IN THE SUPREME COURT OF FLORIDA

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CURTIS WINDOM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 80,830

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NUMBER 80,830

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

> **(T)** Transcript of trial proceedings held on February 25-28, 1992, consisting of four volumes of 732 pages.
>
> **(R)** For the 392 pages numbered consecutively consisting of Volume I - transcript of penalty phase proceedings held on September 23, 1992 (R1-113); Volume II - transcript of the sentencing proceedings held on November 10, 1992 (R114-34); two volumes consisting of the pleadings filed in the case (R135-392); and the supplemental record numbered consecutively from the record on appeal (R393-595) consisting of transcripts of both pre-trial and post-trial hearings and other pleadings.

The Appellant, Curtis Windom, will be referred to as the Appellant or by his proper name. The government will be referred to as the State or the prosecutor.

STATEMENT OF THE CASE

On March 3, 1992, the 1991, fall term grand jury in the Ninth Judicial Circuit, Orange County, Florida indicted Curtis Windom on three counts of first-degree murder and one count of attempted first-degree murder. (R153-55)

On July 17, 1992, Appellant filed a motion to suppress physical evidence. (R184-85) Following a hearing held on August 14, 1992, the trial court denied the motion. (R547-52) During the trial, the evidence was admitted over Appellant's objections. (T561-67)

Also prior to trial, the court denied Appellant's motion to preclude challenges for cause based on a juror's opposition to the death penalty. (R200-1) During jury selection, several potential jurors were excused for cause based on this very philosophy. (T75-76,82-84,93-97,113-16,155-63,184-87)

This case proceeded to trial on August 25, 1992. (R262-66) During jury selection, Appellant interposed a Neil/Slappy[1] objection to several peremptory challenges exercised by the State. (T250-52,255-57)

During the State's case-in-chief, the trial court allowed the introduction of several gruesome photographs over Appellant's objections. (T531-37)

At the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal based on the insufficiency of

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[1] State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 18 (Fla. 1988).

the evidence to prove premeditation in the murders of Valerie Davis and Mary Lubin, and the attempted murder of Kenny Williams. (T551-52) After hearing argument, the trial court denied the motion. (T554) Appellant presented four witnesses that testified in his behalf. (T580-634) During Appellant's case-in-chief, the trial court rebuffed Appellant's attempt to call Sergeant Fusco as a witness. (T619-21) Appellant renewed his previously made motion for judgment of acquittal which the trial court again denied. (T634)

Following deliberation, the jury returned with verdicts of guilty as charged on all four counts. (T723-28)

Appellant was the subject of a penalty phase on September 23, 1992. (R1-113) The State presented, over objection, one witness (R1-37) and the Appellant presented none. (R38-46) Following deliberation, the jury returned with recommendations that Windom be sentenced to death on each of the three capital crimes. (R108,318-20)

Windom's life was the subject of a mitigation hearing held before the trial court only on November 5, 1992. (R470-546) On November 10, 1992, the trial court heard the testimony of one more witness before sentencing Curtis Windom to die in Florida's electric chair. (R117-133,355-79) The trial court found two aggravating factors[2], three statutory mitigating factors[3], and

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[2] Prior violent felony convictions and heightened premeditation. §§ 921.141(5)(b) and (i), Fla. Stat. (1991).

four nonstatutory mitigating circumstances.[4] (R355-63) The court sentenced Windom to twenty-two years imprisonment for the attempted murder of Kenny Williams. (R377) The trial court ordered that all four sentences run consecutively. (R371-77)

Appellant filed a notice of appeal on November 24, 1992. (R380) Appellant filed an amended notice of appeal on December 18, 1992. (R389) This Court has jurisdiction. Art. V, §3(b)(1), Fla. Const.

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[3] Appellant had no significant history of prior criminal activity, acted under extreme duress, and may have been under the influence of extreme mental or emotional disturbance. §§ 921.141(6)(a), (b) and (e), Fla. Stat. (1991).

[4] Curtis Windom assisted needy people in the community and was a good father. As a child, Windom saved his sister from drowning. As an adult, he peacefully resolved a potentially violent dispute by paying a debt out of his own pocket.

STATEMENT OF THE FACTS

During the morning hours of February 7, 1992, Jack Luckett and Curtis Windom, both long-time friends and life-long residents of Winter Garden, were discussing Johnny Lee, a mutual friend. In response to Windom's question, Luckett admitted that Johnny Lee had won money at the dog track the previous evening. (T320-23) Windom told Luckett that Lee owed Windom $2,000.00. Over Luckett's protest, Windom announced his intention to kill Lee that day. When Luckett again attempted to dissuade Windom, Windom purportedly replied that it was not about money, but rather something else. (T320-24) Luckett denied any knowledge of what "else" it was about. (T324)

Shortly before noon on February 7, 1992, Curtis Windom purchased a box of .38 caliber ammunition at the Wal-Mart in Ocoee, approximately two miles from Winter Garden, located in Orange County, Florida. (T281-86) Around noon on the same day, Jean Willis and Pamela Fikes were talking near the tennis courts on Eleventh Street in Winter Garden. (T286-90,310-11) As the women conversed, Johnny Lee, Windom's best friend (T298) walked up and joined the conversation. (T287-89,311) Willis, Fikes, Lee and Windom had grown up together and remained friends in the close-knit community of Winter Garden. (T286-87,289,298-99,310-12) Willis noticed Windom driving his black Maxima down Eleventh Street toward the group. (T290-91) Windom stopped his car with the passenger side right next to where Johnny Lee stood. (T292,312-13) Johnny Lee did not appear startled or frightened.

(T291,313)

Windom immediately slid over to the open passenger window and shot Lee twice in the back. (T292-93,306-7,313-14)[5] Lee fell to the ground, Windom got out of his car, came around the rear of his car, and shot Lee three more times as Lee lay on his back. (T293,305-8) After the shooting, Windom abandoned his car where it stood and ran up Eleventh Street with the gun still in his hand. (T294-95,314-15)

Both Willis and Fikes were stunned by Windom's actions. (T308-9,316-18) Both women noticed that Windom looked different than his normal self. Willis noticed that Windom "looked wild... [his] eyes was [sic] big." (T308)

Luckett had never attempted to warn Johnny Lee of his impending doom and, was nearby and saw Windom drive up and shoot Lee. (T325,328) Luckett, a three-time convicted felon, denied removing a gun, drugs, or jewelry from Johnny Lee's body or car after the shooting, but before the police arrived. (T326)

Kenny Williams was talking to Thomas Watkins near Center and Eleventh Streets when Williams heard gunshots down the road. (T337-40,343,378-81) Watkins saw Windom, with pistol in hand, rounding the corner of a nearby house. (T339-40) Watkins left and went inside. (T340) A few minutes later, Williams saw Windom enter the Eleventh Street Apartments. Williams heard more

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[5] Although Jean Willis testified that neither Windom nor Lee said anything before the shots were fired (T293), Pamela Fikes heard Windom say, "My motherfucking money, nigger," prior to the shooting. (T313)

shots, this time from the apartments. Concerned for his safety, Williams started to leave also, but ran into Windom as he was coming around the corner of a building. (T378-81) Williams noticed that Windom, whom he had known for twenty-five years, did not look normal. His eyes bugged out and he looked like he had "clicked." (T390-91) Williams described Windom's eyes as looking "half crazy." (T399)

From inside his kitchen, Watkins heard a voice say, "I don't like police-ass niggers," followed by a gunshot. (T340-42) When he stepped outside, he saw Kenny Williams clutching his chest and requesting an ambulance. Windom was walking away, down Center Street with a gun still in his hand. (T340-42) Williams denied that Windom looked mad and, instead, described him as looking confused. (T399) After Williams uttered a brief greeting, Windom shot him once in the chest. (T381-82) Williams denied that Windom mentioned anything about "police informants" prior to the shot being fired. (T382-83) When impeached with a prior inconsistent statement on this issue, Williams explained that the police "fed" him the statement at the hospital while he was under the influence of drugs. (T382-83) Williams subsequently recovered from his wound. (T385-86)

At 12:15, Cassandra Hall saw Valerie Davis at the Eleventh Street apartment that Davis sometimes shared with Windom.[6] Hall could see Valerie Davis through the window blinds talking on the

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[6] Valerie Davis and Curtis Windom jointly parented a child. (T356)

phone. (T349) As Hall knocked on the apartment door, she heard four shots coming from the street. (T348-49) A few minutes later, Hall noticed Curtis Windom huffing and puffing his way up the sidewalk between the apartment buildings. Hall saw that Windom was holding a gun at his side. (T350) Windom stepped around Hall and entered the apartment and stated: "Val, I can't take it any more." (T350) Windom then shot Davis at close range. (T350) Hall panicked when Davis got shot and Windom turned the gun on her. (T351) She fled from the apartment.[7]

At the time she was shot, Valerie Davis was involved in a three-way telephone conversation with Latroxy and Maxine Sweeting. (T358-60,365-70) Both Sweetings heard Cassandra Hall warn Davis of the shots being fired in the neighborhood. Both also heard Curtis Windom tell Davis, "I'm tired. I'm through. I'm through." (T360-61) When Davis asked Windom what the problem was, the Sweetings heard Windom reply that he could not take it anymore. Both Sweetings then heard a gunshot followed by the sound of a door closing and moaning. (T359-70)

After leaving Davis' apartment Windom had his encounter with Kenny Williams. A few minutes later, Windom was spotted coming from behind Brown's Bar by Pearly Mae Riley, Windom's distant cousin. Windom looked angry, wild, strange, and had "big eyes."

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[7] Hall's version of Davis' shooting was substantially impeached with her prior inconsistent statements in which she denied seeing the gun, denied that Windom tried to shoot her, that Davis had left the apartment before Windom arrived, and that, although she believes that Windom shot Davis, others in addition to Windom were shooting that day. (T354-56)

He had a gun in his hand. (T423-26,432) Riley asked Windom what the problem was but, being deaf, she was unable to hear his answer. (T425-26) Windom continued walking to East Bay Street where he encountered Mary Lubin, Valerie Davis' mother, stopped in her car at a stop sign.[8] (T426-27) Lubin and Windom exchanged words that no one could hear. Windom then shot Lubin. (T426-28) Riley admitted that Lubin could have threatened Windom prior to the shooting. (T431-32) After Lubin said, "He shot me," Windom shot Lubin once more. (T428) Lubin opened her door, got out of the car, walked to a nearby tree and fell to her knees. (T428) Riley noticed Lubin's car rolling down the street, so she got into the car and stopped it. (T428) Riley then went to Lubin's aid. (T428-29) Lubin's boyfriend, Sylvester, came upon the scene and took possession of Lubin's purse, which Riley had retrieved from the car. (T433-34) Riley did not look in Lubin's purse for a gun. (T435)

Mary Law, who admitted to serious drug problems in her past, also saw Windom shoot Lubin. Law first noticed Windom in the company of three men near Brown's Bar. One of the men, James Duke, was attempting to talk Windom into giving up his gun. (T438) Windom eventually walked away from the trio and, at the next street corner, shot Mary Lubin as she sat in her car at a stop sign. Law estimated that Windom was ten to fifteen feet from Lubin's car when the shots were fired. (T439) Law also

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[8] Lubin had received word that Valerie Davis, her daughter, may have been shot. She was on her way to check on her. (T512-13)

admitted that Lubin may have uttered a threat to Windom before the shots. (T440-41)

Law described Windom as looking "spaced out" and he "seemed to be out of it." (T445) Law also admitted being high on crack cocaine that day. (T445) After being confronted with a prior inconsistent statement, Law agreed that Perry Brown and James Duke were holding Windom when he shot Lubin. (T451-52)

After the shooting, Law dropped her purse and ran to Lubin's aid. (T441-42) When the paramedics arrived, Law returned to retrieve her purse. James Duke led Law a short distance from the shooting scene and returned her purse. At that point, Law realized that Duke had hidden a gun in her purse. (T442-43) After hiding the gun overnight, Law was approached by police the next morning. They obtained consent to search her purse, where they found the gun. (T444)

Autopsy results indicated that Valerie Davis died from a single gunshot wound to the heart, while Johnny Lee and Mary Lubin died of multiple gunshot wounds. (T524-45) Police arrested Windom the next day. Ballistic tests connected some of the bullets fired to the gun recovered from Mary Law's purse. (T496-502)

Dr. Robert Kirkland, a psychiatrist, interviewed Curtis Windom about the shootings. Windom remembered the first encounter with Johnny Lee and the last encounter with Mary Lubin. However, Windom had no recollection of shooting Valerie Davis, his girlfriend. (T580-81) Dr. Kirkland explained a severe

psychotic reaction called a fugue state, which is a depersonalization reaction people sometimes suffer due to stress or pressure. Taking its name from the musical term (meaning the frantic playing of discord notes), a person in a fugue state often acts in a frenzy without knowing their identity. (T582) The disorder may last only a brief period of time or may last for years. (T582-83) Amnesia can play a part of an individual in this state. (T583) Dr. Kirkland made no diagnostic finding as to whether or not Curtis Windom was in a fugue state during the shootings. Kirkland allowed that it was possible, but not likely. (T584)

Dr. Kirkland recounted one fugue state case history in which a young man, home from college, was practicing baseball with his father. The father was killed by accident with the bat. The trauma led to a psychotic reaction during which the son also killed his mother and older brother. (T585)

Lena Windom, Appellant's mother, saw Windom at the Winter Garden Police Station shortly after his arrest. Mrs. Windom could tell that Curtis "wasn't hisself [sic]. He wasn't hisself [sic] at all. Nothing at all." (T621-23) During most of her conversation with Curtis, Mrs. Windom was doing most of the talking, trying to get him "back to his senses." (T628) During his entire life, Mrs. Windom had never seen Curtis look or act like he did at the police station that day. (R628) Curtis was running a fever and did not seem to remember that he had shot Valerie. (T631-32)

Mrs. Windom helped the police apprehend her son who was under siege in a house on Klondike Street. (T629) Mrs. Windom approached the front door and identified herself. Curtis came to the door saying, "Mamma, what have I done?" (T630)

Mitigation Evidence

Defense counsel chose to bypass his opportunity to present mitigation evidence to the jury at the penalty phase. (R38-46)[9] Appellant did present extensive evidence in mitigation to the trial court at a hearing on November 5, 1992. (R470-546)

When Curtis Windom was only nine years old, he saved his older sister from drowning. (R475-77) As an adult, Windom was very generous to friends and even strangers. Windom frequently gave neighbors flowers, cards, and small gifts on birthdays and other days of remembrance. (R479-80) He also paid bills for one neighbor who had been laid off from work. (R480-81) Windom was able to accomplish this good deed in spite of the fact that he was out of town during her time of need. Windom also helped the same neighbor with money for medication. (R481)

Windom made frequent donations to the community church. (R480) He also bought clothes and food for children involved in community football. (R481) Windom was kind and attentive to all of the children in the community, especially his own. (R481-82) Windom was a particular help to the children of a local white peddler named Steve. Windom bought approximately $300.00 worth

[9] The State presented only one witness who testified, over objection, about the "community impact" of the murders. (R1-37)

of clothing for Steve's children. (R482) Windom bought diapers and other necessities for Odessa Reynolds. (R482) Windom also gave money to a homeless person who had been reduced to eating garbage. (R482)

Windom also helped another couple in the community by buying needed medication. (R498) Windom often helped unemployed families at Christmas time "doing little things" like giving toys to the children. (R498-99) Windom was the only one of twenty witnesses who came forward to reveal the identity of the vandal who damaged a local restaurant. (R500-1) Windom had also helped a former girlfriend with money for clothing. (R512-14)

The trial court also heard from one more witness at the sentencing on November 10, 1992. (R117-26) Four years before his sentencing, Windom had intervened in a financial dispute between John Scarlet and "Black Pete." Scarlet fully intended to shoot Pete, but Windom calmed Scarlet down, confiscated his gun, and paid the debt himself. (R119-20) Windom actually stepped between a drunk Scarlet, who was brandishing a gun, and "Black Pete." (R121-22)

The trial court also heard of the animosity between Windom and Mary Lubin, one of his victims. Mary Lubin was Valerie Davis' mother. Valerie Davis was Windom's girlfriend. Lubin and Windom did not get along. (R486) Lubin was upset about a physical confrontation between Windom and Valerie Davis. (R496) Witnesses heard Mary Lubin threaten Windom to his face. (R486-87) "If [you] ever touch [my] daughter again, [you will] be in

hell or [I will]." (R487) Lubin had also threatened Windom's life in front of other witnesses. (R501)

Windom was the father of three children. (R511-12) He was a good father and shared responsibility in caring for his children. (R517-18) One child suffered from lead poisoning and Windom took his turns staying at the hospital with the child. (R518-19) The mother of two of his children described him as a "great" father. (R519) He never physically disciplined the children, instead using patient reasoning. (R519-20) Windom also provided financially for his children. (R527-28)

The character witnesses described Curtis Windom as a mild-mannered man with a kind smile all of the time. (R488) All agreed that the murders were totally out of character. (R488, 500,515) None had known him to be violent (R488,514-15) They described Curtis as low-key. (R500)

Mary Jackson, an HRS worker with a master's degree in criminal justice pointed out that Windom is amenable to rehabilitation. (R500) When Jackson visited Windom in jail following his arrest, Curtis cried, expressed remorse, and stated his inability to believe that he had killed. (R502) Windom realized that he had to be punished. (R502)[10]

While there was some evidence that Windom may have been involved in street-level drug dealing, many of the witnesses

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[10] The videotape of Windom at the police station also showed remorse. Windom cried and repeatedly said, "I don't know what happened...." He concluded that he would have to spend the rest of his life in prison.

denied knowledge of that reputation. (R495,504-7,516,531-39) Mary Jackson heard rumors that Windom dealt drugs and, ultimately, he indirectly admitted involvement. (R504) She had discussed the rumors with Windom and he assured her that he was attempting to "get away" from Valerie Davis and the drug scene. (R504-7)

SUMMARY OF THE ARGUMENT

Curtis Windom challenges his convictions and death sentences based on a variety of reasons. Juror Laurence was excluded from jury service by the State based solely on her racial identity. Laurence, an East Indian in nationality, was never asked about her racial background. When the State exercised a peremptory challenge on Laurence, the defense objected based on Neil, supra. The prosecutor could not give an adequate race-neutral reason for excusing Laurence. The trial court, after much debate about Laurence's race, erroneously concluded that she was not part of a cognizable minority and allowed the challenge to stand.

The jury's verdicts at the penalty phase were tainted as a result of objectionable evidence concerning "community impact." Over timely and specific objection, the trial court allowed a local police officer to tell the jury of the devastating effects of the murders on the children of the community of Winter Garden. The State's evidence at the penalty phase is limited to the aggravating circumstances listed in the statute. The inflammatory evidence relating to victim and community impact is nonstatutory aggravation which should have been excluded. Additionally, the evidence was irrelevant to any material fact in issue. Since it was the only evidence heard by the jury at the penalty phase, it obviously became a feature of the trial. Furthermore, the statute in question violates the *ex post facto* clauses of both the state and federal constitutions. Windom's crimes occurred before the enactment date of the statute. The

statute is retro-spective and disadvantages Curtis Windom. The statute is also unconstitutional on its face for a variety of reasons. This Court alone has authority to adopt rules for the practice and procedure in all courts, not the legislature. Additionally, the Florida Constitution protects against cruel _or_ unusual punishment. The admission of the evidence also violates the Due Process Clause.

Windom also challenges the adequacy of his counsel. Specifically, after hearing complaints about his representation, the trial court failed to conduct a hearing pursuant to _Nelson v. State_, 274 So.2d 256 (Fla. 4th DCA 1973).

Windom also challenges his convictions based on evidentiary rulings by the trial court during the guilt phase. Over objection, the trial court allowed the introduction of prejudicial and unnecessary photographs of the dead victims. Additionally, the trial court rebuffed Windom's attempt to call a witness in his defense. That witness would have impeached a State witness. The ruling resulted in a denial of Windom's constitutional right to present his defense. Windom also challenges the jury instruction on reasonable doubt as constitutionally infirm.

Windom also challenges several instructions at the penalty phase. The instruction on the "heightened premeditation" aggravating factor provided absolutely no guidance to the jury and is constitutionally infirm. The trial court denied Windom's numerous requests for special jury instructions which would have

provided sufficient guidance to the jury in their consideration of Windom's life. The requested instructions were not covered by the standard jury instructions.

Windom also attacks the trial court's treatment of the evidence regarding the findings of fact in support of the death sentences. The evidence is insufficient to find that the murders were committed in a cold, calculated and premeditated manner. This is especially true regarding the murders of Valerie Davis and Mary Lubin. The State failed to show any advance planning to kill Lubin or Davis. The finding is unsupported in the murder of Johnny Lee, since Windom had a pretense of justification, in that Lee, a person with a violent reputation, owed him money and refused to pay. The other aggravating factor [prior violent felony conviction] cannot be used, since the felonies were contemporaneous to the murders. Additionally, the trial court improperly rejected substantial, competent, uncontroverted mitigating evidence by finding that the mitigating factors were established, but giving them little, if any, weight. The trial court's treatment of the mitigating evidence flies in the face of precedent from this Court.

Finally, Windom contends that the ultimate sanction is disproportionate when applied to him. Windom also challenges the constitutionality of Florida's death sentencing scheme for a variety of reasons, many of which have been previously rejected by this Court.

ARGUMENT

Curtis Windom discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentences. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE MINORITIES FROM THE JURY DENIED WINDOM HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

An individual's right to an impartial jury representing a cross-section of the communities guaranteed by Article I, Section 16, Florida Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. The purpose of peremptory challenges used during jury selection is to promote the selection of an impartial jury. "It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury." State v. Neil, 457 So.2d 481, 486 (Fla. 1984); See also Batson v. Kentucky, 476 U.S. 79 (1986).

Both the United States and Florida Constitutions prohibit the discriminatory use of peremptory challenges when selecting a jury in a criminal case. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution forbids a prosecutor exercising peremptory challenges solely on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). This Court condemned purposeful racial discrimination in the selection or exclusion of perspective jurors in State v. Neil, 457 So.2d 481 (Fla. 1984) as a violation of a defendant's right to an impartial jury under Article I, Section 16, of the Florida Constitution. The prosecutor offended these principles in using a peremptory challenge to excuse Maria Laurence[11] from serving on Curtis Windom's jury.

Windom's jury was selected after some individual and some collective voir dire. (T1-268) The parties also examined juror questionnaires prior to questioning in order to determine which of the venire should be subject to individual questioning. (R212-261) Throughout the questioning, the court granted or denied cause challenges from both sides. At the end of individual and collective questioning, each side exercised their peremptory challenges and a jury was chosen (after questioning) in eight pages of transcript. (T250-58)

The State exercised the first peremptory challenge, which

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[11] The potential juror appears in the transcript as Ms. Laurence, but her juror questionnaire reveals she is actually Maria Lawrence. (R236;T255-57) To avoid confusion, Appellant will refer to her in this brief as she appears in the transcript, Juror Laurence.

defense counsel immediately questioned as a "race issue." (T250) When the trial court asked the prosecutor for a reason, the prosecutor stated that he had challenged that juror for cause based on his death penalty opinions.[12] (T250-51) The trial court had denied the challenge for cause. Defense counsel did not object to the prosecutor's race-neutral reason. (T251) After the court excused the juror, defense counsel stated that five black jurors were left on the remaining panel of thirty veniremen. (T251) The prosecutor challenged this number and a debate began about the ethnicity of the remaining jurors. (T251-52) Both parties and the judge counted up the remaining minority veniremen and concluded that five, perhaps six, were left on the panel.[13]

Defense counsel exercised a peremptory challenge on Mr. Haley and the prosecutor objected based on State v. Neil, 457 So.2d 481 (Fla. 1984). (T254-55) Defense counsel asked the court to excuse Haley for cause based on his fanatic support for

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[12] The record is completely unenlightening as to the identity of this particular juror.

[13] The transcript uses two different sets of numbers in referring to the potential jurors. One set is the "big numbers" (as the trial judge said), while the other set of numbers appears to refer to the order in which the potential jurors are seated in the courtroom. Five jurors are identified as minority members, none of whom are Maria Laurence, the juror at issue on appeal. [Laurence's "small number" is 27 and her "big number" is 181. (T255-56)] In addition to the five minority members mentioned by number, Marquita Anderson is also apparently a member of a minority. [The prosecutor believed Anderson to be Black, while the court thought she was Hispanic. (T252)]

the death penalty. The prosecutor accepted this as a racially neutral reason. (T255)

When the prosecutor used a peremptory challenge to excuse Ms. Laurence, defense counsel objected.

> MR. LEINSTER (Defense Counsel): I'd like to question that choice too, assuming she is black.
>
> MR. ASHTON (Prosecutor): I don't believe she is.
>
> THE COURT: It says Hispanic.
>
> MR. ASHTON: I think she is actually Indian.

(T256) The court then asked the prosecutor for his reason in striking her.

> 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: A minority does not have to be the same as the defendant anyway.
>
> THE COURT: That's true....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.

(T256) The prosecutor became concerned about determining Ms. Laurence's ethnicity.

> 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: Hi. What is your nationality?
>
> MS. LAURENCE: 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.
>
> 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.

(T257) It is clear from portions of the transcript quoted above that Juror Laurence was excused by the State over Appellant's <u>Neil</u> objection. Over defense counsel's protestations, the trial court failed to require the prosecutor to state a race-neutral reason for exercising the challenge. This was apparently based on the misconception that Ms. Laurence was not a member of a cognizable minority.

This Court "specifically limited the impact of <u>Neil</u> to peremptory challenges exercised solely because of the perspective jurors' race. This Court also stated that the applicability of <u>Neil</u> to other groups would be addressed as such cases arose.

State v. Alen, 616 So.2d 452, 454 (Fla. 1993)

> Although neither the Supreme Court nor the law of this state provides us with any precise definition of a cognizable class, the cognizability requirement inherently demands that the group be objectively discernible from the rest of the community. First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

Id.

Webster's Third New International Dictionary (unabridged) defines East Indian:

> (1) A native or inhabitant of the East Indies; sometimes: EURASIAN
>
> (2) A native or inhabitant of India or Pakistan; also: a person of East Indian ancestry

The World Book Encyclopedia describes the East Indies:

> [I]n its widest sense, refers to southeastern Asia, including India, Burma, Thailand, Laos, Cambodia, and Vietnam; the islands around the Malay Archipelago and the Philippines. In a narrower sense, the term East Indies is used to mean only the islands of the Malay Archipelago. The republic of Indonesia, formerly the Netherlands Indies, forms part of this island group.

The encyclopedia goes on to explain that the term was first used in the 1400's when Columbus thought he was finding a short route to the rich Indies when he landed in America. He therefore called the islands the Caribbean Indies. Later, these islands

were named the West Indies and the Pacific Islands were called the East Indies, in order to distinguish the two groups.

The World Book describes the Malay Archipelago, also called the East Indian Archipelago or Malaysia, as the largest group of islands in the world which are found in the Pacific Ocean. The archipelago lies between southeastern Asia and Australia, and includes the Philippines, Indonesia (including the Moluccas and Lesser Sunda Islands), New Guinea, and smaller groups. The Summary Population and Housing Characteristics, United States, in the 1990 census of population of housing includes East Indian as part of the Asian Indian group which is part of the larger Asian group.

Courts have disagreed and struggled in deciding whether a particular group is a cognizable class. Note, Due Process Limits on Prosecutorial Peremptory Challenges, 102 Harv.L.Rev. 1013, 1020 (1989). Under Batson, cognizable groups that have been recognized include: United States v. Alvarado, 891 F.2d 439 (2d Cir. 1989) [Hispanics]; United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988) [Italian-Americans]; United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987) [Native Americans]; Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991) [white males]. Courts have found certain groups did not qualify as cognizable/distinctive minorities: United States v. Canfield, 879 F.2d 446 (8th Cir. 1989) [city residents]; Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988) [young adults/college students]; Anaya v. Hansen, 781 F.2d 1 (1st Cir. 1986) [blue collar workers/"less educated individuals"].

There can be no question that Juror Laurence is part of a cognizable group. As this Court stated in Alen, supra, at 455:

> When an identifying trait is a physically visible characteristic such as race or gender, the process of defining a class is comparably less arduous then defining a class of people in the same ethnic group.

A reading of the discussion regarding Ms. Laurence's ethnic origin is enlightening in and of itself. Neither the judge, the prosecutor, nor defense counsel could agree on Laurence's race. She obviously stood out visually in some way. Defense counsel first raised the objection stating, "assuming she is black." (T256) The trial court believed that Laurence was Hispanic. The prosecutor said, "I think she is actually Indian." (T256) However, the prosecutor did not believe that Indian or Pakistani was a cognizable minority recognized for the purposes of Batson/Neil. In an attempt to resolve the issue, the trial court asked Ms. Laurence her nationality, erroneously assuming that would answer the question. (T257) When Ms. Laurence replied that she was East Indian, the trial court concluded that she was definitely not a recognized minority. (T257) Obviously confusing the East Indies with the West Indies, defense counsel pointed out that, "Everybody in Trinidad is black." The prosecutor replied that Laurence obviously was not black and defense counsel opined that she might be Indian. Obviously wanting to move along, the trial court replied, "All right. She's Indian but I'm going to let him strike her..." (T257)

The trial court did not have the benefit of this Court's

opinion in State v. Alen, 616 So.2d 452 (Fla. 1993), which had not been decided prior to Windom's trial. This Court pointed out that nationality is not determinative of the issue. This Court compared a person born in Cuba who becomes a citizen of the United States at a young age, and is raised with English as her primary language. That person is no less Hispanic simply because she speaks English more frequently and fluently than she speaks Spanish. Similarly, a person named Mary Smith born in the United States is no more Hispanic, simply because she marries and adopts the surname of a man with a traditionally Hispanic name. State v. Alen, 616 So.2d at 455. No matter what her race, it is abundantly clear that Ms. Laurence was excluded from jury service merely as a result of her racial identity, rather than her ability to follow the law.

The only potentially race-neutral reason given by the State for excusing Ms. Laurence was the prosecutor's mention of his "numerical rating system." (T256)[14] However, when the prosecutor apparently realized that Ms. Laurence was practically neutral, even using his bogus numerical rating system, he settled on the strategy of contending that Ms. Laurence was not "an established minority." (T256) Indeed, Laurence was completely neutral on the death penalty. (R236) Laurence only wanted to be sure she did not send an innocent or an insane man to the electric chair. (R236)

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[14] The prosecutor, Jeffrey Ashton, is the same prosecutor whose "numerical rating system" this Court condemned in Kramer v. State, 619 So.2d 274, 276 (Fla. 1993).

The State's use of peremptory challenge to remove Ms. Laurence violated her right not to be improperly removed from jury service because of a constitutionally impermissible prejudice. Jefferson v. State, 595 So.2d 38 (Fla. 1992). Defense counsel objected and the trial court failed to hold a Neil inquiry. State v. Johans, 613 So.2d 1319 (Fla. 1993). Even one racially motivated strike violates both the Equal Protection Clause of the Fourteenth Amendment and the Florida Constitution's Article I, Section 16. Reynolds v. State, 576 So.2d 1300, 1301 (Fla. 1991). State v. Slappy, 522 So.2d 18 (Fla. 1988). Any doubt about whether the objecting party has shown a likelihood of racial motivation in peremptory strikes should be resolved in favor of that party. Slappy, 522 So.2d at 22; Tillman v. State, 522 So.2d 14, 17 (Fla. 1988). This Court has found reversible error in situations similar to the one at bar where the trial judge failed to conduct a Neil inquiry. See, e.g., Reynolds v. State, 576 So.2d 1300 (Fla. 1991) and Blackshear v. State, 521 So.2d 1083 (Fla. 1988). Because Curtis Windom was convicted by a jury which was selected under the taint of racial bias, he was deprived of his rights under Article I, Sections 2 and 16 of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. He should now be granted a new trial.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IRRELEVANT, PREJUDICIAL EVIDENCE OF A NONSTATUTORY AGGRAVATING FACTOR, SPECIFICALLY THE EFFECT OF THE MURDERS ON THE COMMUNITY'S CHILDREN.

The State presented only one witness at the penalty phase. (R29-37) Defense counsel chose to present no evidence to the jury at the penalty phase. (R38-48) Over objection, Vickie Ward, a Winter Garden police officer, testified about her involvement in the DARE program at Dillard Street Elementary School. Ward explained to the jury the impact of the shootings on the children in the school. Two of Valerie Davis' sons were students at Dillard. After the murders, one changed schools. Officer Ward explained to the jury that the remaining son, Shawn, appeared very withdrawn. Shawn kept his head down on his desk during the entire program presented by Officer Ward. After a couple of weeks, Shawn slowly came out of his shell and began reacting. (R29-31) In order to graduate from the DARE program, each child wrote an essay. Shawn wrote:

> Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself.

(R31)

Officer Ward also described the effect of the shootings on the other children. Ward noticed that when the children played "shoot 'em up," as children do, the "victims" reacted negatively. It was not merely a children's game anymore. (R32)

Officer Ward told the jury that many of the children seemed afraid. Some of the comments she heard:

> I thought that it was my mom....I was scared....I heard that something bad happened, and I was afraid that it was my family that it happened to until I got home....I was afraid.

(R33) Other children had fantasies that they were closer to the shootings than they actually were.

> I heard everything that happened....I was there, I saw it, I heard it....It happened right outside my house.

(R33) In reality, the children were nowhere near, when the crimes occurred. (R33) Ward told of one white child in the program who lived in a neighborhood far from the scene of the crimes. That child actually wrote a book about Windom's case. (R33)

On the day of the shootings, the children were kept in school after classes ended due to a fear for their safety, since Windom had not been apprehended. (R36) In the weeks following the crimes, certain children got special attention from psychologists. Children were kept after class to discuss their feelings about the murders. (R34)

Appellant objected to the State calling Officer Ward as a witness. Specifically, Appellant objected based on *ex post facto* grounds, that the testimony constituted nonstatutory aggravation, that the testimony was irrelevant, and that it was prejudicial. (R3-9,18-21) The State contended that the testimony was proper "victim impact" evidence, while defense counsel called it

"gratuitous slime." (R19) The trial court overruled the objections and allowed the testimony. The court did instruct the jury at the close of all of the evidence and argument:

> The victim impact evidence is not an aggravating circumstance.

(R102) During final summation, the prosecutor forcefully argued the objectionable evidence:

> Now, you heard testimony today from a witness Vickie Ward who told you a little about the impact of this crime on the community. It was the children in the community. That is not to be considered by you as an aggravating circumstance. You are not to consider that, determine whether there are aggravating circumstances in this case.
>
> But you are allowed to consider it in looking at the big picture and weighing the mitigating -- weighing the mitigating evidence and deciding how much weight to give that. You can consider that, because crimes don't happen in a vacuum.
>
> There was not simply three people out there, some of them ended up dead and some in jail. This has an impact. It is like when you drop a pebble in a pond, there are ripples, and ripples affect people. And in this case, the effect was on children.

(R88-89) This was the final thought left with the jury by the prosecutor.

The "victim impact" evidence should have been excluded by the trial court. The introduction of the improper evidence unfairly and unconstitutionally tainted the jury's recommendation. Section 921.141(7), Florida Statutes (1992) provides:

> ...the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be presented as a part of victim impact evidence.

A. Florida Law Does Not Permit the State to Introduce Evidence Which Is, In Essence, Nonstatutory Aggravation.

Florida has consistently excluded evidence designed to create sympathy for the deceased. Jones v. State, 569 So.2d 1234 (Fla. 1990). See also Lewis v. State, 377 So.2d 640 (Fla. 1979) and Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). This rule of law provides even more protection to a capital defendant at a penalty phase.

> Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. § 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

Contrary to the State's assertion below, Payne v. Tennessee, 111 S.Ct. 2597 (1991) does not authorize the introduction of "community impact" evidence of the type presented to the jury

below. Payne holds only that there is no Eighth Amendment bar to victim impact evidence during the penalty phase of a capital trial. Id. at 2601. Neither Payne, nor any other United States Supreme Court case, deals with the question of whether such evidence is permissible under state law.

Since the issuance of the Payne opinion, this Court has addressed the introduction of victim impact evidence only a few times. In those cases, this Court has rejected an Eighth Amendment challenge, pointing out that Payne receded from Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). See, e.g., Jones v. State, 612 So.2d 1370 (Fla. 1992); Burns v. State, 609 So.2d 600 (Fla. 1992); and Hodges v. State, 595 So.2d 929 (Fla. 1992). When dealing with the broader contention that victim impact evidence was improperly admitted, this Court focused on the relatively minor effect that the evidence had in each particular case. See, e.g., Sims v. State, 602 So.2d 1253 (Fla. 1992) and Burns v. State, 609 So.2d 600 (Fla. 1992).

Even after Payne, to be admissible, evidence must be relevant to a material fact in issue. The challenged testimony in this case was not. See Bryan v. State, 533 So.2d 744, 746-47 (Fla. 1988); §§ 90.401, 90.402, Fla. Stat. (1991). This Court's opinion in Burns v. State, 609 So.2d 600 (Fla. 1992) is dispositive of the issue at hand. The Burns trial court allowed evidence of the police officer/victim's professional training, education and conduct to "rebut" statements made by defense

counsel during opening statement of the guilt phase. This Court held that the admission of evidence was error, although harmless in that particular case.[15]

Appellant submits that the error is not harmless in his case. In Burns, the evidence was admitted during the guilt phase. Since numerous eyewitnesses testified about the shooting, the error was harmless. The objectionable evidence was admitted at Appellant's penalty phase. The error was not harmless in the case at bar. "Substantially different issues arise at the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase." Castro v. State, 547 So.2d 111, 115 (Fla. 1989). The jury used the objectionable evidence to determine that Curtis Windom should die, not to determine that he was guilty of the crimes charged. The fact that the objectionable testimony was the only evidence considered by Windom's jury at the penalty phase only magnifies the error.

The jury not only heard "victim impact" evidence, they heard "community impact" evidence. Not only did they hear that a son of one of the victims was withdrawn after the murders, they heard that the child blamed the killings on drugs. (R31) They heard that the little boy contemplated suicide. (R31) But that's not all the jury heard. They heard that all of the children in the community were deeply troubled following the crimes. (R32-33)

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[15] A number of disinterested eyewitnesses observed Burns shoot the officer in cold blood.

The jury even heard that the impact of the crimes exceeded beyond the community boundaries. (R33) During final summation, the prosecutor told the jury not to consider the evidence as aggravation. Rather, consider it in the "big picture," like ripples caused by a pebble thrown into a pond.[16] (R88-89)

All the jury should have been considering was the evidence in aggravation and the evidence in mitigation. All they heard was the State's bogus "community impact" evidence. They were never told how to treat this evidence, only that they should not treat it as aggravation. How then were they supposed to treat it? Surely they considered the impact on the community's children as aggravation and, as a result, the jury voted that Curtis Windom should die in Florida's electric chair.

B. The Application of Section 921.141(7), Florida Statutes (1992) Violates the *Ex Post Facto* Clauses of the State and Federal Constitutions.

The offense in question took place on February 7, 1992. The statute in question went into effect on July 1, 1992, well after the offense. The application of this statute to Curtis Windom violates the *ex post facto* clause of Article I, Section 10 of the Florida Constitution and Article I, Sections 9 and 10 of the United States Constitution.

The United States Supreme Court set forth a test for determining a violation of the *ex post facto* clause in Weaver v.

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[16] Since the objectionable evidence was the only evidence the jury considered at the penalty phase, the testimony must, out of necessity, become a feature of the penalty phase. Williams v. State, 117 So.2d 473 (Fla. 1960).

Graham, 450 U.S. 24, 30 (1981).

> Two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective... and it must disadvantage the offender affected by it.

Here, the statute at issue clearly fails this test. It applies to the trial which occurs well after the offense and severely disadvantages Windom. The statute instead exposes Windom to a panoply of unlimited and highly emotional evidence designed to flame the jury.

This Court has set forth the test for a violation of the *ex post facto* clause of the Florida Constitution.

> In Florida, a law or its equivalent violates the prohibition against *ex post facto* laws if two conditions are met:
>
> (a) it is retrospective in effect; and
>
> (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense.

Dugger v. Williams, 593 So.2d 180, 181 (Fla. 1991). This Court went on to explain that a law may be *ex post facto* even if it is procedural in nature.

> ...it is too simplistic to say that an *ex post facto* violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive affect. Where this is so, an *ex post facto* violation also is possible.

Id.

The statute, which counsel challenged on these grounds (R3-5), clearly diminishes "a substantial substantive right," i.e.,

the right to have guided jury discretion free from the distorting effects of this type of highly-charged evidence. The application of this statute to Curtis Windom violates both the Florida and Federal constitutions. But see Combs v. State, 403 So.2d 418 (Fla. 1981).

C. Section 921.141(7), Florida Statutes (1992) Is Unconstitutional On Its Face.

The statute is unconstitutional for a variety of reasons. First, the legislature had no authority to pass this statute as it violates Article V, Section 2(a) of the Florida Constitution which states, in part, "The Supreme Court shall adopt rules for the practice and procedure in all courts." The Florida Supreme Court has consistently held that this provision is exclusive in that any statute which invades this prerogative is invalid. Haven Federal Savings and Loan Association v. Kirian, 579 So.2d 730 (Fla. 1991). The matters at issue in Section 921.141(7) are clearly procedural. Id. The statute at issue is an attempt to regulate "practice and procedure." It deals with "the method of conducting litigation", just as surely as the regulation of voir dire, waiver of jury trial, or severance. Id. at 732. This Court has recognized that rules of evidence "may be procedural" and thus the sole responsibility of the Florida Supreme Court. In re Evidence Code, 372 So.2d 1369 (Fla. 1979).

The Florida Constitution also requires that this type of evidence be prohibited, as it provides broader protection than the United States Constitution for the rights of a capital defendant. Tillman v. State, 591 So.2d 167 (Fla. 1991). The

Tillman court explicitly held that a punishment, in a given case, is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of this sort of victim sympathy evidence violates Article I, Section 17. The existence of this evidence is totally random; depending upon the extent of the deceased's family and friends, and their willingness to testify. The strength of this evidence would also depend on the articulateness of the friends and family (or other representatives of the community in this case).

The admission of this evidence also violates the Due Process Clause of Article I, Section 9 of the Florida Constitution. This Court's opinion in Tillman, supra, is a clear indication that this type of evidence violates Article I, Sections 9 and 17 in a capital case, even if it is permitted in other cases. Death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties.

The admission of this evidence violates Article I, Sections 9 and 17 in other ways. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the

courts have painstakenly achieved in this area. Fourth, the evidence invites the jury to impose a death sentence on the basis of race, class, and other clearly impermissible grounds. Allowing this type of evidence inevitably makes the entire system freakish and arbitrary and thus unconstitutionally infirm.

It must also be noted that Section 921.141(7) is extremely broad and vague. The language concerning the "victim's uniqueness as a human being and the resultant loss to the community" puts absolutely no limits as to <u>who</u> can testify or what they can testify to. The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion pole. That very horror story came true at Windom's trial.

It is clear that a statute, especially a penal statute, must be definite to be valid. <u>Locklin v. Pridgeon</u>, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. <u>D'Alemberte v. Anderson</u>, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute.

The statute at issue here clearly fails under any standard of definiteness under the United States and Florida Constitutions. The term "community" contains a wide variety of meanings. It can be geographic community or it can mean people with perceived common interests. <u>See</u> <u>Black's Law Dictionary</u> (containing several different definitions of the term). Even

within the concept of a geographic community, it can mean anything from a neighborhood up to the "community of nations." The term "community" when applied to a community of interests can mean virtually anything; including common hobbies, jobs, sports teams, political beliefs, religion, race, or ethnicity. One of the most common ways in which the term "community" is used, is in the racial or ethnic sense. The phrases "Black Community," "Hispanic Community," etc. are widely used in the media. Testimony of the loss to members of a racial or ethnic community would clearly be forbidden under the Florida and United States Constitutions. The statute's terms are simply too vague and overbroad; capable of a wide variety of clearly impermissible uses. The statute also fails to give the defendant any notice of the type of evidence he is to defend against.

Nor is the jury given any guidance on how to use this evidence. As noted previously, the evidence does <u>not</u> constitute an aggravating circumstance. The jury in this case was specifically told by the trial court and the prosecutor that they were not to treat the "victim impact" evidence as an aggravating circumstance. (R88-89,102) The jury was left with no guidance as to how to weigh this evidence.

The admission of this evidence without any guidance is unconstitutional pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. The failure to sufficiently guide discretion, with the

possibility of arbitrary and discriminatory results, was a theme running throughout the opinions in Furman v. Georgia, 408 U.S. 238 (1972). The guiding of the judge and jury's discretion was a critical factor in upholding the facial constitutionality of the Florida statute. Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Several cases has recently been reversed based on jury instructions which fail to sufficiently define an aggravating circumstance. See, e.g., Espinosa v. Florida, 112 S.Ct. 2926 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). The statute clearly fails to pass constitutional muster and this Court should make that pronouncement for all to hear.

POINT III

THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE HEARING ABOUT COMPETENCY OF TRIAL COUNSEL.

Trial counsel was evidently retained by Appellant's family, specifically his sister. (R393-422) Five months before trial, the court found Windom, who had been jailed since his arrest, insolvent for purposes of costs. (R419-20) In jail, Windom had no apparent source of income. It is therefore clear that he had no funds to hire other counsel prior to trial. This is especially true in light of the fact that he did not pay for his original trial counsel.

At the March 29, 1992 hearing on the motion regarding insolvency, the trial court asked Windom why he had not sold his car. Windom complained that, since his arrest two months before, his lawyer had visited him only once for approximately two minutes. Trial counsel did not deny this allegation which he obviously heard in open court. (R400-1) At a hearing on several motions, a mere eleven days before trial, the trial court questioned defense counsel directly:

> THE COURT: Have you done depos yet?
>
> MR. LEINSTER: (Defense counsel) They are set for this coming week. They are getting taken care of this coming week.
>
> THE COURT: Are you doing depos the week before trial?
>
> MR. LEINSTER: That's right.
>
> THE COURT: Okay.

(R559-60) On the day before trial began, the court asked Windom if he was satisfied with the services of his lawyer. Windom responded:

> I can't really say because I don't really know what's really going on because I'm just saying it looked like I am in the blind. I don't know about the investigation. I never ain't got no motion of discovery whatever. You know what I'm saying?
>
> I don't know what's going on. I can't really say. Like I'm saying, he did came [sic] and talked to me three times. We ain't had a ten-minute conversation yet.

(R462) The trial judge asked defense counsel to talk to Windom before trial started "as to what is going on in his defense." (R462) Counsel responded by complaining of the difficulty of getting defense witnesses lined up.

> I can't go out and beat the bushes of Winter Garden and Central Florida to make a case for Curtis. I have told Curtis exactly what is going on as far as where we have been, and I have talked to him about his version of events, if any.
>
> So, I have a clue of what's going to be presented in court. I have a pretty good idea of what is going on in Curtis' head. Whether or not he can see into mine is another story.
>
> I will try to clarify for his benefit, but it's not as though we haven't talked. I know I've been out there at least three times.

(R463-64)

When a defendant complains of incompetency of court-appointed counsel, the trial court must inquire of the defendant

and counsel to see if reasonable cause exists to believe counsel is not rendering effective assistance. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), approved Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Watts v. State, 593 So.2d 198, 203 (1992); Hunt v. State, 613 So.2d 893 (Fla. 1993).

Nelson is not necessarily limited to court-appointed counsel. See, e.g., Beatty v. State, 606 So.2d 453 (Fla. 4th DCA 1992). At any rate, Windom did not pay for his own lawyer and had since been declared insolvent. (R393-421) Although Windom never specifically asked for another lawyer, his complaints on the record were sufficient to trigger an inquiry by the trial court. Kearse v. State, 605 So.2d 534 (Fla. 1st DCA 1992) [defendant said attorney did nothing on his behalf at bail hearing and did not file appeal.] Indeed, the trial court's own discovery that defense counsel was taking depositions only one week before the capital trial started was justification in and of itself without any complaint from Appellant.[17] Windom should be granted a new trial.

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[17] The fact that counsel admitted that he had visited his client only three times a mere two weeks before trial should also have raised some eyebrows.

POINT IV

THE INTRODUCTION OF PREJUDICIAL AND UNNECESSARY PHOTOGRAPHS OF THE VICTIMS DENIED CURTIS WINDOM HIS RIGHT TO A FAIR TRIAL.

The issue of gruesome photographs is one of the most troubling in capital cases today. Too often, appellate courts are asked to rubber stamp the admission of truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors...." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975); Walker v. City of Miami, 337 So.2d 1002 (Fla. 3d DCA 1976); Young v. State, 234 So.2d 341 (Fla. 1970).

The initial test for the admissibility of photographic evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981). However, even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." §90.403, Fla.Stat. (1991). Thus, even though technically relevant, before photographs can be admitted into evidence, "the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury." Leach v. State, 132 So.2d 329, 332 (Fla. 1961).

The trial court allowed the introduction of numerous photographs and X-rays of all three victims over Appellant's

timely and specific objections. (T531-37) At trial, Appellant never contended that the victims had not been shot. Especially in light of the fact that this issue was not contested by the defense at trial, the admission of the prejudicial evidence constitutes reversible error. See, e.g., Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990).

POINT V

THE TRIAL COURT'S DENIAL OF APPELLANT'S ATTEMPT TO CALL SERGEANT FUSCO AS A WITNESS UNCONSTITUTIONALLY DEPRIVED WINDOM OF HIS RIGHT TO PRESENT HIS DEFENSE.

At the guilt phase, defense counsel appeared to explore a variety of potential defenses. Self-defense was one avenue that Appellant attempted to pursue. Appellant cross-examined one eyewitness about the possibility of Johnny Lee carrying a weapon on his person or in his car at the time of the shooting. (T319) Appellant accused another eyewitness of removing a gun from Johnny Lee's body before the police arrived. (T326) The trial court also rebuffed Appellant's attempt to establish Lee's reputation for violence during the State's case-in-chief. (T299-302)

Appellant also attempted to pursue this theory of defense in the shooting of Mary Lubin. One witness to the shooting saw but was unable to hear Lubin say something to Windom immediately prior to the shots. The witness admitted that Lubin could have uttered a threat to Windom. (T426-28,431-32) Lubin's purse was removed from the scene by her boyfriend. (T434) The prosecution felt the need to establish that the witness who handled Lubin's purse and car did not notice a gun in either. (T435-36)

During his own case-in-chief, Appellant recalled Jack Luckett, an eyewitness to Johnny Lee's shooting. Luckett also was the key witness for the State in establishing Appellant's premeditation. (T320-25) Luckett, a three-time convicted felon,

purportedly heard Windom announce his intention to kill Johnny Lee a few hours before the actual shooting. (T320-26) When recalled by Appellant, Luckett denied, among other things, seeing anyone removing any items from Johnny Lee's body after the shooting. (T617-18) Luckett denied telling Sergeant Fusco that someone else, not him, had removed drugs from Lee's body. (T618) Luckett also denied removing a gun from Lee's body. (T618)

After Luckett's testimony, Appellant attempted to call Sergeant Fusco to impeach the testimony. Appellant announced that Sergeant Fusco would testify that Luckett had denied the rumor that he had removed drugs from Lee's body and that, in fact, someone else had taken them. (T620) Defense counsel pointed out that the issue related to his intended argument that Lee's body was moved after the shooting but before police arrived. (T620)

> One witness said it was next to a car. And one witness said it was about 20 feet from Curtis Windom's car. Nobody has gotten that one straight. But my point is I need to be able to argue, right or wrong, that the body was moved. And that statement would show there was time between the time he was shot and the time the police arrived to take something off his person.

(T620) Appellant cross-examined Officer Johnson, the first policeman on the scene, about the position of Lee's body when found. (T418)

The prosecutor contended that the testimony would constitute impeachment on a collateral matter, since there was no allegation of self-defense. (T620-21) The State contended that, since

Windom was not testifying, there would not be an allegation of self-defense. (T621) The court refused to allow the testimony saying, "That's going way too far." (T621) Appellant objected to the trial court's ruling. (T621)

The right of an accused to present witnesses to establish his defense is a fundamental element of Due Process. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. A defendant has a constitutionally protected right to present evidence relevant to his defense. Story v. State, 589 So.2d 939 (Fla. 2d DCA 1991). A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). No such rule prevails over the fundamental demand of Due Process of law in the fair administration of criminal justice. United States v. Nixon, 418 U.S. 683, 713 (1974).

The trial court's ruling effectively curtailed Appellant's theory that Johnny Lee, a man with a violent reputation, was armed and dangerous. The jury was left with a three-time convicted felon's testimony that he never told the chief investigator that someone had removed items from Johnny Lee's body before the police arrived. Sergeant Fusco never got to testify that Luckett had told him otherwise during the investigation. In the weighing process, the fundamental constitutional right to present witnesses should prevail. The Sixth Amendment right to present evidence is supreme, and any

doubts must be resolved in favor of that fundamental right. This is especially true in a capital case. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987).

POINT VI

THE INSTRUCTION ON REASONABLE DOUBT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

The trial court instructed the jury that, "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt." (R288;T706) (Emphasis added.) The instruction is constitutionally infirm. The instruction improperly tells the jury that reasonable doubt cannot be a "possible doubt." Such an instruction is improper. United States v. Shaffner, 524 F.2d 1021 (7th Cir. 1975).[18]

Finally, the language stating that a reasonable doubt is not a speculative, imaginary, or forced doubt, is also improper. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative" a court is "playing with fire" when it goes beyond that. United States v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979).

The United States Supreme Court has recently unanimously held that a structural defect in a reasonable doubt instruction can never be harmless error. Sullivan v. Louisiana, 113 S.Ct. 2078 (1993). The improper instruction regarding reasonable doubt denied Windom Due Process and a fair trial. Amends. V and XIV, U.S. Const.; Art. I, § 9, Fla. Const. Windom's convictions and

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[18] In Shaffner the jury was instructed: "It is not necessary for the government to prove the guilt of the defendant beyond all possible doubt." 524 F.2d at 1023. The reviewing court held that, "It is quite clear that this part of the instruction favors the government on the issue of reasonable doubt." Id.

sentences must be reversed and this cause remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE VAGUE AGGRAVATING CIRCUMSTANCE FOR COLD, CALCULATED AND PREMEDITATED.

At the penalty phase charge conference, defense counsel stated:

> ...I'm assuming [the jury] must have decided it was committed in a cold, calculated and premeditated manner or they would not have rendered the verdict [guilty of premeditated murder] that they did.
>
> I have a little problem with that from a legal standpoint. Because by virtue of committing premeditated murder, you automatically have an aggravating circumstance. Because that is the verbiage, premeditated manner.
>
> And then it does go on without any pretense of moral, legal justification, but that is justifiable homicide. That is a defense. So I'm not arguing to you that I don't think the State is off base in asking for that as an aggravating circumstance as it exists statutorily. But I am arguing that that particular provision would appear to be somewhat of a redundancy.
>
> You are being sentenced possibly to the electric chair as a result of the fact that you have committed a premeditated murder. So the act itself sends you to the chair when, in fact, I think these aggravating factors were intended to lend some guidance to whether you get a life imprisonment. So I would object to that on those grounds; constitutional grounds, basically.

(R49-50) No one mentioned the extensive precedent from this Court regarding the requisite "heightened" premeditation

necessary to support this aggravating factor. See, e.g., Jent v. State, 408 So.2d 1024 (Fla. 1981). The trial court later instructed the jury as follows:

> The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R102,314)

It is well-established that the Eighth and the Fourteenth Amendments prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420 (1980). The State "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. at 428 (footnotes omitted). "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356 (1988). "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its fact." Walton v. Arizona, 497 U.S. 639 (1990).

The instruction as given was vague. The jury was given absolutely no guidance in the application of the CCP factor.

They certainly got no help from defense counsel who was ignorant of this Court's definition of the factor. As a result, the jury was left to its own devices concerning the application of this aggravating factor. The jury undoubtedly found it applicable to any premeditated murder, as defense counsel conceded during closing argument.

> ...I agree with Jeff [the prosecutor], it was cold. The two aggravating factors are that it was premeditated. Well, that is part of the charge. Anybody that could commit first-degree murder, it is premeditated. So that is aggravated.
>
> And the other that it was cold in the sense that any killing is cold. It is, by definition....

(R96) As a result of the vague instruction and erroneous concession by defense counsel, Windom's jury considered this aggravating circumstance as established without proper guidance.

It must be presumed that the jury relied upon this invalid aggravating circumstance. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992). The prosecutor aggressively argued to the jury that CCP applied. (R80-84) Defense counsel conceded that the factor applied. (R96-97) It must also be presumed that the trial court gave great weight to the jury's recommendations of death. Espinosa. Thus, the trial court indirectly weighed, indeed even found, the invalid circumstance and violated the Eighth and Fourteenth Amendments. Id. Since only two aggravating factors were even arguably present, the error cannot be deemed harmless.

The United States Supreme Court has applied Espinosa to

Florida's CCP aggravating circumstance when it remanded Hodges v. State, 595 So.2d 929 (Fla. 1992). Hodges v. Florida, 113 S.Ct. 33 (1992). By Hodges the United States Supreme Court acknowledged the flaws in Florida's CCP instruction. The error at bar violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Appellant's sentences must be vacated.

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE.

Defense counsel filed numerous special requests for jury instructions at the penalty phase. (R329-51) At the charge conference, the trial court heard argument and denied all of the requested instructions. (R66-76) Although defense counsel did withdraw requests for certain inapplicable or confusing instructions, Appellant maintained that several should be given, in that the standard instructions were inadequate.

Due Process of law applies "with no less force at the penalty phase of a trial in a capital case" than at the guilt phase. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978); Amend. V, U.S. Const. The need for adequate instructions to guide a jury's recommendation in a capital case was expressly noted by the Court in Gregg v. Georgia, 428 U.S. 153, 192-93 (1976). See also Espinosa v. Florida, 112 S.Ct. 2926 (1992) and Maynard v. Cartwright, 486 U.S. 356 (1988).

Among the requested instructions denied was one that informed the jury that the State bore the burden to show that the aggravating factors outweigh the mitigating factors. (R330) This particular instruction is not covered by the standards and, despite the prosecutor's contention below, is a correct statement of the law. Arango v. State, 411 So.2d 172, 174 (Fla. 1982). Furthermore, the jury should have been told that the death penalty is reserved for only the most aggravated and unmitigated

murders. (R69-70,332) It is also important that the jury know that only two out of eleven aggravating factors were even arguably applicable to the case at bar. (R70,335) The remainder of the requests that were not withdrawn by defense counsel were correct statements of the law and added necessary clarification to areas not adequately covered by the standard instructions. (R66-75,329-51) The trial court's error violated Appellant's constitutional rights. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const.

POINT IX

THE TRIAL COURT ERRED IN FINDING THAT THE CRIMES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court applied this particular aggravating factor for a variety of reasons. On the morning of the murders, Windom discovered that Johnny Lee, who owed Windom $2,000.00, had won some money at the dog track the night before. Windom purportedly responded by announcing that he intended to kill Johnny Lee and would "make headlines." Windom went to a Wal-Mart where he purchased ammunition and, according to the sales clerk, appeared "calm as could be." A few minutes later, Windom pulled his car up to where Johnny Lee stood talking to two females. Windom leaned out of the car and shot Lee twice in the back. Prior to the shots one of the witnesses heard Windom say something about "...my motherfucking money." Windom then got out of the car and shot Lee two more times, even though he was probably already dead.

Windom then ran to his apartment where Valerie Davis, his girlfriend, was on the phone. Cassandra Hall, a visiting friend, heard Windom tell Davis that "he couldn't take it anymore" and that he was "tired" and that "he was through." Within seconds of arriving, Windom shot Davis once. Windom then turned the gun on Hall. The gun was either empty or misfired and Hall escaped.

On leaving the apartment, Windom encountered Kenneth Williams on the street. Saying, "I don't like police-ass

niggers," Windom shot Williams once in the chest. Williams, who like Johnny Lee, had known and been friends with Windom all of his life, survived.

After shooting Williams, Windom ended up behind Brown's Bar where three men, including Windom's brother, unsuccessfully attempted to talk him out of his gun. Windom walked up the street where Mary Lubin, Valerie Davis' mother, was in her car stopped at a stop sign. After an exchange of words which no one heard, Windom shot Lubin twice, killing her.

In finding the requisite "heightened premeditation," the trial court relied on the fact that the victims were carefully selected, sometimes out of a group of several individuals. Windom shot the victims at close range with "incredible accuracy." Windom had known all of the victims well for many years. All of the witnesses noticed that Windom looked strange and upset. Kenny Williams said Windom "did not look normal -- his eyes were bugged out like he had clicked." Many of the witnesses testified that Windom was "not himself", and looked confused and crazed. All agreed that he was not a violent person and that the shootings were shocking and extremely out of character. (R356-59); (Appendix)

There is absolutely no evidence that Curtis Windom had **any** preconceived plan to kill Valerie Davis or Mary Lubin. The State has failed to meet its burden of proving this aggravating circumstances beyond a reasonable doubt. See, e.g., Lewis v. State, 377 So.2d 640 (Fla. 1979). Unlike the evidence relating

to Windom's statements about killing Johnny Lee, the State presented **no** evidence that Windom made any statements to anyone about killing Davis or Lubin. The evidence is much more consistent that, after shooting Lee, Windom simply "lost it," and Lubin and Davis were the unfortunate victims.

Everyone who saw Windom during the entire incident agreed that he was not his normal self. He looked "wild" (T308); he did not look normal; his eyes were bugged out and he looked like he had "clicked" (T390-91); his eyes looked "half crazy" (T399), confused (T399), wild and strange (T423-26,432); he looked "spaced out" and "seemed to be out of it." (T445)

Regarding the murders of Davis and Lubin, the evidence is entirely consistent that Windom, after shooting Lee, wandered around in a daze until he arrived at his own apartment where he found Valerie Davis. Saying that he was "tired...through and [could not] take it anymore" (T350,360-61), he decided at that very moment to shoot Valerie Davis.

The lack of evidence to support "heightened premeditation" is even more pronounced in the shooting of Mary Lubin. Lubin had received word that Davis, her daughter, may have been shot and was on the way to help her. (T512-13) Windom, who just happened to be in the area, saw Lubin driving on the street. When she stopped for a stop sign, Windom simply approached her, words were exchanged, and he shot her. (T426-28) The shooting of Lubin is clearly a spur of the moment decision. Contrary to the trial court's order, there is no evidence that Windom "carefully

selected" Davis and Lubin. The State failed to prove this aggravating circumstance beyond a reasonable doubt.

Additionally, the trial court heard evidence at the mitigation hearing, which the jury did not hear, that established an ongoing domestic dispute among Windom, Lubin, and Davis. See, e.g., Blakley v. State, 561 So.2d 560 (1990). Lubin had threatened Windom on several occasions and was angry at him for mistreating her daughter.[19] (R486-87,496,501) The court also heard evidence at the mitigation hearing about the ongoing problems between Windom and Valerie Davis. (T505-9) Both were involved in drug dealing. Windom complained that Davis constantly initiated larger and larger drug deals causing him great consternation.[20] These pertinent facts shed light on the meaning of Windom's words to Davis prior to the shot being fired. It is therefore clear that, regarding the shootings of Lubin and Davis, Windom had at least a **pretense** of legal or moral justification. Therefore, this aggravating circumstance cannot apply to their murders.

The State's best argument for the application of this aggravating factor is in Johnny Lee's case. The evidence, viewed

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[19] Although the trial court allowed evidence of particular instances of threats and violence between Lubin and Windom, the court excluded other evidence that Lubin had a violent nature. (R482-85) This ruling was clearly erroneous. See, e.g., Banda v. State, 536 So.2d 221, 225 (Fla. 1988).

[20] Following their joint arrest for drug dealing, the rumor persisted on the street that Valerie Davis was going to turn Windom in to save her own hide. (R11-13) Windom was aware of the rumor. (R13,504-9) This factor provided a **pretense** of justification in the shooting of Davis.

in the light most favorable to the State, indicates that Windom announced his intention to kill Johnny Lee. He bought ammunition and proceeded to carry out his threat. However, it is clear that Windom had at least a **pretense** of moral justification. Windom's announcement was prompted by his discovery that Lee, who owed him a substantial sum of money, had won at the dog track the night before. (T323-24) Furthermore, an eyewitness to the shooting heard Windom make a remark about "my motherfucking money" immediately prior to the shots being fired.[21] (T313) For that precise reason, this aggravating circumstance is not applicable to the shooting of Johnny Lee. The language of the circumstance is clear.

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner <u>without any pretense of moral or legal justification</u>.

§ 921.141(5)(i), Fla.Stat. (1991). (Emphasis added). If in the perpetrator's mind, he had a pretense of a justification for the murder, even if objectively no justification at all, this circumstance is inapplicable. <u>Blanco v. State</u>, 452 So.2d 520 (Fla. 1984) (victim confronted and struggled with the defendant during a burglary.) While Johnny Lee's outstanding debt was clearly not actual justification for the shooting, the statute

[21] In addition to this **pretense** of justification, there was much talk of evidence, none of which the jury heard, that indicated Johnny Lee was a person with a violent reputation in the community. (T299-302) Additionally, defense counsel attempted several times, without success, to prove that Johnny Lee was carrying a gun that others removed after the shooting before the police arrived. (T319,326,617-21)

requires only a **pretense** of a justification. The State failed to meet its burden of proof in establishing that this particular aggravating circumstance applied. Especially in the shootings of Davis and Lubin, the evidence is just as consistent with the conclusion that Windom "snapped." Windom had problems with all three of the victims prior to the shootings. He shot Davis in his own apartment. There is no evidence that he went there with the intent to kill her. Windom, Davis and Lubin were participants in a continuing domestic (and in Davis' case -- legal) dispute. His mental state and physical appearance support the conclusion that the shootings were a spontaneous act. Windom literally happened upon Mary Lubin as she was driving her car through the neighborhood. The evidence simply does not support the finding of this aggravating circumstance.

POINT X

> THE TRIAL COURT ERRED IN FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR WHERE THE ONLY OTHER CONVICTIONS OF PRIOR FELONIES WERE CONTEMPORANEOUS TO THE MURDERS.

In imposing the ultimate sanction, the trial court found only two aggravating circumstances. (R355-59) The court relied in part on its finding that Windom had been convicted of a prior violent felony based on the contemporaneous felonies committed.

> 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 the purposes of aggravation of the other First Degree Murder Charges. This aggravating circumstance was proved beyond reasonable doubt.

(T356)

This aggravator is defined in Section 921.141(5)(b) of the Florida Statutes as follows:

> The defendant was **previously convicted** of another capital felony or of a felony involving the use or threat of violence to the person.

(Emphasis added.) Appellant's contemporaneous convictions cannot be legitimately construed as the defendant being "previously convicted" so as to qualify Appellant for this aggravating circumstance. Such an interpretation would render the word "previously" totally without meaning.

The word "convicted," within the term "previously convicted," is the past tense of conviction. The plain meaning of the word "convicted" by itself in Section 921.141(5)(b) permits any conviction occurring prior to the sentencing to qualify the accused for this aggravator. This is the same manner in which the present aggravator is construed due to the term "previously convicted." In other words, "previously convicted" has been interpreted to mean the same as "convicted." Thus, because of the present interpretation of "previously convicted" the word "previously" has been interpreted as mere surplusage -- i.e., useless language. This is contrary to the rule of statutory construction that statutes do not employ "useless language." Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986). The word "previously" must be given some meaning other than what the past tense word "convicted" signifies. The legislature obviously intended to modify "convicted" with the adverb "previously."

The only legitimate interpretation of "previously convicted" in this context is that the defendant have a conviction prior to sentencing [i.e., "convicted"] and that the conviction be prior to the convictions for which the defendant is being sentenced [i.e., "previously"].[22] The term "previously convicted"

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[22] This interpretation is consistent with the requirement that penal statutes be construed in favor of the person against whom a penalty is to be imposed. Ferguson v. State, 377 So.2d 709, 711 (Fla. 1979). This interpretation is also consistent with the legislature's reference to convictions rather than a reference to crimes.

obviously does not permit this aggravator to be based on contemporaneous convictions.[23] It was error to find this aggravator based on the contemporaneous convictions.

Admittedly, it has been held that contemporaneous convictions can be used to establish the prior violent felony aggravating factor where there was more than one victim. Wasko v. State, 505 So.2d 1314 (Fla. 1987). On the other hand, contemporaneous convictions may not be used to support the prior violent felony aggravator when the convictions were for crimes committed against the murder victim in the course of the action leading up to the murder. Wasko, 505 So.2d at 1318 (in effect overruling Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984)). Although the Wasko court factually distinguished these cases from cases holding that contemporaneous convictions of crimes against different victims could be used as prior violent felonies, no reason for making the distinction was given. There is no valid reason for such a distinction. Moreover, correct interpretation of the term "previously convicted" makes such a distinction unnecessary.

Elledge v. State, 346 So.2d 998 (Fla. 1977), stated that the purpose of considering aggravating and mitigating factors was to engage in character analysis to ascertain whether death was appropriate. Whether the defendant exhibited a propensity to commit violent crime was relevant. 346 So.2d at 1001. The

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[23] When convictions are contemporaneous, neither conviction occurred prior to the other.

defendant who has previously committed a violent crime prior to the crime charged would seem to have a propensity to commit such crimes.

Contemporaneous crimes do not suggest that the defendant has a propensity for violence. Propensity for violence is shown by the fact that prior to the episode for which the defendant is being sentenced, the defendant had been involved in violent behavior, and despite a conviction for this prior violence, the defendant continues to use violence.

Inclusion of contemporaneous offenses adds nothing to show the propensity for violence. Prior to the day of the incident, Appellant never perpetrated any violence. All of the state witnesses agreed that Windom's action on that fateful day was shocking, unexpected, and absolutely out of character. (T308-9, 317,327,335-36,391,432) Appellant presented even more evidence of Windom's nonviolent nature at the mitigation hearing following the penalty phase but prior to sentencing. (R470-545) The once-in-a-lifetime incident of violence does not place Appellant in a category to which the aggravator is meant to apply -- those who have shown a propensity for violence through their prior felonies. These violent individuals never learned from their previous crimes and show a willingness to continue their violent ways. Appellant is not among those to which this category is meant to apply. The error in finding this circumstance, and in instructing the jury, denied Appellant of Due Process and a fair trial and reliable sentencing. Amends. V, VIII and XIV, U.S.

Const.; Art. I, §§ 9 and 17, Fla. Const. Appellant's death sentences must be vacated.

POINT XI

THE TRIAL COURT IMPROPERLY REJECTED SUBSTANTIAL, COMPETENT, UNCONTROVERTED MITIGATING EVIDENCE BY UNJUSTIFIABLY GIVING THE MITIGATION LITTLE, IF ANY, WEIGHT.

The trial court found three nonstatutory mitigating circumstances to be applicable. Curtis Windom has no significant history of prior criminal activity. § 921.141(6)(a), Fla. Stat. (1991). Windom had been arrested for battery, but that charge was dropped. Approximately two months before the murders, police arrested Windom and charged him with several drug offenses. The State filed a nolle prosequi as to all these charges after the murder arrest. The trial court acknowledged that, other than these arrests, Windom's "record was clean and the Court gave that mitigator some weight." (R359-60)

The trial court considered that the murders may have been committed while Windom was under the influence of extreme mental or emotional disturbance. § 921.141(6)(b), Fla. Stat. (1991). Dr. Kirkland testified that, although it was unlikely, the possibility remained that Windom was in a "fugue state"[24] when he committed the murders. The trial court "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." (R361)

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[24] A "fugue state" is a severe psychotic reaction due to stress. The subject may engage in short, frenzied, senseless behavior. (R360)

The trial court concluded that Windom acted under extreme duress but gave this circumstance "little weight." (R361) § 921.141(6)(e), Fla. Stat. (1991). The court rejected Windom's age (26) as a mitigating factor and gave it no weight. (R361)

The trial court considered and accepted substantial non-statutory mitigating circumstances, but concluded that they were entitled to little, if any, weight. (R361-62) The court agreed that Windom assisted people in the community, was a good father, and was extremely charitable. (R361) However, the court seemed concerned about Windom's source of the income with which he was so generous.[25] The trial court cited Windom's testimony at the insolvency hearing, wherein he testified that he was unemployed and made money by gambling. (R361-62) The court found it hard to believe that Windom had sufficient income to be as benevolent as witnesses described. (R362) The court accepted the fact that he was a good father who supported his children, "even though the source of that support is dubious." (R362) The trial court gave these two combined nonstatutory mitigating factors "little weight." (R362)

The trial court did accept the fact that, when he was

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[25] During the mitigation hearing, the State repeatedly attempted to introduce evidence concerning Windom's reputation as a drug dealer. Appellant repeatedly objected to these attempts by the State, but some evidence was revealed. (R490-99,504-9, 516,525-29) Over Appellant's objections, the trial court did allow the State to introduce two statements, a lab report, etc., which revealed that Windom had been arrested for drug offense. (R531-39) The trial court allowed the evidence, but claimed that it would be given little, if any, weight. The trial court's ruling allowing any of this evidence was clearly erroneous.

approximately eight years old, Windom saved his older sister from drowning at a local swimming pool. The trial court concluded that, "although commendable, this occurred 17 years ago, and is given very little weight in mitigation of his sentence of age 26." (R362)

The trial court also accepted the fact that Windom intervened in a monetary dispute between Mr. Scarlet and Windom's cousin. (R362) To resolve their differences, Windom paid the $20.00 debt by paying it out of his own pocket. The court concluded that, "If true, this is given very little weight." (R362) The court does not explain why this factor is entitled to little weight.

Appellant contends that the trial court's treatment of much of the uncontroverted mitigating evidence runs afoul of this Court's pronouncements in <u>Campbell v. State</u>, 571 So.2d 415 (Fla. 1990); <u>Nibert v. State</u>, 574 So.2d 1059 (Fla. 1990); and <u>Rogers v. State</u>, 511 So.2d 526 (Fla. 1987). While the relative weight to be given each mitigating factor is within the province of the sentencing court, once a mitigating factor is found, it cannot be dismissed as having <u>no</u> weight. <u>Dailey v. State</u>, 594 So.2d 254 (Fla. 1991). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature. This is a question of law. <u>Campbell v. State</u>, 571 So.2d 415 (Fla. 1990). In <u>Campbell</u>, the trial court rejected the defendant's abused childhood since it had occurred "many years before" the capital murder. This Court held such a conclusion to be error.

Windom's trial court made a similar error. In assigning "little weight" to the fact that Windom had saved his sister from drowning, the trial court cited the fact that the incident occurred seventeen years before the murders. (R362) Rather than diminish the importance of this heroic act, Windom's tender age at the time should entitle the feat to greater weight. Similarly, the trial court seems overly concerned about Windom's source of income when considering his benevolence and charity in the community. (R361-62) Appellant submits that it matters not how Windom made his money, he was generous nevertheless. He certainly did not need to be and this evidence is mitigating as a matter of law.

The trial court fails to explain why Windom's intervention in a potentially violent confrontation is entitled to "very little weight." (R362) Likewise, the trial court dismisses Windom's responsible paternal activities as being entitled to "little weight." (R362) The trial court failed to follow the law or logic in dealing with this substantial, uncontroverted mitigating evidence. A proper consideration and weighing of the evidence results in the inescapable conclusion that Curtis Windom deserves to live.

POINT XII

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE.

The trial court found only two aggravating circumstances in this case. Neither one is valid. The "heightened premeditation" circumstance is not supported by the evidence. See Point IX. The finding that Windom had prior violent felony convictions cannot be upheld. See Point X. Striking these two factors leaves no aggravating circumstances and, therefore, Windom's death sentences cannot stand. See Banda v. State, 536 So.2d 221, 225 (Fla. 1988) ["The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist."] Even if this Court concludes that only one of the aggravating circumstances should be stricken, this Court has very rarely affirmed a death sentence based on a single valid aggravating factor. See, e.g., Arango v. State, 411 So.2d 172 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); and Gardner v. State, 313 So.2d 675 (Fla. 1975). Most of these cases involved torture-murders.

In addition to the trial court's finding of invalid aggravating circumstances, the trial court also failed to properly treat uncontroverted, substantial mitigating evidence. See Point XI. A proper consideration in weighing of all of the evidence results in the inescapable conclusion that Curtis Windom deserves to live.

POINT XIII

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only

Florida allows a death penalty verdict by a bare majority.

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory." See, e.g., (T28-29)

2. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

3. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[26] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[27]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[28] Prior to that time, judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election

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[26] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[27] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[28] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[29]

The history of elections of African-American circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In St. Lucie and Indian River Counties, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination[30] and disenfranchisement,[31] and use of at-large

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[29] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

[30] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[31] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and

election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Fifth Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial.[32] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing

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in practice has never been so applied."

[32] In choosing judges in the Ninth Circuit (only three circuit judges since Reconstruction) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of

accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[33]

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[33] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[34] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[35] See, e.g., Rutherford v. State, 545 So.2d 853

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of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

[34] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

[35] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review

(Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[36] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission

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without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

[36] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[37] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more

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[37] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

mitigating circumstances sufficient to outweigh the presumption.[38] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett[39] principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should

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[38] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

[39] Lockett v. Ohio, 438 U.S. 586 (1978)

play no role in the process. The trial court denied a requested special instruction that would have allowed the jury to consider mercy. (R351) The instruction given violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant requests the following relief:

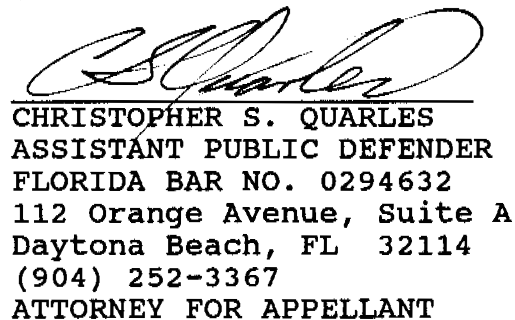
As to Points I, III and IV through VI, a new trial;

As to Points II, VII, and VIII, vacate the death sentences and remand for a new penalty phase;

As to Points IX through XIII, vacate the death sentences and remand for imposition of life imprisonment on each count.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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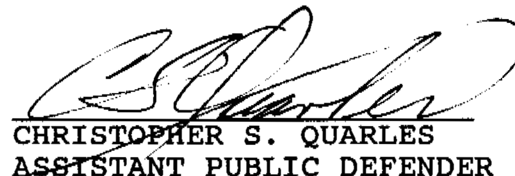
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Curtis Windom, #368527 (42-1147-A1), P.O. Box 221, Raiford, FL 32083, this 22nd day of November, 1993.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM,	)	
Appellant,	)	
vs.	)	CASE NUMBER 80,830
STATE OF FLORIDA,	)	
Appellee.	)	

APPENDIX

Sentencing Order, State of Florida v. Curtis Windom,
Case Number CR 92-1305

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR APPELLANT

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.

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.

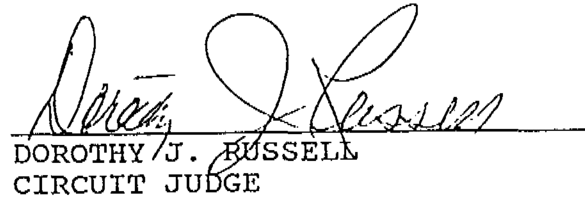
The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating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

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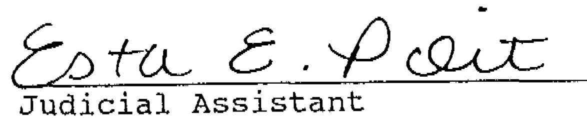
Mr. Curtis Lee Windom, Defendant



Judicial Assistant