IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM,

Appellant,

vs. **CASE NO. SC01-2706**

STATE OF FLORIDA,

Appellee.
_____/

STATE OF FLORIDA'S ANSWER BRIEF ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY

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PRELIMINARY STATEMENT

References in this brief are as follows:

The transcript on direct appeal will be referred to as “TR” followed by the appropriate page number. The supplemental transcript on direct appeal will be referred to as “Supp. Tr.” The penalty phase transcript on direct appeal will be referred to as “PP.” The post conviction record will be referred to as “PCR”, followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

I. TRIAL

This court provided the following summary of the facts introduced during appellant's trial:

> In her sentencing order, the trial judge set out the details of this tragic event, which occurred in the City of Winter Garden in west Orange County, Florida on February 7, 1992. Before the event was over, defendant, armed with a gun, had murdered three people and seriously wounded a fourth. The pertinent facts taken from the trial record and stated in the trial judge's order are as follows:
>
> Jack Luckett testified that he had talked with the Defendant the morning of the shootings. In their discussion, the Defendant asked Jack if Johnnie Lee had won money at the dog track and Jack said, "Yes, $114." The Defendant said Johnnie Lee owed him $2,000. When the Defendant learned Johnnie had won money at the track, he said to Jack, "My nigger, you're gonna read about me." He further said that he was going to kill Johnnie Lee. That same day at 11:51 a.m. (per the sales slip and the sales clerk) the Defendant purchased a .38 caliber revolver and a box of fifty .38 caliber shells from Abner Yonce at Wal-Mart in Ocoee. Mr. Yonce remembered the sale and recalled there was nothing unusual about the Defendant and that he was "calm as could be."
>
> Within minutes of that purchase, the Defendant pulled up in his car next to where Johnnie Lee was standing talking to two females and Jack Luckett on the sidewalk. All three testified that the Defendant's car was close and the Defendant leaned across the passenger side of the vehicle and shot Johnnie Lee twice in the back. (Johnnie Lee's back was towards the Defendant and there was no evidence he even saw the Defendant.) ... After the victim fell to the ground, the Defendant got out of the car, stood over the victim and shot him twice more from the front at very close range.... The Defendant then ran towards the apartment where Valerie Davis, his girlfriend and

> mother of one of his children, lived. (The Defendant lived with Valerie Davis off and on.) She was on the phone, and her friend Cassandra Hall had just arrived at the apartment and was present when the Defendant shot Valerie once in the left chest area within seconds of arriving in the apartment and with no provocation....
>
> From the apartment, the Defendant went outside, encountered Kenneth Williams on the street, and shot him in the chest at very close range. Mr. Williams saw the gun but did not think the Defendant would shoot him. Right before he was shot, he turned slightly and deflected the bullet somewhat. Although he was in the hospital for about 30 days and the wound was serious, he did not die. He said the Defendant did not look normal--his eyes were "bugged out like he had clicked." ...
>
> From there, the Defendant ended up behind Brown's Bar where three guys, including the Defendant's brother, were trying to take the weapon from him. By that time, Valerie's mother had learned that her daughter had been shot, so she had left work in her car and was driving down the street. The Defendant saw her stop at the stop sign, went over to the car where he said something to her and then fired at her, hitting her twice, and killing her.
>
> Windom was charged and convicted of three counts of first-degree murder and one count of attempted first-degree murder. The jury unanimously recommended death, and the judge followed the recommendation, sentencing Windom to death for all three counts of first-degree murder. Windom was also sentenced to a consecutive term of twenty-two years' imprisonment for the attempted first-degree murder charge.

This Court provided the following summary of the sentencing order:

> In support of each death sentence, the trial judge found two aggravating factors: (1) the defendant had been previously convicted of another capital offense or felony involving the use of threat or violence to

> the person; and the crime was cold, calculated, and premeditated. The court also found a number of statutory and nonstatutory mitigating factors but determined they were not of sufficient weight to preclude the death penalty.
>
> In mitigation the court found the following statutory factors: (1) Windom had no significant history of prior criminal activity (§ 921.141(6)(a), Fla.Stat. (1991)); (2) the capital felony was committed while Windom was under the influence of extreme mental or emotional disturbance (§ 921.141(6)(b), Fla.Stat. (1991)); and (3) Windom acted under extreme duress or under the substantial domination of another person (§ 921.141(6)(e), Fla.Stat. (1991)). The following nonstatutory mitigators were considered: (1) Windom assisted people in the community; (2) Windom was a good father; (3) Windom saved his sister from drowning; and (4) Windom saved another individual from being shot during a dispute over $20. [Excerpt from Note 3]

Windom, 656 So.2d 435, 440.

II. THE POST-CONVICTION EVIDENTIARY HEARING

A. Testimony of The Attorneys And Presiding Judge

Roy Edward Leinster represented Windom in his 1992 homicide trial. (PCR-16, 805). While Leinster thought that Windom was his first capital case involving the penalty phase, he had tried other first degree murder cases. (PCR-16, 805). In trying the Windom case, Leinster had the assistance of another attorney, Kurt Barch. (PCR-16, 806).

Leinster acknowledged that he brought out circumstances relating to Windom’s demeanor at the time of the shootings in support of a defense to first degree murder: “He looked

wild...Crazy Wild" and that the witness had never seen him look like that before. (PCR-16, 824-25). Leinster agreed that his strategy was to implant in the jury's mind that Windom was incapable of committing first degree murder. (PCR-16, 825-26). He thought that no matter what he did that Windom would be convicted of first degree murder for killing Johnnie Lee. (PCR-16, 826). Leinster admitted that although his outlook for avoiding first degree murder conviction was bleak, especially for victim Johnnie Lee, he did not concede Windom's guilt. (PCR-16, 827). Leinster testified: "Well, I was - - in any case, no matter how bleak your chances, you sit back and you take whatever shot you can, and, you know, you hope that the ultimate shot doesn't fire against you. So I didn't concede Johnnie Lee in the sense that I said, okay, he's guilty of first degree murder against Johnnie Lee. I don't think the record reflects that." (PCR-16, 827).

Leinster stated that if he had evidence of organic brain damage he would have used it even if it would have opened the door to "dope dealing." (PCR-16, 828). However, he would not have simply put into evidence Windom's subjectively bad childhood because some of those things would open the door to bad character evidence. (PCR-16, 828-29). As Leinster explained, "the whole problem with Curtis Windom was that he was

reputed to be a large scale cocaine dealer in the Winder Garden area, and that prevailed the whole fabric of that case." (PCR-16, 829). Leinster felt he had to be extremely careful in presenting evidence in this case so that it did not open the door to such evidence. (PCR-16, 829).

The story Leinster got in the way of "gossip" was that Johnnie Lee was having a tryst with Windom's girlfriend and "that there was a falling out with Johnnie Lee about drug money, and that that's - - that was the - - general essence of the problem with Johnnie Lee." (PCR-16, 830). Leinster was familiar with the social milieu in the Winter Garden black community at the time of trial. (Pcr-16, 830). He had represented several young men in that community before. (PCR-16, 831). The Winter Garden area was known as a high profile drug area. Leinster went to the funeral of Kenny Thames a young man who was "tortured and murdered." Thames's yard was dug up looking for his drug money. It was rumored that gun play would ensue at the funeral. (PCR-16, 831).

Leinster recalled from his colloquy with the judge reflecting putting on individuals in the penalty phase that I can't control the answers and the possibility for the state to cross-examine the witnesses, opening the door to revelations about cocaine dealing. Leinster stated at the time: "And this

has been from start to finish a cocaine case with a murder overlay, the jury hasn't heard that." (PCR-16, 833). Further indicative of his thinking at the time of trial, the following statement in the record:

> There are ways of approaching these kind of cases, and I would probably have tried this case in a different fashion if it were not a first degree murder case, if it didn't have a death sentence attached to it. I may have been perfectly happy to let the jury hear that was cocaine involved and other people that were involved, that there were notations of his girlfriend sleeping with another person and that she might have been an informant and on and on, except the fact that, in my opinion, that would have made an already almost inextricable legal situation worse, finishing there.

(PCR-16, 834). Leinster agreed that this general strategic thinking dominated his tactics during the guilt and penalty phases. (PCR-16, 834-35).

The evidence suggesting motive for the murders might have come from the very people that he might have called in mitigation. (PCR-16, 835-36). However, Leinster testified that he was more afraid of the questions than the answers. (PCR-16, 836). Leinster later called mitigation witnesses in front of the judge to take advantage of these witnesses without the risk of revealing prejudicial evidence to the jury. (PCR-16, 836). The goal was to put them in a forum where the judge might be able to overlook the prejudicial evidence that might come out or that the judge would not weigh it as heavily as the jury. (PCR-

16, 836). Although he did not recall it, if one of the witnesses revealed that she talked with Windom before the murders and talked to him about a rumor that Valerie Davis was about to become an informant against him, Leinster agreed that this information would be detrimental. (PCR-16, 837). Again, however, Leinster had very poor recall of specific witnesses. He did in general recall talking to Windom's family members but did not recall what sort of matters were discussed. (PCR-16, 838).

When asked about his overall strategy, Leinster testified that he had Dr. Kirkland's somewhat limited possibilities then stated:

> And probably hope that everything would become so obfuscated during the course of trial that the complete lack of sense of the whole thing might play into a fugue analysis, and that maybe we might cover Johnnie Lee's activities with the same smokescreen.

(PCR-16, 840). Leinster thought his strategy was to obfuscate or eliminate the intent element. (PCR-16, 841). However, he stated the record would be the best reflection of the strategy he pursued at trial. (PCR-16, 841).

Leinster agreed that he would have used evidence of organic brain damage if he possessed it at the time. (PCR-16, 843). However, whether or not he should "have gone further with Dr. Kirkland is argumentative." (PCR-16, 843). Leinster testified

that the only evidence he had of mental illness were the acts themselves. In dealing with Windom Leinster did not observe anything that would have tipped him off that he was mentally ill. (PCR-16, 845-46). Windom was subdued and did not give Leinster a good explanation for his conduct, but Leinster had met people he's considered "nuts" but did not recall thinking that about Windom. (PCR-16, 846).

Prior to testifying at the evidentiary hearing, Leinster looked over the expert reports provided to him by collateral counsel prepared by Doctors Pincus and Beaver. (PCR-16, 807). When asked if he recalled the content, Leinster stated: "Well, I didn't - - I didn't do an in-depth review of those reports. I remember the crux of them." (PCR-16, 807). The conclusion of those reports was that Windom suffered from "organic brain damage." (PCR-16, 807). Leinster testified that had he had such evidence that Windom suffered from organic brain damage at the time of the offense, he would have utilized it during the guilt phase if they could testify that Windom was insane at the time of the offenses. (PCR-16, 807-08). Leinster stated he would have used such information even if it opened the door to "his being a drug dealer." (PCR-16, 808). Further, Leinster opined that he would have called those experts during the penalty phase had they been available and willing to testify

that Windom suffered from an extreme mental or emotional disturbance at the time of the offenses: "Yes, I would think so." (PCR-16, 808). Leinster also agreed that he would offer those experts to testify that brain damage rendered Windom substantially unable to conform his conduct to the requirements of the law, notwithstanding the State being able to present evidence that Windom sold cocaine. (PCR-16, 809-10).

Leinster did not have an independent recollection of either calling Dr. Kirkland or even talking to him about the Windom case. (PCR-16, 812). Leinster testified: "I talked to Dr. Kirkland on numerous occasions over the past 20 years." (PCR-16, 812).

As to the first murder victim, Johnnie Lee, Leinster testified he assumed that Windom would be convicted of first degree murder no matter what he did. (PCR-16, 813). Leinster was concerned about losing credibility with the jury if he challenged that conviction. (PCR-16, 813). He did more vigorously challenge the first degree murder charges relating to victims Valerie Davis and Mary Lubin. (PCR-16, 813). Leinster stated that the record would speak for itself as far as how he presented Windom's case. (PCR-16, 813). He doubted that he consulted with Windom at all on decisions involving his legal strategy relating to Johnnie Lee. (PCR-16, 814).

Leinster recalled a discussion in court between himself, Windom, and Judge Russell relating to the presentation of mitigating evidence; but, only to the extent that Leinster had discussed the issue with collateral counsel. (PCR-16, 816). Windom waived presentation of certain mitigating evidence based upon Leinster's advice. (PCR-16, 816-17). The mitigation waived consisted of evidence that Windom had been kind to people in the community, was charitable, and had been a good father. (PCR-16, 817). The basis for not presenting such evidence is that it would open the door to allow the state to present "the fact that he as a drug dealer." (PCR-16, 817). Leinster did not think that opening the door to such rebuttal "was strategically sound." (PCR-16, 817). He did not file a motion in limine prior to the penalty phase, stating that "in theory you could file a motion in limine every time you ask the question or interpose an objection." (PCR-16, 817).

Leinster stated that both he and Mr. Barch talked to Windom's family in Winter Garden. (PCR-16, 819). Leinster testified:

> You know, I spoke to the family on any number of occasions, whether at my office or out in Winter Garden, I don't recall. Certainly we had - - we had contact with the family. I had contact with the family, not just Mr. Barch. In terms of what - - what the purpose of the conversation was for, I don't recall at this time, you know, whether it was intended to moun[t] a penalty phase or guilt phase argument in

> general, finding out something about the lay of the land.

(PCR-16, 819). When asked if that was Barch's area of responsibility, Leinster testified: "I talked to the family myself, not just Mr. Barch." (PCR-16, 819). While Mr. Barch's primary responsibility was gathering penalty phase information, "that doesn't mean that Mr. Barch is the only person that ever talked to the family." (PCR-16, 819).

Leinster testified that he was no longer a member of the Bar and that he is currently incarcerated at Lake Correctional Institute. (PCR-16, 821). He lost his case file when he moved and therefore had no chance to review it prior to the hearing. (PCR-16, 820-21). Leinster was a member of the bar at the time of Windom's trial and for some years after that: "My quarrel with the Florida Bar had nothing to do with this case." (PCR-16, 822).

Kurt Barch testified that he shared an office with Leinster in 1992. (PCR-16, 847-48). He became involved to assist in the Windom case to develop information from family and friends to be used in the penalty phase. (PCR-16, 848-49). He thought an investigator would be beneficial after talking with some family members and friends of Windom. Barch was told that other people in the community "probably would be suspicious of me, and that I should get an investigator and someone who was, quite frankly,

was a black person, that they would be more likely to assist that individual." (PCR-16, 849-50). He thought that people may have been out on their porches and observed Windom shoot Mary Lubin but that no one was coming forward. (PCR-16, 831). Nonetheless, Barch did talk with Windom's mother and sister and other individuals in the community. (PCR-16. 850-51).

Barch asked Windom's mother and sister about any possible injuries that might have caused brain damage. (PCR-16, 865). Barch learned about a car accident Windom was in from talking with them. (PCR-16, 851-52). Barch had no recollection of them telling him about an abnormal birth. (PCR-16, 865). Barch was given the name of the treating doctor and talked to him briefly over the phone. (PCR-16, 852, 866). The doctor indicated that in his opinion appellant did not suffer any long term injury or consequence as a result of the accident. (PCR-16, 852). The doctor told him, "as far as he knew, there was no damage, long-term damage or impairment from that accident." (PCR-16, 866). Barch did not recall having any conversations with Dr. Kirkland. (PCR-16, 853).

Barch did not sit at counsel's table during the guilt phase but did come in and out of court to check with Leinster. Barch more or less managed Leinster's docket when he was trying the Windom case. (PCR-16, 854). Barch was present during the

penalty phase and recalled his and Ed's surprise when the State rested after presenting only one or two witnesses. (PCR-16, 854). They returned to Leinster's office where he made the decision not to present witnesses during the penalty phase. (PCR-16, 855).

Barch testified that after the State put on their case, he and Leinster talked about their strategy for the penalty phase:

> ...We were surprised that there wasn't a whole bunch of information at least attempted to get into evidence about the - - I think there was a police operation going on where Curtis was one of the targets, and they were about - - I think they were thinking about indicting him at the time, or asking for an indictment. That's what we were expecting from the state to try and put all that in. And when he stopped, both he and I apparently thought the same way. Because I remember leaving the courtroom and walking to the parking garage, and I believe I was driving that day, and going to his office and talking about it. And we figured they were - - and we may have outsmarted ourselves, but our thought was the State is gonna try to get us to put on - - to open the door to let them put in what they couldn't put in directly themselves.

(PCR-16, 876). Barch testified that neither he or Leinster went to talk to Windom about their strategy during the lunch break after the state rested. (PCR-16, 856).

Barch testified that he only met with Windom once or twice in jail, probably to discuss background information. (PCR-16, 877). The strategy they pursued was to tell the judge about all the good information they had about Windom to gain some benefit

without having the risk of the jury hearing about drug dealing. They put on evidence that Windom was generous in the community, supported his children, helped other people with money and groceries, bought equipment for athletic teams. (PCR-16, 879). Barch thought it was the State's strategy to let the defense show what good Windom was doing with his money and open the door to "drug information and gambling information and general lack of support..." (PCR-16, 879-80). Barch and Leinster discussed it and thought it was a wise decision. Barch testified that he still thinks that it was a wise decision. (PCR-16, 882).

During the period of March thru August of 1992 Barch had to cover for Leinster a lot. (PCR-16, 857). Barch testified that although Leinster "had a brilliant legal mind and knew a lot of law" he drank a lot "was forgetful" and was not attentive to his cases. (PCR-16, 858). Leinster had the flu bad at the beginning of Windom's trial and Barch got it shortly after him. (PCR-16, 863). He admitted that he was in close contact with Leinster during the trial but did not notice him smelling of alcohol. (PCR-16, 864). Leinster did shake a lot, which Barch associated as a symptom of, or the result of, alcohol abuse. When Barch was present in the courtroom he testified that it appeared Leinster knew what was going on and was focused. (PCR-16, 865).

Judge Dorothy J. Russell presided over the pretrial hearings, the guilt phase, the penalty phase and insolvency hearings and mitigation in the Windom case. (PCR-17, 936). At the time, Judge Russell had been a judge for nine years and had had the opportunity to have Mr. Leinster appear before her in court on several cases. (PCR-17, 937). Prior to the Windom trial, Judge Russell had worked with Mr. Leinster when she was a prosecutor and had known him for a number of years. (PCR-17, 939).

Judge Russell was aware that Mr. Leinster had some problems with drugs or alcohol and she would look for any evidence of his being under the influence when he appeared in her courtroom. (PCR- 17, 941). At no time during the Windom trial did Judge Russell observe anything that would indicate that Mr. Leinster had difficulties focusing on the case because of being under the influence of alcohol or psycho tropic drugs. (PCR-17, 942-43). His speech was not slurred and there was nothing wrong with his appearance. He was very focused on one defense. (PCR-17, 947). At no time did Mr. Leinster concede to the jury that his client was guilty of first degree murder. (PCR-17, 948).

Mr. Leinster appeared to be alert throughout the trial and he posed his arguments to the court in a manner that appeared appropriate and concerned. (PCR-17, 950). On cross

examination, Judge Russell stated unequivocally that she never saw any indication Mr. Leinster was under the influence of alcohol when he was in her courtroom. (PCR-17, 953).

Robert Norgard was called by defense counsel. He is an attorney licensed in the state of Florida since 1981 whose private practice is predominantly in the area of criminal defense. (PCR- 17, 966). Among the many documents, he reviewed were the trial transcript, affidavits of lay mitigation witnesses, Dr. Kirkland's testimony and report, and opening statements and closing arguments in both the guilt and penalty phases of the Windom trial. (PCR- 17, 1008). Norgard was aware that Windom had a drug trafficking offense that was nolle prosed and that there were references to drug dealings involving Windom.

By 1992, Mr. Norgard had been doing capital defense work for nine years. (PCR-17, 1003-1005). He opined that in the investigation of a capital case the attorney is looking for information relevant to a defense in the guilt phase and to the penalty phase presentation. He testified in general as to standards of practice in capital cases and the time necessary to prepare for a capital case and the necessary areas of investigation. (PCR-17, 986-992). Not every avenue of investigation produces something useful, however. (PCR-17,

1018). At the time of the Windom trial, the Spencer hearing did not exist. However, the sentencing hearing concept did. Mr. Norgard noted that there may be some mitigation that an attorney would not want to present to a jury but would want a judge to hear and that there could be valid tactical reasons for doing so. (PCR-17, 1026).

Jeff Ashton is an Assistant State Attorney with the Ninth Judicial Circuit. (PCR-17, 1042). He was the prosecutor on the Windom case and was familiar with Mr. Leinster for eleven years. (PCR-17, 1045-47). Mr. Ashton did not recall seeing Mr. Leinster exhibit any signs that he was under the influence of either alcohol or psycho tropic drugs during the trial. Leinster was consistent throughout the case as far as the defense he was presenting and arguing. (PCR-17, 1050). There were times when Mr. Ashton was close to Mr. Leinster during the trial; at bench conference and conversations. He did not recall detecting the smell of alcohol on him during those times. (PCR-17, 1052). Because Mr. Ashton was aware of Mr. Leinster's past problems, he was attuned to the possibility of such during the Windom trial. However, he did not see anything that alarmed him in any phase of the trial. Mr. Leinster appeared to be able to focus on what was going on, his answers were appropriate in the context of what was being discussed and Mr. Ashton never saw him

slumped over as if he were having trouble with consciousness. (PCR-17, 1053-54).

Neither in his manner nor tone, in either his arguments to the jury or court or his objections, did Mr. Leinster convey that he was unconcerned about the outcome of the case. Mr. Ashton's impression was that he was trying to maintain some credibility with the jury while still defending his client. (PCR-17, 1051). His arguments to the court were presented in a very vigorous manner. (PCR-17, 1052).

During Mr. Ashton's preparation of the case, he discovered factors that he felt had a bearing on Windom's possible motivation or motive for committing the murders. Among those issues was drug dealing, drug trafficking and a large-scale drug trafficking enterprise. Mr. Ashton was specifically referring to a federal task force investigation labeled "Cookie Monster" which indicated the large scale crack cocaine sales operation was being run by Windom. Mr. Ashton prepared a written memo to the State Attorney, Lawson Lamar, discussing whether to proceed with a state prosecution for the murders or a federal prosecution. (PCR- 17, 1057-60). Ultimately, the decision was made to try the murders in state court and let the federal court handle all the drug-related crimes. (PCR-17, 1063).

There was some information that at least one of the murder

victims had spoken to law enforcement about the drug operations and that Windom had been concerned about that prior to the murders. Mr. Ashton was quite eager to put that information before the jury to consider as Windom's motivation or motive for committing the crimes and he made it clear to Mr. Leinster that he was going to use it. However, Mr. Ashton chose not to introduce the information in the guilt phase and he would have brought it in in the penalty phase if the door had been opened. Mr. Ashton believed that he couldn't talk about Windom's life prior to the murders without talking about drugs because they were such an integral part of his life. He made his position clear to everybody on that. (PCR-17, 1063-1065).

At the time of the Windom trial, Mr. Ashton recalled that there was no such thing as a Spencer hearing. However, they did have a trifurcated process but it was not the routine practice at the time. (PCR-17, 1066). Mr. Ashton recalled taking the deposition of Mary C. Jackson wherein Ms. Jackson related that Windom knew or suspected Valerie Davis to be an informant or snitch. (PCR- 17, 1067).

Mr. Ashton acquired copies of all of Windom's arrest affidavits and case police reports. He felt they were related to Windom's background and motive for committing the murders. (PCR- 17, 1070-71). Mr. Ashton was positive that Leinster knew

about that information because he recalled having discussions with him about it and the drug cases. (PCR-17, 1078). Mr. Ashton testified that if the defense had called a defense mental health expert at the penalty phase, he would have gotten that expert to discuss before the jury the defendant's unfavorable background, including prior arrests and prior crimes. Leinster's decision not to call Dr. Kirkland or some other mental health expert at the penalty phase hampered the State's ability to put unfavorable information about Windom before the jury. It made it impossible for the State to show the jury the whole drug background of the case. (PCR-17, 1080).

Janna Brennan was a prosecutor for the Ninth Judicial Circuit and was one of the attorneys who assisted Mr. Ashton in the Windom case. (PCR-18, 1088-89). She had the opportunity to see Mr. Leinster frequently in the courtroom setting. During the Windom trial she did not notice anything unusual about the way Mr. Leinster presented himself and nothing that would lead her to believe he was under the influence of alcohol or psycho tropic drugs. She did not smell the odor of alcohol on him and he did not appear unusually disheveled or disoriented. He was able to focus and make arguments to the court. (PCR-18, 1091).

He was adamant in the arguments he was making although he was not flippant or cavalier about it. He displayed a goal directed manner and tone of voice when he was making his arguments to the judge and the jury. (PCR-18, 1090-92). Mr. Leinster appeared to be focused in attempting to be persuasive and making his points and defending his client. (PCR-18, 1096).

Ms. Brennan did not think Leinster's reference to being the firm of Christ and Houdini to be a flippant remark. She thought that Leinster's comment to the jury in penalty phase that it wasn't too tough finding Windom guilty to be a strategic decision on the defense's part to try to regain some of their credibility with the jury. (PCR-18, 1097).

B. <u>Mental Health Experts Called During The Evidentiary Hearing</u>

Dr. Jonathan Pincus has testified almost exclusively for the defense "over the course of the last 20, 25 years." (PCR-15, 518). Dr. Pincus concluded that Windom suffered from frontal lobe damage but that also he was psychotic at the time of the murders. (PCR-15, 557). Dr. Pincus testified: "He [appellant] described to me paranoia of a delusional intensity and auditory hallucinations he had been having at the time of the incident. He said he heard a deep voice telling him that he had to die, he, Curtis Windom, had to die." (PCR-15, 557). A

delusion that he had was that “he thought that people were against him, were going to kill him.” (PCR-15, 557).

Windom did have some basis for believing that people were out to get him: “Then there was a telephone call where someone spoke to Val and indicated that, that Curtis was going to be killed at some point. There was a threatening call. And Curtis didn’t know who it was, you know, who it can be. And he began to think more and more about someone trying to kill him.” (PCR-15, 558). Windom was afraid that someone was going to shoot him, and he “would be protective of himself in a variety of different ways.” (PCR-15, 558). He was afraid that “someone’s gonna shoot him. Someone actually did shoot him at one point, and he was afraid of having - -.” (PCR-15, 558). Dr. Pincus did not think that Windom’s fear was delusional “before this happened, but it was something that he was concerned about. It was something in the background.” (PCR-15, 559). His fear got to the point where he “felt he had to get a gun to protect himself.” (PCR-15, 559). Someone suggested to Windom that it was Johnnie Lee who was trying to or wanted to kill him. (PCR-15, 560).

In the days prior to the incident, Windom became “disheveled and not clean and neat, and noticeably so, and more excited and less able to, to relax and think clearly.” (PCR-15, 560).

Windom had a chronic problem with sleep. There were times when he was more functional than others. He suffered from manic depressive illness and hyper sexuality, sleeping with "three women in one day at one time." (PCR-15, 561). This went along with mania, spending money and gambling. (PCR-15, 561). Windom was not a drinker, but the night before the murders he drank a six pack of beer in an attempt to self medicate. (PCR-15, 562). He was not intoxicated at the time of the murders, but his alcohol consumption was, in Dr. Pincus's opinion, Windom's way of self medicating. He knew that he was going over the edge "couldn't relax, and wanted to be able to." (PCR-15, 562).

Dr. Pincus concluded: "I think the mental illness led to the extreme paranoia, and the brain damage led to an incapacity of inhibiting the impulses that were generated by the paranoia, the delusional paranoia." (PCR-15, 563). He thought that Windom's capacity to distinguish right from wrong at the time of the killing was "seriously compromised." (PCR-15, 564). Dr. Pincus testified that Windom was "legally insane" at the time of the killings. When asked if that was to a reasonable degree of medical certainty, Dr. Pincus replied: "I think so." (PCR-15, 564). Dr. Pincus also thought that Windom was incapable of acting with premeditation: "I think that his mental illness and neurological illness made it impossible for him to premeditate

properly, to cooly calculate what he was about to do. I don't think he had - - that he had any plan to do what he did." (PCR-15, 564). The shootings did not appear planned, "shoots his best friend, and shoots at somebody else in the street that he happened to casually meet at the time, kills his girlfriend, doesn't even remember it, and then shoots somebody else later, a mother, all in the mistaken idea that they were after him or there was some kind of conspiracy." (PCR-15, 565).

Dr. Pincus also testified that in his opinion both statutory mental mitigators applied in this case. Dr. Pincus testified: Windom was "[s]ubstantially impaired for each of the shootings, each of the four shootings." (PCR-15, 569). Dr. Pincus also agreed with Dr. Merin that Windom appeared to have a "dissociative forgetting of having done that indicates the degree of emotional stress he was under at that time." (PCR-15, 571).

Dr. Pincus admitted that his conclusions are drawn from his own testing and the materials supplied to him by collateral counsel. (PCR-15, 572-73). He only received portions of the trial transcript. He did review a few or some of the arrest affidavits relating to drugs on Windom. (PCR-15, 573). Windom acknowledged that he had been arrested for drugs and also indicated that he had fought with a girlfriend and been arrested

for that. (PCR-15, 573). One of the arrests, the drug arrest, involved the victim, Valerie Davis. (PCR-15, 573). The domestic violence incident also involved victim Valerie Davis. (PCR-15, 573-74).

Dr. Pincus acknowledged that Windom had been arrested on December 6, 1991 after execution of a search warrant. (PCR-15, 575-76). During the search of Windom and Valerie Davis' house they found over $1,000 dollars in cash. (PCR-15, 576). A confidential informant had given Windom a $1,000 dollars earlier. (PCR-15, 576). Both Windom and Valerie Davis were taken into custody. (PCR-15, 576). The confidential informant evidently bought "two cakes of cocaine for a thousand dollars." (PCR-15, 576-77). Going back to August 2, 1991, Windom was arrested for another drug charge. (PCR-15, 577-78).

Given that history, the prosecutor asked Dr. Pincus whether he would have to consider whether an ordinary, non-brain damaged person would begin to have feelings of anger and frustration about someone in the community turning him in and making it more difficult to earn his living. (PCR-15, 578). He admitted "that might have been subsumed in his paranoia, the concerns about somebody was turning him in and somebody was looking for him and trying to get him, but I don't think it was the cause of it." (PCR-15, 578). Dr. Pincus admitted that if Windom thought

"Valerie Davis, his partner in the drug business, was going to inform on him or somehow get him into greater trouble so he gets sent to prison possibly, that would be a reason" for even a "non-brain damaged" person to have feelings of anger and resentment. (PCR-15, 579). And, when asked if that could provide motive for first degree murder, Dr. Pincus replied: "It certainly could." (PCR-15, 579).

Dr. Pincus was unaware that a witness called to testify during the penalty phase, Mary Jackson, who worked as a program analyst for HRS, discussed with Windom a rumor "that his girlfriend Valerie, was going to inform on him to the authorities." (PCR-15, 580). He was not aware that Windom had heard that people "were saying Valerie was going to inform on him" and he "didn't know whether to believe that or not." (PCR-15, 580-81). Dr. Pincus did not know that to be true, as Windom apparently did not tell him that, but "he did think that Johnnie Lee was." (PCR-15, 581). However, according to Dr. Pincus: "when [Windom] was told that Johnnie Lee was going to, was the guy who was gonna kill him, he thought to himself, that's not reasonable." (PCR-15, 581). The person who told Windom that was Jack Luckett. (PCR-15, 581). Although Windom and Johnnie Lee were close friends, Windom "became suspicious of Johnnie Lee however increasingly so, and Curtis knew that Johnnie Lee was

carrying a gun." (PCR-15, 583).

Dr. Pincus was provided a copy of the Florida Supreme Court's opinion by the prosecutor who read an excerpt describing Luckett's testimony. In a discussion with Luckett before the murders, Windom asked if Johnnie Lee had won money at the track and Luckett said yes. (PCR-15, 584). Windom said that Johnnie Lee owed him $2,000 and said to Luckett, "Jack, my nigger, you're going to read about me." He told Luckett that he was going to kill Johnnie Lee. (PCR-15, 584). And, that same day, at 11:51 A.M. per the sales slip and sales clerk, Windom purchased a box of 50 .38 caliber shells from a Wal-Mart in Ocoee. (PCR-15, 584). When asked if that scenario agreed with what Windom told him, Dr. Pincus stated that it did, although: "He - - we talked about the business of owing money, and he said that that was nothing. He was accustomed of giving away money and lending money to people." (PCR-15, 585). Notwithstanding Luckett's testimony, Dr. Pincus thought that money had little to do with the murder. (PCR-15, 585).

The prosecutor moved on to another witness, who actually observed Windom shoot Johnnie Lee. When witness Pamela Fikes was asked what happened after Windom drove up in his car, Fikes testified: "He came and pulled on the side. He said, Quote, My mother fucking money, nigger, and pulled the gun and shot him

twice, Johnnie Lee fell." (PCR-15, 587). When asked if that scenario suggested that money was an important factor, Dr. Pincus explained that it was not as there was no allegation that Windom went through Lee's pockets for money after killing him: "The meaning of those words is not clear from the - - testimony. It's equivocal. But what he did afterwards was not a robbery." (PCR-15, 588). When asked by the prosecutor if the best indicator of what is going through a person's mind at a particular point is what they say, Dr. Pincus replied: "Surely. But the interpretation of what they said and what they meant is not entirely clear in that instance." (PCR-15, 588). But, Dr. Pincus admitted that he really didn't have a chance to think about what Windom said at the time according to witnesses because he wasn't given that testimony to consider before rendering his opinion. (PCR-15, 588). However, Dr. Pincus said that "I do know there isn't a charge of robbery. This as not a robbery, this was a killing." (PCR-15, 588). Dr. Pincus thought that what was uppermost on Windom's mind was what Luckett had said, that Johnnie Lee was going to kill him and had a gun. (PCR-15, 589). However, Dr. Pincus did not recall reviewing Luckett's trial testimony. (PCR-15, 589-90). Dr. Pincus finally admitted that Windom appeared to get angry when he learned about the money: "Yeah." (PCR-15, 592).

Dr. Pincus admitted that one characteristic of frontal lobe damage is that you don't see the logical outcome of your action. (PCR-15, 593). He admitted that Windom told Luckett that "you will see me in the newspapers." (PCR-15, 593). Dr. Pincus denied that this was a logical outcome of shooting Mr. Lee. (PCR-15, 593). He said that just because someone could anticipate that a killing would be reflected in the newspapers "doesn't necessarily have intact frontal lobes, that's A." (PCR-15, 593). And, B, Dr. Pincus thought that something innocuous which might have been said by Luckett could have been misinterpreted by Windom "who said, I am gonna get him first if he tried to get me, and tries to see him in the streets, he puts his hand in the pocket and says, I'm gonna get him, he's trying to kill me now." (PCR-15, 594). Dr. Pincus thought that the manner in which Lee was killed and Windom's just walking off after shooting him did not reflect a well thought out plan or that Windom was anticipating the consequences of his conduct. (PCR-15, 594). In response, the prosecutor asked the following: "Well, let's look at what he said. He said, did he not, that he wanted to, according to Luckett, he wanted to kill Johnnie Lee, that he was mad with him from the context about the money and something else?" To which, Dr. Pincus replied: "Yes." (PCR-15, 595).

The prosecutor asked Dr. Pincus about another witness to the shooting of the third victim, Mr. Watkins. Dr. Pincus acknowledged that as he shot the third victim, he said "I don't like police ass niggers." (PCR-15, 596). When asked if the fact he said that reflected that Windom had been repeatedly arrested based upon confidential information, Dr. Pincus replied: "I'm - - if he had been repeatedly arrested on that basis I think that there would be - - I think he was arrested once." (PCR-15, 597). Dr. Pincus thought that assuming Windom said that here remained the question of why, "was this a premeditated thing or was this something that just happened in a spur of a moment, like that, or is it the result of a pervasive paranoid state that was going on for several weeks before hand and reaching an apogee at this point, which is what I think has happened." (PCR-15, 597). Dr. Pincus reiterated that he did not think this was a planned assassination, but "this is something that happened on the spur of a moment." (PCR-15, 598).

Although Windom claimed not to recall shooting Val, the prosecutor pointed out that he told Dr. Beaver of his concern upon seeing Mary Lubin, Val's mother, pulling up in a car. Windom was worried that she would shoot him for having shot her daughter. (PCR-15, 599). Dr. Pincus explained that this does

not indicate that he has a recollection of shooting Valerie, the question "is whether he can recollect it at a given time, that's what dissociation is. It's the same thing as truly not remembering - - it's not being able to call forth that memory." (PCR-15, 599). Dr. Pincus thought that Windom was not making things up, and thought that all experts agreed that he was being straightforward. (PCR-15, 599).

Dr. Pincus agreed that Windom was intelligent enough to know the situation he was facing and that he wasn't psychotic when he was examined. (PCR-15, 600). Dr. Pincus acknowledged that Windom did not tell him about a conversation with Ms. Jackson wherein he acknowledged being aware of a rumor that Valerie was about to inform on him. (PCR-15, 600). Dr. Pincus also admitted that in his conversations, Windom did not mention he was upset with Johnnie Lee about the money. (PCR-15, 600). Again, Dr. Pincus thought that it made sense to find a motivator for a crime to talk to people actually seeing him at the time of the crime. (PCR-15, 601). Yet, Dr. Pincus admitted that he did not talk to or even read the testimony of many of the people who were present at the time of the shootings. (PCR-15, 601).

Dr. Pincus again asserted that it was typical of someone with frontal lobe damage to exhibit socially inappropriate behavior. (PCR-15, 601). When asked about evidence of such

inappropriate behavior and the relative lack of it prior to the crimes, Dr. Pincus stated that Windom acted irresponsibly with money and gambling. (PCR-15, 602). Also, Dr. Pincus explained that Windom had two girlfriends and children in "both places." (PCR-15, 602). "He had been promiscuous. And he was dealing in drugs." (PCR-15, 602). While Dr. Pincus admitted that this behavior could not necessarily be attributed to frontal lobe damage, "I don't think we can say he was functioning with a full deck either." (PCR-15, 602). Also, Dr. Pincus testified that there were other examples of poor judgment and violent conduct, including altercations with Valerie, recounting on one occasion that Windom shaved her head and beat her when he thought that she had been unfaithful. (PCR-15, 604). However, Windom could also be generous and sweet, the fluctuations suggest that he was "sort of a - - a brittle guy." (PCR-15, 604).

Dr. Pincus agreed that there was no one reliable test to measure judgment. (PCR-15, 605). Dr. Pincus agreed that most people who have frontal lobe damage are not autonomists "and most them are not violent, that's correct." (PCR-15, 605). And, Dr. Pincus also agreed that they retained free will of "considerable scope:" "Yes, that's true." (PCR-15, 606). He admitted that you do not go automatically from a finding of brain damage to a finding of diminished responsibility. (PCR-

15, 606). However, Dr. Pincus thought that two factors were working in this case, brain damage and mental illness, rendering Windom vulnerable. (PCR-15, 606).

During his period of incarceration, Windom has been involved in several fights. (PCR-15, 689). Dr. Pincus was also aware that Windom sought treatment for injuries sustained while playing basketball in prison. (PCR-15, 609). However, he did not think that those injuries or reinjuries were significant as an explanation for the possible brain damage revealed by his own testing. (PCR-15, 609-11).

Dr. Craig Beaver, retained by collateral counsel, testified that Windom "falls at the bottom of what we would consider dull normal to borderline mentally deficient." (PCR-15, 642). This was consistent with the testing done by the expert retained by the State, Dr. Merin. (PCR-15, 642). Testing revealed certain deficits for Windom in "executive function" talking about the ability to "organize one's life with higher demands being placed on it." (PCR-15, 645). Dr. Beaver explained: "...What we typically see with more moderate brain difficulties, if you will, moderate to mild is that the difficulties really manifest themselves or show themselves under periods of increased duress or stress of some kind, whether they have got too many things to do or whether because it's a very emotionally charged situation,

but there is a direct interaction with their emotional status and the situation going on around them and their ability to cope effectively with it." (PCR-15, 646).

Windom was under severe stress for quite a while before the shooting. Going back two years before, Windom was "shot in the leg on a street corner and the woman next to him had been killed. And that seemed to really have a significant impact upon him." (PCR-15, 647). He was more nervous after that incident, "it really shook him up." (PCR-15, 647). Also, closer to the shootings, his home had been "ransacked," he got a "threatening phone call" and "he had been arrested by the police." (PCR-15, 648). In the two weeks prior to the shootings, the family saw an abrupt change in his behavior and functioning. Windom was usually meticulous about his appearance, yet in the two weeks prior to the murders, he looked disheveled, stop keeping his hair clean, and wore the same clothes day after day. (PCR-15, 649). Windom had a high level of paranoia, he talked about changing his behavior, not wanting to go out in public, not wanting his girlfriend or children to be around him. (PCR-15, 650). This high level of paranoia is reflected in the personality testing scores from Dr. Merin. (PCR-15, 651). Also, the MMPI revealed a possible Bipolar Manic with "psychotic symptoms" "a possibility, considering various

diagnostic alternatives." (PCR-15, 653).

Windom had an impoverished upbringing, low IQ, and a history of head injury. Windom also had situational stressors affecting him at the time of the shootings. These included the following:

> He's got two different girlfriends, if you will, that he's divided between. That would be stressful for most people. He has a series of events happen to him. He gets shot unexpectantly, that tends to be a pretty traumatic event for anybody, even if you live in a pretty rough neighborhood. He worried he could have been killed. The lady next to him was killed.
>
> It is through a period of time where a number of other things start to fall apart around him. He gets his house ransacked. He gets threatening phone calls. He gets arrested by the police. You know, a series of things happen.

(PCR-15, 661).

The combination of moderate brain damage and stressors combined to the point that Dr. Beaver thought Windom was under "extreme emotional distress at the time of the shootings." (PCR-15, 663). The frontal lobe damage would make it more difficult for Windom to process information. (PCR-15, 665). For instance, being informed that Valerie was going to cooperate with police or report him, Dr. Beaver opined: "I imagine that would be a pretty salient event that a person would really react to." (PCR-15, 665). However, Dr. Beaver would not expect a "normal" person with this information to act in the way Windom acted. (PCR-15, 665).

Shooting Johnnie Lee in the middle of the day with two

witnesses present did not seem very rational to Dr. Beaver. (PCR-15, 668). Dr. Beaver agreed that after the criminal episode Windom suffered from dissociative amnesia. "When something stressful or traumatic happens, people psychologically sometimes block their willingness to recall it, and we call that dissociative amnesia." (PCR-15, 668). He also thought at the time of the shootings, Windom was under an acute psychotic episode but in a longer term diagnosis, it "would be bipolar disorder in a psychotic manic phase, or depressive disorder with mood congruent psychotic feature, or lastly, which I think is probably the less likely, would be schizophrenia paranoid type." (PCR-15, 670). But a question surrounding Windom was that he was not under any mental health care at the time and it was hard to get a picture of Windom at the time of the shootings due to communication problems the doctor had with his friends and family members: "[I]t's been hard to get a more sophisticated description of what was going on with Curtis at that time to provide a more definite diagnosis." (PCR-15, 672). Dr. Beaver testified that information contained in a defense exhibit, talking with family members, and affidavits, constituted important information. (PCR-15, 674-75).

When asked if it was possible Windom had an antisocial personality disorder, Dr. Beaver testified:

> Depends on what definition you want to use. But certainly he's engaging in, in drug trafficking with the cocaine, that's certainly an antisocial behavior act. But in terms of personality characteristics, in terms of lack of attachment with others, a lot of manipulativeness with others, those kinds of more traditional aspects of what we think of as sociopath and the correct version of that disorder, no he doesn't show those features.

(PCR-15, 675-76).

When asked if Windom was delusional at the time of the murders, Dr. Beaver admitted it was a "difficult question." (PCR-15, 676). "Certainly there is a strong paranoid theme running as been mentioned by some of the family and also my talking with Curtis and reviewing records, and that I think bordered in that range where you consider it delusional." (PCR-15, 676). Dr. Beaver testified that he could have formed his conclusions without a taped interview with Windom made shortly after the shootings, but thought that seeing his demeanor an hour or so after it occurred was "helpful." (PCR-15, 677). Dr. Beaver thought a mental health professional had an obligation to ask for additional material so that he could reach a conclusion where the initial or preliminary interview raised concern. (PCR-15, 678). Dr. Beaver thought that when Windom shot Johnnie Lee he was in fear for his life: "That's the perception that Curtis Windom presents with. And I think that's consistent with what we know about his history." (PCR-15, 680). Dr. Beaver

thought a fair assessment of Windom's state of mind at the time he shot Johnnie Lee was "kill or be killed." (PCR-16, 718). Dr. Beaver did not consider the murder of Johnnie Lee cold and calculated, he was confused, he was dazed, and that towards the end of it he was crying. (PCR-15, 681).

In Dr. Beaver's opinion, the brain damage, increased stress and family background substantially affected Windom's ability to conform his conduct to the requirements of the law. (PCR-15, 683). As to whether he rationally understood right from wrong, Dr. Beaver testified: "Well, I don't have any reason to believe that Curtis Windom at that time didn't realize he was pulling the trigger on the gun, that that could result in Johnnie Lee's death, but his reasoning for making that decision was not rational." (PCR-15, 683).

Dr. Beaver then talked about non-statutory mitigation he could have provided about Windom's childhood and impoverished background. (PCR-15, 685). His urination problem, being teased by kids in school. (PCR-15, 685). Windom struggled in school and "had some adaptive classes" and eventually quit. (PCR-15, 686).

On cross-examination, the prosecutor questioned Dr. Beaver about witness' statements and testimony reflecting what occurred at the time of the murders. Dr. Beaver did not review the whole

transcript, but was familiar with some of the testimony discussed earlier on cross-examination of Dr. Pincus. (PCR-16, 691). Dr. Beaver agreed that it might be important to know what Windom's demeanor or affect was when he bought the ammunition used in the murders. (PCR-16, 692). The clerk at Wal-Mart did not recall Windom being upset when he bought the ammunition used in the fatal shootings. (PCR-15, 692-93). Also, the affect Windom had when talking to Jack Luckett just prior to the murders was important. Luckett did not mention him being that upset, or crying, just angry, but not exceptionally so. (PCR-15, 692). During the period immediately prior to the murders, Dr. Beaver admitted Windom obtained the gun, loaded the gun, then went to the location where he found Johnnie Lee. (PCR-15, 693). Dr. Beaver acknowledged that these actions "could be" consistent with somebody who is angry with Johnnie Lee and wants to kill him. (PCR-15, 693). But, Dr. Beaver added that it was important to note how his behavior changed in that week to "balance out those things in looking at what occurred." (PCR-15, 693). Dr. Beaver thought that Killing Johnnie Lee in broad daylight and knowing that it would get his name in newspapers was not rational, but agreed that it "was a means to an end, yes, it could accomplish that." (PCR-15, 695).

Dr. Beaver agreed that Windom told Jack Luckett before

shooting Johnnie Lee that he was upset over money. (PCR-16, 695).

Also, witness Pamela Fikes, at the time of the shooting, said that it was the money. (PCR-16, 695). However, Dr. Beaver also thought that another witness said that Johnnie Lee was after Windom. (PCR-16, 696). But, when pressed, Dr. Beaver admitted that his source for that information was Windom, relying upon what Windom told him. (PCR-16, 696). Dr. Beaver testified that the amnesia related by Windom occurred after he actually shot Johnnie and that such a traumatic event is "what put in motion the dissociative amnesia." (PCR-16, 697). Dr. Beaver admitted therefore that Windom's recollection might not be the most reliable one: "Yes, that could be a problem with his recollection." (PCR-16, 697-98). Dr. Beaver admitted that the DSM-IV mentions "selective amnesia" and that it was a factor to consider. (PCR-16, 698). Moreover, the DSM-IV mentions that you should consider malingering when a person is facing legal difficulties. (PCR-16, 699).

Dr. Beaver admitted that he may have been motivated to shoot some of the victims over the cocaine situation, testifying:

> Well, I certainly think he was upset about being arrested, I think that that was part of the equation in terms of overall duress that he was under that helped culminate in these events, yes.

(PCR-16, 699). Dr. Beaver also admitted that it could be a

motive for the crimes, but that he personally didn't believe "that was the case." (PCR-16, 699-700). The statement "he didn't like police ass ..." also suggested that informants and the cocaine situation was something on his mind at the time he shot Kenny Williams. (PCR-16, 700).

Dr. Beaver acknowledged that there was a rumor that Valerie Davis was going to inform on Windom. (PCR-16, 701). He agreed that this "could" provide a possible motive for murder. (PCR-16, 701). Dr. Beaver acknowledged that there were possible motives for the murders, but thought that "many factors may have gone into that kind of overload that resulted in that deterioration." Nonetheless, Dr. Beaver "felt that at the time the shootings occurred, that he was in an extreme emotional state." (PCR-16, 701). Dr. Beaver reiterated that there was not just one cause, the neurological issues played a role, emotional status, and, his conflict with Johnnie Lee resulted in the "rampage." (PCR-16, 703). Dr. Beaver admitted that Windom did not have a history of acting out violently as might be seen in some brain damage cases. However, he did have a history of doing poorly in school, did not maintain employment, and, usually had help from girlfriends to take care of things for him. (PCR-16, 704).

Windom did not admit to any difficulties with Valerie Davis

when talking with Dr. Beaver. (PCR-16, 705-06). Windom reported that he had no recollection of going to their apartment and shooting Valerie Davis. (PCR-16, 706). However, he did have some recollection of Mary Lubin, Valerie Davis' mother pulling up in her car and being concerned that she would shoot him for having shot her daughter. (PCR-16, 706). So, as the prosecutor inquired, he obviously had some recall of shooting Valerie Davis. (PCR-16, 706). It might be, opined Dr. Beaver, that Windom had fragmented recall which can happen with dissociative experiences. (PCR-16, 707).

Dr. Beaver again acknowledged that Windom evidently did have in his mind that shooting someone in broad daylight would get him in the newspapers. (PCR-16, 708). That could suggest a calculated or means to an end thinking process. (PCR-16, 708-09). Further, after shooting Valerie Davis, the thought that her mother might want to shoot Windom, knowing she carried a gun, indicated cause and effect thinking, "means to an end." (PCR-16, 709). Windom's actions that day indicated that he was in touch with reality to the extent he knew who the people were he was interacting with and had a motivation for shooting them, with the possible exception of Kenny Williams. (PCR-16, 710). However, Dr. Beaver thought that his motivations were irrational thoughts and beliefs. (PCR-16, 711).

Dr. Robert Kirkland, a psychiatrist, examined Windom in 1992. (PCR-16, 760-61). Dr. Kirkland thought he was appointed to examine Windom for competency to stand trial and his "mental condition at the time of the offenses." (PCR-16, 761). In his report to Judge Russell, Dr. Kirkland stated that he did not have enough information to make a determination of sanity at the time of the crimes. He needed arrest reports and witness statements to make that determination. (PCR-16, 762). Dr. Kirkland did not see any mention in his notes of any significant head injury. (PCR-16, 764). Had he information suggesting serious head trauma he might have recommended additional neuropsychological testing: "That might be one of the avenues that I would have suggested." (PCR-16, 764).

Prior to the evidentiary hearing, collateral counsel provided three volumes of material to Dr. Kirkland. He reviewed that material and stated that it would have been "helpful" at the time of his evaluation. (PCR-16, 765). Dr. Kirkland denied that it would be impossible to render a complete evaluation because of a lack of background material but did agree that "[t]he more information you have, the better, if you will." (PCR-16, 765). Dr. Kirkland was not asked to evaluate Windom for the penalty phase with regard to statutory or non-statutory mitigating circumstances. (PCR-16, 767).

On cross-examination, Dr. Kirkland admitted that his report ruled out the existence of organic brain damage. (PCR-16, 768-69). Dr. Kirkland testified: "Well, they were just the standard parts of the mental status examination that involves in looking at a person's memory, his presentation, his emotional tone, his intellectual capabilities, his orientation to his surroundings, his judgment. No specific tests." (PCR-16, 769). As part of taking a defendant's history, Dr. Kirkland "would inquire about past history of medical history, in terms of what things he had suffered. And he did, he mentioned some things that had happened to him." (PCR-16, 769). Windom mentioned that he had been shot. (PCR-16, 769). Windom did not mention any particular health problem or psychiatric history. (PCR-16, 770).

Part of his standard examination is to ask about any history of significant brain injury. (PCR-16, 770). Dr. Kirkland testified: "Well, only - - you see, what I'm trying to say is this, we are more interested in clinical signs of organic brain disorder. In other words, what - - how the brain disorder affects our life and our behavior, et cetera, as opposed to just whatever you might have had in the past." (PCR16, 770). If Windom had told Dr. Kirkland about a serious head injury where he was rendered unconscious at the age of 16, Dr. Kirkland would

have written it down. (PCR-16, 771).

Dr. Kirkland stated that part of the normal mental status examination consists of talking to an individual in conversation, avoiding wherever possible yes or no responses in order to judge "recall, "memory" and "presentation." (PCR-16, 771-72). Dr. Kirkland explained the speech pattern and presentation gives an examiner a very good picture of brain functioning: "You know, their vocabulary, any nuances or peculiarities of speech, any kind of peculiar gesturing or normal gesturing they may carry out throughout. And also wasn't to evaluate memory, the ability to think clearly, have ideas connected and so forth. So without sitting down with pencil and paper, one gets a very good idea of mental functions of the brain functioning, if you will, simply by a conversation." (PCR-16, 772). Dr. Kirkland's assessment was that Windom did not show "any significant signs of brain damage." (PCR-16, 772).

Dr. Kirkland testified that his information about the case came from Windom and Leinster. (PCR-16, 775). He looked at Windom's jail file and did not notice anything significant. The jail file will ordinarily include information from questions regarding any severe injuries, particularly head injuries. (PCR-16, 778). He did not recall any such indication of

significant injury from the jail records and stated that "I don't remember that being a big issue at the time that I looked at it." (PCR-16, 778-779). Windom stated that he was depressed and that he made a suicide attempt, "but soon recanted that." (PCR-16, 776).

Windom recalled "three of the shootings, but did not recall shooting his girlfriend, Valerie Davis, and had clear recall of shooting the first victim, Johnnie Lee." (PCR-16, 776). "He subsequently encountered, I believe, Valerie Davis's mother on the street and he shot her. He felt a danger to her. And then there was another man that was shot, and I'm not sure that he was fatally wounded. But so all the recounting of the issue was that he had clear recall of three of the events, but according to him no recall of shooting Valerie Davis, who certainly would have been without - - certainly important to him, and was the mother of his children or child and somebody he lived with and somebody he had strong feelings about. But, as I say, he had no recall of that." (PCR-16, 776-77).

Dr. Kirkland talked to Leinster prior to trial about his examination. Leinster asked Dr. Kirkland how Windom could have recall of some shootings but not others. (PCR-16, 777). They talked about "various kind of stress situations and scenarios that develop, and certainly can develop in the midst of high

tension, high excitement, high anxiety situations, and I mentioned the word fugue state." (PCR-16, 777). Leinster latched on to the phrase "fugue state" and seemed to focus Dr. Kirkland on that for his trial testimony. (PCR-16, 777).

Dr. Sidney Merin was called by the State and accepted as an expert in neuropsychology. (PCR-18, 1113). He evaluated Mr. Windom for signs of mental impairment that might have contributed to his criminal conduct and to determine whether he suffered from brain damage which had an impact upon his behavior. (PCR-18, 1114-15). Dr. Merin listed the large volume of materials he reviewed in preparation for this case, including Windom's prior criminal history, reports and depositions of Dr. Beaver and Dr. Pincus, testimony of Dr. Kirkland, witness statements, affidavits, charging documents, DOC medical records, school transcripts, and a videotape of Windom made shortly after his arrest. (PCR-18, 1117-19).

The tape of Windom talking with his mother revealed no signs of manic activity. (PCR-18, 1119). Dr. Merin testified: "His responses appeared appropriate and relevant to her statements and questions." (PCR-18, 1119).

In testing Windom, Dr. Merin attempted to review those areas of brain function that deal with making judgments, planning, capacity for planning, to think rationally. Dr. Merin also

tested some areas of intelligence but focused on the major question of whether or not the brain was impaired to render Windom incapable of making judgments, controlling his behavior, and other motivational issues. (PCR-18, 1120). Those functions are primarily controlled by the prefrontal cortex. (PCR-18, 1120). Dr. Merin also looked at Windom's personality and gave the MMPI and other tests to determine if there are aspects that contribute to the behavior that might have "erroneously been attributed to brain damage." (PCR-18, 1121). Perhaps most important to Dr. Merin was the clinical interview and consultation which was videotaped. (PCR-18, 1121).

In his interview and interaction with Windom, Dr. Merin noted "no present clinical evidence of psychotic, tho[ught] processes. His only reference to hallucinations were made at the time of the crimes, and they were not command hallucinations, and referred only to injury to himself." (PCR-18, 1123-24). Dr. Merin questioned whether or not that was a true hallucination or represented an "awareness" of what he had done and prompted him to state "I got to die." (PCR-18, 1124). Aside from the lack of any command hallucination, Dr. Merin found no motivational or inhibitory deficits associated with prefrontal lobe impairment. Dr. Merin explained:

> The prefrontal lobe controls and contains strategies associated with motivation. And his comments and his

> test production reveal very adequate motivation. And you'll see on the videotape that he would take the initiative, which is another prefrontal lobe function, he would move ahead and he would talk.
>
> And very importantly too, prefrontal lobe allows for the inhibition of certain impulses. Underneath you may want to punch somebody in the nose, but you say to yourself, you just don't go around punching people in the nose. That's prefrontal lobe that says, you're angry, but you just don't do that, you inhibit that.
>
> He's quite capable of inhibiting his behavior as evidenced by my comment to him to either slow down or hold it while I record what he was saying. And he was able to do that. When I either lifted my finger as if to say in the symbolic representation of, wait a minute, or if I'd say, hold it a minute, he would stop promptly. And when I'd say, okay, he would pick up again. Perfectly normal type of behavior.
>
> If there is impairment of prefrontal lobe, he would just go right through it and either not attend to what I was saying, not inhibit his impulse, or jump in when his - - his comments were not - - not yet ready to be recorded.

(PCR-18, 1125-26). Windom was animated, responsive, and revealed no break of reality. He was taking no medication and has not been medicated for the past year. "No difficulty organizing and articulating thoughts." (PCR-18, 1130). Windom is "of low intelligence with some suggestions he has some capabilities into the average range." (PCR-18, 1130).

Dr. Merin described a number of tests he gave Windom to assess his mental ability and prefrontal lobe function. Windom generally scored satisfactorily on those tests. (PCR-18, 1132-33). His fund of knowledge or information which usually depends upon schooling was in the lower end or low average range. (PCR-

18, 1133-34). As Windom had a learning disability and did not go far in school, his fund of information was correspondingly weak. (PCR-16, 1134). The intelligence sub-tests generally revealed low average range intelligence. (PCR-18, 11139-40). On number and letter sequencing, Windom scored relatively well. This is an area that takes some mental manipulation and is a prefrontal lobe function. (PCR-18, 1141).

Mr. Windom scored well on some tests and poorly on others. The poor scores on some tests were attributed by Dr. Merin to Windom's lower level IQ and possibly his learning disability rather than potential brain damage. (PCR-18, 1231).

Dr. Merin also administered the MMPI-2 and discussed those results. Windom's paranoia score was the most elevated score, but this did not mean that Windom was delusional. Dr. Merin explained:

> ...You look at the videotape, nothing of that sort [delusion] whatsoever. What I did find, what this does mean, based on the nature of his personality is that he can be suspicious, he can be guarded, he can use the mechanism of projection, which is typical in -- in paranoidal types of individuals. That is, they project responsibility onto others. It's not my fault I did this, because it's their fault, so I better get to him first type of thing. And they - - they have difficulty sometimes getting along with people, particularly if they become suspicious and they act on their suspicions.

(PCR-18, 1176).

The second highest elevation was on the SC or schizophrenic

scale. That score does not mean that Windom is schizophrenic. Dr. Merin explained:

> ...What we find here in - - in research, unless the person has been hospitalized, unless they have had psychiatric care, unless they have shown symptoms of delusion or schizophrenia, bizarre concepts, seeing little green men from mars or laser beams coming down and taking out your innards...nothing of that sort, that would be a true schizophrenia symptoms of that bizarre nature.
>
> But rather a person who is withdrawn and has difficulty dealing with their - - their emotions, can live more within their own thinking, that the person on the outside may not always know what's going on inside their own head...

(PCR-18, 1173). Despite the elevated score, Windom was not a schizophrenic. Dr. Merin explained: "It doesn't say the schizophrenia scale measure schizophrenia unless the individual has a significant history of schizophrenia, and in conversation and observation is clearly schizophrenic psychotic. (PCR-18, 1240). Dr. Merin agreed that Windom's score could be consistent with schizoid personality. Persons with that disorder are not often hospitalized, but are withdrawn, and irritable. (PCR-18, 1241).

In attempting to interpret these scores, Dr. Merin explained that you need to look at the person's history over their lifetime and how they interact with other people. The scores must be clinically correlated. (PCR-18, 1178-79). The background on Windom revealed that he grew up in poverty, had

been made fun of in school, had a learning disability. (PCR-18, 1179). Windom did not show a great deal of difficulty socializing, he had a lot of friends, relationships with females, had children he cared for, had an attitude and appearance that were important to him. (PCR-18, 1179-80). His ability to conduct himself within his socioeconomic culture and sell drugs reveal a certain amount of mental awareness and ability to manipulate. (PCR-18, 1180).

Another elevated score was the PD scale or psychopathic deviate scale. (PCR-18, 1181). This did not necessarily mean Windom had an antisocial personality but it did reveal aspects of his personality. "For example, the capacity to act impulsively, the tendency to be manipulative, to have shallow emotion, to be superficial, to have difficulty accepting the demands made by others, but yet capable of making demands of his own. Con artists are high on this scale. Individuals who have difficulty with social values and social norms, they often find themselves in conflict with the law or some sort of authority... (PCR-18, 1181).

Windom's MMPI revealed four additional elevated scores. One score was for agitation or obsessiveness, that is, he gets an idea he'll obsess about it. (PCR-18, 1181-82). The second was the MA or energy scale, "hypomania." This simply means that

Windom has a lot of energy. "If you look at the videotape, the guy's got a lot of energy. This does not mean that he's manic. If you take a look at the tape, he's very well controlled, logical, coherent, so on." (PCR-18, 1182). The third score was depression. "This could be a matter of anxiety, could be a matter of the position he finds himself in now. But certainly it would be a reflection of the sadness that we see in other areas of his personality." (PCR-18, 1183). The final elevated score was the MF the masculine femininity scale. The lower score here reflects an individual who might need to prove their masculinity. (PCR-18, 1184).

Dr. Merin did not get the impression that Windom was faking the test even though the validity or F scale was elevated. Typically an elevation on this scale could mean that an individual was malingering. However, Dr. Merin thought that Windom was simply recognizing that he was in a bad position "and he wanted to express himself in that direction." (PCR-18, 1184).

Dr. Merin was able to come to a conclusion as to Windom's mental state at the time of the shootings. First, Windom had "Dissociative Amnesia Selective Type." (PCR-18, 1190-91). This type of amnesia refers to an individual who "remember[s] some parts of what had occurred and not other parts." (PCR-18,

1191). The fact that Windom claims amnesia does not mean that he didn't know what he was doing at the time: "Amnesia is an event that occurs after an act, as you forget that you had done that." (PCR-18, 1192). It can emanate from either a feigned inability to recall or a result from trauma or stress. (PCR-18, 1192-93). Windom claims to recall some parts of the shootings but not others. (PCR-18, 1192). "The type of memory problem that he claims to have doesn't fit any particular sort of brain phenomenon. There are different types of memories and different types of problems, but to remember some parts of an event and not other parts doesn't fit a pattern of certain types of brain impairment." (PCR-18, 1193).

Dr. Merin thought that Windom had a personality disorder, not otherwise specified, but having certain more or less prominent features. (PCR-18, 1192). The more prominent features in Windom's case are Borderline, Antisocial, and Paranoia. (PCR-18, 1194). The personality disorder is a "long term maladaptive behavior that rarely causes a person to end up in a - - in a psychiatric hospital. Very often, however, when it's a borderline or antisocial, when those features are prominent, they often end up in some sort of difficulty with the law." (PCR-18, 1194).

Dr. Merin concluded within a reasonable degree of

psychological certainty that Windom did not suffer from any significant organic brain functioning problem. Dr. Merin testified:

> I found no compelling evidence that there's any significant brain impairment other than - - and it's not really an impairment - - I think he was born as a slow thinker. His reports are his family was, like extended family were like that.
>
> The fact that he fell on his head at birth, I'm not certain if that really had too much to do with it. Because the brain at that age, skull at that age is very flexible, and any problems would have been, should have been overcome, unless it was so severe he had to go to the hospital because there was bleeding or whatever.
>
> The accident that he had at age 16, motor vehicle accident, he was in the hospital for two or three days. They said he was unconscious. And other reports or other examiners had been told the same thing. That may have had some adverse effect, but the probabilities are that it did not. He may have had a concussion of some proportion that may have knocked him out. I even wonder about the extent of his unconsciousness because after that he revealed no evidence of impaired behavior other than using poor judgment.
>
> Now, poor judgment has to be differentiated from impaired judgment. But, as I said earlier, he got along with Val, he got along with apparently got along with Val, he got along with Julie, he was able to relate to them, he took care of his children, he dressed appropriately, and he was able to conduct himself on the street in order to - - to carry out whatever business he was involved with.

(PCR-18, 1198). Although he has experienced rage and anger with Val, he's capable of directing his anger in anyway he see's fit. (PCR-18, 1199).

In Dr. Merin's opinion, Windom was not under extreme mental

or emotional disturbance when he committed the murders. While Windom was under stress, Dr. Merin testified: “He had considered that he had been manipulated by Johnnie Lee. Johnnie Lee owed him some money, Johnnie Lee told him that he had given money to his father to give to Mr. Windom, that was not accurate, and Johnnie Lee gave him a part of what he owed him, things of that sort. So there was a buildup of some resentment, some anger. But I wouldn’t consider that that constituted a basis for extreme emotional distress.” (PCR-18, 1199). Dr. Merin also testified that Windom was not substantially impaired at the time he committed the murders. Dr. Merin testified: “Within a reasonable degree of psychological probability, I think he was quite capable of doing so. In fact, there was one report in an affidavit one of his friends referring to his knowing that he had done something wrong.” (PCR-18, 1200). Also, in Dr. Merin’s opinion, Windom knew was he was doing and the consequences for committing it. (PCR-18, 1200). He reacted afterwards with some degree of guilt and when the only auditory hallucination he ever heard were voices within him saying “you got to die” this was rather than a true auditory hallucination represented anxiety about what he had done and recognizing the likely consequences. (PCR-18, 1201). Windom knew whether his acts were right or wrong at the time of the shootings. (PCR-18,

1201).

On cross-examination, Dr. Merin stated that he took into account Windom's difficulty sleeping in the two weeks prior to the murders. The sleep disorder and his change in appearance reflected that something in his life was making him unhappy, however, there is "no evidence of psychosis, no evidence of sudden brain damage." (PCR-18, 1248-49). Dr. Merin admitted he did not administer the full WAIS-R-III, omitting the block design test and parts of the arithmetic test. (PCR-18, 1258-59). Dr. Merin reviewed Dr. Pincus' neurological report and stated that he did not find any part of his report "particularly unreasonable." Most parts of Dr. Pincus' examination dealt with motor movements and movements of the eyes. (PCR-18, 1261). Dr. Merin stated that he reviewed Dr. Beaver's report and did not find his evaluation or examination unreasonable. However, Dr. Merin testified: "His conclusions I would not agree with, but his examinations are fine." (PCR-18, 1262). Dr. Merin testified that reasonable mental health professionals can disagree, that's what courts are for. (PCR-18, 1263).

On re-direct, Dr. Merin testified that no one test can accurately diagnose a defendant. It is important to use testing and background materials coupled with clinical observations. (PCR-18, 1266-67). In observing the whole picture of Mr.

Windom, Dr. Merin concluded that “he was not” suffering from any degree of prefrontal lobe damage. (PCR-18, 1267). Dr. Merin summarized:

> ...his ability to interact, to comprehend, to socialize with me, as it were, to take the initiative, be motivated, be able to inhibit his response, his remarks, control and contain his behavior, develop a principle and understand ideas, organize his thoughts. All of these are prefrontal lobe functions and he performed admirably.

(PCR-18, 1268). Dr. Beaver’s report also mentioned that while Windom had an impoverished vocabulary, he was engaging, understandable, made good eye contact, was animated, and demonstrated an appropriate range of emotions. (PCR-18, 1269). Dr. Beaver’s report also notes that Windom displayed no gross signs of hallucinations or delusions in presenting behavior. (PCR-18, 1269-70).

SUMMARY OF THE ARGUMENT

ISSUE I--Trial counsel made a strategic decision in the guilt and penalty phases to limit evidence and testimony which would open the door to appellant's dealing cocaine and possible drug related motives for the murders. Counsel's strategic decision was well informed and kept highly damaging information from the jury. That collateral counsel now opines that a different strategy should be followed does not establish that trial counsel's representation was deficient.

After a full and fair evidentiary hearing below, the trial court found the defense mental health experts opinions regarding appellant's sanity and the statutory mental mitigators were not credible. Moreover, even if such highly contested evidence was presented, it would be offset by damaging information about appellant's drug dealing, related motives, and countered by the more credible expert presented by the State. Based upon this record, appellant has no carried his burden of establishing either deficient performance or resulting prejudice emanating from counsel's representation during the guilt and penalty phases of his trial.

ISSUE II--Appellant's remaining allegations of error were properly denied as procedurally barred from post-conviction proceedings and otherwise without merit.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE DURING THE GUILT PHASE OF HIS TRIAL? (STATED BY APPELLEE).

The trial court extensively analyzed the testimony and evidence presented during the evidentiary hearing below before rejecting appellant's post-conviction allegations of ineffective assistance. The record supports the trial court's factual findings and legal conclusions. Consequently, the trial court's ruling should be affirmed on appeal.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Reichmann, 777 So. 2d 342 (Fla. 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

Deference to the circuit judge recognizes the superior position of the trier of fact who has the responsibility of weighing the evidence and determining matters of credibility. Brown v. State, 352 So. 2d 60, 61 (Fla. 4th DCA 1977). An appellate court will not "substitute its judgment for that of the trial

court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en*

banc), cert. denied, 116 S.Ct. 490 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

An unfortunate fact of litigating capital cases at the trial level is that defense counsel's performance will invariably be subject to extensive post-conviction inquiries and hindsight miasma. This Court has stated that ineffective assistance claims should be the exception, rather than the norm: "A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule." Clark v. State, 460 So. 2d 886, 890 (Fla. 1984)(quoting Downs v. State, 453 So. 2d 102 (Fla. 1984)). Unfortunately, despite this Court's admonition in 1984, it has

become the rule, not the exception in capital cases.

With these principles in mind, the State submits that the circuit court properly denied appellant's allegations of ineffective assistance after a full and fair evidentiary hearing below.

C. Trial Defense Counsel Was Not Ineffective In Failing To Uncover And Present Expert Mental Health Testimony To Support An Insanity Defense Or To Negate The Intent Element Of First Degree Murder

The trial court below found that Leinster pursued a strategy to depict the shootings as senseless acts, purposely providing limited background information about Windom to Dr. Kirkland. Leinster's strategy kept the State from introducing highly damaging evidence about his drug dealing and the fact that most of his murder victims were informants or suspected informants. After hearing the evidence presented by the defense below and the evidence presented by the State in rebuttal, the trial court held, in part:

> ...It is undisputed that the only mental health evidence presented at trial was the testimony of Dr. Kirkland, the court-appointed psychiatrist. Dr. Kirkland examined Windom shortly before trial, but he was not asked to evaluate Mr. Windom for penalty phase purposes.
>
> The defense's medical experts, Pincus and Beaver, used as the linchpin for their argument that Mr. Windom suffered from frontal lobe damage and severe brain injury arising from two distinct events in Mr. Windom's life. The first, supported by the testimony of Windom's mother, is that when he was born, he fell out of his mother's womb (at their residence) and hit his head on a hard concrete floor (HT 250). Secondly, when he was around 16, Mr. Windom was in a severe car accident which necessitated a hospital stay (HT 253).
>
> Further, even though Dr. Kirkland did evaluate Mr. Windom before trial, he never received this information, or additional information he requested such as witness statements in preparing his assessment (HT 271). When given the defense version of defendant's medical history at the evidentiary

hearing, Dr. Kirkland stated that had he known of Mr. Windom's history of head trauma, he would have pursued further evaluations. (HT 273).

Based on the extensive material they received, both Dr. Pincus and Dr. Beaver concluded that Mr. Windom was likely insane on the day of the shootings. Mr. Windom argues that Doctors Pincus and Beaver clearly showed that supplying more information would have resulted in a better, more accurate assessment of his mental health. Mr. Windom argues that since both of these doctors reached the conclusion that he was under a psychosis at the time of the shootings, Dr. Kirkland would have done so as well had he been given the additional information, especially the information concerning the two traumatic events causing head injury.

On the contrary, the state argues that first, there was a strong tactical reason for not calling a mental health expert whose testimony would include background facts. Second, Mr. Windom failed to produce any expert witness whose testimony including background evidence would have made a difference at trial. Specifically, the state argues that Mr. Leinster's strategy was simple, but it had at least as good an opportunity for success as the strategy now posed by defense counsel. His strategy was simply to try the case on its merits, without presenting mental health testimony which he felt, based upon his knowledge of Mr. Windom and his prior activities, would have opened the door to Mr. Windom's violent past as a drug dealer, and also would have provided a motive for the murders.

A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. See White v. State, 729 So. 2d 909 at 912 (citing Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)). [N.3 In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice]. Mr. Leinster clearly faced a dilemma in this matter. He could attempt to introduce mental health testimony suggesting that Mr. Windom was not of sound mind and that he was unable to formulate criminal intent. However, knowing of Mr. Windom's

past, Mr. Leinster knew that the introduction of this evidence would open the door to Mr. Windom's activities as a successful drug dealer in his community and what prosecutor Jeff Ashton described as "operation cookie monster." Mr. Ashton testified that "operation cookie monster" was a large scale drug investigation that was going on in Mr. Windom's community at the time of the murders, and the fact that the victims were cooperating with authorities in this drug investigation. Additionally, Mr. Ashton testified that he made this clear to Mr. Leinster, along with the fat that he was anxious to put this information into evidence should Mr. Leinster put on mitigation.

This evidence would have been extremely detrimental to Mr. Windom's interests. The jury would have certainly thought less of Mr. Windom as a person if they knew he was a drug dealer. Additionally, the evidence that Mr. Windom was a drug dealer would have provided a more sensible motive for his shootings. Mr. Ashton's memorandum, prepared ten days after Mr. Windom's arrest, indicated that some or all of Mr. Windom's victims were police informants. In both deposition and mitigation hearing testimony, witness Mary Jackson testified that Mr. Windom was concerned that Valerie Davis was about to inform on him. (R. 505). The record on appeal supports Mr. Ashton's testimony that Mr. Windom was involved in large scale drug sales. Mr. Windom and his girlfriends were in possession of large amounts of money at any given time. He and Valerie Davis bought a car for $8,500 in cash. (R. 398). His sister Gloria was able to come up with $15,000 in cash to engage Mr. Leinster. (R. 403). Further, Mr. Windom had $10,000 in cash in a safe located at the apartment of another girlfriend, Julie Harp. This safe was apparently stolen by someone before the murders (R. 417). These are fairly staggering amounts of money considering the uncontradicted fact that Mr. Windom had never been gainfully employed. The state argues that such large amounts of money obviously could be the source of serious disagreements between Mr. Windom and his fellow drug dealers.

If the jury had heard this evidence, Mr. Leinster would have been unable to present the shootings as senseless acts committed by a person in an altered

> mental state. the record is clear that Mr. Leinster attempted to buttress his argument that defendant was in [an] altered mental state at the time of the murders by Dr. Kirkland's testimony. Dr. Kirkland suggested the possibility that Mr. Windom might have been suffering from a fugue state at the time of the murders, but it did not include or rely on Mr. Windom's background history (TT 582-84, HT 336-338). Mr. Leinster attempted to limit Dr. Kirkland's testimony so as to allow him to attack the intent element of the crimes without opening the door to evidence of Mr. Windom's bad character, and potential motives for committing the murders. The record shows that this was Mr. Leinster's strategy throughout the guilt phase of the trial. Mr. Leinster emphasized in both the opening statement and in closing argument that the shootings were "a senseless act of violence" and that the jury should determine from the acts themselves, the inherent bizarreness of the acts (TT 277; 665). The state argues that the absence of a sensible motive for the shootings increased the likelihood that the jury might be persuaded that the shootings were a product of mental state or defect. . .

(PCR-2632-35).

As the trial court found below, counsel's decisions surrounding mental health testimony were driven by strategy. Such strategic decisions are almost immune from post-conviction attack. See Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000)(where this court "recognized that counsel cannot be ineffective for strategic decisions made during a trial.")(citing Medina v. State, 573 So. 2d 293, 297 (Fla. 1990)); United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)("[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of

a claim of ineffective assistance"). The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second guessed on collateral attack"). "Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983), cert. denied, 464 U.S. 1663 (1984).

This Court has in the past determined that an attorney is not ineffective in failing to provide background materials to a mental health professional where such background materials would reveal damaging information about the defendant. See Van Poyk v. State, 694 So. 2d 686, 692-95 (Fla. 1997)(defense counsel not ineffective for failing to present mental health professional defendant's prison records for review where such records contained damaging information). Further, this Court recently reaffirmed the principle that an attorney is not

ineffective when he chooses not to present available mental health evidence in the penalty phase based upon the potential for exposing the jury to negative information. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.") (citing Ferguson v. State, 593 So. 2d 508 (Fla. 1992) and State v. Bolender, 503 So. 2d 1247 (Fla. 1987)). See also Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995)(decision not to offer expert testimony as to mental condition at trial was reasonable tactical decision where counsel "feared that the presentation of psychiatric testimony would 'open the door' to allow the prosecution to parade the horrible details of each of the murders before the jury under the guise of asking the psychiatrist or other expert whether Bonin's acts conform to the asserted diagnosis.")(emphasis added).

Counsel's decision was patently reasonable in this case. It would certainly harm the defense to have evidence before the jury showing that Windom was a large scale drug dealer and that his motive for murdering at least two of the victims is that he thought that they either had or were about to inform on his drug

activities. As Leinster explained: "[T]he whole problem with Curtis Windom was that he was reputed to be a large scale cocaine dealer in the Winter Garden area, and that prevailed the whole fabric of that case." (PCR-16, 829).

Leinster used lay witnesses and Dr. Kirkland to show that Windom was in an altered state of mind on the day of the murders. Windom looked "wild" and that he had never looked like that before. (TR. 308, 399). Witnesses who knew Windom were shocked at his appearance and his acts. (TR. 308, 317, 327). Victim Kenneth Williams stated that Windom did not look normal. (TR. 381, 391). Jack Luckett testified that appellant was not only upset on the day of the murders, but had been upset and crying some nights before the murders. (TR. 327-28). Leinster was able to buttress this lay witness testimony by calling Dr. Kirkland. Dr. Kirkland testified that Windom might have been in a fugue state at the time of the murders, but he did not include or rely upon Windom's background or any particular facts of this case. (TR. 582-84).

Limiting Dr. Kirkland's testimony in this way allowed the defense to attack the intent element of the crimes without opening the door to evidence of Windom's drug dealing and motives for committing the murders. The record shows that Leinster pursued this strategy throughout the guilt phase of the

trial. Leinster emphasized in his opening statement and closing argument that the shootings were acts of “senseless” violence and that the jury can determine from the nature of the acts themselves and the inherent “bizarreness” of these acts that they were not the product of a rational mind. (TR. 277, 665-66). Leinster argued, in part: “There’s no motive for any of this. Not a motive that would justify killing anyone. There is no sense to any of this.” (TR. 684). Thus, Leinster was able to use the lack of a sensible motive for the murders to contend that the murders were the product of an altered mental state or defect.

Now, using “20-20 hindsight” collateral counsel contends that a different course should have been followed, presumably using the two experts selected by collateral counsel. However, that strategy, as found by the trial court, reveals that Windom was a successful drug dealer and provides a motive for most of the murders, thereby undercutting the argument Leinster was able to present to the jury. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.").

While collateral counsel opines that Leinster should have filed a motion-in-limine to ascertain whether or not extensive

mental health testimony would have opened the door to Windom's drug dealing, it is abundantly clear that such evidence is admissible. Experts talking about the possible effects of brain damage on Windom and his life would certainly be confronted with questions regarding his ability to pursue an occupation. Windom's chosen occupation happened to be that of a drug dealer.[1] Moreover, as the cross-examination of the defense experts below revealed, legitimate questions surrounding Windom's ability to form intent required a discussion of all possible motives for the murders, including the fact that Windom had reason to suspect that some or all of his victims' were police informants.

Although the trial court agreed that a motion-in-limine should have been filed, it clearly would not have granted such a motion. The trial court stated:

> ...I cannot conceive of a judge letting in mitigation evidence suggesting significant brain damage to a defendant and his inability to function independently,

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[1]Mental health experts are certainly confronted with aspects of his behavior which might support the various personality disorders reflected in the DSM-IV. The potential disorders in this case include that Windom had an antisocial personality disorder, which, would be consistent with pursuing an illegal occupation, such as drug trafficking. Although Dr. Beaver acknowledged that Windom's drug trafficking constituted an antisocial act, he rejected the possibility that appellant suffers from the disorder in that he did not show a lack of attachment to others or a lot of manipulativeness which is characteristic of the disorder. (PCR-15, 675-76).

> and then leaving out rebuttal evidence suggesting that he was actually one of the more successful drug dealers on Orlando's west side, that he had a motive for killing his victims since they were police informants thus interfering with his operation, and that he had a premeditated design to do so as explained to witnesses before the murders. While the motion in limine should have been filed, I cannot conceive of it having any beneficial effect on this matter.

(PCR-26, 2649). Appellant offers no legal authority to suggest that such a motion would have been successful under the facts presented here.

The fact that Leinster now opines that he would have pursued a different strategy if he had experts to testify that Windom was insane at the time of the murders is not dispositive[2]. As the trial court found below:

> Collateral counsel is quite correct in arguing that Mr. Leinster now says he would have pursued a different defense if Dr. Kirkland or some other expert had diagnosed brain damage. However, Mr. Leinster's opinion now does not determine whether the defense he used at trial constituted ineffective assistance. Breedlove v. State, 692 So. 2d 874 (Fla. 1997); Gibbs v. State, 604 So. 2d 544, 546 (1st DCA 1992). That determination must be made from the record and from other available evidence. Mr. Leinster's testimony at the hearing was that he did not have a perfect recollection of Mr. Windom's trial.

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[2]While Dr. Pincus clearly stated that in his opinion appellant was insane at the time of the offenses, Dr. Beaver made no such declaration. Indeed, while it is clear he believed that both statutory mental mitigators applied, it is not certain from his record that he could state appellant met the criteria to be considered insane at the time of the murders. (PCR-15, 678-682).

> While much has been made of Mr. Leinster's well-chronicled misfortunes since the date of this trial, none of his post-trial activities (including a current DOC sentence) shed any light at all on his activities and decisions in Mr. Windom's trial. His opinion now as to what he would have done at the 1992 trial is not dispositive. (PCR-26, 2634-35).

See Williams v. Head, 185 F.3d 1223, 1235 (11th Cir. 1999)(noting the inherent difficulty in reconstructing the facts surrounding an attorneys penalty phase investigation due to the passage of time and inability to review a lost file, stating, "[t]his is a prototypical circumstance in which we must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and 'recognize that counsel is strongly presumed to have rendered adequate assistance.'")(quoting Strickland, 466 U.S. at 689-90).

Aside from the trial court's finding that trial counsel pursued a reasonable strategy in limiting the use of expert mental health assistance, the record reveals that counsel's handling of mental health issues was not deficient. Collateral counsel did not establish that Dr. Kirkland's opinions would have changed with the benefit of any additional material furnished to him by collateral counsel.[3] Dr. Kirkland did state

[3]Interestingly enough, CCRC's legal "expert" in this case, Robert Norgard, has been accused by CCRC of rendering ineffective assistance in a capital case. See Johnson v. State, 769 So. 2d 990, 1000 (Fla. 2000).

that such background material furnished by collateral counsel was helpful, **he did not testify that his opinion had changed since the time of the trial.** (PCR-16, 764-65). Thus, collateral counsel did not carry his burden of showing that the background material was significant in the sense that it would have changed or altered Dr. Kirkland's opinion. See e.g. Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991)("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**")(emphasis added); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999) (finding no deficient performance for failing to procure Doctors Crown and Toomer; noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.").

Dr. Kirkland stated that he would have ordered additional tests if he had known of Windom's alleged history of head trauma. However, it appears that Dr. Kirkland did ask Windom about any history of significant head trauma during the clinical interview. Windom evidently failed to disclose the automobile accident wherein he was allegedly knocked unconscious at the age

of 16. Or, if Windom did report it, the injury did not appear significant enough to Dr. Kirkland to note it in his report. (PCR-16, 762, 769-71). From his report and notes, Dr. Kirkland's assessment of Windom was that he did not show "any significant signs of brain damage." (PCR-16, 772).

Kurt Barch testified that he investigated the injury Windom suffered from the car crash at the age of 16. He was told about the crash by Windom's mother and sister. (PCR-16, 851-52). Barch was given the name of the treating doctor and talked to him over the phone. (PCR-16, 852). The doctor indicated that Windom did not suffer any "long-term injuries or consequence" as a result of the accident. (PCR-16, 852).

Finally, Leinster testified that other than committing the acts themselves he had no basis to believe that Windom was mentally ill. In dealing with Windom, Leinster did not observe anything that would have tipped him off that he was mentally ill. (PCR-16, 845-46). This is not a case where trial defense counsel ignored obvious signs of mental illness. Windom had no history of prior psychiatric illnesses or hospitalizations. Thus, appellant has not shown that counsel was on notice to investigate any further the possibility of brain damage due to the car accident or other possible mental infirmities.

Appellant next asserts that he was denied his right to a

competent mental health assistance under Ake v. Oklahoma, 105 S. Ct. 1087 (1985). This claim is procedurally barred as it could have been raised on direct appeal. See Moore v. State, 820 So. 2d 199, 210 (Fla. 2002)(affirming summary denial of Ake claim where it could have been raised on direct appeal and was therefore procedurally barred from review in post-conviction motion). Moreover, appellant never established that Dr. Kirkland was unqualified or that the additional background materials gathered and furnished to him by collateral counsel would have changed his opinion at the time of trial. While additional background material would certainly have been beneficial, appellant failed to show the lack of such background information rendered Dr. Kirkland's evaluation inadequate or unprofessional.

The trial court rejected this claim below, stating in part:

> ...Defendant failed to prove this claim at the evidentiary hearing. Dr. Kirkland found, when he assessed Mr. Windom in 1992, that he showed no significant signs of brain damage. (HT 281). The evidence from Doctors Pincus and Beaver at the hearing was not persuasive. Even though these defense medical experts had an opportunity to review a far more extensive background record than did Dr. Kirkland, I cannot accept their opinions. Specifically, Mr. Windom's conduct on the day of the murders refutes rather than supports their opinions that his acts were the product of brain damage or delusion. Further, as previously noted, he was quite successful over a period of years as a drug dealer. After an extensive review of Mr. Windom's background, the record, and testing, Dr. Merin arrived at much the same conclusion

as did Dr. Kirkland in 1992.

> Mr. Windom has failed to prove that Dr. Kirkland's examination was inadequate in the sense that he was prejudiced by an unreliable outcome at either the guilt or penalty phases. His assessment and conclusions about Mr. Windom, however abbreviated, were largely correct. Therefore, this claim is denied.

(PCR-26, 2652).

In any case, had trial defense counsel pursued more defense oriented experts as did collateral counsel, there is no reasonable probability of a different result in this case. As found by the trial court below, the two defense experts utilized by collateral counsel reached conclusions about Windom's mental state which were simply not credible. Moreover, they were countered by the more credible testimony of Dr. Merin, who found that Windom was sane at the time of the offenses that neither statutory mental mitigator applied in this case.

After hearing and weighing the testimony of the experts developed below, the trial court held, in part:

> Mr. Windom has not met his burden to show a reasonable probability that the strategy he now claims Mr. Leinster should have employed regarding guilt phase mental health experts would have produced a different outcome at the guilt phase trial. It is clear that Mr. Leinster acted as he did to prevent the introduction of evidence about Mr. Windom's criminal drug activities, along with his potential motive to kill certain victims for being informers. Had he introduced such evidence, prosecutor Ashton would have had the platform he needed to build a different model of Mr. Windom. The notions suggested now by the collateral counsel, that Mr. Windom was a simple,

humble man who was mentally incompetent and unaware of the nature and consequences of his actions, would have been countered with the state's evidence showing that Mr. Windom was a remorseless killer bent on revenge for those who informed on him for illicit drug activities. ...

While I found both Dr. Pincus and Dr. Beaver to be bright, articulate, and authoritative witnesses, their conclusions were drawn from facts not supported by the evidence. As previously mentioned, both based their finding of brain damage, at least in part, upon Mr. Windom's history as related by himself and his family. Now, some nine years after the fact, Mr. Windom and his family related, in graphic detail, Mr. Windom's difficulties following his fall to a concrete floor quite literally from his mother's womb and a rollover traffic accident at the age of 16. While there is a wealth of evidence to suggest that Mr. Windom suffered from low IQ, depression, and a bipolar disorder, there is virtually no evidence to suggest that Mr. Windom had any trouble functioning prior to the date of theses murders. Virtually no medical records existed to verify either of the head injuries now claimed by Mr. Windom. Mr. Windom's family says that after his vehicle injury at the age of 16, he became more paranoid and failed to interact much with anybody. This appears to be a part of what the doctors based their conclusions upon. Yet in the evidentiary hearing, Mr. Windom's family testified that prior to this event, he was well-groomed, affable, and took pride in his appearance. One story seems to contradict the other.

I am also somewhat chagrined by the fact the Dr. Pincus seemed to focus extensively on the fact that this was not a clever assassination. The doctor seems focused on the fact that Mr. Windom committed the final murder in broad daylight, and then walked away from the crime scene leaving his car door open. While it is certainly possible that this is the product of some dissociative state, it is also entirely logical that Mr. Windom was finally overwhelmed by the enormity of what he had just done. Further, Dr. Pincus seemed to be struck by the fact that he believed Mr. Windom was telling him the truth. He stated on more than one occasion that Mr. Windom does

not prevaricate. He seemed to believe that this was why all of his historical information was accurate. Finally, as one other foundational support for his conclusions, Dr. Pincus mentioned several times about Mr. Windom's "mania" just prior to the murders.

Specifically, the evidence was that Mr. Windom gambled, gave away money, was sleeping with as many as three women in one day (hyper sexuality), and drinking excessively. As evidence of his excessive drinking, Mr. Windom told Dr. Pincus that he drank one six-pack of beer the night before all of this occurred. While this certainly does not appear to qualify as excessive drinking, Dr. Pincus theorized that people with brain damage are much more sensitive to alcohol than others. while it is easy to visualize where this type of behavior could portend brain damage in some individuals, theses activities seem equally consistent with those of a narcissistic drug dealer.

Dr. Beaver's conclusions seemed to draw upon the same facts as Dr. Pincus. I agree with the state that the doctors did not have a grasp of the violent social setting within which Mr. Windom lived at about the time the shooting occurred. Neither doctor knew of the fact that Mr. Windom's drug partner, Kenny Thames, was tortured and murdered within months of Mr. Windom's murders (HT 340, 568). The doctors never conversed with Mr. Leinster about Mr. Windom's lifestyle prior to these murders. With additional information, such as Mr. Ashton's testimony about "operation cookie monster," they might have believed that Mr. Windom's "edge" demeanor was more likely a realistic assessment of the setting in which he lived, rather than a product of irrational paranoia or delusion.

Both doctors seemed to have ignored Mr. Windom's own statements on the day of the murders, which would seem to belie Dr. Pincus' conclusions that these murders were merely a series of chance encounters with Mr. Windom acting out of momentary impulse. As previously noted, Mr. Windom suggested to one witness to be sure and read the papers the next day because his name would be in it. He was correct. The totality of the circumstances surrounding these events suggest to me in no uncertain terms that Mr. Windom's actions were knowing and premeditated. Testimony such as that of Doctors Pincus and Beaver would not have

altered that fact. Perhaps with additional medical testimony, well prepared, Mr. Leinster could have done more to obfuscate the facts by presenting the mitigation of brain damage. Given the other facts which could have and would have surfaced, however, I doubt it.

The testimony of Dr. Sidney Merin seemed more logically based and consistent with the facts. He did not find that Mr. Windom was suffering from a mental impairment which would have supported an insanity defense for his acts on the day of the shootings (HT 708-710). He did feel that Mr. Windom had a personality disorder and that some of his low sub-test results were the product of the fact that he suffered from a learning disorder and resultant low fund of information (HT 657, 736-737). Further, Dr. Merin drew these examples from his psychological testing of Mr. Windom (HT 629, 631, 635-639, 647-650, 653, 665, 669-671, 675-677) from his background review (HT 636-637, 689, 706-708), and from the facts of the shooting incident (HT 708-709). Dr. Merin's [sic] found that Mr. Windom's shooting of the victims was probably not the result of significant frontal lobe damage (HT 675-676, 776-779).

There is no reasonable probability that the guilt phase would have resulted in a different outcome if experts such as Dr. Pincus and Dr. Beaver had been prepared and called by Mr. Leinster. Their conclusions seemed contrived, and were based upon speculation about Mr. Windom's state of mind on the day of the shooting. their conclusions ignored much of the trial record evidence of Mr. Windom's statements on the day of the shootings which indicated that he knew what he was doing and had motives for his shooting the victims. Finally, the state argues vehemently that the most important item that Dr. Pincus and Dr. Beaver disregarded was the social setting in which defendant committed his crimes. The hearing evidence revealed that the nature of the Winter Garden drug trafficking culture was both violent and impulsive. Mr. Windom himself had been previously shot in a drive-by shooting. His house had been ransacked and his girlfriend threatened. He had been arrested a few months before he committed these crimes, and his drug sales partner, Kenny Thames, was tortured and murdered shortly after defendant was

> jailed for these murders. Given this setting, Mr. Windom's acts were arguably more a product of the drug culture within which he lived, than any mental infirmity.

(PCR-26, 2637-42).

The conclusion of the trial court below is accompanied by an extensive analysis which is clearly supported by the record in this case. Offering the defense experts would have been the vehicle by which the State could bring out the fact that Windom was a cocaine dealer and that Windom suspected that most of his victims either were informants or were about to become informants. Moreover, such expert testimony was not credible and was offset by the expert called by the State. See Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989)("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which the opinion is based.")(citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)). As a determination of credibility, the trial court's conclusion is virtually unchallengeable on appeal. Based upon this record, there is no reasonable probability of a different outcome even if appellant had presented the defense

oriented experts he called during the postconviction hearing.[4]

D. **Trial Counsel Was Not Ineffective In Failing To Present Additional Lay Witness Testimony During In The Guilt Phase**

Appellant argues that Leinster was ineffective in failing to develop and present additional lay witnesses during the guilt phase. Appellant contends that counsel should have uncovered or developed additional lay witnesses to support a mental health defense and explore the possibility of raising a claim of self-defense to the murder of Mary Lubin. The trial court rejected this claim, finding that counsel presented significant lay witness testimony and that any additional testimony was largely cumulative. The trial court stated:

> ...It is clear from the hearing evidence that Mr. Leinster's preparation of fact witnesses at the guilt phase could have been better. More could have been done, band both his efforts and those of his co-counsel could have been more intense. However, based upon the trial strategy chosen by Mr. Leinster, his preparation of fact witnesses at the guilt phase did not fall below the range of reasonable representation. All of the significant facts testified to by the fact

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[4]It must be remembered that Windom chose to hire private counsel in this case, Mr. Leinster. This is a choice that the defendant made. A choice which the State neither participated in nor encouraged. The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. This is particularly true in a case such as this where the defendant utilized counsel of his own choice.

> witnesses defendant called at the evidentiary hearing were either known to Mr. Leinster through his investigation, or in the case of the alleged birth injury, should have been uncovered in the questions that Mr. Barch asked of Mr. Windom's mother and sister.
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> Mr. Windom has argued that Mr. Leinster should have discovered a witness to show that Mr. Windom shot the last victim, Mary Lubin, in self-defense. However, no such witness was produced at the evidentiary hearing. Eddie James Windom did testify that he was present when Ms. Lubin drove up, but he stated that he jumped into the bushes and did not see whether Lubin had a gun (HT 429). He did not know how many shots were fired after that point (HT 430).
>
> ...
>
> Even if Mr. Leinster's background investigation fell below reasonable professional standards, Mr. Windom must still show that there is a reasonable probability that the outcome of the case would have been different had he called additional fact witnesses. Based on the evidence produced at the evidentiary hearing, there did not appear to be a reasonable probability of a different outcome. The fact witnesses who testified as to Mr. Windom's mental state added little to what Mr. Leinster brought out at trial. At trial Mr. Leinster was able to establish that Mr. Windom appeared to be in an altered state of mind on the day of the murders, that he looked wild, and that he was never like that (TT 308, 399). Victim Kenneth Williams stated that Mr. Windom did not look normal (TT 381, 391). Witness Luckett testified that Mr. Windom was not only upset the day of the murders, but had been upset and crying some nights before the day of the murder (TT 327-328). The fact witnesses called at the evidentiary hearing added very little to that which Mr. Leinster presented for the jury at the guilt phase trial.

(PCR-26, 2629-30).

Curiously, appellant alleges as support for his self-defense claim the fact that Barch interviewed a witness prior to trial who indicated that Lubin was reaching for a gun prior to Windom

shooting her. (Appellant's Brief at 55). At the time Barch interviewed him, this witness did not want to be involved or even give his name. Appellant failed to produce this witness during the evidentiary hearing and now wants this court to presume some type of prejudice from a non-existent witness. Ineffectiveness cannot be shown based upon such speculation. As observed by the District of Colombia United States Court of Appeals:

> ...a defendant basing an inadequate assistance claim on his or her counsel's failure to investigate 'must make a comprehensive showing as to what the investigation would have produced. The focus on the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.'

U.S v. Askew, 88 F.3d 1065 (D.C. Cir. 1996), cert. denied, 136 L.Ed.2d 340 (1996)(quoting Sullivan v. Fairman, 819 F.2d 1382, 1392 (7th Cir. 1987)). See also Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)(reversible error cannot be predicated on mere conjecture). The hearsay statement of some un-named witness does not constitute credible or even admissible evidence.

Ineffectiveness is not shown, as appellant apparently believes, by simply showing that something more or something different could have been done. "To state the obvious: the trial lawyers, in every case, could have done something more or

something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent and appropriate, but only what is constitutionally compelled.'" Chandler v. U.S., 218 F.3d 1305, 1312 (11th Cir. 2000)(en banc)(quoting Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)); See Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"). The trial court's order is well reasoned and supported by the record. Appellant has neither carried his burden of establishing deficient performance or resulting prejudice from counsel's alleged failure to present additional lay witnesses during the guilt phase.

Appellant attempts to bolster his claim by casting aspersions on trial defense counsel's character. However, there is no credible evidence to suggest Leinster was intoxicated during any court proceedings relating to the appellant. Moreover, the record reveals that counsel was a diligent advocate for Mr. Windom. The trial court noted below:

> ...During the hearing, some evidence was presented by Mr. Windom's relatives that Mr. Leinster smelled of alcohol during the trial. However, Mr. Barch, the presiding judge, and both prosecutors testified that they say absolutely no evidence of alcohol use or abuse. Further, they each alleged that, based upon Mr. Leinster's reputation (he had several prior alcohol and drug related arrests), they were looking

> for any signs of impairment. On this issue, I accept their testimony over that of Mr. Windom's relatives. Further, Mr. Leinster himself testified that while he had a well known problem with alcohol, he had never, even one time, appeared in court impaired or under the influence of alcohol.

(PCR-26, 2629). Again, as a determination of credibility, the trial court's conclusion is virtually unchallengeable on appeal.

E. Appellant Received Effective Assistance Of Counsel During The Penalty Phase Of His Trial

Leinster and Barch made a tactical decision to present their lay mitigation witnesses on before the judge alone rather than risk exposing Windom's drug dealing and possible drug related motives for the murders before the jury. This was a decision that Barch and Leinster both discussed and agreed to after the State rested their case. Barch testified that he and Leinster were surprised at the brevity of the State's case in aggravation and thought the State was waiting for them to open the door to allow them to introduce the "drug information." (PCR-16, 879-80). Consequently, they decided not to put their lay witnesses on in mitigation before the jury. The strategy they pursued was to present witnesses to show the good aspects of Windom in front of the judge without the risk of the jury learning about drug dealing. (PCR-16, 879). In fact, Barch, who was primarily responsible for preparing the penalty phase, testified that even

in hindsight, he thinks the decision was a wise one. (PCR-16, 882). See Darden v. Wainwright, 477 U.S. 168, 187-161, 91 L.Ed.2d 144, 160-161 (1986)(where counsel's choice not to present any mitigating evidence in the penalty phase and had the defendant make a simple plea for mercy was within the realm of sound strategy where available mitigation evidence might be countered by damaging information concerning the defendant's background).

After hearing the testimony presented below, the trial court found that trial counsel were not ineffective, stating;

> ...As previously noted, it is clear that Mr. Leinster and Mr. Barch knew about Windom's difficult background, including the fact that he had suffered a head injury in an accident. Further, Mr. Barch had checked out the alleged head injury, with a physician telling him that there was no lasting effect. Mr. Leinster knew Mr. Windom had been upset in the days leading up to the shooting, and he put this fact into evidence during the trial (TT 327-328). Strategically, as in the guilt phase, Mr. Leinster avoided presenting a full-blown background mitigation defense in front of the jury at the penalty phase because he did not want to permit the prosecutor to reveal the fact of Mr. Windom's involvement in a violent world of drug dealing (PT 39-47). Instead, Mr. Leinster's strategy was to argue to the jury in the penalty phase that Mr. Windom's acts were crazy (PT 95) and they were the product of a bizarre configuration of relays (PT 97).
>
> In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice. White v. State, 729 So. 2d at 912 (citing Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)). (Emphasis supplied). The haunting specter of the state introducing Mr. Windom's

> background as a violent drug dealer, including "operation cookie monster," in the event that Mr. Leinster chose to pursue evidence of mitigation in front of the jury, does not seem patently unreasonable. According to the testimony of the prosecutor, Mr. Ashton, Mr. Leinster's fears were not unfounded. Therefore, Mr. Windom has failed to show that this tactical decision constituted ineffective assistance.

(PCR-26, 2646-47). Appellant, on the record, stated that he agreed with counsel's decision not to present witnesses during the penalty phase before the jury. (PP. 39-48).

Appellant contends that counsel's tactical decision was unreasonable because evidence of drug dealing and his motives for murdering the victims would not even be admissible in the penalty phase. As support for this contention, appellant cites Hildwin v. State, 531 So. 2d 124 (Fla. 1988). Appellant's reliance upon Hildwin is misplaced. The point of this Court's opinion in Hildwin is that the State cannot introduce evidence of uncharged misconduct simply to attack the character of the defendant. Such misconduct must either relate to a statutory aggravating circumstance or be used to rebut evidence presented by the defense.[5] Hildwin recognizes that a defendant who places

[5]The State clearly attempted to introduce evidence of appellant's drug dealing in its case in chief and the federal investigation into his activities through two officers involved in the investigation. However, the trial court sustained defense counsel's objections, noting that such evidence did not relate to a statutory aggravating factor. (PP 9-14). Defense counsel noted that they were here for a murder case and they

his non-violent character in issue may be faced with rebuttal in the form of specific acts of violence even though a conviction was not obtained for the misconduct. Hildwin, 531 So. 2d at 127.

Sub judice, trial counsel's tactical decisions shielded the jury from hearing about such serious criminal misconduct. However, the path post-conviction counsel argues should have been taken clearly opens the door to such damaging information. Allegations of significant brain damage are certainly countered by Windom's ability to interact with others and pursue drug dealing as an occupation. Indeed, his own experts were familiar with appellant's chosen occupation and testified that his paranoia or motives might have been influenced by his drug trafficking. (PCR-16, 699-700). Moreover, questions concerning Windom's motive and intent are certainly fair game once a defendant places his mental condition into issue during the penalty phase.

It must be remembered that Barch and Leinster talked to appellant's friends and family members, and ultimately presented five witnesses before the judge prior to sentencing. (Supp. Tr. 471-545-531). The choice not to present their testimony in the

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specifically "avoided" making reference to drugs during the trial. (PP 14).

penalty phase before the jury therefore was clearly not a matter of negligence or simple failure to prepare.[6] Indeed, despite counsel's best efforts, appellant's reputation as a drug dealer was introduced and a drug related motive was revealed for the murder of Valerie Davis. (Supp. Tr. 504-507). However, the jury was not present to hear this damaging revelation.

Collateral counsel asserts that appellant's agreement with the decision to waive mitigation evidence in front of the jury was not valid. The record reveals that at the time of trial appellant agreed with his attorneys decision not to present his mitigation witnesses on before the jury. Appellant failed to testify during the evidentiary hearing below to support his claim. The trial court rejected this claim below, stating, in part:

> ...The only evidence taken at the evidentiary hearing regarding this matter was that of co-counsel, Kurt Barch. His testimony revealed that while Mr. Leinster did not consult Mr. Windom in his presence (Barch's) after the state rested its case (HT 365), he conceded that Mr. Leinster could have discussed strategy with Mr. Windom as was testified to in court on the record at the penalty phase (HT 386). Importantly, Mr. Windom did not take the stand and testify that his

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[6]This is in stark contrast to Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), where counsel had apparently only talked to the defendant's brother prior to the penalty phase and his calls to other potential witnesses were not returned. In Blanco not only was there virtually no penalty phase investigation by counsel, but the defendant's waiver of mitigation was not based upon any legitimate tactical consideration.

> record waiver was not knowing, voluntary, or intelligent. The bare allegations in the motion, without more, were insufficient to prove this sub-claim.
>
> When an evidentiary hearing is ordered, defendants have the burden of coming forward with some evidence to support his alleged grounds for relief. Failure to present any evidence in support of the allegations should result in denial of the claim. In contrast, there is no burden upon the state to produce any evidence to refute the allegations. See Boisvert v. State, 693 So. 2d 652 (Fla. 5th DCA 1997)(defendant's post conviction claim that his attorney failed to properly advise him regarding potential sentence was denied because he did not testify in support of the claim at the evidentiary hearing).

As there was no evidence offered at the hearing to establish insufficient consultation or that appellant's agreement with his attorneys strategic decision was invalid, this claim was properly denied. The record reflects that appellant was made aware of the mitigation witnesses counsel was prepared to present in open court. At the very beginning of the penalty phase Barch announced the following list of potential mitigation witnesses: "July Harp, Mae Tatum, Andre Walker, Willie May Rich, Gloria Windom, Adam Manuel, Frank Massey, Charlene Mobley, Geraldine Windom, Lena Windom, Dan Johnson. Possibly I may call the State's witness Mary Jackson. Lois Johnson, Shirley Bennan (ph), and I believe that is all at this time." (PP. 24). Since five mitigation witnesses were actually presented to the judge prior to sentencing, appellant was aware of the nature and quality of available mitigation at the time of sentencing. The

colloquy during the penalty phase below showed that appellant was aware of the mitigation that could be presented and that he agreed with his attorneys strategic decision not to present such evidence. (PP. 39-48). Appellant offered nothing to contradict the record evidence of a knowing, voluntary, and intelligent waiver.

Assuming, *arguendo,* that counsel was deficient in failing to procure the defense oriented experts post-conviction counsel retained to testify during the evidentiary hearing below, appellant has not satisfied the prejudice prong of Strickland. The trial court provided the following prejudice analysis below:

> The record indicates that the jury was instructed that they could find both the "extreme mental or emotional disturbance" and "substantially impaired capacity of Mr. Windom to appreciate the criminality of his conduct" mitigators (PT 103). The jury apparently did not find that these factors outweighed the aggravating factors, and there is no reasonable probability that the penalty phase outcome would have been different had Mr. Leinster called mental health witnesses such as Doctors Pincus and Beaver to testify. First, as previously discussed, calling such witnesses such witnesses would have resulted in rebuttal testimony about Mr. Windom's background, and would have opened the door to evidence which would have explained that he shot some or all of his victims because he believed they were police informants or they owed him money. When weighed against the effect of potentially devastating rebuttal testimony by the prosecutor, the beneficial effect of the mitigating testimony by Dr. Pincus and Dr. Beaver would not have been great. Additionally, as

> previously pointed out, the foundational support for much of the doctors testimony was lacking.
>
> Mr. Windom argues that Mr. Leinster's attempt to justify the decision not to put on penalty phase evidence by claiming it was strategic, since he was afraid that this would elicit information about Mr. Windom's alleged drug activities, was groundless. Mr. Windom argues his family's history of mental illness, his head trauma incidents, and other evidence would not have opened the door because it is irrelevant. As an example, collateral counsel cites the fact that Mr. Windom's brain damage is irrelevant to any drug activity and would not have opened the door. Respectfully, I disagree. Most of the evidence before this court indicates that Mr. Windom not only sold drugs, he was apparently quite good at it. Since he was unemployed, it seems fairly safe to assume that this illicit business enterprise was quite fruitful. As previously noted, he bout a car for $8,500 cash R. 398). His sister was able to come up with $15,000 in cash to engage Mr. Leinster ® 403), and Mr. Windom had $10,000 in cash in a safe in a girlfriend's apartment ® 417). Arguably, this would not only militate against a jury's finding of brain damage, it does not seem entirely unreasonable to assume that he had a higher level of intellectual functioning, and managed his enterprise quite well.

(PCR-26, 2647-48). See Breedlove v. State, 692 So. 2d 874 (Fla. 1997)(finding no prejudice under Strickland where the benefit of presenting additional witnesses during the penalty phase was largely offset by the damaging revelation of serious criminal misconduct).

Appellant's reliance upon this Court's decision in Rose v. State, 675 So. 2d 567 (Fla. 1996) is misplaced. Trial counsel in Rose did not even investigate the defendant's mental status and failed to uncover and present a large amount of potential

mitigation.[7] Significantly, this Court noted that in Rose the testimony of Dr. Toomer regarding the statutory mental mitigators during the evidentiary hearing was largely un-impeached. Rose, 675 So. 2d at 571.

In contrast, *sub judice,* not only did the State severely test the opinions of the defense doctors on cross-examination, but their testimony was contradicted by the expert called by the State, Dr. Merin. The trial court found Dr. Merin's testimony to be more credible than the testimony offered by the defense doctors. Moreover, the mitigation value of such testimony would be offset in this case by damaging information brought out through cross-examination and rebuttal evidence (drug dealing and drug related motives for the murders). A consideration not present in Rose.[8] Appellant "must demonstrate that there

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[7]The other potential mitigation included the fact that Rose grew up in poverty, that he was emotionally and physically abused throughout his childhood, that he was locked in a closet by his mother for extended periods, that he suffered severe head injury in a 30 foot fall and suffered blackouts, that he had a learning disability, and was a chronic alcoholic.

[8]Upon remand for presentation of the additional non-statutory and statutory mitigation discussed in Rose, the jury again recommended and the trial court once again imposed the death sentence. The sentence was affirmed on direct appeal by this Court. Rose v. State, 787 So. 2d 786, 802 (Fla. 2001)[Rose II]. Interestingly enough, this Court noted that the trial court correctly rejected the opinion of Dr. Toomer that the statutory mental mitigators applied where his testimony was successfully impeached by the State on cross-examination. Rose II, at S215.

is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 122 S.Ct. 179 (2001) (quoting Strickland, 466 U.S. at 695). Appellant made no such demonstration here. The trial court in this case found two valid statutory aggravating circumstances, CCP and prior violent felony convictions. These are two of the most weighty aggravating circumstances in Florida's sentencing calculus. See e.g. Larkins v. State, 739 So. 2d 90 (Fla. 1999)(noting that heinous, atrocious, or cruel and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme..."); Lindsey v. State, 636 So. 2d 1327 (Fla.), cert. denied, 513 U.S. 972, 115 S.Ct. 444, 130 L.Ed.2d 354 (1994). Of particular weight is the fact that Windom committed multiple murders, killing three people and attempting to kill a fourth.[9] Under the facts of this case, there is no reasonable probability

[9]Interestingly enough, appellant mentions the non-statutory mitigators that were developed included the fact he was caring toward others and that he neither used or abused drugs and alcohol. (Appellant's Brief at 62, 66). These circumstances are easily offset by the facts developed below. Appellant deprived one of his children of his mother and grandmother by murdering them. Moreover, while he may not have used drugs, he profited from selling the highly addictive drug cocaine to members of his community.

of a different sentence if Windom had presented the highly contested mental health evidence in mitigation. This evidence was not only contradicted by the State's expert, but was offset by the fact it opened the door to evidence that Windom was a successful cocaine dealer who suspected that two of his victims were police informants.[10] Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991)(additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide a reasonable probability of life sentence if evidence had been presented); Porter v. State, 788 So. 2d 917 (Fla. 2001)(additional mitigation of history of alcohol abuse, abusive childhood, and defendant's military history would not make a difference in the sentence where the murders committed were "cold, calculated, and highly premeditated").

F. The Trial Court Properly Rejected Appellant's Claim That His Trial Counsel Made Damaging Admissions And Conceded The State's Case

Appellant asserts that his trial counsel abandoned his role as an advocate and essentially conceded the State's case in aggravation during the penalty phase. The trial court rejected this claim below, stating, in part:

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[10]Based on the evidence presented by trial counsel below, the sentencing court found that appellant was under an extreme mental or emotional disturbance at the time he committed the murders.

> ...As to the comments made during the penalty phase, there was likewise no prejudice for the reasons set forth in the ruling on Claim III, Part 2. Again, Mr. Windom had already been convicted of first-degree premeditated murder, and counsel was attempting to restore credibility with the jury in order to make an argument for saving his client's life. There was no harm in conceding the validity of the jury's verdict during the penalty phase, and it was a reasonable trial strategy for Mr. Leinster to be realistic about the facts of the case in order to restore a measure of credibility to the defense as it moved into the penalty phase.
>
> Finally, as set forth in Claim III, Part 2, the apparent concession that Mr. Windom deserved the death penalty was not a concession at all. Mr. Leinster's comments conceding that Mr. Windom deserved the death penalty and conceding the existence of the CCP aggravator are taken entirely out of context. Mr. Windom had already been convicted of first-degree premeditated murder, and Mr. Leinster was faced with a daunting task. As he stated matter-of-factly, "My job is to try to save a man's life, end of story." It would have strained his credibility, thereby contributing to the difficulty of his task, to argue the verdict was unjust to the same jury which would be imposing a sentence. It was reasonable trial strategy for Mr. Leinster to be realistic about the facts of the case in order to restore a measure of credibility to the defense. The record also demonstrates that he argued vigorously ***against*** the death penalty in general and argued that executing Mr. Windom would be just another act of murder. ***See*** penalty phase transcript, pages 90-99.

(PCR-26, 2654).

Once again, the State can add little to the trial court's detailed order denying relief on this claim. The State notes, however, that appellant fails to show what compelling alternative argument was available to counsel regarding the

aggravating circumstances. Certainly trial counsel would not want to argue the aggravating circumstances, reminding the jury again of the horrible crimes for which they had convicted the appellant. Moreover, appellant fails to suggest an alternative closing argument that would have resulted in a life recommendation under the facts of this case. See Griffin v. Delo, 33 F.3d 895, 903 (8th Cir. 1994)("We agree with the district court that there is no reason to conclude that a longer or more passionate closing argument would have resulted in an alternative sentence or that the brief dispassionate argument undermined the reliability of the jury's sentence of death.").

The State submits that argument during the penalty phase is uniquely a matter of trial strategy and tactics. Leinster's argument against the death penalty in general and arguing to the jury that it was wrong to take a human life under any circumstances was certainly a reasonable argument under the circumstances of this case. Moreover, trial defense counsel reminded the jury of trial testimony indicating they had never seen Windom look like he did on the date of the murders and tied that testimony to the statutory mental mitigator of extreme mental or emotional disturbance. (PP. 97). Based upon this record, appellant has not carried his burden of establishing

either deficient performance or resulting prejudice. Accordingly, the trial court's order denying relief must be affirmed.

Any assertion that counsel was ineffective for failing to object to the language of the CCP instruction is procedurally barred. See Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988)("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). A challenge to the instruction was raised on direct appeal and this claim may not be relitigated under the guise of ineffective assistance of counsel. See Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel"). The trial court properly found this claim both without merit and/or procedurally barred below. (PCR-26, 2658-59). See Brown v. State, 755 So. 2d 616 (Fla. 2000)(finding claim of error in CCP instruction procedurally barred from consideration in post-conviction proceeding); Maharaj v. State, 684 So. 2d 726 (Fla. 1996)(Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without

an evidentiary hearing).

ISSUE II.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S REMAINING POST-CONVICTION CLAIMS. (STATED BY APPELLEE).

A. Appellant's Claim That He Is "Innocent" of First Degree Murder And Innocent Of The Death Penalty Was Properly Rejected

Appellant generally attacks his death sentence without providing any factual basis or argument for this Court to conclude that he is either "innocent" of first degree murder or "innocent" of the death penalty. This vague claim was properly rejected by the trial court below. The trial court stated in part:

> ...Again, the evidence of guilt presented at trial was overwhelming, so there is no reasonable probability that Mr. Windom could show actual innocence, and he has not alleged any facts to support such a finding. His claim that he lacked the mental capacity necessary to form intent is likewise conclusory. His death penalty innocence claims are procedurally barred because they were already raised and rejected on direct appeal. And, he refers to mitigating evidence "discussed elsewhere" but fails to explain how it renders his death sentence "disproportionate." Therefore, this claim is insufficient because it lacks supporting facts, and it is summarily denied.

(PCR-26, 2657-58). Appellant's lack of supporting facts or argument is sufficient to deny this claim on appeal. See Shere v. State, 742 So. 2d 215, n. 6 (Fla. 1999)).

This record reflects that appellant was a drug dealer whose chosen occupation was providing him with "stress" such as the

"rational" belief that someone was out to kill him and the probability of imprisonment based upon his recent arrests. Appellant wanted to settle all of his scores at once and recognized that his course of conduct would "get his name in the newspaper." Appellant murdered three people and attempted to murder a fourth. There is no question of his guilt and the death sentence is the only appropriate punishment based upon this record.

B. The Trial Court Properly Rejected Appellant's Claim That Florida's Standard Jury Instructions Improperly Shifted The Burden In The Penalty Phase

The trial court, citing Arbalaez v. State, 775 So. 2d 909 Fla. 2000), rejected this claim below as procedurally barred because it could have been raised on direct appeal. (PCR-26, 2558-59). Moreover, the trial court found that trial counsel was not ineffective in failing to object to these standard instructions. Citing Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(ineffective assistance claim based on failure to object to allegedly improper burden shifting instructions was without merit as a matter of law) and Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993)(Florida's standard jury instructions fully advise the jury of the importance of its role). The jury was properly instructed in this case. See Asay v. Moore, 27 Fla. L. Weekly S577 (Fla. 2002)("This Court has repeatedly rejected the

argument that the standard instruction shifted the burden to the defense.")(citations omitted).

C. <u>The Trial Court Properly Rejected Appellant's Claim That The Jury Was Improperly Instructed On The Cold, Calculated, And Premeditated Aggravator And That Counsel Was Ineffective In Failing To Object To The Instruction</u>

The trial court rejected this claim as procedurally barred below, stating:

> Mr. Windom alleged the jury instruction on the cold, calculated, and premeditated aggravating factor (CCP) was unconstitutionally vague and likely to cause jurors to automatically characterize first-degree murder as involving the CCP aggravator. However, this claim is procedurally barred. *See Brown v. State*, 755 So. 2d 616 (Fla. 2000)(claim of error in CCP jury instruction is procedurally barred from consideration in collateral action); *Pope v. State*, 601 So. 2d 221 (Fla. 1998)(claim that counsel was ineffective for failing to object to CCP instruction is procedurally barred).

(PCR-26, 2659-60).

The trial court, citing Klokoc v. State, 589 So. 2d 219, 222 (Fla. 1991), recognized that counsel did not have any legal basis for arguing the CCP aggravator was unconstitutionally vague. (PCR-26, 2659). This Court on direct appeal recognized that the evidence supporting this aggravator as to the first victim was compelling. Windom v. State, 656 So. 2d 432 (Fla. 1995). The murder of Johnnie Lee was cold, calculated and premeditated under any view of the evidence presented in this case. See Sireci v. State, 469 So. 2d 119, 120 (Fla.

1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.")

D. The Trial Court Properly Rejected Appellant's Claim That His Death Sentences Are The Result Of An Automatic Aggravating Circumstance

The trial court properly denied appellant's claim that his death sentence rests upon an automatic aggravator based upon the prior violent felony conviction aggravator being applied to his contemporaneous murder convictions. The trial court found this issue procedurally barred as it could have been raised on direct appeal. (PCR-26, 2660). See Vining v. State, 27 Fla. L. Weekly S654 (Fla. 2002)(finding claim that defendant's death sentence rests on an unconstitutional automatic circumstance "should have been raised on direct appeal and thus is procedurally barred"). Aside from being procedurally barred, as appellant recognizes, this issue has been decidedly adversely to him by this Court.[11] In fact, some variation of this issue was raised and rejected by this Court on direct appeal. Windom, 656 So. 2d at 440.

E. The Trial Court Properly Rejected Windom's Claim That Rules Promulgated By The Florida Bar Prohibiting Juror Interviews

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[11]There is nothing unfair about holding appellant accountable for having committed more than one murder. Appellant had ample time to reflect after murdering his first victim and refrain from committing his additional acts of murder.

In Unconstitutional

The trial court rejected this claim below, finding the issue procedurally barred. (PCR-26, 2660). Not only is the claim procedurally barred, but it is clearly without merit. Appellant has failed to identify any specific issue raising the possibility of juror misconduct which would warrant intrusive post-trial inquiry of the jurors. See Morris v. State, 811 So. 2d 661, 667 (Fla. 2002); Arbalaez v. State, 775 So. 2d 909, 920 (Fla. 2000)).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the decision of the trial court denying appellant's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to - Jeffrey M. Hazen, Assistant CCRC - N, 1533-B South Monroe Street, Tallahassee, Florida 32301, on this ___ day of January, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
COUNSEL FOR APPELLEE