, on the 7th day of February, 1992, in Orange County, Florida, in violation of Florida Statute 777.04 and 782.04 from a premeditated design to effect the death of Kenneth Williams in the County and State aforesaid attempt to murder Kenneth Williams by shooting him with a firearm.

THE COURT: Thank you, counsel. Now, do you have a list of the witnesses that may be called in this trial?

MR. ASHTON: Yes, I do.

THE COURT: Please listen to these names because I am going to be asking you if you know them and if your knowing them influences you any in the case.

MR. ASHTON: The first will be members of the Winter Garden Police Department. Sergeant Fusco, Lieutenant Jon Johnson, Vicki Ward, Corporal John

Gardner, Officer S. J. Phillips, Officer Bobby Gammill, Kenneth Williams of Winter Gardner, Florida. Cassandra Hall, Keeman Hunter, Jerry Hanks, Thomas Watkins, Connie Walton, Sheron Clark, Augusta Scott, Maxine Sweeting, Latroxy Sweeting, Terry Jackson, Patricia Hunter, Pamela Fikes, Miriam Holley, Pearly Mae Riley, Jean Willis, Jack Luckett, Adam Manuel, Andre Walker, and Reverend Ray Beacham, all of Winter Garden, Florida.

Dr. William Anderson of the medical examiner's office, Willie Thompson of Oakland, Florida, Abner Younce, Y-o-n-c-e, of Casselberry, Florida.

Terry Kingerly and Susan Komar of the Florida Department of Law Enforcement Crime Lab. Sorry. And Mary Law of Orlando, Florida.

THE COURT: Does the defense have any names you'd like to add to that list?

MR. LEINSTER: Yes, we will. Potentially, Mary Jackson, Eddie Windom, Nathan Watkins, Andre Walker, Charlie Brown, Willie Reich, Odessa Reynolds, Wilbur Archer, Florida Windom, Adam Manuel, Marlene Mobley, Frank Massey. And that's it for now.

THE COURT: Do any of you recognize any of those names or know anything of the people that are named?

PROSPECTIVE JURORS: No.

THE COURT: Okay. This first part of the trial, called voir dire, means to speak the truth in French; and this is the part of the trial where the attorneys will question you, in addition to what they have already questioned you, to make sure that you don't have any bias or prejudice either for or against the defendant as you start the trial.

One thing I do want to challenge or remind you of is the purpose is to get a jury of 12, plus 1 alternate who could try the case fairly and impartially to both the State and the defense. Because there has been a little or some pretrial publicity -- some of you have seen it; some have not -- we need to be particularly careful because we are looking for an impartial jury and one that we've spent a lot of time culling out a little bit today already.

If you think of something, if something comes to mind, if you remember something that you didn't remember before, if there's something that these lawyers or I ask that remind you of something you know about the case, please don't blurt it out and contaminate the rest of the jury with what you might know.

If you've got something that you need to tell us

about, we certainly would want to know something of that nature that you know about the case. Please raise your hands, and we'll have you come up to the bench and talk about it, along with the lawyers and me and the court reporter so that we don't have everybody in the group learn anything from what you already know.

In fact, if there's any question that the attorneys ask you, I assure you they are questions that are not designed to delve into personal affairs and your private lives; but some of the questions they will need to ask you may turn out to reflect on something that you just don't want to share with everybody in the room.

And, certainly, if that's the case, please tell us. We'll have you come up for that kind of question, too, if you've got an answer that you just don't want to share with everybody.

If you are not selected as a juror on this case, don't think your honesty or integrity has been challenged. I assure you, that's not the case.

Do any of you have any bias or prejudice either for or against the defendant as you sit there right now? Yes, ma'am? Is there something you want to tell us

MS. REYES: Yea.

THE COURT: Would you, please, come on up and the court reporter and counsel.

(The following is a bench conference.)

THE COURT: You're Mrs. Reyes?

MS. REYES: Yes. I already feel that he's guilty. I don't know and I just don't think it's fair for me to sit here. I'm either thinking should he get the years or the chair.

THE COURT: Why have you decided this?

MS. REYES: I have had some time to think about it. I have that feeling. I'm starting to think more about what I saw in the news, you know.

THE COURT: Any questions?

MS. REYES: Didn't he have longer hair back then?

THE COURT: I don't know. Do you know?

MR. LEINSTER: (Shakes head.)

MR. ASHTON: I don't know.

MADAM CLERK: It was a little longer.

THE COURT: Okay. You want to ask her anything?

MR. ASHTON: Do you feel at this point there's any instruction the Judge could give you that would enable you to completely put this feeling out of your mind or will it kind of stick with you at this point?

MS. REYES: I would not want to be stuck with it.

MR. ASHTON: But you are right now?

MS. REYES: (Nods head.)

MR. ASHTON: No further questions.

THE COURT: Any reason not to let her --

MR. ASHTON: I think it's necessary.

THE COURT: As far as I know, the jury room is closed. We need your button. Did they tell you to come back tomorrow?

MS. REYES: They haven't told me anything.

THE COURT: I think she can be excused today.

MS. REYES: Give to this to --?

MADAM CLERK: Me.

MS. REYES: I'm sorry.

THE COURT: That's all right. Thank you.

(End of bench conference.)

THE COURT: Any of you have any physical problems -- hearing, sight or otherwise -- that would render you incapable of sitting on the jury and listening to the testimony?

PROSPECTIVE JURORS: No.

THE COURT: If we went past six o'clock any night, would that be a problem for you?

PROSPECTIVE JURORS: No.

THE COURT: If you are selected as a juror in this case, will you render a fair and impartial verdict based on the evidence that you have heard and seen during the trial and on the instructions that I'll give you on the law at the end of the trial and render a fair and impartial verdict?

PROSPECTIVE JURORS: Yes.

THE COURT: Is there -- do you have any other reason why you cannot give this case your undivided attention and render a fair and impartial verdict?

PROSPECTIVE JURORS: No.

THE COURT: Okay. Counsel for the state may inquire.

MR. ASHTON: Good afternoon to y'all once again. What we're going to do now is ask some questions of you I want you to answer. I don't have questions of everybody.

I have gone through your jury questionnaires, the factual ones you filed out for jury service. And for some of you I have questions to clarify. Don't have questions for everybody. If I skip over you, don't be offended or don't think I don't want to talk to you. I don't want to hold you here to ask you what bumper stickers you have on your car or what books you read. Just a few questions.

Mr. Giraud, I have to ask you this: What is Beasties of the Kingdom where you work?

MR. GIRAUD: It is miniature, little animal statues. You see them in the gift shops.

MR. ASHTON: Okay. And the casting is the actual case in which they are made?

MR. GIRAUD: I pour the -- like, in the molds.

MR. ASHTON: I had it totally wrong. I thought it was entertainment and you cast. Just goes to show you. How long have you been worked there?

MR. GIRAUD: Two years.

MR. ASHTON: Thank you. Ms. Cooper.

MS. COOPER: Yes, sir.

MR. ASHTON: You have sat on a jury before; is that correct?

MS. COOPER: Yes.

MR. ASHTON: What kind of -- do you recall what kind of case it was?

MR. COOPER: Cocaine.

MR. ASHTON: Okay. Is there anything about that jury service that would make you not want to sit as a juror again?

MR. COOPER: No.

MR. ASHTON: Okay. Thank you. Mr. Guffey, I have two questions for you. The first is you

indicated that you or some member of your family had been accused, complainant or witness in a criminal case?

MR. GUFFEY: I was.

MR. ASHTON: What was your involvement?

MR. GUFFEY: I was charged with grand theft. I was acquitted.

MR. ASHTON: Did you take the case to trial?

MR. GUFFEY: Yes, it did.

MR. ASHTON: Did that experience leave you with a bad experience about defense attorneys, police officers?

MR. GUFFEY: My father is a retired police officer. I don't have any bad feelings whatsoever.

MR. ASHTON: And you indicate you do have close friends that are law enforcement officers?

MR. GUFFEY: My father, he's tired.

MR. ASHTON: Who is local?

MR. GUFFEY: He was with the Edgewood Police Department and constable's office. We're going a way back with the constable's office.

MR. ASHTON: We're going quite a way back. Thank you, sir. Ms. Reyes has got to leave, and I'm sure you would love to know what it is she said that got her to leave. We're not going to tell you.

A JUROR: Don't want to know.

MR. ASHTON: I like to hear that. Does anybody here honestly feel like this is really a chore; that you would just do almost anything to get out of here? Or do you feel like this is something that may not be pleasant but it's your duty and you're here to do it?

PROSPECTIVE JURORS: Yes.

MR. ASHTON: I feel anybody who really wanted to get out of here would have lied to us and been gone. Mr. Schimmel, you also know someone who was an accused, complainant or witness in a criminal case?

MR. SCHIMMEL: Yes.

MR. ASHTON: Can you tell me about that?

MR. SCHIMMEL: I was in here about a year ago for aggravated assault. It was dropped to a misdemeanor.

MR. ASHTON: Was that on a plea or in trial?

MR. SCHIMMEL: Plea.

MR. ASHTON: Again your experience, as Mr. Guffey, I asked him, did that leave you with any bad feelings about police, prosecutors, defense attorneys, judges or anybody with the system?

MR. SCHIMMEL: No.

MR. ASHTON: No problems there?

MR. SCHIMMEL: No.

MR. ASHTON: Okay. Mr. Haley, sir, you have a close friend who is a law enforcement officer. Who would that be?

MR. HALEY: I have several. Jerry Demings and Sam Ings.

MR. ASHTON: Sam Ings is with the Orlando Police Department. Anything about your relationship with those people that would give you difficulty in sitting in a criminal case?

MR. HALEY: No.

MR. ASHTON: Okay. Thank you. Mr. King.

MR. KING: Yes.

MR. ASHTON: You sat on jury in a criminal case in the past. Can you tell -- do you remember what kind of crime it was?

MR. KING: It was a drug case.

MR. ASHTON: A drug case? Okay. Anything about that experience that would make you not want to sit as a juror again in a criminal case?

MR. KING: No, sir.

MR. ASHTON: No problem?

MR. KING: (Shakes head.)

MR. ASHTON: Okay. Mrs. Conklin, you also sat in on a drug case. Same question to you: Anything

that would make you not want to do it again?

MS. CONKLIN: No.

MR. ASHTON: All right. Mrs. Stewart, you also know someone that was involved in a criminal case. Could you tell me about that?

MS. STEWART: My husband's wallet was stolen by a credit card ring down in Miami when he was visiting.

MR. ASHTON: Was he every actually called to testify in trial?

MS. STEWART: No.

MR. ASHTON: So, he was a victim of a crime, basically?

MS. STEWART: Right.

MR. ASHTON: Okay. I assume his credit cards weren't there when the credit cards were found?

MS. STEWART: No, but they found the guys because they did send a letter back from Miami saying they were taking it to court. But he never had to testify or anything.

MR. ASHTON: Okay. Good. Mr. Vaughan, two questions for you: First, you indicated that you knew someone that was a complainant or witness in a criminal case. Can you tell me about that?

MR. VAUGHAN: Well, it was my brother. I don't

know much about the case, though.

MR. ASHTON: Was he accused of the crime?

MR. VAUGHAN: No. He was the complainant.

MR. ASHTON: He was the victim in other words?

MR. VAUGHAN: Right.

MR. ASHTON: Do you remember what kind of crime it was?

MR. VAUGHAN: I'm not real sure.

MR. ASHTON: Okay. What is your occupation?

MR. VAUGHAN: I'm out of work right now.

MR. ASHTON: Okay. You used to work in the art department at U.C.F.?

MR. VAUGHAN: Right.

MR. ASHTON: Okay. Great. Ms. Lansing, Louise Lansing over there on the end, you were a juror in a criminal case. Can you tell what kind of charge it was?

MS. LANSING: Some students from a northern state came down on spring break at Daytona and ripped off a car and took a tape deck and wallet and some other things.

MR. ASHTON: Okay. Anything about that experience that would make you not want to sit as a juror again?

MS. LANSING: No.

MR. ASHTON: Someday someone is going to answer that, "Yea. I'll never do it again. It was the worst experience of my life."

Mrs. Cowley, you have a next-door neighbor that is a Orlando Police Department officer?

MS. COWLEY: Yes. Karen Burson.

MR. ASHTON: Anything about your relationship with her that would make you not want to sit as a juror in a criminal case?

MS. COWLEY: No. But I do have one other comment, and I don't know if I should say it here or up in the front.

THE COURT: If there's any doubt, come on up.

(The following is a bench conference.)

MS. COWLEY: I was engaged to a gentleman that turned out to be a hard alcoholic and drug user. If the case has anything to do with alcohol or drugs, I definitely would be prejudiced.

MR. ASHTON: Okay. Thank you for that. I don't have any questions for her.

THE COURT: Do you?

MR. LEINSTER: (Shakes head.)

THE COURT: Okay. Have a seat. We'll see.

(Short pause.)

THE COURT: I don't know what you can bring up

about any drugs. Does it say anything to do with drugs on the arrest report?

MR. ASHTON: I anticipate that at some point during the penalty phase the fact of the defendant's occupation or what we believe to be his occupation is going to come out and that does involve drugs.

So, that's my guesstimation of what's going to happen.

MR. LEINSTER: I think -- I have been anticipating this, too. It may even come out in the case in chief because this whole area was so permeated with drugs and his reputation being what it is. I'm not intending to elicit that, but it's very possible that somebody is going to blurt something out about drugs.

The clear impression is going to be left, I think, that everybody out there, basically, is a drug dealer.

THE COURT: What do you want to do with her?

MR. LEINSTER: I would challenge her. She wants out of here anyway.

THE COURT: Which one was she?

MR. ASHTON: She was the one with my migraines. She was the one with migraines.

THE COURT: What was her name?

MR. ASHTON: 199.

MR. LEINSTER: They are falling like flies.

(End of bench conference.)

THE COURT: Ms. Cowley, if you'll give us your button, we will let you go. I don't think they wanted you to come back tomorrow because you served two days. If you'll give us the button -- give it to the court deputy -- you will be excused. Thank you.

MR. ASHTON: Another secret conference. That brings up a point that I want to make. Many times during a trial, there are conferences that are held between the attorneys and judge to which the jury is not privy; that you don't get to hear.

It's not because we're trying to hide anything from you. It's just that there are certain matters which you shouldn't hear, legal decisions the Judge has to make, legal arguments that you should not hear.

Please don't ever think anybody is trying to hide anything from you or keep you in the dark. You hear what the law says you should hear; and, everything else, the Judge needs to deal with.

I'm still not going to tell you how she got out, though.

All right. Mrs. Anderson, two questions for

you: You have answered the question about someone being involved in a criminal case. Would you tell me what that was about?

MR. ANDERSON: Can we come up?

MR. ASHTON: It's like the Price is Right.

(Bench conference.)

THE COURT: Okay. What did you want to say?

MR. ANDERSON: About 15 years ago, I guess, my husband was in a case involving receiving stolen property.

THE COURT: You were?

MR. ANDERSON: My husband.

THE COURT: Was he taken to trial?

MS. ANDERSON: Uh-huh.

THE COURT: Was he found guilty?

MR. ANDERSON: It was a nolle contendere plea.

THE COURT: It didn't go to trial?

MS ANDERSON: It did go to trial.

THE COURT: He plead in the middle of the trial?

MS. ANDERSON: I know it went to trial.

THE COURT: Maybe he pled in the middle of it. Anyway, is there anything about that experience that you feel very strongly against the whole system or the State or the police?

MR. ANDERSON: No.

THE COURT: Okay. Why did you bring that up now?

MR. ANDERSON: Why did I bring it up?

THE COURT: You didn't want to say all of that in front of the jury?

MR. ANDERSON: Yea.

THE COURT: I didn't want you to feel it was a problem for you. Mr. Leinster, want to ask her anything?

MR. LEINSTER: No, I don't have any questions.

(End of bench conference.)

MR. ASHTON: This is a good spot to make a point at. Many times during the jury selection and, occasionally, perhaps during the trial but more at jury selection, both the Judge and Mr. Leinster and myself may seem a little lighthearted, like we are not taking this seriously.

I want to let you know the reason to do that is to relax you. It's much easier for us to get correct and candid information if you are not afraid, like someone is going to come down and hit you with a hammer.

Please don't think the jovial spirit or lighthearted comments in any way detracts from the

seriousness of the case. We take this very seriously. But there's no reason we can't smile and be informal and talk to each other. Please hear that in the right way.

Mr. Heidelberger, you were a juror in a federal case?

MR. HEIDELBERGER: Yes, sir.

MR. ASHTON: Do you remember what the crime was?

MR. HEIDELBERGER: Drug manufacturing.

MR. ASHTON: Drug manufacturing?

MR. HEIDELBERGER: Yes.

MR. ASHTON: Okay. Anything about that experience that would make you not want to sit as a juror again?

MR. HEIDELBERGER: No, sir.

MR. ASHTON: Okay. All right. Let me just throw one sort of open question out. Have any of you thought of anything while I have been speaking or any part of this case that you feel we should know about in deciding who to pick for this jury? Mr. Franklin?

MR. FRANKLIN: I'd like to come up.

MR. ASHTON: Come on up.

(The following is a bench conference.)

MR. FRANKLIN: Over the years I have been -- when I was a teenager, I got into trouble and things

like that. As an adult I have been arrested for DUI and got a violation charge against me but nothing pending at this time. I know a lot of people that have been in trouble in the past. But, you know, what they got is not up to me to decide; and it has no bearing on this. But I just felt that I ought to say something about it at this point.

THE COURT: Have you ever been convicted of a felony?

MR. FRANKLIN: I don't remember.

THE COURT: You didn't mention felony. You said DUI.

MR. FRANKLIN: I have arisen forward from the DUI and I was not -- I mean, I was not convicted of it. But I pled guilty to the charge.

THE COURT: Then you're convicted. Was it here in Florida?

MR. FRANKLIN: Yea.

THE COURT: You were convicted but that is not a felony.

MR. FRANKLIN: The violation of probation charge, was that a felony?

THE COURT: On what case?

MR. FRANKLIN: The same thing.

THE COURT: No.

MR. FRANKLIN: As far as I know.

THE COURT: You are not as bad as you think. Is there anything about your experience with the law, especially here, that would make it difficult for you to be fair and impartial if somebody else is the defendant?

MR. FRANKLIN: Not at all. But I felt like I had to say something because I didn't know.

THE COURT: We want to make sure we ask the questions to find out if there is anything about your experience as the defendant that would line you up with or against the defendant in this case.

MR. FRANKLIN: No. Like I said, I know a lot of people that have been in trouble.

THE COURT: So have we.

MR. FRANKLIN: That's part of growing up.

THE COURT: How old are you now?

MR. FRANKLIN: Thirty-two.

THE COURT: So, you have cleaned it up?

MR. FRANKLIN: Quite a bit. One other thing, I was -- I did have a drug problem, okay? But I went through treatment and got cleaned up and everything.

THE COURT: What treatment?

MR. FRANKLIN: Phoenix.

THE COURT: How long ago was that?

MR. FRANKLIN: I got out in six months in the program, and I got out December 6th of last year.

THE COURT: Well, okay. Anything about that you want to ask him?

MR. ASHTON: No.

THE COURT: Mr. Leinster?

MR. LEINSTER: I notice you have tatoos on you hand. What is the significance of love backwards?

MR. ASHTON: It's not backwards from this arrangement.

MR. LEINSTER: Would you show it to him close up?

THE COURT: That's right. That's the way they always do it.

MR. LEINSTER: Is there any significance to putting love on four fingers?

MR. FRANKLIN: I did that when I was four finger.

MR. ASHTON: Nothing to do with a motorcycle gang, racists or anything like that?

MR. FRANKLIN: None of that.

(Short pause.)

THE COURT: Okay. You think he's okay?

MR. LEINSTER: I'm okay; he's okay.

THE COURT: Okay.

(End of bench conference.)

MR. ASHTON: Somebody else?

THE COURT: Mr. Nagarya.

(The following is a bench conference.)

MR. NAGARYA: The one thing that came to light when we were discussing the witness is the fact that my stepson maybe two years or more back dated an Officer Angel Laite, who is a member of the Winter Garden Police Department.

THE COURT: Angel Laite?

MR. NAGARYA: Angel L-a-i-t-e. I have no reason or my wife to see her since then. Whenever she was a guest in our home, we never talked about police duties or anything like that.

THE COURT: Is there anything about your knowledge or knowing her that would bias you one way or other in this case?

MR. NAGARYA: No. She was an exemplary police officer, and she never discussed her specific work on the police department.

THE COURT: She was dating your son?

MR. NAGARYA: My stepson.

THE COURT: Anything y'all want to ask him?

MR. ASHTON: No, Your Honor.

THE COURT: You are still good.

(End of bench conference.)

MR. ASHTON: Anyone else have anything they would like to talk about?

MR. ASHTON: Mr. Phillips?

MR. PHILLIPS: Yes, sir.

MR. ASHTON: Come on up, please.

(The following is a bench conference.)

MR. PHILLIPS: I have a bad neck and shoulder, and I make regular visits to the chiropractor. And I can probably forgo the M.D. that I go to, but somewheres (sic) in there I'm going to get real stiff sitting in these chairs all day.

It really bothers me to bring something like this up. This jury has really bothered me in many ways. As much as I'd like to sit here, do you have any idea what the hours would be? Would I still get to see my doctors?

THE COURT: We would have hours something like 9:30 in the morning until about 6:00 at night, five to six at night and take about an hour to an hour and a half lunch break. The only other breaks we get -- I won't keep you sitting more than two, two and a half hours. Then we'd have a break.

9:30 to noon and 1:30 to 3:00 or 4:00 and then finish up the evening. So, you're not going to be

sitting more than three hours at one time. But can you sit up to two, two and a half hours?

MR. PHILLIPS: I can deal with that.

THE COURT: So, you will have a chance to see your doctor around that schedule. We're hoping to finish Friday, aren't we?

MR. ASHTON: Yes, ma'am. I wanted to check the schedule. Let me check one more time.

(End of bench conference.)

MR. ASHTON: Anyone else like to take the walk?

THE COURT: We are kind of making light of this, but we really shouldn't. We need information from people regardless of how sensitive it may be. Come on up.

(The following is a bench conference.)

THE COURT: What is your name? Janet Stewart?

MS. STEWART: Yes. I just wanted to say that first when he had asked me if seeing it on television had made me feel one way or other about it, at the time he asked it didn't because I see that kind of thing on television all the time.

But the longer I'm sitting here and the longer I'm thinking about it, I keep seeing the lady on television saying he just came in and shot him. I feel more guilty than not right now.

THE COURT: Okay.

MR. ASHTON: The question is: Regardless of what you may remember, can you set it aside and only rely on the evidence that you hear from the testimony of the witnesses and the exhibits you see as opposed to what you may have heard?

MS. STEWART: I can't really say that I can or I can't. I really don't know.

MR. ASHTON: So, you think there's a chance the media might influence your ultimate verdict in this case?

MS. STEWART: Yes, sir.

MR. ASHTON: Thank you.

(Prospective juror leaves the bench. Short pause.)

THE COURT: Any challenges for cause?

MR. LEINSTER: Out of here.

MR. ASHTON: I guess that means challenge for cause. I don't have any objection to it.

MR. LEINSTER: I wanted her out of here the first time around.

(End of bench conference.)

THE COURT: I know you did. Now you've got what you wanted.

Mrs. Stewart, if you'll give us your button,

we're going to let you go.

You want to ask anybody else?

MR. ASHTON: Before the court reporter goes back?

THE COURT: Yes, sir.

MR. ASHTON: Mr. Petillo?

(The following is a bench conference.)

MR. PETILLO: Let me complain; it's hot in here.

THE COURT: I'll talk to the people about that.

MR. PETILLO: Since I filled out the questionnaire, I found out that my 16-year-old is being charged with selling a nickel bag of marijuana.

THE COURT: 16 years old? In juvenile court?

MR. PETILLO: Yes. Tomorrow he is being arraigned, I believe.

THE COURT: You are going to the arraignment?

MR. PETILLO: No. We're doing it by letter. We have a letter.

THE COURT: Is that going to prevent you from sitting on this jury this week?

MR. PETILLO: Shouldn't. I mean, you know, the arraignment is one thing, setting a date if it goes to trial. I don't know. It's his first offense. He's a good kid other than that, being very stupid.

THE COURT: Where does he go to school?

MR. PETILLO: The new school, Cyprus Creek.

THE COURT: Is there anything you want to ask him?

MR. ASHTON: No.

THE COURT: That's not going to interfere with being fair and impartial or be partial to the cops or anything like that or line up with the defendant? You are still neutral?

MR. PETILLO: In fact, I'm kind of thinking that we caught him at the very beginning.

THE COURT: Probably right. Okay. Thanks.

MR. ASHTON: Anyone else? All right.

(End of bench conference.)

MR. ASHTON: Once again, we make light about our trips back up to the bench; but we did get information that's valuable.

Anybody else have anything they would like to say in the broader group here that you think we should know? All right. That's all I have, Your Honor.

THE COURT: Thank you, counsel. Mr. Leinster.

MR. LEINSTER: There is a certain method to this madness. We have gone through a lot of gyrations today, but the net result is that 20 of you folks who started out today are now gone. That's the whole

purpose of this, is to find the best possible juror we can.

We are never going to be perfect, but we're going to be as class as we can. I had thought a few moments ago it would be clear to you if you wanted out of here at this point, all you have to do is raise your hands and come forward and you're gone. But it only worked three out of six, so I can't guarantee that anymore.

Those of you who are sitting here are guaranteeing us that you can be completely fair and impartial about ever aspect of this case?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: Okay. Well, I'm going to satisfy what has to be your curiosity, but I'm not going to tell you who said it. One of the individuals is no longer here because that individual said, "I think he's guilty."

I don't know where that came from, why that thinking process started to set in because we haven't heard a shred of evidence. At least that individual is honest enough to say, "That's what I think."

I had a child molestation case, and there hadn't be a shred of evidence; and one of the ladies said, "Do you think there is any inference to be drawn --"

and she started to quiver and cried, "How could he do such a thing?" She was gone obviously.

We started off talking about assuming he was guilty. We played that game with everybody which is really an extraordinary thing to do in a criminal case. We usually start off telling you that somebody is presumed innocent. You have heard all of that, haven't you?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: Tapes and movies and all that? That's where we start usually. Today we played a little different game. We pretended he was guilty so we could figure out how you felt about the death penalty. You understand we are pretending, don't you?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: And he is presumed to be innocent of these charges -- the charge of first degree murder involving premeditated, intentional murder -- presumed innocent until proven guilty beyond a reasonable doubt. Do you understand that? Beyond every reasonable doubt. Do you agree with that?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: Do any of you think that the act necessarily of shooting someone with a gun demands a

verdict of guilty, that they intended to kill that person?

Because, if you do, if you think there is an absolute causal relationship there, then I want you to tell me. Most of you probably haven't ever shot anybody. Would that be a fair statement?

PROSPECTIVE JURORS: No.

MR. LEINSTER: Would you tell me if you had?

MR. PHILLIPS: (Raises hand.)

MR. LEINSTER: Again. I appear to be joking about this. It's not a joke. But does anybody here think that there is a necessarily causal relationship between that act and the intent to kill? No? All right.

Would everyone here agree that you need to evaluate all of the circumstances, everything that may have gone through a man's mind before he can even begin to try to figure out what made him tick?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: Do you agree that all of us exhibit different behavior one day as opposed to another?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: Do you agree we are all human beings in the sense we are all fallible?

PROSPECTIVE JURORS: Yes.

MR. LEINSTER: Now, the nature of this case, being what it is, ordinarily -- and in covering the death penalty -- we would have gotten the feedback. We would have been looking for -- as far as does the nature of this case by itself make you so sick that you don't want to sit on it, a rape case, a child molestation case, or is there something about the case you don't like and don't want to be a part of it.

You probably have already gone through that in your mind in going through the death penalty. But it's a difficult thing to talk about it and actually sit through it.

Those of you who actually sit will hear testimony, will see perhaps photographs. I don't know. I'm guessing. Things that you don't see every day, things you probably don't want to see every day or want to hear everyday; but you know they exist. It's part of being on the planet.

Is there anybody here now coming to grips with visualizing themselves seeing these things close range? Is it going to disturb anybody to the point you wouldn't be able to be as fair and objective as we want you to be? No?

PROSPECTIVE JURORS: No.

MR. LEINSTER: Mr. Guffey, you, for one, were glad the system worked.

MR. GUFFEY: Yes, sir, I am.

MR. LEINSTER: Is that right?

MR. GUFFEY: (Nods head.)

MR. LEINSTER: You're probably one of the few people that likes lawyers?

MR. GUFFEY: I don't particularly like lawyers, but the system does work.

MR. LEINSTER: You like jurors probably?

MR. GUFFEY: Yes, I do like jurors.

MR. LEINSTER: That's all I have.

THE COURT: Okay. Where is Mr. Ashton? We need to select the jury. Do you need a chance to talk to your client before we come up here?

MR. LEINSTER: No.

THE COURT: You want to come on up then?

(The following is a bench conference.)

THE COURT: Y'all couldn't possibly have any more challenges for cause, could you?

MR. ASHTON: I don't have any more.

THE COURT: Do you have any more challenges for cause?

MR. LEINSTER: No, I don't.

THE COURT: State, how do you feel about the first six, which is 1, 2, 6, 7, 9, and 10?

MS. BRENNAN: Six or twelve?

THE COURT: Let's do six. I can't keep up with twelve. We're going to have twelve when it's over.

MR. ASHTON: It's going to take me a minute because these people aren't in the same order.

THE COURT: I don't want to go one at a time.

MR. ASHTON: I will exercise a peremptory challenge as to juror number one.

MR. LEINSTER: I would question that as a race issue.

THE COURT: What is the reason?

MR. LEINSTER: Challenge him for cause. You denied it on the same basis I gave for challenge for cause. Do it on the basis of a challenge for cause at this point.

THE COURT: What was the basis for cause?

MR. ASHTON: I don't have his exact words, but it was an opinion of the death penalty. I think this is the fellow that we couldn't get to say the word death penalty.

MS. BRENNAN: Yea, it is.

MR. ASHTON: As I recall, he kept saying --

THE COURT: All right. For the record, number

one juror is black and so is the defendant. I'd like to recall that he had problems using the words death penalty, although I find he did say the word death.

MR. ASHTON: He did and the Court denied the challenge for cause. But I feel it's very clear that he is not in favor of the death penalty and that is a rational, neutral reason for excluding him.

THE COURT: If that's the objection, I'll exclude him.

MR. LEINSTER: I would note for the record there appear to be five black jurors on the panel that now has 30 left to choose from.

THE COURT: Okay.

MR. ASHTON: I don't know that I agree with that.

THE COURT: Let's see.

MR. LEINSTER: One of them appears to be Latin descent.

THE COURT: Is that the one in the back?

MR. ASHTON: I see one, two, three -- I see four.

MS. BRENNAN: There's one woman. There's five, I see.

MR. ASHTON: Five.

THE COURT: Which ones are they? Identify them

so I can mark them so I'll know.

I've got number 6 and number 16. What are the others?

MR. LEINSTER: There's number 213.

THE COURT: 213?

MR. LEINSTER: Yea.

THE COURT: Okay. And who else?

MR. LEINSTER: Number 164.

THE COURT: Why don't you give me the big number.

MR. LEINSTER: Juror 16.

THE COURT: I got that.

MR. LEINSTER: Okay.

THE COURT: Anybody else?

MS. BRENNAN: Juror 18.

THE COURT: 18.

MS. BRENNAN: And juror 6.

MR. ASHTON: There's also the juror in the back. Forget which one she is. Marquita Anderson is also black.

MR. LEINSTER: I don't think she is black.

THE COURT: She may be Hispanic. I don't know.

MR. ASHTON: I believe she's black. So --

THE COURT: So, you have struck one. What about the rest through 11?

MR. ASHTON: Giraud, there is no objection to. Dawson.

THE COURT: Dawson was on this group.

MR. ASHTON: No objection to her at this time.

THE COURT: Cheryl Cooper. She was on the big group.

MR. ASHTON: Okay, Cooper. Mr. Guffey is the fellow that --

MS. BRENNAN: Charged with grand theft.

MR. ASHTON: He's okay. No objection to him.

THE COURT: Rosemarie Lister was on the big group.

MR. ASHTON: Okay. So was Mr. Tague, wasn't he?

THE COURT: Was he? Yes, right here. 17.

MR. ASHTON: No objection up to that. Up to number --.

THE COURT: How do you feel about them?

MR. LEINSTER: As I understand, right now the State has accepted 2, 6, 7, 9, 10 and 11?

THE COURT: Right.

MR. LEINSTER: I would strike number two, Mr. Giraud.

THE COURT: Any others through 15?

MR. LEINSTER: No. I'll accept them at this point.

THE COURT: State?

MR. ASHTON: What am I being tendered? The next one up?

THE COURT: Let's go through 18.

MR. ASHTON: Can we go ahead and make it groups of twelve?

THE COURT: We could.

MR. ASHTON: It would be easier for me to keep track.

THE COURT: Okay. Through 24.

MR. ASHTON: Okay. Let me take a look here. No problem with Mr. Schimmel. No problem with seat 167, Mrs. Walton --

THE COURT: She was on the big group.

MR. ASHTON: Okay. No problem with her. Julia Hamm, no problem with her at this point. 174, Minniear, was she on the larger group?

THE COURT: Yes, number 6.

MR. ASHTON: Okay. Rex King. Okay. Was Conklin in the big group, as well? Yes, she was. No objection to those at this time.

THE COURT: Mr. Leinster, through 24.

MR. LEINSTER: I'd like number 15, Mr. Schimmel.

THE COURT: Any others through 26?

MR. LEINSTER: Yes, number 16, Mr. Haley.

MR. ASHTON: Your Honor, I would make the same objection on the O'Neal basis just for the record. I also know all the victims are black.

MR. LEINSTER: I asked you to excuse him for cause because he is so strongly in favor of the death penalty.

MR. ASHTON: We would agree. That's a racially neutral reason.

THE COURT: So, you don't have any problem with that now?

MR. ASHTON: Now that that's stated, I don't dispute that.

THE COURT: Any others through 27?

MR. LEINSTER: Are we going through 27 now?

THE COURT: Uh-huh.

MR. LEINSTER: I wanted to strike one more. I'm sorry. Number 23, Rex King.

THE COURT: Any others through 28?

MR. LEINSTER: Not at this time.

THE COURT: State.

MR. ASHTON: Mr. Phillips now number 28?

THE COURT: Right.

MR. ASHTON: Okay. Let me see. We would excuse juror number 181.

MS. BRENNAN: Twenty-seven.

MR. ASHTON: Twenty-seven, Laurence.

THE COURT: Any others through 29?

MR. LEINSTER: I'd like to question that choice, too, assuming she is black.

MR. ASHTON: I don't believe she is.

THE COURT: It says Hispanic.

MR. ASHTON: I think she is actually Indian.

THE COURT: What's your reason for wanting to strike her just in case?

MR. ASHTON: Her response to the death penalty questions were less -- a little bit less than neutral. I have a numerical rating system and hers was -- 3 is in the middle and hers was 2.8. I don't believe she is an established minority.

THE COURT: I believe she is Hispanic. When I was doing these, I wrote Hispanic down. I don't know for sure.

MR. LEINSTER: The minority doesn't have to be the same as the defendant anyway.

THE COURT: That's true. We have no challenges, just for peremptories, if we don't give him some leeway. Same as you. I'm going to allow the strike if you want to strike her.

I have her down as neutral regarding the death penalty, would rely heavily on the law.

MR. ASHTON: I don't know how we're going to do this. Somehow for the record we need to establish her race. Because if she's Indian or Pakistani, that's not a race that's been recognized.

THE COURT: Want to bring her up here and ask her? Ms. Laurence, could you please come up? You want to ask her?

MR. ASHTON: I'd rather you do it if you don't mind. Make Mr. Leinster do it; it's his objection.

THE COURT: Hi. What is your nationality?

MS. LAURENCE: East Indian.

THE COURT: Okay. That's all we need to know. Thank you.

(Short pause.)

THE COURT: She is definitely not a recognized minority. She's East Indian.

MR. LEINSTER: Everybody in Trinidad is black.

MR. ASHTON: Not everybody because she is, obviously, not.

MR. LEINSTER: She may be Indian.

THE COURT: All right. She's Indian but I'm going to let him strike her if that's what he wants to do.

MR. ASHTON: Seat number 27.

THE COURT: Right. Now where are we? Okay.

We're through Sudimak. How do you feel through Sudimak?

MR. ASHTON: No objection.

THE COURT: Defense.

MR. LEINSTER: Okay. I'm going to strike Carolyn Moore, number 26.

THE COURT: Okay. Through 34. Defense?

MR. LEINSTER: Acceptable.

THE COURT: State?

MR. ASHTON: No objection through Mr. Petillo at this point.

THE COURT: Okay. Can we all agree that that's the jury up to 34?

MR. ASHTON: Let me take a second.

MR. LEINSTER: Let me take a look here. Yup.

THE COURT: Okay.

MR. LEINSTER: Yup.

THE COURT: Okay. Jeff?

MR. ASHTON: That's fine.

THE COURT: Okay. So, the jury is number 6, number 7, number 9, 10, 11, 18, 20, 21, 24, 28, 29, 34. Now, how about the alternate? State? The first one would be Kenneth Vaughan.

MR. ASHTON: We would excuse him as an alternate.

THE COURT: Defense? How do you feel about Anderson?

MR. LEINSTER: I would excuse him (sic).

THE COURT: Okay. State, how do you feel about Lansing?

MR. ASHTON: No objection to her.

THE COURT: Defense? How do you feel about Lansing?

MR. LEINSTER: I'm sorry. Which one is Lansing?

THE COURT: Up here, 39.

MR. LEINSTER: She is okay.

THE COURT: State, how do you feel about Franklin?

MR. ASHTON: We'd excuse him.

THE COURT: How about Gardner?

MR. ASHTON: That's fine.

THE COURT: How about Gardner?

MR. LEINSTER: I'll take off Gardner.

THE COURT: How about Hughes?

MR. LEINSTER: That's fine.

THE COURT: How about Hughes?

MR. ASHTON: That's fine.

THE COURT: All right. So, the two alternates would be Lansing and Hughes; am I right?

MR. ASHTON: That's correct.

THE COURT: Okay. You did it.

MR. ASHTON: Did you ever doubt us?

THE COURT: Yes. In fact, I even ordered 25 more jurors for tomorrow.

THE COURT: Okay.

(End of bench conference.)

THE COURT: Okay. We do have our jury. What we'll do is -- that's all we're going to do for the night. I'm going to let you know where you are to be seated; so, when you come back tomorrow, you'll know exactly where you go.

And we have 10 jurors -- 12 jurors, plus one (sic) alternate; and then the rest of you, once we get these people seated, I'm going to let the rest of you go. That will be the end of your jury duty.

So, I need you to turn in your buttons. Then we'll have instructions and be out in five minutes.

Would the clerk, please, call the names of the jurors?

MADAM CLERK: Cathy Dawson.

THE COURT: Please come forward and the court deputy will show you where to start being seated.

MADAM CLERK: Cheryl Cooper, George Guffey, Rosemarie Lister, Gregory Tague, Christine Walton, Julia Hamm, Nicola Minniear, Patricia Conklin, Craig

Phillips.

THE COURT: Craig Phillips. And who is the one right of you?

MS. MINNIEAR: Nicola Minniear.

THE COURT: You need to sit where Mr. Phillips is and you move over one. That will work.

MADAM CLERK: Deborah Sudimak, Connie Petillo, Louise Lansing, Johanna Hughes.

THE COURT: Okay. Except for these people whose names were just called, the rest of you can take your jury buttons off and give them to the court deputy; and you are excused from jury duty.

That should be the end of your duty this week, unless they told you otherwise in the jury room. Thank you very much for your time and staying late.

Tomorrow morning we're going to be swearing in this jury. And I need to give you instructions for the tonight.

First of all, remember, you can't talk to the lawyers and they can't talk to you or the witnesses or the defendant about any subject until after the deliberations are finished in this case.

In addition to that, you are not to listen to any newscasts about this. There had been some before, and I know that; and I don't know that there

will be any this week or not.

But you have to be very careful not to listen to news. Maybe you need to tape it.

Now that we've finally got our unbiased jury, please don't get partial on me. Don't listen to news. And have somebody screening the newspaper to make sure there is nothing in the newspaper this week that you would be exposed to this.

The press would be interpreting something. They don't always get it exactly right. Don't go to the scene or any of that kind of thing that would be bringing in information that's not presented during this trial.

Because the only thing you're to consider in your deliberations is what happened in this courtroom in front of the attorneys, the defendant and the Judge and yourselves. Nothing outside, no outside influence should ever come into your knowledge about the case.

Other than that, you're free to go wherever you like. I don't believe anybody has requested sequestration of jurors in this case. So, as long as you can keep yourselves away from any news forecasts, there should be no reason for sequestering you in a hotel while this is going on.

Tomorrow morning we can start, hopefully, at 9:30 or, certainly, very close to that if it's not. I have arraignments and sentencing before that, but I should be through by then. The court deputies will tell you exactly where to report back to.

Okay. With that, have a nice evening. We will see you at 9:30 in the morning.

One other thing: Don't discuss this case with anybody. Thank you.

(On August 25, 1992, proceedings concluded at 6:05 p.m. The following proceedings commenced at 10:00 a.m. on August 26, 1992:)

P R O C E E D I N G S

THE COURT: I asked Mr. Leinster whether he wanted to request the jury instruction in the preliminaries: In every criminal proceeding the defendant has the absolute right to remain silent. He said yes. So, I'll be reading that. Anything else?

MR. ASHTON: I have a copy here of a preliminary draft of jury instructions, and there's also -- for the Court's convenience -- an exhibit list. I have given both to Mr. Leinster, also.

In the last three or four days, the defense has given us three witness lists, some of whom I

understand are possible witnesses for this phase of the trial.

I was going to make a request on the record that the defendant produce any witnesses for the guilt phase for us to talk to at sometime during today, hopefully.

If it needs to be actually during the trial, Mrs. Brennan can talk to them. But I'm not sure. At least four or five that supposedly were involved -- I guess I should announce their names.

Some of them I already know and don't need to talk to. Somebody named Charlie Brown that I don't have an address on.

Julie Harp and Eric Brown if, in fact, they are witnesses for this phrase and May Tatum. Those four, if they are witnesses for the guilt phase, I would like to have them here so I can speak to them.

If they are witnesses for the penalty phase, I can talk to them later.

THE COURT: Do you know, Mr. Leinster?

MR. LEINSTER: I know that Charlie Brown is ostensibly a guilt phase witness. There is an Andre Walker who is also similarly situated. I do not know where they are physically located; but, obviously, I'm going to try to get them with Mr. Ashton as soon

as possible.

I don't think they are here today. They weren't even provided me until a couple of days ago. So, last night when I left I called my secretary and said, "Have you got these people? Do you know where they are?" She said yes.

MR. ASHTON: Andre Walker is no problem. The police interviewed him, and I know what his testimony is. So, Mr. Brown is the only one I would have a need to be produced and speak to him.

MR. LEINSTER: That's not a problem.

THE COURT: As soon as possible during a break. And you have given me the -- not preliminary instructions by the final instructions. This is your rough draft, right?

MR. ASHTON: That's correct. Subject to whatever changes we would like to make.

THE COURT: And we have a list of exhibits -- that's good -- that are already marked.

MR. ASHTON: They aren't already marked.

THE COURT: You're doing it now?

THE CLERK: Yes.

MR. ASHTON: No, sir. Most of the physical evidence will come in with one witness who will testify later today or tomorrow. All the evidence is

here and should move smoothly.

THE COURT: Anything else?

MR. LEINSTER: One thing. I was requested by some of the penalty phase witnesses as to whether or not they would be allowed to watch the trial. I don't know of any law or policy that prevents that, and I hadn't thought much about it until this morning.

I mentioned that briefly to Mr. Ashton, and I don't know what the Court's inclination is in that direction.

THE COURT: What was your --

MR. ASHTON: The difficulty with it is since these witnesses were all produced late, I have not spoken to them. I don't know. If their testimony about the penalty phase is going to have anything to do with the events of the shootings, it would be a violation of the rule for them to sit and listen to other witnesses testify.

If their testimony is merely historical, that isn't a problem. I've got to believe their testimony is going to have something to do with the day of the shooting; in which case, I think it would be a violation of the rule to sit in and hear the testimony.

THE COURT: Do you know what they are going to testify to?

MR. LEINSTER: I think it's probably a fair guess that it is somehow going to tie in clearly with the day that it happened. I don't see how you could divorce from that the historical background.

Actually, using the goose-gander theory, I probably wouldn't be thrilled with their penalty phase witnesses sitting through the trial, either. So, maybe I raised a meaningless point. I'll agree they be excluded.

THE COURT: Okay. We'll agree that all penalty phase witnesses, State and defense, will be excluded. Everybody agree with that?

MR. ASHTON: Yes, ma'am.

MR. LEINSTER: You understand what we just said? You are not going to be allowed to sit in the trial. I will explain that to you later. You'll have to wait outside.

(Discussion off record.)

THE COURT: Put it this way: They will not be allowed to testify if they sit in this trial. So, if they are thinking about testifying, the best advice is not to have them here at the trial.

MR. LEINSTER: Could I have one minute to talk

to Gloria?

THE COURT: Yea.

(Short Pause.)

THE COURT: Have you got any witnesses in here that may testify in either phase?

Okay. All right. I think we can bring in the jury. Where is Mr. Ashton? I'm going to get some ropes and chains.

MR. LEINSTER: If they put the stand here, I won't be able to see anything.

THE COURT: What is it that you want to see?

(Discussion off record.)

THE COURT: Okay. Are we ready to bring in the jury? Let's bring them in.

(Jury is in the box at 10:07 a.m.)

THE COURT: You may be seated. Wait a minute. You have to be sworn. Sorry.

THE CLERK: If y'all raise your right hand, I'll swear you in. Do each ever you solemn swear that you will well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and evidence, so help you God?

(Jurors indicate affirmatively.)

THE COURT: Now you can be seated. Thank you.

Does the State and defense recognize the jury is properly seated?

MR. ASHTON: Yes, Your Honor.

MR. LEINSTER: Yes.

THE COURT: Good morning, ladies and gentlemen of the jury. You have been selected and sworn as the jury to trial the case of the State of Florida versus Curtis Windom.

This is a criminal case, and Mr. Windom is charged with the crimes of murder in the first degree, three counts, and one count of attempt to commit murder in the first degree.

The definition of the elements of these crimes will be explained to you later.

It is your solemn responsibility to determine if the State has proved it's accusation beyond a reasonable doubt against Mr. Windom.

Your verdict must be based solely on the evidence or lack of evidence and the law.

The indictment is not evidence and is not to be considered by you as any proof of guilt.

It's the Judge's responsibility to decide which laws apply to this case and to explain those laws to you. It's your responsibility to decide what the facts of this case may be and to apply the law to

those facts.

Thus, the province of the jury and the province of the Court are well defined and they do not overlap. This is one of the fundamental principles of our system of justice.

Before we proceed further, it will be helpful if you understand how the trial is conducted.

At the beginning of every trial, the attorneys will have an opportunity, if they wish, to make an opening statement.

The opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during the trial.

What the lawyers say, though, is not evidence and you are not to consider what they say as evidence.

Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be produced as evidence.

After the evidence has been presented, the attorneys will have the opportunity to make their final arguments.

Following the arguments by the attorneys, the

Court will instruct you on the law applicable to this case. After the instructions are given, the alternate jurors will be released and then the rest of you will retire to consider your verdict.

The two alternates are Louise Lansing -- where is she? -- and Johanna Hughes. You two need to listen just as carefully. If anything should happen to one of the other twelve, you would be stepping up that fast; so you need to be up to speed.

You should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the Judge.

Until that time, you should not discuss this case even among yourselves.

During the course of the trial, the Court may take recesses during which you will be permitted to separate and go about your own personal affairs.

During these recesses you are not to discuss this case with anyone nor permit anyone to say anything to you or in your presence about this case. If anyone attempts to say anything to you or in your presence about this case, tell them that you are on the jury trying to case and ask them to stop.

If they persist leave them at once and report it

to the court deputy, and the court deputy will report it to me. The case must be tried by you only on the evidence during the trial in your presence and in the presence of the defendant, the attorneys and the Judge.

Jurors must not conduct any investigation of their own. Accordingly, you must visit any of the places described in the evidence; and you must not read nor lessen to any reports about this case.

Further, you must not discuss this case with any person; and you must not speak with the attorneys, the witnesses or the defendant about any subject until your deliberations are finished.

In every criminal proceeding, a defendant has the absolute right to remain silent. At no time is it the duty of the defendant to prove his innocence. From the exercise of a defendant's right to remain silent, a jury is not permitted to draw any inference of guilt. And the fact that the defendant did not take the witness stand must not influence your verdict in any manner whatsoever.

The attorneys are trained in the rules of evidence and trial procedure, and it's their duty to make all objections that they think are proper. When an objection is made, you should not speculate on the

reason why it's made.

Likewise, when an objection is sustained or upheld by me, you must not speculate on what might have occurred had the objection not been sustained nor what a witness might have said had he been permitted to answer the question.

Is the State ready to proceed with your opening statement?

MR. BRENNAN: Yes, Your Honor.

THE COURT: Mrs. Brennan.

MS. BRENNAN: May it please the Court, counsel, members of the jury: You are going to hear and see evidence that on a Friday morning in February, Curtis Windom went to Walmart.

While at Walmart he bought 50 rounds of .38 caliber ammunition, went back to his Winter Garden neighborhood, loaded his revolver with five rounds of ammunition and went looking for Johnny Lee, drove his car and found Johnny Lee right here near the tennis courts, got out of his car, went up to Johnny Lee, shot Johnny Lee in the back not once but twice.

When Johnny Lee fell to the ground, he shot him another two times in the chest. He then proceeded -- Curtis Windom proceeded down the street over to, first, the apartments where his girlfriend, Valerie

Davis, lives, in this apartment right here.

He went in there. Cassandra Hall went in there also screaming to Valerie, "Something is wrong with Curt. Something is up with Curt."

Valerie, you will hear, was on the phone. She was in a three-way conversation with Maxine Sweeting and her daughter, Latroxy Sweeting.

Curtis went in there, confronted Valerie and said, "Who are you talking to?" He said, "I'm through. I'm through. I'm tired of this."

Pointed the gun at Valerie and shot her once through the heart. He then went -- Cassandra Hall turned around and began to flee out of the apartment.

Curtis Windom turned to her, pointed the gun to her and clicked it several times; but he was out of bullets. He had used the bullets on Johnny Lee and the last bullet on Valerie Davis.

Cassandra Hall was able to escape. In the apartment Curtis reloaded his .38 revolver with five more rounds. Went out, left the apartments, came out here, Center Street, where he confronted Kenny Williams. Looked at Kenny Williams. Said, "Hey, what's up?" Kenny said what's up to Curtis.

He said, "I don't like no police ass niggers no

how." Pointed the gun and shot him straight in the chest. Curtis then walked across Center Street, went behind this bar, Brown's Bar.

He then -- about that time, Valerie Davis' mother, Mary Lubin, was working at the Maxey Recreational Center over here, heard or had gotten word -- it's a very small area -- gotten word her daughter had been shot.

She got in her car and proceeded down the street here when she was met by Curtis Windom. He had left behind the bar and approached her car on the street. It's a dirt road right here.

You will hear that he opened the passenger door, put the gun in, shot her twice, went right through the right side of her, through her body.

You will hear then that the police descended on the area. At the time that he shot Mary Lubin, another Mary was there, Mary Law. And also his brother was there -- Curtis Windom's brother -- Jamie Dukes, was there.

They took the gun from Curtis and put it in Mary Law's purse about the time Mary Lubin was shot.

You will hear that next the police descended on the neighborhood and that, after a while -- Curtis Windom was hiding in one of the houses over in the

neighborhood. And after a while, the police were able to talk him out of the house and were able to arrest him.

You will hear the police got the tip that the gun that Curtis Windom had used in these shootings was in Mary Law's purse.

And the next day you will hear -- the day after -- the gun was recovered from Mary Law's purse.

You will hear that -- you will hear and see a lot of evidence in this trial.

And you will learn that Valerie Davis was killed as a result of the shooting. Johnny Lee was killed as a result of the shooting, and Mary Lubin was killed as a result of the shooting. Kenneth Williams lived.

And you will hear from him, and he currently is in jail; and he will be in jail blues when he testifies.

After you have heard and seen all the evidence in this case, I am confident you will come back with a verdict that on that February morning Curtis Windom shot and killed Johnny Lee, Valerie Davis and Mary Lubin and shot Kenneth Williams and that your verdict should be he is guilty of three counts of first degree murder and also the attempted first degree

murder of Kenneth Williams. Thank you.

THE COURT: Defense, would you like to make your opening at this time?

MR. LEINSTER: Yes.

THE COURT: Okay. Mr. Leinster.

MR. LEINSTER: I do not expect -- and I'll lose all credibility if I told you that you would hear through the course of this trial a reasonable or meaningful defense to the action that you just heard described.

In February of 1991 there resounded across the news media still another senseless act of violence which was largely ignored, apparently by jury questionnaires, maybe because the planet we live on that it's another day and another senseless act.

And you're left wondering: Why do these things happen? What goes through the mind of people when something like this happens?

And what I'll be asking you to do over the course of the next few days is to take a look at the totality of everything that was going on and the fashion in which this happened.

A 26-year-old man with no history of violence, who is largely liked by the members of the community, including Kenny Williams, who he shot, and Johnny Lee

who was a life-long friend, the best of friends -- behavior totally out of character is what you will find. No one could believe it happened, including Kenny Williams, who, you will find out, watched Curtis walk down the street with a crazed look on his face carrying a gun.

Even in the face of the fact he saw him walking down the street looking like that, he wasn't afraid. He didn't think he was going to get shot.

And you will find that Curtis Windom walked up to him and took one shot in a position something like this and the bullet went through one side and out the other. And Kenny Williams then fell down and started to run reasonably thinking he was going to die.

And when he looked up, Curtis Windom is going down the street.

Valerie Davis, he had lived with for three years. They have a 13-month old child together.

So, February, 1992, all of sudden, for reasons you may never know and I may understand -- all of a sudden this violence erupts out of nowhere and Johnny Lee -- and we'll find out more about Johnny Lee as the case goes on. Johnny Lee lies dead.

Curtis Windom leaves his car in the middle of the street in broad daylight. Rather than jumping in

it to flee, goes home. And as his live-in girlfriend, mother of his child, is on the telephone, for no apparent reason -- although overheard saying something to the affect, "I can't take it anymore," wheels and fires a shot, which entered her on a slightly upward direction.

I think you will find the coroner would say would be consistent with that type of a movement (indicating), not a trained, you're-going-to-die type of thing, a rash impulsive -- boom. Again, why?

Then he goes down the street, shoots Kenny Williams. Could shoot him several more times but doesn't. Why? And then the mother of the Valerie Davis pulls up in a car and she dies.

His plan was to kill himself. The only reason he didn't kill himself was because his brother intervened, and they got the gun away from him. Doesn't make any sense.

Now, I don't expect you to somehow forgive these acts. And I don't expect you to necessarily make sense of them. But what I will ask you to do is to try to bring to this trial some understanding of the fact that we haven't paid a lot of attention to the human brain.

We can reach the moon. As a matter of fact, we

can listen to the far galaxies now to pick up extra terrestrial signals. But we don't have a clue as to why these things happen.

At the end of all of this, you will be deciding not, in my opinion, whether Mr. Windom is guilty or not guilty of anything. You're going to find him guilty of something. There's no question of that. The question is do you find him guilty of first degree murder, having that presence of mind to say I want you dead --

MR. ASHTON: Let me object. This is in the form a nature of closing argument and not the nature of an opening statement.

THE COURT: Overruled.

MR. LEINSTER: Or whether or not you will consider his act to have been a rash, impulsive, stupid act.

And I want you to consider that as to each of these individuals, because each is a separate charge. Each is to be considered independently so that your verdict as to one does not necessarily carry over to the other. Thank you.

THE COURT: Thank you, counsel. State, call your first witness.

MR. ASHTON: Abner Younce.

Thereupon,

ABNER YOUNCE

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: One thing I didn't ask counsel. Is either side seeking to have the rule invoked on these witnesses?

MR. ASHTON: The State is, Your Honor.

THE COURT: Do you have any other witnesses here?

MR. ASHTON: Yes, but I have already instructed them on the requirements of the rule.

MR. LEINSTER: Could I just make a general statement here?

THE COURT: Yea.

MR. LEINSTER: If there's anybody here that is going to testify at any point in time during any phase of this trial, then you cannot be in the courtroom.

These are just spectators? Okay.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. ASHTON:

Q Would you please state your name, sir.

A Abner Younce.

Q How are you presently employed?
A Walmart in Ocoee.
Q And how long have you been employed for Walmart?
A Six years.
Q Now, you said Walmart in Ocoee. Where is that located?
A That's Highway 50 right near Storey Road. I don't know exactly where it is.
Q That's fairly close to Winter Garden, is it not?
A About two miles.
Q Were you employed there back on the 8th day of February, 1992?
A Yes.
Q Do you work in a particular -- did you at that time work in a particular area of the Walmart store?
A I work in the sporting goods area.
Q Does Walmart, in the sporting goods store, sell firearms and ammunition?
A Yes.
Q Were you working -- at that time working a shift that would have you working right around noon, between 11:00 and 12:30, that area?
A Yes.
Q Did you have a regular lunch hour when you would leave for lunch?

A About twelve.

Q Now, do you recall in the minutes just before noon on February the 7th of 1992 when you had a transaction in which you sold some objects to a black gentlemen?

A Yes.

Q All right. Now let me show you first --

MR. ASHTON: For the record, Your Honor, we'd ask this be marked. I believe it would be identification -- B for identification. I'd like the record to reflect it is sealed. I'll show it to Mr. Leinster. Then I'll open it and show it to the witness. Would you like to see it?

MR. LEINSTER: (Reviewing document.)

MR. ASHTON: At this time, Your Honor, I'll open it and let the witness take a look at it.

BY MR. ASHTON:

Q I'm going to show you State's Exhibit B for identification. Messy with some powder there. I want to ask you if you recognize that receipt either by your memory or notations.

A Yes. It has my number of the sale. In-sales number.

Q Which number is that?

A Thirty-one. It's somewhere.

Q It may have been covered?
A Yes.
Q But you have seen this?
A Yes.
Q And you have identified this?
A Yes.
Q On this receipt does it reflect the time of the sale?
A Yes. It was 11:51.
Q 11:51. And that was on February 7th, 1992?
A Yes.
Q Do you, specifically, recall today what you sold the individual that is reflected in this receipt?
A I knew it was shells. By the price of the shells, it's .38.
Q By the price of the shells you can tell it was .38 caliber shells?
A Yes.
Q Now, the next day a police officer from the Winter Garden Police Office come to you and questioned you about that transaction?
A Yes.
Q And did he show you a photographic lineup, a series of photos to see if you could identify the person involved in that transaction?

A Yes.

MR. ASHTON: If I could have this marked.

THE CLERK: Yes.

MR. ASHTON: This will be State's Exhibit Q for identification.

BY MR. ASHTON:

Q Let me show you Exhibit Q and ask if you recall being shown this item, a photographic lineup, and whether you were able to identify anybody as the person that purchased the items.

A Yes.

Q Which one?

A The second one.

Q That has the mall number two next to it?

A Right.

Q And that is the person involved in the purchase of the State's Exhibit B, the receipt?

A Right.

Q Now, do you recall anything unusual about the way this person was acting, about his demeanor or anything he may have said to you?

A No, just calm as could be.

Q And the time reflected on the receipt of 11:51, is that in fact a correct reflection of the time the transaction took place?

A That's right.

MR. ASHTON: I have no further questions of this witness. Wait a moment. Mr. Leinster may.

THE COURT: Cross examination?

MR. LEINSTER: I have no questions.

THE COURT: Either of you want to call him back or shall I release him?

MR. ASHTON: He may be released.

THE COURT: Next witness.

MR. ASHTON: State would next call Jean Willis.

Thereupon,

JEAN WILLIS

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: State.

DIRECT EXAMINATION

BY MR. ASHTON:

Q Would you please tell us your name.

A Jean Willis.

Q Where do you live?

A 1000 East Bay, Winter Garden.

Q How long have you lived in Winter Garden?

A All my life.

Q During the time you lived in Winter Garden, did you come to know a fellow by the name of Johnny Lee?

A Yes.
Q How long had you known Johnny Lee?
A We lived in the neighborhood, so all my life.
Q All your life?
A Yes.
Q Was he about the same age as you, a little older, younger?
A No.
Q What was his age in reference to you? Younger or older than you?
A I was older than him.
Q I want to direct your attention to the day of February 7 -- I know it's a day you remember -- of this year. Were you on the morning of that day involved in a -- did you see Johnny Lee?
A Well, I was in the road before he got to where I was standing at.
Q Okay. Let me put this in an area where we can use it.
(Discussion off record.)
THE COURT: We need the jury to see it, the witnesses to see and the attorney to see it.
MR. ASHTON: May I have the witness to step down for a minute?
THE COURT: Okay.

BY MR. ASHTON:

Q Now, this is State's Exhibit for identification Y. Do you recognize this diagram?

A Yes.

Q You actually have seen it before?

A Yes.

Q Do you recognize this as being a diagram of the streets and some of the buildings in the area of Winter Garden where you lived and still do live?

A Yes.

Q Okay. Now, can you show us on the diagram where it is that you first came in contact with Johnny, Johnny Lee? Do you recognize all the landmarks, the tennis court here, Klondike Street, the Maxey Center down here? Eleventh Street apartments down there?

A I don't see where my home is at.

Q Your home is not at the map?

A I recognize the tennis court and Klondike because I was standing in the road on 11th Street.

Q Over here?

A Yes, sir.

Q You were standing in the road of 11th Street?

A Yes.

Q Were you there first and Johnny walked up?

A Yes, I was first.

Q Was there anybody else there that y'all were talking to?

A Well, there's about five or six more peoples in the road before Johnny come up.

Q Do you know a lady by the name of Pamela Fikes?

A Yea.

Q Did you she come up?

A I stopped her first.

Q Was she in a car?

A Yes.

Q Were you and Johnny talking to Pam?

A Well, I stopped Pam first and then Johnny come over and all three of us started talking.

Q Were you talking about anything special?

A No.

Q Just talking?

A Right.

Q Now at some point -- do you know a guy named Curtis Windom?

A Yes.

Q How long did you know Curtis Windom?

A We grew up together in the neighborhood.

Q About the same length as Johnny?

A Yes.

Q Did Curtis Windom drive up to 11th Street at

some point?

A Yes.

Q Describe for the jury what happened.

A We were standing in the road where the tennis court at, me and Johnny. I stopped Pam. We was talking about Pleasure Island where I went Thursday night, February 6th; about what a good time I'd had.

Q That is like a nightclub?

A Yea. Talking about a good time I had. So, Johnny walked over to Pamela's car and he asked me did I want to go out with him to an all-star game that Friday night.

Q That's a basketball game?

A I said, "You asked me do I want to go out with you?" I said yes. Curtis Windom got in his car, come down 11th Street, ran the stop signs.

Q Did you actually see Curtis get into his car or see him in the car?

A I seen him in the car as he was coming down the street.

Q This way or this way (indicating)?

A Coming down.

Q Down the street in this area?

A Yes.

Q What kind of car did he have?

A Black Maxima.
Q Is there anything like lettering on it that enables you to recognize it?
A Yes.
Q Do you remember what the lettering says?
MR. LEINSTER: That's irrelevant. She says she recognizes their car.
THE COURT: Is that relevant?
MR. ASHTON: That's how she recognized it.
THE COURT: She can say how she knows it's his car.
BY MR. ASHTON:
Q Do you remember there's lettering?
A Not with being broke on the top of the car.
Q So, you saw it coming down the street?
A Yes. We turned our head like this, and we thought Curtis was going to go around but he stopped.
Q You said he ran the stop sign?
A Right.
Q Did Johnny seem upset or scared when he saw Curtis' car coming down 11th Street?
A No.
Q You figured he was going to go on by?
A Right.
Q So, what happened?

A He stopped.
Q Did he get out of the car before he fired the gun?
A No, he was inside the car coming over the passenger side.
Q As if to get out of the car?
A Well, acted like he was already going to stop and come over like that, aiming the gun.
Q And he fired?
A Yes.
Q How close was he to Johnny when he fired the first two times? If you need to pick out something from me to an object or move me to the right direction --
A How close?
Q Yea. How close a distance between Curtis and Johnny?
A It was real close. Like, this is Johnny and this is Curtis. He was as close to hit Johnny.
Q So, he was that close to Curt's car or Curt himself?
A When he cut the corner of the car, it was real close.
Q He shot Johnny. Where did he shoot Johnny?
A The first two shots, I'm looking like this with my head turned looking at Curtis and shoot him two times

in the back.

Q He shot him two times in the back?

A Yes.

Q Now, when Curt drove in the car and stopped, did Johnny say anything to him?

A No.

Q Do you remember hearing Curt say anything to Johnny?

A No.

Q So, he shoots twice in the back? What does Johnny do?

A He fell forward with Johnny's elbow raised up and fell back and landed on the ground. Curtis got out of his car, came around the back bumper and fired the gun three more times.

Q Into Johnny?

A Right. Aiming the gun at Johnny.

Q Was he lying on his back or stomach?

A On his back.

Q So, he shot him on the front part?

A Yea.

Q Did Johnny say anything when he first got shot or fell or anything?

A No.

Q You didn't hear him saying anything?

A No, I didn't.
Q Were his eyes open when Curtis shot him the last time?
A Yes.
Q Would you -- could you tell what Johnny was looking at?
A He was looking straight ahead.
Q Could he see Curtis coming?
A I don't know.
Q But he didn't say anything?
A Nope.
Q Why don't you have a seat. Stay right there. After he shot, what did Curt do next?
A After he shot, when he was laying on his back, took off running back up toward 11th Street.
Q That would be in this direction, from the bottom of the diagram to the top?
A Right.
Q How was he moving? Running? Walking fast?
A Running.
Q Did he still have the gun in his hand?
A Yes.
Q Where was Curt the last time you saw him after the shooting?
A He was, like, going up to 11th Street, and there

was a house right here where the church is. He ran between the church and the home.

Q All right. Now, do you know where Curt was living at this time?

A At somewhere at 11th Street over there.

Q What now?

A 11th Street area apartments.

Q Would that be the apartments on the top of the diagram?

A Yes.

Q But you are not sure which one exactly?

A No.

Q Did Johnny, after Curt left, say anything or do anything other than lie there and bleed?

A No.

Q What did you do?

A Well, I just stood there, and I kept looking like this. And I said, "He just killed this man." Then I said, "He shot this man. I don't believe this."

MR. LEINSTER: The question is what did they do, if anything, not what she said.

MR. ASHTON: That's part of what she did.

MR. LEINSTER: It's irrelevant what she said.

THE COURT: Overruled.

BY MR. ASHTON:

Q So, you were amazed at what had happened?
A I was shocked.
Q Did you leave, go yell for help? Were you able to do anything?
A I just turned around and walked away and went back up in my yard and started crying.
Q At some point during this incident did Pam drive off in her car?
A I don't know.
Q You don't remember?
A I don't remember. I was in shock.
Q Did the police come shortly after the shooting?
A Yes.
Q Okay. Now, do you remember hearing any other shots in the neighborhood after Johnny was shot?
A No.
Q You don't remember?
A Nope.
Q All right. Please have a seat.
Now, let me show you what's been marked for identification as State's Exhibit T-1 and ask if you recognize that's a photograph of Johnny Lee, the person you have been telling us about.
A Yes.
Q That's Johnny?

A Yes.

Q Okay. The person that you have been talking about, using the name Curt -- are you all right?

A Yea.

Q If you want to take a minute, that's all right. Want to go ahead?

A (Nods head.)

Q Okay. The person you're talking about by the name of Curt, is that Curtis Windom? Is that his full name, Curtis Windom?

A Yes.

Q Do see Curtis Windom in the courtroom today?

A Yes.

Q Could you point him out and describe for the record what he's wearing?

A (Points.) Black and white.

MR. ASHTON: May the record reflect the witness has identified the defendant, Your Honor?

THE COURT: The record will so reflect.

BY MR. ASHTON:

Q Now, the area where this occurred and where you lived, is that here in Orange County, Florida?

A Yes.

MR. ASHTON: Just a moment, Your Honor.

(Short pause.)

MR. ASHTON: That's all the questions I have for this witness, Your Honor.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. LEINSTER:

Q Ms. Willis, you have, by your testimony, lived in Winter Garden your entire life, right?

A Yes.

Q And how old are you?

A Twenty-nine.

Q And Winter Garden, the black community out there, most everybody knows everybody else, don't they?

A Yes.

Q And you're how old? I'm sorry.

A Twenty-nine.

Q Twenty-nine, all right. So, you're a little bit older than Curtis is?

A Yes.

Q And you have known each other since you were kids?

A Yes.

Q You knew Johnny Lee since you were kids?

A Yes.

Q And you know, do you not, that Johnny Lee and Curtis Windom were pretty much best of friends?

A True.

Q And in spite of the fact that Johnny Lee was known to be violent -- wasn't he?

MR. ASHTON: Objection, Your Honor. Relevance. May we approach the bench?

THE COURT: Yes.

(The following is a bench conference.)

MR. ASHTON: I object as to relevance of any of that.

MR. LEINSTER: My client, ultimately, is not going to exercise his right not to testify.

THE COURT: He's going to testify?

MR. LEINSTER: Yes. And even if he couldn't, he's told Dr. Kirkland that it was in self-defense. Johnny Lee, according to my client and several other witnesses, was known to carry an uzie, was violent, was a stick-up man.

And it is my client's explanation to me, at least, as to the reason he shot Johnny Lee was because he was making threats he was going to kill him. And that's the deal.

So, it's not just trying to slander Johnny Lee. It's to show that he does have that reputation in the community, and my client will tie up he was aware of that reputation and felt threatened by Johnny Lee.

MR. ASHTON: Your Honor, the fact that Mr. Leinster is actually going to argue this defense is a surprise to me.

But the case law is clear that before any of this has to come in that there must be a predicate showing an act on the part of the victim to justify self-defense.

There has been no such predicate laid, so at this point the evidence is premature. Obviously, the witness can be recalled in the defense's case. It's improper, and I would move to strike it and ask the jury to disregard it.

MR. LEINSTER: She hasn't answered the question.

MR. ASHTON: Your question implied in a leading fashion that he had a reputation. There is no predicate laid. It is prejudicial.

I seriously doubt, based on the fact the defendant armed himself and went after Johnny Lee, you are going to give the self-defense instruction.

MR. LEINSTER: I'm not interested in your appraisal of my case.

THE COURT: Is she going to say Johnny Lee threatened him?

MR. LEINSTER: I don't think she ever heard him threaten him. I suspect she is going to say he did

have a reputation and was known to carry a firearm.

My client says he had a firearm on him at this time. Whether or not that's true, I doubt I will be able to prove that.

THE COURT: Did the cops find one when they came out to the scene?

MR. LEINSTER: I'm stuck with what my client tells me is his theory of the defense. I don't vouch for the truth of the matters.

The fact that I can't vouch for the truth of it doesn't mean I don't have the right to present it. Wait a second, please.

I disagree with the fact that I can't ask this witness without setting up the predicate first. I told you we will tie it up.

A lot of evidence is admitted conditional of being tied up at a future point in time.

MR. ASHTON: We can take about five minutes. I'll give the Court five cases, all of which say, specifically, you cannot bring this out until a predicate has been laid because it is so prejudicial.

THE COURT: Can you lay the predicate, though?

MR. LEINSTER: The predicate he would be looking for would be my client taking the stand.

THE COURT: If that's all you've got, you will

have to put her on in the defense's case.

MR. LEINSTER: We will leave her under subpoena.

MR. ASHTON: I'd like the jury instructed -- Mr. Leinster, I would ask the jury be instructed to disregard the question because the implication was pretty serious.

(End of bench conference.)

THE COURT: The last question, please disregard. We're going to go into another topic. Thank you.

BY MR. LEINSTER:

Q We are back to the fact that we have established that Johnny Lee and Curtis were known to be best of friends?

A Yes.

Q And you indicated that Johnny Lee showed no signs of fear, anxiety or anything else when he saw Curtis coming?

A No.

Q You also indicated that when the first two shots were fired that you turned looking toward Curtis?

A Yes.

Q Do you remember giving a sworn statement to the police on the 7th of February of 1992? Do you remember writing out a statement?

A I just gave a statement.

Q Do you remember that it was written out by a patrolman at your request and then you signed it?

A Yes.

Q Did you read it?

A Yes.

Q All right. Have you had a chance to see it before coming in here today?

A Yes.

Q All right. On that statement you indicated, "We were standing outside the car talking to Pamela. Curtis Windom pulled up and fired two shots. At this time our backs were turned away from Curtis Windom's car. When I heard the shots, I looked over my shoulder." Is that true?

A We was standing with our backs toward the road. And Curtis pulled the car up and fired two shots.

Q My question is: Were you looking at Curtis when he fired, or was your back to him as you said in this statement?

A It was to the back.

Q The car was how close to Johnny Lee when the first two slots were fired?

A Catty-corner.

Q I'm sorry?

A Catty-cornered.
Q You said --
A It was real close to him.
Q In terms of feet, could you tell me two feet, three feet?
A Probably two feet.
Q And was Curtis leaning out of the car? Had the car come to a stop at that point?
A Yes.
Q Had the car door opened?
A No.
Q So -- all right.
A He was inside his car.
Q All right. The car door hadn't opened?
A No.
Q And so Curtis would have been -- let's say Curtis was looking in this direction. Johnny Lee would have been over here? See where I'm pointing to my left toward the front? Is that about where Johnny Lee would have been or behind or where?
A He was on the side.
Q On the side?
A Yea.
Q All right. Now, did Curtis lean out with his left hand or his right hand?

A His right hand.

MR. ASHTON: Would you move over a little bit? I can't see the witness. Or to the side. Thank you.

BY MR. LEINSTER:

Q So, with his right hand he would have been leaning across the wheel with the window open?

A Right.

Q How quickly did all of this happen? When the car pulled up, the car stops. Did he slam on his brakes or came to a stop?

A Came to a stop.

Q From that point until he reaches across the wheel with his right hand, how much time elapsed? A second or two?

A When he come across, he just started shooting.

Q Almost immediately?

A Right.

Q Then you say he got out of the vehicle and shot twice?

A Came around the bumper of his car, got out of his car and came around the back of his car.

Q Trying to figure this out.

A He got out of the car --

Q I heard you. Curtis is looking this way. You said that Johnny Lee is over here to the left; is that

right?

A Right.

Q To the side?

A Right.

Q Now Curtis gets out of his car in this direction. I'm now walking in the direction you said that Johnny Lee is.

MR. ASHTON: Your Honor, let me object. He might want to let the witness explain it.

MR. LEINSTER: Let me do it my way.

THE COURT: I think it's getting confusing now.

MR. ASHTON: We've got paper over there.

THE COURT: Perhaps we can have her demonstrate.

MR. LEINSTER: I'd like to do it my way.

BY MR. LEINSTER:

Q I think it's clear, at least to me. Do you understand me?

A Go ahead.

Q I'm standing, looking -- for the record, I'm driving a car; I'm at the wheel, right? I am Curtis Windom.

A Uh-huh.

Q Johnny Lee is to my left?

A To your right.

Q I'm pointing to left.

MR. ASHTON: Let me object.
THE COURT: Is he to his right?
THE WITNESS: On the right.
MR. ASHTON: His right.
THE COURT: Across the passenger.
THE WITNESS: Right.
BY MR. LEINSTER:
Q He doesn't shoot out of the driver's side?
A No.
Q I thought you said he leaned across with his right hand and shot?
A He came across the passenger side, shot two times. Then he got out of the car, come around and fired three more times.
Q Now, how close was he for the second two (sic) shots?
A He was still in his car on the second shot.
Q Didn't you say there were a total of five shots? Not the first two. But after he gets out, how close was he?
A He was already down on the ground about two feet again.
Q Did Curtis have to bend down or do it from a standing up position?
A Standing up.

Q Where were you at this point? Were you just standing --

A Right besides Johnny.

Q You hadn't started to run?

A No, I was scared.

Q And Curtis, when he left the area, he just left his car sitting there, right?

A True.

Q Was his door open?

A Yes.

Q And you described how -- did you see an impression on his face? You said he didn't say anything. How did he look?

A He looked wild.

Q Crazy? Wild?

A Wild. Eyes was big.

Q And you had never seen Curtis like that, had you?

A No.

Q As a matter of fact, this shocked you that he would do something like this, didn't it?

A Yes.

Q Because you had known Curtis all your life?

A Yes.

Q And in a million years you wouldn't have thought

he was capable of doing this, would you?

A No.

Q Did you watch what the police did when they got there?

A When they got there, I was, you know, crying and turning around and around. Then somebody said you got shot. And I just started crying. And I turned my head and looked at Johnny again and said, "Cannot be true."

MR. LEINSTER: Okay. That's all I have. Thank you.

THE COURT: Redirect examination?

REDIRECT EXAMINATION

BY MR. ASHTON:

Q Is it your recollection today that the first two shots were in the back?

A Say what?

Q Were the first two shots in the back?

A Yes.

MR. ASHTON: No further questions.

THE COURT: Okay. You need to stay on standby during this trial. So, we need to know how to get in touch with you. Do you have a phone?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Next witness.

MR. ASHTON: Pamela Fikes.

Thereupon,

PAMELA FIKES

was called as a witness, having been first duly sworn, was examined and testified as follows:

MR. ASHTON: May I proceed?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. ASHTON:

Q Would you please state your name.

A Pamela Fikes.

Q Where do you live?

A Winter Garden.

Q How long have you lived in Winter Garden?

A All my life.

Q All your life?

A (Nods head.)

Q Now, were you living in Winter Garden back on February 7th of this year?

A Yes, I was.

Q Now, back in that time did you know a fellow by the name of Johnny Lee?

A Yes.

Q How long had you known Johnny?

A All my life.

Q All your life?

A Uh-huh.
Q Did you also known Jean Willis?
A Yes.
Q Now, on the 7th of February, in the hours just before -- minutes just before noon, were you out near the tennis courts on 11th Street with Jean Willis and Johnny Lee?
A Yes.
Q What were you doing?
A I was coming back from the Thriftway, and I stopped and talking to Jean and Johnny came over there by the car.
Q The Thriftway is a grocery store?
A Uh-huh.
Q What were you talking about? Anything special?
A We was talking about the party that was going, the basketball party.
Q For the all-star game?
A Yes.
Q So, you were in your car?
A Yes.
Q Where were you, Johnny and Jean?
A Standing besides my car.
Q Next to the driver's door or --
A Yes.

Q Driver's door?
A Yes.
Q Was your driver's window on the curb side of the street or the street side? In other words, if you looked out the window, did you see the rest of the street or did you see the basketball courts?
A My side, on this side. Okay? It was on -- this is the curb.
Q Let me put it to you this way: Where was Johnny Lee standing in the street?
A On the side of my car.
Q As you were talking -- do you know a fellow by the name of Curtis Windom?
A Yes, I do.
Q How long have you known Curtis Windom?
A All my life.
Q Do you know -- did Curtis have a car you recognized?
A Yes.
Q Did you see Curtis Windom driving up the area where you were with Johnny and Jean?
A Yes.
Q Where was the car coming from; do you remember?
A Down from 11th Street.
Q As you were sitting in your car, your car was

looking north toward the 11th Street apartments or the other direction?

A Toward north.

Q So, he came, basically, the way you were looking?

A Uh-huh.

Q Tell us what he did as he drove up.

A He came and pulled on the side. He said, "My mother-fucking money, nigger," and put the gun, shot him twice -- Johnny Lee fell --

Q Let me slow you down.

THE COURT: Curtis said, "My mother-fucking money, nigger?"

THE WITNESS: Uh-huh.

BY MR. ASHTON:

Q Who was he talking to?

A Johnny.

Q When Curtis was driving up, did Johnny seem afraid or angry that Curtis was driving up?

A No, sir.

Q He drove up, said that and shot Johnny?

A Uh-huh.

Q Do you know where Johnny got shot? In the front or the back?

A The back. He was facing the other way.

Q The way you were sitting, was Johnny between you and where Curtis was?

A Johnny was facing me right here.

Q I mean, to see Curt, did you have to look past Johnny? You understand what I'm saying?

A Yes.

Q Is that the way it was?

A (Nods head.)

Q So, when Curt drove up, did Johnny do anything unusual?

A No.

Q So, he shot him twice in the back?

A (Nods head.)

Q What did Johnny do?

A Johnny fell and Johnny was laying like on -- at my tire, and I couldn't move. And Curt jumped out of his car, ran around his car, shot Johnny three more times.

As he was shooting Johnny, Johnny was jumping out from under my car. And when he got through shooting Johnny, he turned toward me with the gun. I reversed my car, parked and parked in Jean Marie's yard; and Curt was running down the road.

Q So, after the first two shots in the back, did Johnny say anything that you could hear?

A No.

Q Make any noise at all?
A (Shakes head.)
Q So, he fell on the ground?
A Yes.
Q You said when Curt shot him, he was jumping. What do you mean by that?
A (Indicating.)
Q Body was flinching?
A Yes.
Q As he was shooting?
A Yes.
Q Did that movement get Johnny out from underneath your tires?
A Yes.
Q And that was when you pulled away?
A Yes.
Q What was Curt doing the last time you saw him?
A He was running.
Q Where was he running?
A Toward 11th Street back where he had came from.
Q Now, did Curt say anything during the incident other than, "I want my fucking money, nigger?"
A No, he didn't.
MR. ASHTON: No further questions.
THE COURT: Mr. Leinster.

CROSS EXAMINATION

BY MR. LEINSTER:

Q Pamela, you know everybody out in Winter Garden in that community, right?

A Yes, sir, just about everybody.

Q And I'm sure not everybody is close. That's probably not a true statement. But everybody knows everybody's business basically, don't they?

A Yes, sir.

Q And you have known Johnny Lee, and you have known Curtis ever since you were kids?

A (Nods head.)

Q And how old are you?

A Twenty-five.

Q So, you're about Curtis' age?

A Yes, sir.

Q Did you go to school with him?

A Yes, sir.

Q What school is that?

A Maxey Elementary.

Q And you said Johnny Lee registered no fear, no nothing, when Curtis pulled up?

A No, sir.

Q Obviously, you didn't either?

A No.

Q It's just: Here's Curtis Windom.
A Right.
Q And this came as a complete shock to you, obviously?
A (Nods head.)
Q And it's still a shock to you that Curtis Windom would have done that?
A Yes.
Q Because that was not the Curtis Windom you knew, correct?
A Right.
Q He is not that kind of person, right?
A Right.
Q And let me ask something: Do you remember the words exactly that were used about the money, or was it just something about money?
A It was something, mother-fucking money.
Q Something like mother-fucking money but you don't know what else was said?
A No.
Q And did he say that to your recollection before any shots were fired?
A He said it before the shots was fired.
Q Before any shots were fired; is that right?
A Uh-huh.

Q Now, you did have a statement prepared for you by one of the police officers out there, didn't you?
A Yes.
Q And you read it at the time?
A Yes.
Q And you signed that statement?
A (Nods head.)
Q Have you had a chance to review that statement?
A (Nods head.)
Q Pardon?
A Yes.
Q At the time of the statement, you indicated that Curtis Windom jumped out of his car, came up to Johnny and said something about his fucking money and then shot Johnny three more times?
A No. That was backwards. I had told him -- I said that that was before everything had happened about his mother-fucking money.
Q So, the patrolman wrote it down incorrectly?
A Yes.
Q Did you have an opportunity to see the police when they were out there on the scene?
A No.
Q You didn't watch as they went through the car?
A No, sir.

Q And were you able to see Johnny Lee with any kind of weapon at any time?

A No, sir.

Q Nor did you see one in his car?

A No, sir.

Q Where did you go after the shooting took place?

A I went in Jean Marie's house.

Q And stayed in there? You didn't come back out to the car to talk to the police or anything like that?

A Yes. Well, I stayed in there until the lady officer -- I forgot her name -- came out and asked me my name and said police would get back with me later.

Q But that's it?

A Yes.

Q You weren't keeping an eye on what they were doing, processing the scene, any of that?

A No.

MR. LEINSTER: That's all I have.

THE COURT: Redirect examination.

REDIRECT EXAMINATION

BY MR. ASHTON:

Q This morning when you were outside, did I give you a copy of the statement that Mr. Leinster referred to that the policeman wrote for you?

A Yes, sir.

Q And did you notice the mistake the patrolman had made at that time?

A Yes, sir.

Q Did you point that out to me then?

A Yes, sir.

MR. ASHTON: No further questions. I would like her on the same standby, however.

THE COURT: Okay. Do you have a phone?

THE WITNESS: Yes, ma'am.

THE COURT: We want to keep you on standby for the rest of this trial, so please give it to the court deputy.

MR. ASHTON: We have the phone numbers, and we will provide those to Mr. Leinster, Your Honor.

THE COURT: Next witness.

MR. ASHTON: State would call Jack Luckett.

Thereupon,

JACK LUCKETT

was called as a witness, having been first duly sworn, was examined and testified as follows:

MR. ASHTON: May I proceed?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. ASHTON:

Q Would you, please, state your name.

A Jack Lee Luckett.
Q Where do you live?
A 1130 Lincoln Terrace, Winter Garden, Florida.
Q How long have you lived in Winter Garden?
A Thirty-one years.
Q Thirty-one years?
A Yes, sir.
Q All your life?
A Yes, sir.
Q As you grew up out there, did you come to know a fellow by name of Johnny Lee?
A Yes, sir.
Q Was he a friend?
A Yes, sir.
Q How about Curtis Windom?
A Yes, sir.
Q Curtis was also a friend of yours?
A Yes, sir.
Q I want to direct your attention back to the 7th day of February, the day that Johnny was killed.
Do you remember in the morning hours having a conference with Curtis Windom?
A Yes, sir.
Q Over on 11th Street?
A Yes, sir.

Q Okay. Was that in an apartment or on the street?

A It was on the street.

Q Okay. What were y'all doing out there?

A We was just talking.

Q All right. And what was Curtis doing?

A Well, he was putting activator in his hair.

Q That is some kind of chemical stuff you do to fix your hair?

A Yea.

Q Did Curtis say anything or ask you any questions about Johnny Lee?

A Yes, sir.

Q What did he ask you?

A Okay. He had gave the --

MR. LEINSTER: I object. He asked him -- what he asked him, he's going into a narrative.

THE WITNESS: I was going to tell you what was said that morning.

MR. ASHTON: He is going to get to that.

THE COURT: Answer the question that was asked.

THE WITNESS: He asked me did he win money at the dog track.

BY MR. ASHTON:

Q Curtis asked you if he, meaning Johnny, won

money at the dog track?

A Yes.

Q What did you tell Curtis?

A Yup.

Q That he had?

A Yes.

Q And what did Curtis say?

A How much money?

Q How much?

A $104.

Q What is the next thing Curtis said?

A He said, "My nigger, you are going to read about me today."

Q Now, did he indicate to you that Johnny owed him some money?

A Yes, sir.

Q Did he tell you how much Johnny owed him?

A He -- okay. Can I explain it this way?

MR. LEINSTER: No.

BY MR. ASHTON:

Q As long as all you're doing is telling us what Curtis told you.

A $2000.

Q Did he tell you that on that day he was going to kill Johnny?

A Yea.
Q And he told you what after that?
A He told me, he said, "You're going to read about me. I'm going to make headlines."
Q Did you try to talk Curtis out of that to appease him in any way?
A Yes, sir.
Q What did you offer to do?
A Best thing for you to do, don't speak to him; that will hurt more than anything you can do.
Q Did you offer to pay Johnny -- Curtis the money?
A I said, "Go to the Florida Mall and forget about it."
Q Did he?
A He said it wasn't about money; it was something else.
Q Did he tell you what something else was?
A No, sir.
Q The person we are referring to, Curtis Windom, do you see him in the courtroom?
A Yes, sir.
Q Could you describe what he is wearing for the record?
A He got a black suit on.
Q Point him out for us.

A (Indicates.)

MR. ASHTON: Your Honor, may the record reflect the witness has identified the defendant.

THE COURT: The record will so reflect.

BY MR. ASHTON:

Q Were you in front at the tennis courts on 11th Street around noontime?

A Yes, sir.

Q Did you see something happen?

A I saw Curtis pull up in a Maxima, pull besides a girl called Pamela and shot Johnny a couple of times and got out and walked around the other side and shot him again.

Q When you saw Curtis pull up or at any point when he was there, did you say anything?

A I told Curtis, "Don't shoot him no more."

Q And did Curt stop?

A Nope.

MR. ASHTON: No further questions.

THE COURT: Cross?

CROSS EXAMINATION

BY MR. LEINSTER:

Q Do you remember -- do you have a brother Jamie?

A Yes, sir.

Q And was he also out there?

A Yes, sir.

Q And before the police arrived, did you and your brother go into -- did Johnny Lee have an automobile right there?

A He had a automobile, yea.

Q Did you guys do anything with Johnny Lee? Did you search him, go into his car?

A Nope.

Q You didn't remove a gun?

A I didn't remove nothing.

Q Jewelry?

A Nope.

Q Have you ever been convicted of a felony?

A Yes, sir.

Q How many times?

A Three times.

Q And would you say you were closer to Johnny Lee or to Curtis Windom as far as --

A I was close to both of them.

Q You, essentially, have grown up with them?

A Yes, sir.

Q So, Curtis, apparently, felt comfortable enough confiding his innermost thoughts to you?

A Me and Curt had talked a lot. I talked to him and he talked to me.

Q You know Curt is not a violent person, had never been a violent person before; isn't that right?

A Yes, sir.

Q And this kind of behavior is completely different than the Curtis Windom everybody knew, right?

MR. ASHTON: Objection to the relevance of this, Your Honor.

THE COURT: Overruled.

BY MR. LEINSTER:

Q Yes?

A Yes.

MR. LEINSTER: Okay. That's all I have. Well, wait.

BY MR. LEINSTER:

Q Did it surprise you when he said something about going to kill Johnny Lee?

A Yes, because I thought he was playing.

Q Just playing?

A Yea, I didn't think he would do that.

Q Okay. But you thought it was serious enough to suggest what?

A Okay. I suggested that we just go somewhere and get it off his mind because he was crying. I wasn't there that night he say he was crying. I never saw Curt go through that before.

Q I didn't understand what you were talking about. You mean the night before?

A They said Thursday night he was crying.

MR. ASHTON: Object and move to strike based on hearsay.

THE COURT: Sustained.

MR. ASHTON: And ask the jury to disregard that.

THE COURT: Disregard anything that is not his own personal knowledge.

BY MR. LEINSTER:

Q Let me ask you this: Did you discuss with Curtis anything about his crying?

A No, sir.

Q You did not?

A No, sir.

Q All right. Did Curtis appear to be calm or was he upset emotionally?

A He was calm.

Q All right. How far were you from Johnny Lee when you saw Curtis' car pull up?

A I was about from here to you.

Q And how long had you been in that vicinity?

A I was there about two hours.

Q Had you been talking to Johnny Lee?

A No.

Q But you knew Johnny Lee was right there?
A He just pulled up to where I was.
Q How long had he been there before you saw Curtis drive up?
A He was there about two minutes before Curtis came.
Q So, you're right near Johnny Lee for ten minutes before Curtis arrives?
A Yes, sir.
Q But you didn't go up to Johnny Lee and say, "I had this conversation with Curtis, and he said they are going to read about him because he is going to kill you?"
A I never talked to Johnny Lee. He was talking to some girls.
Q You didn't tell Johnny about this conversation because he was talking to girls?
A No. I didn't tell him that.
Q Who else was present during that conversation that morning?
A Terry Jackson.
Q Terry Jackson?
A Yup.
MR. LEINSTER: I don't have anything further.
THE COURT: Redirect examination.

REDIRECT EXAMINATION

BY MR. ASHTON:

Q Mr. Leinster asked you whether Curtis has ever been violent before. Are you aware if Curt had ever been violent to Valerie Davis before?

A I never saw it.

MR. LEINSTER: Objection.

THE WITNESS: I heard it.

MR. ASHTON: The defense question was whether he knew Curtis Windom to be violent. It was directly in response to Mr. Leinster.

MR. LEINSTER: If he heard he had an argument with a girlfriend, it has nothing to do with a reputation for violence.

THE COURT: Disregard the last statement. Sustain the objection.

BY MR. ASHTON:

Q Have you ever known Mr. Windom to be violent to anybody?

A No, sir.

Q You have never heard about an instance of violence?

MR. LEINSTER: An instance is not reputation.

THE COURT: It has to be more than one instance.

MR. ASHTON: Your Honor, he asked if he had ever been violent. Ever is ever. I want to -- ever is a

broad question. Has he ever been violent. It's in direct response to that question.

THE COURT: You did ask if he had ever been violent.

MR. LEINSTER: Say is this out of character. Is he known to be -- this kind of question.

MR. ASHTON: Mr. Leinster knows this is an argument with his girlfriend.

MR. LEINSTER: I don't know any such thing. I move for a mistrial.

THE COURT: Counsel approach.

(The following is a bench conference.)

THE COURT: Have you seen this?

MR. LEINSTER: The point is I don't care if he's heard about the incident. My question is have you known him to be a violent person and generally his character.

The fact that he may have heard that he had a fight or argument with his girlfriend, the door wasn't open to that.

My overriding concern now is that Mr. Ashton has published to the jury the fact that I somehow know that my client is violent. That isn't the truth at all.

MR. ASHTON: Your Honor, Mr. Leinster --

MR. LEINSTER: I want that stricken.

MR. ASHTON: He asked a question has he ever been violent.

THE COURT: Can you read that back?

(The requested portion was read back by the court reporter.)

THE COURT: Mr. Leinster.

MR. LEINSTER: The question is, as I understand it, does he know him to be violent.

THE COURT: You asked him -- he said -- you said has he ever been a violent person before.

MR. LEINSTER: To his knowledge did he know him to be violent, and he already answered that he said no.

Now we're going to get into the fact that he heard he had a confrontation with his girlfriend. He doesn't know anything about the facts of it.

MR. ASHTON: It goes to the basis of his knowledge of the defendant and his ability to answer that question. If he knows of a violent incident and he's ignoring it, this jury has a right to know that. I don't know why Mr. Leinster is defending this case on the vic -- the defense's representation.

MR. LEINSTER: What are you worrying about? How I'm defending the case?

MR. ASHTON: The point is it's been brought up. I have a right to chase it. This man does have a known history of violence -- may have. I don't remember that all these people know about it.

If Mr. Leinster wants to dismiss it as not important, that is for the jury to decide. And this specific --

THE COURT: Let me put it this way: I think we're going into reputation versus one incident. He may be aware, but he doesn't know; and this isn't the way he asked it, as reputation testimony.

I don't think the hearsay would be appropriate. I would like to get off this subject.

If Mr. Leinster wants to pursue it much more, it's going to have the door completely open.

MR. LEINSTER: I understand about the door opening, Your Honor. But I would like this jury to hold that the remark of Mr. Leinster knows it is to be disregarded altogether. Because I, first of all, don't know if I do or not.

THE COURT: What do you want me to tell them exactly that isn't going to draw more attention? Comments between the lawyers are not to be considered? Is that good enough?

MR. LEINSTER: That will be fine.

THE COURT: Otherwise, you really make it a big picture. They may have already forgotten about it.

MR. LEINSTER: I doubt that.

MR. ASHTON: I would also like -- since I'm not going to be permitted to go further, I would like the jury instructed to disregard the comment he has never been violent because -- this is directly relevant to that.

If I can't go into that further, he has already told them he has never been violent. That isn't true. Simply not true.

MR. LEINSTER: The rule of law -- would you opt to have her disregard testimony already in because you can't cross-examine the way you want to?

MR. ASHTON: I can't cross-examine that statement in any way.

MR. LEINSTER: Because she found you can't do it as reputation.

MR. ASHTON: Never been violent is not reputation. It's a fact that the prior history of this man -- this witness has never heard of a violent incident. That is what that says, and we know that's not true. I'm put in a very difficult position.

THE COURT: You can spell it out this way to clear it up. Perhaps you can say something to the

affect that brings it out that he, himself, has never actually seen a violent act by the defendant.

And that way we leave it that he heard about it. I'll tell them to disregard the comments the lawyers make to each other. I'll say disregard any comments you make between each other, and don't show your ass any more.

MR. LEINSTER: What?

THE COURT: Don't yell at each other any more.

MR. LEINSTER: That's what trials are. The difficulty I had was he said it was an argument, an argument with his girlfriend. If we could limit those kinds of statements, we wouldn't have to get into that anymore.

THE COURT: Okay.

(End of bench conference.)

THE COURT: Please disregard of the comments that the lawyers make to each other between themselves. That is inappropriate and I have asked them to stop that. We are only concerned about this trial. Let her sit down and you can proceed.

BY MR. ASHTON:

Q Mr. Luckett, when you testified that you have not known Mr. Windom to be a violent person, you mean by that that you have never seen him be violent?

A Yes, sir.

Q You have never seen him get into a violent situation?

A No, sir.

Q In his entire life?

A Never.

Q Ever seen him get into an argument?

A Yea, I saw an argument.

Q Okay. But just from your personal view, you haven't seen any violence?

A No.

MR. ASHTON: No further questions.

MR. LEINSTER: Nothing further.

THE COURT: Okay. Do either of you want to call back this witness?

MR. LEINSTER: Yes.

THE COURT: Okay. You are still on standby during the trial. So, you just need to be somewhere where we can find you.

THE COURT: State, call your next witness.

MR. ASHTON: State would call Watkins.

THE COURT: How is the jury doing? Okay? Anybody need a break yet?

MR. ASHTON: I anticipate this will be the last one before lunch.

Thereupon,

THOMAS WATKINS

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. ASHTON:

Q Would you, please, state your name.

A Thomas Watkins.

Q Mr. Watkins, where do you live?

A 230 11th Street.

Q Is that in the Winter Garden, Florida?

A Yes, sir.

Q How long have you lived there?

A About 14 years.

Q Now, while you have been living in Winter Garden, did you get to know a fellow by the name of Kenneth Williams?

A Yes.

Q How long did you know Kenny Williams?

A Not that long.

Q Was it a matter of a couple months, couple of years?

A Couple of years.

Q Now, on February 7th of 1992, were you in the

area of Center Street and 11th?

A Yes.

Q Winter Garden, Florida?

A Yes.

Q Did you see Kenneth Williams in that area?

A Yes.

Q What was he doing?

A Just standing over there.

MR. ASHTON: May I have the witness step down, Your Honor?

THE COURT: Yes.

BY MR. ASHTON:

Q If you'll step down and take a look at this diagram, State's Exhibit Y for identification. We have Bay Street, 11th Street, Center Street. Do you recognize that?

A Yes.

Q The diagram? Okay. Where were you and Kenneth Williams right before noon on the 7th of February, 1992?

A This looks backwards, though.

Q The Maxey Recreational Center is over here. The Brown's Bar is here.

A The apartment is supposed to be over there.

Q This side?

A Supposed to be there.

Q All right. The apartments on 11th Street?
A Yea.
Q This is 11th Street here, and these are the apartments and houses in front.
A What was the question you asked?
Q Where are you and Mr. Williams?
A Here (indicating).
Q So, you were in front of these houses right here?
A Yes.
Q Now, did you see Curtis Windom at some point come up to that area?
A Yes.
Q Did he come up more than once?
A No.
Q Okay. That first time you saw Curtis Windom approach that area, where was he coming from? What direction?
A (Indicating.)
Q Okay. From this -- from around this way or this way?
A Here (indicating).
Q Down this way?
A Yea.
Q Did he come around the houses?

A Yes, on the street and went that way.
Q Did you see, when he went around, if he had anything in his hand?
A Yes.
Q What did he have?
A A pistol.
Q A pistol?
A Yes.
Q What did Kenneth Williams do when he saw Curtis Windom?
A Nothing.
Q Did Curtis do anything or say anything to Kenny Williams?
A Not right then because I walked back in the kitchen. I heard, "I don't like police --"
MR. LEINSTER: I can't hear the witness.
THE WITNESS: He said something like, "I don't like police ass niggers." Excuse the expression.
BY MR. ASHTON:
Q Then what happened?
A I heard a gunshot. That was it.
Q Did you see what happened outside?
A Not really.
Q What do you mean not really. What did you see?
A The only thing I saw was, like, when I came out

of the kitchen, Kenny said, "Call the ambulance. He shot me." He was walking off.

Q He being Curt?

A (Nods head.)

Q You saw Curt walk up with a pistol?

A I seen him walk by.

Q You heard somebody say -- what was it again?

A "I don't like police ass niggers."

Q Who said that? Could you recognize the voice?

A Not really.

Q Then you heard a shot?

A Yea.

Q Then you looked out and saw Kenneth on the ground?

A Yes.

Q Was he bleeding?

A No.

Q Was he holding some part of his body?

A Right up in here.

Q And he was saying what?

A Call the ambulance.

Q Anything else?

A That was it.

Q Did he saying anything about being shot?

A Yes.

Q What did he say?
A He said, "He shot me."
Q And you say Curtis is walking off?
A Yes.
Q Was he still carrying the gun?
A Yes.
Q Which way did he go?
A Down there.
Q Down Center Street?
A Yes.
Q Have a seat. Did you call the ambulance?
A No.
Q What did you do?
A Nothing. I shut my door.
Q Shut your door?
A Yea.
Q What was the next thing you saw out there? Anything?
A No.
Q Did you see the police come or the ambulance arrive?
A When I opened up my door, that was when J.J. was running down there.
Q J.J. is Lieutenant Johnson of the Winter Garden Police Department?

A Yea, him.

Q Did he go to Kenny and try to help him?

A Yea.

MR. ASHTON: Just a moment, if I may, Your Honor.

(Short pause.)

MR. ASHTON: No further questions, Your Honor.

THE COURT: Cross.

MR. LEINSTER: Just briefly.

CROSS EXAMINATION

BY MR. LEINSTER:

Q Had you heard another shot prior to this?

A Yea.

Q And how long prior to that would you say that was?

A About two or three minutes, something like that there.

Q Okay. When you hear a gunshot ring out there in your neighborhood, is it an unusual deal?

MR. ASHTON: Objection. What is relevance of that?

MR. LEINSTER: I think I'll tie it up.

BY MR. LEINSTER:

Q Were you just standing out when you heard a gunshot go off?

A Why was I standing out? I wasn't standing out. I was at my mom's house.

Q Okay. And Mr. Williams was there?

A Standing right in front of the house.

Q He just stayed outside there?

A Yea.

Q Did you see Curtis Windom approach Mr. Williams?

A No. It was, like, I was in the house standing in my doorway when Curt walked by. I didn't think nothing of it. I walked in the kitchen. On the way out, I heard somebody say what I said. That was it. I heard the shot. When I came out the door, I saw Kenny then.

Q When you heard the first shot go off three minutes before, was Kenny standing outside?

A (Shakes head.)

Q Was he outside?

A Kenny was nowhere around there.

Q My point is: You and Kenny hadn't had a chance to talk and say we just heard a gun shot go off?

A No. It wasn't nothing like that.

MR. LEINSTER: That's all I have.

REDIRECT EXAMINATION

BY MR. ASHTON:

Q When you heard the one gunshot a couple minutes before Kenny was shot, did that come from back where the

11th Street Apartments was or from down where the tennis courts are?

A Down by the tennis courts.

Q Did you hear more than one shot?

A Yes.

Q Do you recall hearing any shots coming from behind back 11th Street apartments?

A I think one.

Q You think you heard one from there?

A Yea.

MR. ASHTON: No further questions.

THE COURT: Anything else?

MR. LEINSTER: No.

MR. ASHTON: No, Your Honor.

THE COURT: Are you going to want to call him back?

MR. LEINSTER: No.

MR. ASHTON: No.

THE COURT: You are released from the case. Thank you very much. Do you have any other witnesses?

MR. ASHTON: We're going to check. We asked him to come down. If not, we have witnesses prepared for after lunch if the Court wants to take a break.

(Short pause.)

MR. ASHTON: We call Cassandra Hall.

THE COURT: Cassandra Hall.

Thereupon,

CASSANDRA HALL

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRENNAN:

Q Would you state your name, please.

A Cassandra Lynette Hall.

Q You don't have to keep your hand up. That's it. Where do you live?

A In Bay Point, Winter Garden.

Q How long have you lived there?

A About two, two and a half years.

Q How long in Winter Garden in years?

A Twenty-two years.

Q How old are you?

A Twenty-two years.

Q So, you have spent all of your life in Winter Garden?

A Sure have.

Q I bring your attention back to February 7th of this year. Do you remember that day?

A Yes, sir. Yes, ma'am.

Q I have a skirt on.
A Yes.
Q Are you nervous?
A I'll be all right.
Q Do you remember that day?
A Yes.
Q Do you remember what you did that morning?
A I went to work.
Q And where did you work?
A Heller Brothers Packing House on Ninth Street.
Q Is that in Winter Garden?
A Yes, ma'am.
Q Did you see Curtis Windom that day?
A I seen him at lunch time. I was leaving work -- it was five after twelve. I was coming from lunch break.
Q And that is when you first saw him?
A Yes.
Q And where was he going?
A He was going down Center Street in his car.
MR. ASHTON: Your Honor, may the witness step down?
THE COURT: Yes.
BY MS. BRENNAN:
Q I want you to take a look at what has previously been marked for identification as State's Exhibit Y. Do

you recognize this diagram of the neighborhood in Winter Garden?

A Yes, sir.

Q Can you tell me where you first saw Curtis Windom?

A It was located here on Center Street, but she doesn't have enough room for the road.

Q And were you in the same place?

A The open field. It tends to be around this open way. I was on the field coming towards Center Street.

Q Did you see Valerie Davis on that day?

A About 12:15 as I stated on my thing.

Q Where did you see Valerie Davis at?

A At the 11th Street apartments right there.

Q Do you know whose apartment that is you just pointed to?

A I assume it was Curtis and Val's apartment.

Q What brought you to Valerie's apartment?

A She called me. I talked to her that Thursday night, and she told me she wanted tangerines. I said okay. At that time I was located on Center Street, and I went to her apartment to tell her that I didn't pack any tangerines that morning. If we pack any that afternoon, I would bring her some.

Q What did you tell her when you first got to the

apartment? Did you tell her that?

A I knocked -- I didn't have time because I heard shooting, and I just said, "Val, Val, somebody is shooting." She said, "Who? Who?" I didn't know who at the time.

Q You were at her apartment knocking on her door?

A Yea.

Q And said, "Val, Val, somebody is shooting?"

A Uh-huh.

Q Where did you hear the shots coming from?

A They were, like, over -- the first four shoots I heard was over --

Q Over where?

A Right along here.

Q That's on 11th Street?

A Uh-huh.

Q So, what did you do at that point when you were at Val's knocking on her door?

A The blinds were open, and I could see her standing. She was on the phone. I said, "Val, Val, someone is shooting." She said, "Open the door." And I opened the door, and I was standing like this right here by the door. The screen door and back door was open.

Q There is a screen door and a wooden door?

A And I was standing in between.

Q What happened then?

A I said, "Val, Val, someone is shooting." I was going to step back out, and I seen Curtis coming up the sidewalk puffing.

Q Where did you see him?

A Right here.

Q Between the two -- between the two apartment buildings?

A Uh-huh.

Q Then what happened?

A When he came by me, I seen one hand down and one hand up, puffing.

Q Did you see anything in his hands?

A At that time I didn't see anything because he had this hand down. That's the hand he had the gun in.

Q Then what happened?

A He came around me. I was standing in the door. He came around me and stood besides me. He said, "Val, I can't take it anymore." He was puffing. He asked her who she was talking to. She was going to say Maxine, but she couldn't get it out.

Q What happened then?

A He shot her.

Q How did he shoot?

A Close range because it went through the wall.

Q Did you see her?

A I panicked. I said, Oh, my God." And he was, like, clicking the gun.

Q At what?

A At me. I was, like, running.

Q Were you out of the apartment now?

A He was out of the apartment. I didn't know which way to go. And a clothesline hung me.

Q Did you see him clicking the gun?

A I was scared. I didn't know which way to go.

Q And you know Curtis Windom?

A Yes. I know Curtis.

Q How long have you known him?

A All my life.

Q Do you see him in the courtroom today?

A Yes. Over there.

Q Can you describe what he's wearing for the record, please?

A He's wearing a black coat, white shirt, white handkerchief and the coat, a box coat.

MS BRENNAN: Your Honor, may the record reflect that the witness has identified the defendant?

THE COURT: The record will so reflect.

MS. BRENNAN: Take your seat. Thank you. Could I have one minute, Judge?

(Short Pause.)

BY MS BRENNAN:

Q Mrs. Hall, you met with the police more than once to tell them about the incident; is that right?

A Yes, I did. At first he was coming to my job and I was at work. He was asking me questions, and I was telling him I can't talk because I was still shook up. So, he said -- it was Frisco. He said, "Cassandra, meet me at my office tomorrow at noon."

And I went in and he wasn't there, so I wrote out my -- the lady that was there, she told me to go in the back. And I met with one of the other cops that was there; and he told me, "Just relax," and gave me a glass of water to drink and everything. He told me to relax.

At that time I was done relaxing, so he just wrote what I saw.

Q So, you wrote a statement?

A Yes, I did.

Q Did you ever talk with Frisco and give a statement to Frisco also, or was that just at your work?

A I talked with him at work. They called me down to talk to him. He was asking me questions; and I was telling them, like, you know, I can't talk because I was still upset. He said there was nothing to be afraid of because they captured Curtis.

Q Was that the only two times?
A Yes.
Q And Frisco is Sergeant Fusco?
A Whatever it is. I don't know.
Q You don't know his real name; you just call him Frisco?
A But I know him when I see him.
MS. BRENNAN: All right. That's all.
THE COURT: Cross?

CROSS EXAMINATION

BY MR. LEINSTER:
Q Have you had an opportunity to read a statement that you gave to detective Fusco that was typed?
A The statement that I wrote, I haven't seen it since I wrote it.
Q Okay. Do you recall giving a statement to Detective Fusco on February the 17th of this year at Heller Brothers Packing?
A Yes. I talked to him there, and that's when I told him I was upset and still panicking. He told me just to relax and come talks (sic) to him at his office.
Q You told him more than that, didn't you?
A Pardon me?
Q You told him more than that, didn't you?
A I asked help on a couple of questions. I can't

remember what the questions was. But I talked to him.

Q Did you tell him the truth?

A Yes, I did.

Q Okay.

A And he asked me why I did not tell him when I talked to him at the Heller Brothers that Curtis pointed the gun at me, and I told him I was frightened. I was scared.

Q Hold on please. You had another conversation after the one at Heller Brothers?

A No, I did not.

Q Are you saying at Heller Brothers he asked you why you hadn't told him about the pointing the gun at you?

A Yea, because several people had told him that Curtis had pointed the gun at me.

Q You are saying that the statement that you gave to him at Heller Brothers was true, and you said that Curt pointed the gun at you?

A Yes.

Q And your statement is that since you were telling him the truth and you're telling the truth today, you told him that you also saw Valerie get shot?

A Yes, I did. I was standing right there.

Q Okay. Do you recall stating to Detective Fusco, "yea, I told Keeman that I believe Curtis had shot Val and

that's it." And Fusco said, "Did you hear the shot?" And you said, "Huh?" He said, "Did you hear a shot?" And you said, "They just -- you know, we were hearing shots like crazy. It was more than just Curtis shooting because people from way back was shooting. I don't know what was going on. The only thing I told Keeman, I said, "Keeman, I believe Curt done shot Val or something because I heard a bullet and that was it." Do you remember saying that?

A Yes, I do.

Q And then he questioned, "Did you see Curtis with a gun?" And you said, "No, he was running. I just seen him running like he was tired." Remember saying that?

A Yes.

Q And then Fusco says to you, "Somebody told me --I don't remember who it was -- that he tried to shoot you, too?"

And you said, "No, he didn't. He ain't -- " and Fusco said, "He tried to shoot you?" And you said, "I ain't told nobody. They asked me where he was when he shot Val, and I told them I was across the street, you know, just -- you know, I had just left Valerie and I told Keeman, "I believe that Curtis had shot Valerie." That was it. I didn't tell nobody he tried to shoot me."

He said, "He didn't try to shoot you while you was there?" You said, "No, because at the present time when I

was there talking to her she was on the phone. She had already left before he got there". You don't recall all that?

A I talked to him. Like I told you: I was panicking. I didn't know nothing. I'm telling the truth. My statement is the truth and nothing but the truth.

Q You were a close friend of Valerie's; is that right?

A Yes.

Q And you have had an opportunity to hear all of the different Winter Garden gossip and so forth since this event, haven't you?

A Yes.

Q You talked to a lot of different people who say they saw this, heard that, and all that; isn't that right?

A Yes.

Q And Valerie was someone who, I assume, you confided in; and, likewise, she confided in you?

A Pardon me?

Q You talked to each other about close things?

A Certain things Valerie would never tell me. Her close problems, she never told me.

Q And Curtis and Valerie had a child?

A Yes.

MR. LEINSTER: That's all I have.

THE COURT: Redirect examination?

REDIRECT EXAMINATION

BY MS. BRENNAN:

Q Mrs. Hall, after you talked to Frisco at your work --

A Uh-huh.

Q -- did you call him later on and tell him you had more to tell him?

A No, I went up there.

Q You never called him prior to going up there?

A No, he said that was -- I can't remember the date it was on. But the next day he told me, he said, "What's the proper time for you to come?" I said, "On my lunch break."

Q What do you mean the next day?

A The day when he seen me at Heller Brothers. He said, "I understand you're at work," because my bossman had came out to see what was going on. He said he didn't want to talk to me in front of them. He said, "What's the most appropriate time for you to come?" And I said at the lunch break.

And I arrived at the police station on my lunch break the following day.

MS. BRENNAN: Nothing further.

THE COURT: Redirect (sic) examination?

MR. LEINSTER: Nothing further.

THE COURT: Either of you going to want to call this witness again?

MR. ASHTON: No, Your Honor.

MR. LEINSTER: No.

THE COURT: Okay. Then you're released from the case, Mrs. Hall.

THE WITNESS: Thank you.

THE COURT: State have any other witnesses?

MR. ASHTON: We do, Your Honor, but they may take us past noon.

THE COURT: Is it going to take you way past noon?

MR. ASHTON: Not a whole lot past noon.

THE COURT: (To the jury:) Can y'all last that long? Let's do one more.

MS. BRENNAN: Latroxy Sweeting.

Thereupon,

LATROXY SWEETING

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRENNAN:

Q Could you state your name for the record, please.

A Latroxy Sweeting.
Q Ms. Sweeting, where do you live?
A I live at 215 Gene Street.
Q Is that in Winter Garden?
A Yes.
Q How long have you lived there?
A For about four months.
Q How long have you lived in the city of Winter Garden?
A All my life.
Q How old are you?
A Nineteen.
Q I want to bring you back to February 7th of this year, 1992. Do you recall having a phone conversation with Valerie Davis?
A Yes.
Q And could you tell me how that phone call came about?
A Her and my mom supposed to went and picked out furniture. My mom wasn't home.
Q What's mom's name?
A Maxine Sweeting.
Q Did you answer the phone when Valerie called?
A Yes. I told her my mother wasn't home. I asked was this Val. I told her hold on; my mom told me to call

her up at her boyfriend's house. Since we have three-way calling, I called to the boyfriend's home; and we were all on the call.

Q Who was on the phone?

A My mother, Maxine, and Valerie and myself.

Q What happened during your phone conversation?

A I told my mom Val was on the phone. They went on and was talking about picking up the furniture. My mom asked her what time did she want her to be ready. Val said, "I can pick you up now." My mom told her she would have to get dressed and pick her up from the boyfriend's house. Asked me did I want to go, and I told them yes. And later --

Q What do you mean later?

A When Curtis came in.

Q When what?

A We were still on the phone with Val --

MR. LEINSTER: I'm going to object. Obviously, she didn't see anybody come in.

THE WITNESS: No, I didn't see him come in, but I heard his voice.

MR. LEINSTER: I'd like it confined to what the basis of her knowledge is rather than stating something about it.

THE COURT: Let her say why she says it was

Curtis.

BY MS. BRENNAN:

Q How do you know it was Curtis Windom?

A I know Curtis' voice. And he came in saying, "I'm tired. I'm through. I'm through." She was asking him --

Q Who is she?

A Val. He called her Val. Val was asking him what was wrong.

Q What else did you hear?

A And he said he was tired. He is through. He can't take it anymore. And later a gun shot went off. It sounded like a screen door closing. Before he shot Val, I heard Cassandra Hall come in and said he had guns and everything. Said, "They're shooting." And Val was asking Cassandra who? And Val was asking Cassandra --

Q How long have you known Cassandra?

A I been knowing her since I was a little girl.

Q And you recognize her voice?

A Yes.

Q And you recognize Curtis Windom's voice?

A Yes.

Q What did you do after you heard what you described as a screen door closing?

A I asked my mom did she hear that because we

didn't hear Val say anything else. After that I heard moaning. Un, un. I said, "What's going on?"

My mom said, "I'm going home." Adam ran to the house and was knocking on the door.

Q Did you get off the phone?

A I told my mom hold on and answered the door. When I answered the door, Adam said --

MR. LEINSTER: I object to what Adam said.

THE COURT: Sustained.

MS. BRENNAN: That's all, Mrs. Sweeting. I have no further questions.

THE COURT: Cross?

CROSS EXAMINATION

BY MR. LEINSTER:

Q The statement you heard over the phone was they had guns?

A Cassandra came in and said they had guns and things and Valerie was asking her who? She never did say who.

Q You have answered what I have said. It's not a big deal, believe me. But did you tell the police on your written statement that you heard some guy come in Val's house and say they had guns?

A I didn't say some guns.

Q You did not? Okay.

MR. ASHTON: Your Honor, let me object to the statement -- I believe perhaps he is misreading it. The witness might be asked to translate -- well, can we approach and I'll explain what I'm saying.

MR. LEINSTER: Okay. Yea. It does.

MR. ASHTON: We agree it says girl?

BY MR. LEINSTER:

Q It appears to be girl. The statement that you heard -- as I said, it's no big deal. The statement you heard, to the best of your recollection, was, "I'm tired. I can't take it anymore?"

A I'm through. I'm through. Yes.

Q Was that in a loud, excited kind of way?

A It was loud.

Q Okay. And how long after you heard that statement did you hear what sounded like the screen door slamming?

A Right after that.

Q The statement and then the bang?

A Yes.

MR. LEINSTER: That's all I have.

THE COURT: Redirect examination.

MS. BRENNAN: Yes.

REDIRECT EXAMINATION

BY MS. BRENNAN:

Q Mrs. Hall -- I mean, Mrs. Sweeting, could you tell us the order of these things, when you heard Cassandra Hall's voice, when your heard Curtis Windom's voice?

A It was right after each other's.

Q Who was first?

A Cassandra's voice was first, then Curtis.

Q I assume Valerie never did get up to go to the door?

A I don't know. I'm on the phone listening.

Q You heard Cassandra's voice first?

A Yes.

Q And then Curtis' voice?

A Yes, sir (sic).

Q And then you heard what you describe as the screen door?

A Yes.

Q Did you ever hear Valerie tell Curtis that she was talking to you and Maxine?

A She said, "What's wrong with you?" I didn't hear him saying anything after that. She kept saying, "I'm on the phone with Maxine and Latroxy.

Q Did she speak at all after the screen door -- what you describe as the screen door?

A No.

Q So, that was before what you heard as the screen door slamming?

A Yes.

MS. BRENNAN: Nothing further.

THE COURT: Recross?

MR. LEINSTER: No.

THE COURT: Either of you want to call the witness again?

MR. ASHTON: No, Your Honor.

MR. LEINSTER: No.

THE COURT: You're released from the case. Thank you very much. Anymore?

MR. ASHTON: One more the same length, if you'd like to.

THE COURT: Okay.

Thereupon,

MAXINE SWEETING

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRENNAN:

Q Can I get you to state your name for record.

A My name is Maxine Sweeting.

Q Okay. Mrs. Sweeting, do you live in Winter Garden?

A Yes, I do.
Q How long have you lived in Winter Garden?
A All my life. Thirty-four and a half years.
Q Thirty-four and a half years?
A (Nods head.)
Q Did you know Valerie Davis?
A Yes, I did.
Q I want to take you back to February 7th of this year, 1992. Did you have a phone conversation with Valerie Davis on that day?
A Yes, I did.
Q Could you tell us how you got on the phone to Valerie, how that came about?
A Yes. Valerie had asked me a couple weeks earlier if I would go with her to purchase some furniture because she was in the process of moving into her father's house.

And on that day she had called to my house and I wasn't at home. So, my daughter called me at my boyfriend's house.
Q Your daughter is Latroxy?
A Latroxy. So, that way the three of us were on the phone together.
Q Three-way calling?
A Right. And she proceeded to ask me if I would

go.

Q Who is she?

A Valerie. I told her once I came from the unemployment place that I would be able to go with her. So, she said that she would wait for me. And in the process --

Q Mrs. Sweeting, you were on the phone with Valerie and --

A Latroxy.

Q Talking about the furniture, when she was going to come pick you up?

A Right.

Q What happened during that conversation?

A During the time that we were on the phone, Cassandra Hall ran in.

Q How do you know it was Cassandra?

A I recognize her voice.

Q What did she run in to?

A Apparently, Val's apartment.

Q How long have you known Cassandra?

A Since she was a small child.

Q And what did you hear her say, that you could recognize that was Cassandra Hall speaking?

A She ran in and said, "They have guns." Val asked her who. At that time Curt, apparently, came in.

Q Curtis Windom?
A Curtis Windom.
Q Why do you say he, apparently, came in?
A I'm saying he came in because I could hear him come in. And she asked him what was wrong with him and he said that --
Q What do you mean you could hear him come in? Did you hear him speak?
A I could hear the sound of the door closing and could hear him speaking.
Q What did she say?
A Val asked him what was wrong. He said he couldn't take it no more. I'm through. I am through. I'm through. After, no one was on the phone. It sounded like a screen door slamming.
Q Okay.
A After. And after that, nothing.
Q Do you know Curtis Windom's voice?
A Yes. I think I'm pretty much aware of his voice.
Q Have you known him a long time?
A Since he was going to school.
Q When is that? A little boy? Teenager?
A About teenage. I have known his family for a while, a long time, also.

Q Did you ever here Valerie identify -- you know, speak to Curtis? Say Curtis or Curt?

A She was telling him, "Curt, I am on the phone with Latroxy and her mother," with Maxine and Latroxy.

Q Was that after Cassandra said they had guns?

A Yes, this was afterwards.

Q Val said, "I'm the phone with Latroxy and her mother?"

A Yes.

Q And when did Curtis Windom say, "I'm through; I'm through; I can't take it anymore?"

A After she had told him she was on the phone with us, that she was on the phone with Latroxy and her mother. And she asked him what was wrong with him. And he said he couldn't take it anymore. "I'm through. I am through. I am through."

Q Did you hear Valerie say anything else?

A No.

Q Did you hear Curtis saying anything else?

A No.

Q Did you or Cassandra say anything else?

A No.

Q You then heard what you describe as screen door slam?

A Just what sounded like a screen door slamming.

Q When Valerie was speaking to Curtis, saying, "Curt, I'm on phone with Latroxy and her mother," how did she sound to you?

A She sounded normal.

Q Not --

A Not upset or anything.

Q Okay. I'm going to show you what's been previously marked as Exhibit S-1 for identification and ask you if you know who is in this photograph.

A That's Valerie Davis.

THE COURT: What was the letter of that?

MS. BRENNAN: S-1 for identification.

THE COURT: Okay.

MS. BRENNAN: I don't have any further questions at this time.

MR. LEINSTER: I don't have any questions.

THE COURT: Are any of you going to want to call this witness back?

MR. ASHTON: No, Your Honor.

THE COURT: You are excused from the case. Thank you very much. Ready for lunch?

MR. ASHTON: Yes, ma'am.

THE COURT: Remember: It's okay to go wherever you need to go. Don't talk about the case with anyone and don't talk to the lawyers or the defendant

or any witnesses while this case is going on. Other than that, you're free to go wherever you'd like for lunch.

And let's be back about 1:15. It gives you an hour and ten minutes. See you then. Thank you.

(Jury is out at 12:05.)

THE COURT: Did we talk about what kind of sequence we're going this afternoon? How many more witnesses, that sort of thing?

MR. ASHTON: No problem. We have, let's see, one -- we have ten more witnesses in this case. One, two, three, four of them will probably be of similar length of what we have been dealing with today.

One of them is a medical examiner that will take a little while since there are three autopsies. We have a police officer to identify much of the evidence. That will take a little time just the logistics of it.

We have a firearm's expert and a fingerprint expert, and then one officer for a quick matter. So, it's not inconceivable -- well, I think probably what we'll try and do is maybe get through everybody this afternoon, except for the medical examiner who has asked me call him in the morning.

THE COURT: Why does he want to be called in the

morning?

MR. ASHTON: He has -- I forget what it was. He can be called this afternoon. But I don't think we're going to be able to finish everything this afternoon, so I'm going to call him tomorrow morning. It's depositions or something. I mean, if we have to call him, we can, obviously. I don't think we'll get through all ten this afternoon, unless you indicated you didn't want to, unless we had to.

THE COURT: I don't mind going as late as six. I would prefer that as opposed to Saturday.

MR. ASHTON: If all we have tomorrow is the medical examiner, there is absolutely no way we can't finish this by Saturday. Take about half an hour Thursday morning. The rest can be defense witnesses and closing or whatever you want.

THE COURT: Anything you want to say? Well, Mr. Leinster is going to put on something.

MR. LEINSTER: That's why we figure almost all day tomorrow for him and closing first thing Friday at the worst.

THE COURT: Okay. There haven't been any stipulations or anything as to any of the evidence; is that right?

MR. LEINSTER: I suggested we do that, but Jeff wanted to put on whatever they had.

MR. ASHTON: We had to call the witness anyway to talk about where the items were found. Nothing to speed us along.

THE COURT: Nothing but the autopsy.

MR. LEINSTER: No. They really need to see and hear about it. If there's not much cross-examination, that would be fine.

THE COURT: We will be back at 1:15. Thanks.

(Court recesses at 12:08 p.m. At 1:25 p.m., the following proceedings were reported:)

THE COURT: Are we ready to bring in the jury?

MR. LEINSTER: I have a Motion in Limine as to this witness. My understanding from having talked to him and, of course, the testimony so far is that there was a remark made before he got shot. Something to the affect of police nigger, something in that range.

I'm not going to cross-examine him as to what that might have meant. If anybody gets into that, the explanation, potential explanation for that is that my client had been arrested along with Valerie Davis for cocaine prior to that and that it may be hypothesized that my client thought that this

gentleman was somehow involved as an informant.

So, I don't want the State -- I don't know that they will. But just to ward this off, I don't want them to ask him was he an informant, about drugs and so forth; because I'm not going to be trying to bring that out as to what all that meant.

THE COURT: What is your position?

MR. ASHTON: I'm certainly planning on asking him if he has ever given information or cooperated with the police as establishing the motive for the shooting. I don't plan to go into Windom's cases involving him in particular, but I think it's relevant to establish the motive.

THE COURT: What exactly are you going to get into?

MR. ASHTON: That he worked as an informant on occasion for the police.

THE COURT: Are you going to say as it related to Curtis and Valerie?

MR. ASHTON: No. I wouldn't although I think that might be relevant. The prejudicial relevance might outweigh the relevance.

MR. LEINSTER: And my objection is broader. It doesn't take a quantum leap to determine that he was informing against my client. Why else would he be

angry? I don't see motive is important.

It's not important, just a question of the act and the intent. The motive is not necessary. It used to be in common law but not anymore.

MR. ASHTON: I think motive is proof toward premeditation, however.

THE COURT: It would certainly be relevant as to -- I don't want him to go into the details if he was a narc for drugs or something like that. I surely wouldn't want that in there.

MR. ASHTON: Basically, as far as I'm going is how far I'm going.

THE COURT: You are not going any further than that, that he has been an informant for the police, period. I'm going to let him do that.

MR. LEINSTER: Another thing. I had planned on bringing up the issue that I had raised yesterday that was Dr. Kirkland's proposed testimony.

THE COURT: Yes.

MR. LEINSTER: And you don't have to do it right now, but I thought you might then. I saw he brought the witness in. I wanted to give the State enough time, show him a copy of the case I would be relying on, if we have to call Dr. Kirkland in for a profer whenever it's convenient for everybody to do

it.

THE COURT: What is the case?

MR. LEINSTER: We can argue it whatever time. I will at the time you have this.

THE COURT: What is it you're going to be arguing?

MR. LEINSTER: As I told you, Dr. Kirkland informs me that they do recognize a fugue state which can be caused; and he described one of the textbook incidents where a young man killed, I believe, his father with a baseball bat and then went into a fugue state which, essentially, is a blackout and then did some pretty serious damage to some other family members.

Now, Dr. Kirkland, I do not believe, is going to be able to say, yes, this is what happened. According to him, at least, even if he knew everything he could possibly know, he is going to say it's a possibility. We recognize it as a possibility, and there we go.

Now, Mr. Ashton's argument had been that Chestnut excludes everything short of legal insanity or intoxication. But I do not think that's the case when dealing with potential of a blackout situation.

My client is on a video tape that he doesn't

remember most of what happened. So, Dr. Kirkland's testimony would be consistent, at least hypothetically.

THE COURT: I'm just wanting to know what he's going to argue. If you want to argue it at another time, we should do that when we don't have the jury waiting.

MR. LEINSTER: I'm going to give these case on that issue to you to look at.

THE COURT: Do you have the cases?

MR. ASHTON: Chestnut and something else.

MR. LEINSTER: Bunney.

THE COURT: Are we ready to bring in the jury?

MR. ASHTON: Yes.

THE COURT: Let's bring them in.

(At 1:30 p.m. the jury is in the box.)

THE COURT: Did you have a nice lunch? Does the State recognize the jury is properly seated?

MR. ASHTON: Yes, Your Honor.

THE COURT: Defense?

MR. LEINSTER: Yes.

THE COURT: State, call the next witness.

MR. ASHTON: We call Kenneth Williams. He's on the stand.

THE COURT: Would you stand and raise your right

hand, please?

Thereupon,

KENNETH WILLIAMS

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. ASHTON:

Q Please state your name.

A Kenneth Moses Williams.

Q Where are you living right now?

A Orange County jail.

Q You have got some charges pending; is that correct?

A Yes.

Q Where were you living before you went to jail?

A Winter Garden.

Q How long had you lived in Winter Garden?

A Most all of my life.

Q I want to direct your attention to February 7th of 1992, just this year. Were you living in Winter Garden at that time?

A Yes.

Q Now, around noontime were you in the area of Center Street and 11th near some houses?

A Yes.
Q What were you doing there?
A I was standing on the corner talking to another young man.
Q While you were standing there, did you hear anything that sounded like gunshots?
A Yes.
Q Could you tell where the sound was coming from?
A Not exactly, no.
Q Did you have an idea of the area it was coming from?
A Down the street somewhere, yes.
Q Shortly after that -- do you know a guy named Curtis Windom, first of all?
A Yes.
Q Did you see Curtis Windom in the area shortly after the shots were fired?
A Yes.
Q When did you first see Curtis Windom? Coming from what direction?
A From Bay Street. I was standing like this, and he was coming from this direction.
Q Basically, up 11th Street or parallel to 11th Street?
A Yes.

Q Did you see at that point if Curtis had a gun in his hands?

A I can't -- I can't really say right now.

Q So, he came up 11th Street. Did he walk past you?

A Yes.

Q Did he say anything to you or you anything to him?

A No.

Q Okay. Where did he go when he walked past you?

A Went into some apartments.

Q Would that be what's called 11th Street Apartments?

A Yes.

Q After he disappeared into that apartment complex, did you hear anything else that sounded like a gunshot?

A Yes.

Q Could you tell if it came from the area of the 11th Street Apartments?

A It came from behind me, yes.

Q What did you do?

A Well, me and another guy was talking. And at the time I said, "Well, I guess I better leave." And I was on my way off. I was fixing to leave.

Q Were you concerned for your own safety when you heard the gunshots being fired?

A In a way, yes.

Q In a way. All right. You heard the shots, the second shot fired; and you said you were fixing to leave. What happened next?

A I was getting ready to leave. I started walking toward 11th Street and I ran into Curtis.

Q All right. From what direction was he coming? You said you were going toward 11th Street?

A I was going this way, and he was coming from the right to the corner; and we walked into each other.

Q Down 11th and turning on Center Street?

A I was on Center facing this direction. I turned to leave going towards 11th Street, which goes like this. When I was going to go past the house, he came around the other way of the house and we ran into each other.

Q Was anything said? Did you say anything to him, and did he say anything to you?

A I said, "What's up, man?" And he spoke to me.

Q What did he say to you?

A He said, "What's up," I think is what he said.

Q What happened next?

A Well, he didn't look normal. Put it like that.

Q The question was what happened next?

A He shot me.

Q Did he say anything to you before he shot you?

A He said, "What's up?" I spoke to him and he spoke to me.

Q Did he say anything to you about --

MR. LEINSTER: Leading.

MR. ASHTON: Maybe if I finish it, it will be. But I'd like to finish it. Then you can decide.

THE COURT: I think if he recalls anything that was said, he should come up with it. So, let's see if he recalls anything being said.

BY MR. ASHTON:

Q Do you recall him saying anything else?

A No.

Q Do you remember giving a statement to Sergeant Fusco in this case?

A I remember being in the hospital, and I was on drugs; and he came and told me what happened, basically, and told me to tell my side of the story after he had told me what to say.

Q All right. Do you recall telling him -- this is at page four, that he said I don't like police informants right before he shot you?

A He told me that.

Q Understand my question. Do you remember telling

Sergeant Fusco that prior to your being shot that Curtis Windom said to you I don't like police informants, pulled his pistol, "I don't like police informants" and -- boom?

A That is what Sergeant Fusco told me what happened. I was on drugs and I didn't really know what happened because it happened so quick. I spoke to him and he spoke to me. He shot me and I fell on the ground, and I jumped up; and he was walking down the road.

Q So, you don't have a clear memory of what people said?

A It happened too fast.

Q So, he shot you?

A Yes.

Q Where did he shoot you?

A In the chest.

Q And you said you fell?

A Yes.

Q What did you do after you fell?

A What did I do?

Q You said you jumped back up?

A Yea. He shot me the chest. I fell to the ground. I jumped up. I didn't feel any pain. I thought he missed me, but I knew he couldn't have. I started walking and then I started bleeding.

Q Did you do anything to Curtis before he shot

you?

A No. As far as I know, me and Curtis had a pretty good relationship before he shot me. Like I say, he just didn't look normal. I think he just clicked.

Q Have you ever worked -- not worked, have you ever cooperated with police in any police investigations?

A Not exactly. I have had charges on me, and they came and asked me questions about certain things that went on, as far as I know. They asked me who sold drugs. I tell them what they wanted to hear. Simple as that.

Q The question was have you given information in the past?

A About myself, yes.

Q And about others?

A Not exactly.

Q How about somewhat?

A You can say somewhat by myself.

Q You have in the past worked as a police informant; isn't that correct?

A I wouldn't say an informant, no. I wouldn't say so.

Q How would you characterize your relationship with the Winter Garden Police Department?

A They had a lot of charges on me one particular time and asked me particular questions about who's selling

drugs. And I tell them, as far as I know, so and so may be selling drugs. I never told them who was selling drugs, if that's what you're asking me.

Q I think you answered sufficiently. After Curtis walked away, you fell and jumped back up. Did you try to run?

A No.

Q After you jumped back up, what did you do?

A I stood there. I looked myself over, because I didn't feel any pain; and I didn't see any blood. Then as I started to walk, blood started coming out of my chest. So I stood and asked somebody to call the ambulance. The next thing I know, the police detective -- I was laying up the street and laying on the ground, and I was on my way to the hospital in the helicopter.

Q Is that somebody by the name of J.J.?

A I think it was J J. Some other female police officer, too.

Q Did you try to get help from any of the people in the houses?

A Yes, I did.

Q Tell us about that.

A I asked a woman -- I asked her could she call the police for me. She said no because she was panicking, I guess, and she ran back in the house.

Q And did you ask anybody else?
A I don't remember, no. I can't recall asking anyone else. No one else was around.
Q Were you hospitalized for some period of time--
A About a month.
Q -- because of being shot? After you got out of the hospital, did you have to go back to the doctor to have the bullet removed from your body?
A Yes.
Q Do you know who Sergeant Fusco is?
A Yes.
Q Was he present when the bullet was removed from your body?
A Yes.
Q The person that you know by the name of Curtis Windom, do you see him in the courtroom today?
A Yes.
Q Could you point him out and describe what he's wearing?
A He's wearing a black suit.
MR. ASHTON: Your Honor, may the record reflect the witness has identified the defendant?
THE COURT: Which one is he?
THE WITNESS: The black one.
THE COURT: The black suit or the black man?

THE WITNESS: The black guy with the black suit.

THE COURT: Okay. The record will reflect he has identified the defendant.

BY MR. ASHTON:

Q When he shot you, can you demonstrate for us how he did that? He is standing there talking to you. Tell us what he did.

A I was talking to someone else at the time. Like I said, I heard a shot. I said, "Well, I guess I better leave now." So, I started walking in this direction. We walked into each other.

I think he was more shocked at that point. We ran into each other. I said, "What's up?" He said, "What's up?" And he shot me.

Q Well, you did like this. He pulled the gun out. Did he point it out at arms length, from the bottom, behind his back or how did he do it, if you can recall? If you recall.

A (Indicating.) He pointed it down because it went like that. He pulled it out and shot me.

MR. ASHTON: No further questions, Your Honor.

MR. LEINSTER: May we approach?

THE COURT: Yes.

(The following is a bench conference.)

MR. LEINSTER: I would ask for a mistrial. You

had implicitly said that you did not want the witness to talk about being an informant for narcotics. I'm not saying that Mr. Ashton asked the question that necessarily led to that answer, but the witness was here, heard your ruling; and twice he has been heard to say that.

And I don't think it takes much imagination for the jury to figure out that somehow he was a threat to Curtis Windom.

Anticipating that you may deny the mistrial, I would ask for some instruction to the jury that nothing that this witness has said about selling drugs has any bearing on this case, any relevance to this case or anything to do with Curtis Windom.

MR. ASHTON: I don't have any objection to Court instructing them to disregard it. But for this Court to make a statement of fact that it doesn't have anything to do with Mr. Windom is not true.

I think it's appropriate to disregard the reference to drugs if that's what's requested. He is not responding to the question. I didn't try to elicit that. While it's objectionable, it's not a mistrial in the context of this case.

In a lesser case perhaps, it might. But in the context of this case, it's not going to change the

verdict.

MR. LEINSTER: I think what I'm asking the Court to do has nothing to with the truth of the statement. Not every truth is admissible for the jury.

We're here on a murder case not a jury -- not the drug case. The only way to cure that is to tell them that this has nothing to do with Curtis Windom's trial of murder.

THE COURT: I'm going to tell them to disregard -- I'm not going to agree to a mistrial. I deny that. Disregard any statements about drugs, and they are only here on the murder case in this case.

This case is just the murder case and disregard any testimony about drugs. I'm not going to say it doesn't have anything to do with it because I don't know. I'm going to say disregard.

MR. LEINSTER: Okay.

MR. ASHTON: Thank you.

(End of bench conference.)

THE COURT: Any testimony regarding any drugs, please disregard. This is a murder case, not a drug case. So, that should not enter into your discussion or deliberation at all. This is just the murder case. Okay. Cross-examination.

CROSS EXAMINATION

BY MR. LEINSTER:

Q Mr. Williams, you and I talked briefly a couple days ago at the trial, right?

A (Nods head.)

Q You have to say yes.

A Yes.

Q She's taking it down. And it's true, as you said, that you and Curtis Windom had already had a good relationship?

A As far as I know, we did.

Q How long have you lived out in the Winter Garden area?

A About 25 years.

Q So, you have known each other, obviously, for a long time?

A Yes.

Q Did you go to school together?

A Yes.

Q And at some point in time before he actually approached you, you did see the gun, did you not?

A I believe I did, yes, sir.

Q And even though you had heard shots ringing out before that, when you saw Curtis approaching with the gun, you did not think he was going to shoot you, did you?

A No.
Q You were not afraid of him?
A No.
Q As a matter of fact, I believe you indicated that he had already passed you once?
A Yes.
Q And would he have been close enough to shoot you the first time he passed you?
A If he wanted to, he could have.
Q Now you indicated that he looked strange?
A He didn't look like his normal self. He didn't look like his normal -- his eyes was bugged out like he was -- like he had clicked, I guess.
Q Have you had an opportunity to see him as his normal self, as you describe it, enough times to know this was not the fellow you usually see?
A Yes.
Q This was not an encounter where the two of you intentionally ran into each other? You happened to be walking in this direction, and he happened to be walking in a convergent path, right?
A Somewhat, yes.
Q In other words, he didn't know where you were going when you left?
A I think we ran into each other. I was shocked

to run into him, and he was shocked to run into me. Something like that.

Q On the schematic drawing -- you can't see it -- you said you were walking toward 11th Street?

A From Center Street, right.

Q From Center Street. And there are no buildings drawn -- step down if you would.

THE COURT: Wait, Mr. Leinster. Counsel approach the bench here.

(The following is a bench conference.)

MS. BRENNAN: He's got chains on.

THE COURT: He has leg irons. He's isn't going to be able to step down.

MR. LEINSTER: I'll turn it round for him.

THE COURT: Okay.

(End of bench conference.)

BY MR. LEINSTER:

Q Where on this area from Center to Church would that have been roughly?

A I was standing in front of Church on the other side of the room in the third house.

Q The third house?

MR. ASHTON: The witness said across Center and he's pointed across 11th.

BY MR. LEINSTER:

Q Tell me where to put my finger.

A Okay. These four little houses there. I was standing at the third one.

THE COURT: Now the jury probably can't see.

MR. LEINSTER: I need to know where he was first, and then I'll worry about that.

BY MR. LEINSTER:

Q He was at this one or this one?

A That one. And I heard shots and I made a left from Center Street to 11th, and I got to, like, the first house and a half; and he came around the other way and kinds of --

Q The left side of the map, is that the houses?

A See those apartments? He came from that direction, and I was coming from the other direction and he -- he was coming around the corner from the last house, and he was coming toward this direction, those four houses.

Q But this is 11th Street down here. You were coming toward 11th Street?

A The apartments.

Q Apartments, all right. So, you would have been coming out of this house around this way?

A Right.

Q I see. And he's coming around this way?

A Right.
Q I'll -- can I make a little X? Are we talking about this area here?
THE COURT: I don't think so. Not on there.
MR. ASHTON: I would rather you didn't.
MR. LEINSTER: I don't want to deface your map.
THE COURT: Everybody else didn't so we don't want to put more emphasis on this.
Want to use these? You can stick these on there and then you can take them off.
MR. LEINSTER: Okay.
BY MR. LEINSTER:
Q Can you still see this?
A Yea.
Q Now should I put this around here?
A Right.
Q And would we be in this area, here?
A The second house is where I was at. I was coming that direction going this way.
Q This way?
A And before I got to the last house, that house up there.
Q That one?
A Yea. He came around the corner.
Q Were you out in the street?

A No. I was on the grassy part.
Q Do you remember who you had been talking to prior to being shot?
A Tommy Lott.
Q Lott?
A Tommy Lott or Johnny Lott. His last name was Lott.
Q Do you know a Thomas Watkins?
A Thomas Watkins.
Q Yea?
A (Shakes head.)
Q Don't know him?
A Unless that's his real last name.
Q All right. But whoever you were talking to, you say that that was the third house going that way; is that correct?
A Right.
Q And then you had left there and gotten down to the first house roughly?
A Right.
Q And you were out in the grass?
A Right in front of the house.
Q Right in front of the first house?
A Right.
Q Do you know who lives in the first house?

A I think his mother lives in the first house.
Q Who is that?
A Thomas Lott, the guy's mother.
Q And were you up on the porch at any time?
A No.
Q And how far would that be from the grass to the house?
A How far would it be from the grass to the house?
Q From where you were standing when you ran into Curtis Windom.
A (Indicates.) About that far.
Q Was Curtis talking in a conversational voice when you ran into him as opposed to yelling?
A He wasn't yelling, no. I spoke to him and he spoke to me. That's about all I really remember. He shot me, and I fell to the ground and jumped up and went down the road.
Q Now he shot you from very close range, correct?
A Right.
Q But you say that the gun was pointed downward because the bullet entered up here and came out at a lower angle; is that right?
A Right.
Q Did it come through your body front to back or

did it come through laterally from --

A The side.

Q From one side to the other?

A The sides.

Q On your body, where are the exit and entrance wounds?

A Right here.

Q Could you stand up? Would that be a big problem for you?

A Right here to right here (indicating).

Q All right. You can sit down. Now, when you were shot, did you initially fall down?

A Fell straight to the ground.

Q And then you got up, and by that time Curtis Windom is walking away; is that right?

A Walking down the road, yes, sir.

Q So, Curtis, who you never had any problems with as far as you know, comes up, to your recollection, and says, "What's going on," shoots you one shot in that fashion and keeps on walking; is that right?

A Yes.

MR. LEINSTER: That's all I have.

THE COURT: Redirect examination?

REDIRECT EXAMINATION

BY MR. ASHTON:

Q When Curtis walked by you the first time, were you afraid?

A No.

Q Did you try to get away?

A No, I didn't have a reason to. He ran down the road, I believe.

Q Do you remember again the taped statement you gave to Sergeant Fusco when we talked about when you were in the hospital? Do you remember he took a taped statement from you?

A Yes, he had a tape recorder.

Q At page two, for counsel's benefit, here at the bottom, do you recall saying to him, quote, I saw him run down the street with a gun in his left hand, and he went back towards his apartment; so, I said, man, let me get out of here before he starts shooting everybody?

A I don't remember making that statement.

Q You don't remember making that statement?

A No, I don't.

Q When he came back around and you met him the second time, is it your testimony here today that he was acting normal and calm, not like he was angry or anything?

A Say it again.

Q When he came back around the second time, how was he acting?

A He wasn't acting any particular way. He just looked like he was -- his eyes were like he was half crazy at the time. Put it like that. I spoke to him and he spoke to me. He pull the gun out, shot me. I fell to the ground. That was it.

Q Did he look like he was mad?

A More like he was confused.

Q Do you remember the following answer you gave? Page four, for counsel's benefit. You said, "He was mad. He was looking crazy, mad. You know what I mean? He was capable of killing anybody. I just don't want to take no chances. He walked up to me, and we spoke. I said, 'What's up, man?' He started looking around. He pulled his pistol. I don't like police informants. Boom." Do you remember telling the police that?

A I don't think I ever told the police that, no.

MR. ASHTON: No further questions. I'm sorry. I do have one thing.

BY MR. ASHTON:

Q You indicated on the cross you had a meeting with Mr. Leinster in the jail recently?

A Mister who?

Q The defense attorney.

A Yes. He came and visited me.

Q Who was there when you met with him?

A Who was there?

Q Yea, other than you and him?

A I walked in the room. It was him. I said, "I don't want to talk to you," after he told me who he was.

Q You refused to talk to him?

A I refused to talk to him. Then he said -- what did he say? "You don't have to talk to me if you don't want to. I'm trying to find out what happened." I stood up and he said something. I listened to him maybe three or four minutes, five minutes; and I left.

Q What did he say to you during those three or four minutes?

A He asked me how long did I know Curtis and I told him. He asked me -- I think he asked me did I ever have any problems with him. And I think he asked me -- yea. He said everybody he talked to thought Curtis was a nice guy. They didn't understand why he did this.

Q Did he talk to you about your testimony? About what happened when you were shot?

A I don't recall.

Q Did you tell him during that meeting that some of the things you told the police back right after this happened weren't right?

A I didn't know they was right before. I never heard them before until now.

Q You have never seen a copy of the statement?

A No, because I never really made a statement for them. I never made a statement. I was in the hospital and the police told me the whole story of what happened because I was on drugs.

Q Did you testify before the Grand Jury in this case?

A Yes. They asked me a couple of questions and I answered them.

Q Did you tell the Grand Jury the story you told the police or the story you're telling us here today?

A What I'm telling today is what I believed to have happened. What I told them then is what I believed to happen. I don't think anything is changing.

Q Since the time you testified to the police and before the Grand Jury, you got busted on a case out of Winter Garden; isn't that correct?

A Right.

Q And you're facing a fairly substantial amount of prison time right now, aren't you?

A Yes.

Q And you're being prosecuted by my office right now; aren't you?

A Yes.

MR. ASHTON: No further questions.

RECROSS EXAMINATION

BY MR. LEINSTER:

Q How long did we talk total start to finish?

A Probably about three or four minutes, maybe five, if that long.

Q Did I ask you anything about any police reports?

A I don't think you did.

Q Just asked you what happened and you told me. I left. Is that right?

A Sure.

MR. LEINSTER: Okay.

MR. ASHTON: No further questions.

THE COURT: Is anyone going to want to see this witness again?

MR. ASHTON: No.

MR. LEINSTER: (Shakes head.)

THE COURT: We need to take a five-minute break, and then we'll proceed with more testimony. We'll excuse the jury for about five minutes.

(Jury out at 1:58.)

MR. ASHTON: How long of a break are we taking?

THE COURT: Just long enough to get him out of here. I told the jury five minutes. We have eaten up one of them. Back in three and a half minutes.

(Transcript of proceedings continue in Volume

III.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:

COUNTY OF ORANGE

I, SARAH MARTIN LIGHTSEY, Registered Professional Reporter, Official Court Reporter and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and the foregoing pages numbered 1 through 403 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the 3rd day of February, 1993, in the CITY OF ORLANDO, COUNTY OF ORANGE, STATE OF FLORIDA.

Sarah M Lightsey, RPR.

Sarah Martin Lightsey
Official Court Reporter
Ninth Judicial Circuit