IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2706

CURTIS WINDOM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Mr. Windom's motion for post-conviction relief by Circuit Court Judge Stan Strickland, Ninth Judicial Circuit, Orange County, Florida. This appeal challenges Mr. Windom's death sentence. References in this brief are as follows:

"R. ___." The record on direct appeal.

"PP-R. ___." The transcript of the penalty phase proceedings.

"Supp. R. ___." The supplemental record on appeal.

"PC-R. ___." The postconviction record on appeal.

All other references will be self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to develop the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Windom, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On March 3, 1992, an Orange County grand jury indicted Mr. Windom on three counts of first-degree murder and one count of attempted first-degree murder. (R. 153-55, 268-70) There was no indictment alleging any applicable aggravating circumstances under Florida Statute 921.141.

On August 28, 1992, a jury found Mr. Windom guilty on all counts as charged. (R. 301-04, 726)

On September 28, 1992, a jury recommended death for the three murder convictions. (PP-R. 108-09) On November 10, 1992, the trial court followed the jury's recommendation and imposed a death sentence for all three murder convictions. (R. 129-131, 305-08, 355-63)

On direct appeal, this Court affirmed Mr. Windom's convictions and sentences. Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 116 S.Ct. 571 (1995).

Mr. Windom filed his initial Rule 3.850 motion on March 19, 1997. On August 4, 2000, Mr. Windom filed an amended Rule 3.850 motion. The trial court held an evidentiary hearing in this matter June 4-7, 2001. The trial court thereafter denied relief in an order dated November 1, 2001. (PC-R. 2622-68) This appeal follows.

II. STATEMENT REGARDING THE PENALTY PHASE PROCEEDINGS

At the penalty phase of Mr. Windom's trial, his trial attorney waived the opportunity to present mitigation evidence

and witnesses to the jury. (PP-R. 38) Trial counsel stated, in a vague manner, that the decision to waive the presentation of mitigation was so that the jury would not hear about "cocaine." (PP-R. 39) Trial counsel cited to the possibility that the state may ask "questions in cross-examination that I may find highly objectionable." (PP-R. 40) Trial counsel stated that he spoke with Mr. Windom about the waiver during a lunch recess. (PP-R. 41) Mr. Windom, when asked whether he was in agreement with the waiver, stated, "yes. . . because he don't want the drug thing to come in." (Id.)

III. STATEMENT OF THE EVIDENTIARY HEARING FACTS

At the evidentiary hearing, Dr. Jonathan Pincus testified that he is a neurologist and described neurology as the study of medical illness that affects the brain. (PC-R. 509) Dr. Pincus was qualified as an expert in neurology. (PC-R. 511)

Dr. Pincus described a neurological evaluation as consisting of a historical and physical assessment. (Id.) Dr. Pincus conducted a neurological assessment of Mr. Windom and prepared a report of that assessment. (PC-R. 522)

Dr. Pincus reviewed background materials on Mr. Windom that were provided by postconviction counsel and explained that these materials were the type normally relied upon by mental health experts. (PC-R. 523-24) Dr. Pincus also reviewed the report of Dr. Craig Beaver, a videotape of Mr. Windom at the police station shortly after arrest, the deposition of Dr. Sidney Merin, and Department of Corrections

records pertaining to Mr. Windom's postconviction incarceration. (PC-R. 525-27) Dr. Pincus spoke with members of Mr. Windom's family. (PC-R. 528)

Dr. Pincus summarized his findings, stating that Mr. Windom was psychotic at the time of the crimes, is mentally ill, and is neurologically impaired. (PC-R. 529) Specifically, Dr. Pincus testified that, within a reasonable degree of medical certainty, Mr. Windom suffers from frontal lobe damage to the brain. (PC-R. 530)

Dr. Pincus testified that the frontal lobe of the brain is responsible for motivation, judgment, and conforming behavior to societal norms. (PC-R. 532) Frontal lobe damage results in an individual's inability to anticipate circumstances and change plans as a result. (PC-R. 535)

Dr. Pincus described Mr. Windom's cerebral damage as including abnormal visual tracking, motor impersistence, and abnormal reflexes. (PC-R. 541-42) Mr. Windom performed poorly on several physical tests administered by Dr. Pincus. (PC-R. 542-47) Mr. Windom also suffers from a longstanding speech impediment that is indicative of brain dysfunction. (PC-R. 549-50) Dr. Pincus testified that based on testing he administered, Mr. Windom is unable to read above a seventh grade level. (PC-R. 548) Dr. Pincus stated that Mr. Windom unequivocally suffers from brain damage. (PC-R. 549) Dr. Pincus found that Mr. Windom was not malingering. (PC-R. 547)

Dr. Pincus testified that there are several possible causes for Mr. Windom's brain damage, including an incident where Mr. Windom was

dropped onto the floor during labor and a rollover vehicle accident during which Mr. Windom was rendered unconscious. (PC-R. 550-52) Family members of Mr. Windom reported to Dr. Pincus that Mr. Windom's behavior changed significantly after the car accident, with Mr. Windom becoming increasingly paranoid and withdrawn. (PC-R. 552-53)

Dr. Pincus observed scars on Mr. Windom's back which Mr. Windom related were from beatings by his father. (PC-R. 553) Members of Mr. Windom's family related to Dr. Pincus that Mr. Windom's father was a very brutal man. (Id.) The family additionally related that Mr. Windom's father continually beat Mr. Windom's mother, splitting her head open and threatening her with a knife. (Id.) Dr. Pincus testified that in Mr. Windom's history he found many of the earmarks of abused children, including bed wetting. (Id.) As a consequence of the bladder control problem, Mr. Windom was often forced to go to school smelling of urine and was mercilessly teased as a result. (PC-R. 554) Dr. Pincus opined that the beatings could be a factor in Mr. Windom's brain damage. (Id.)

Dr. Pincus testified that in addition to suffering from brain damage, Mr. Windom was also psychotic at the time of the charged crimes. (PC-R. 557) Mr. Windom was suffering auditory hallucinations at the time of the crime whereby a voice was telling him he had to die. (PC-R. 557) Mr. Windom was also suffering from delusional paranoia at the time of the incident in that he thought people were plotting against and seeking to kill him. (Id.) Mr. Windom's family members related that he had a history of paranoia about being shot by someone else. (PC-R. 558) As a result of this paranoia, Mr. Windom

began to carry a gun for protection. (PC-R. 559) Further, he became unable to relax or sleep regularly and his usual neat appearance deteriorated. (PC-R. 560) Mr. Windom also suffered from mania, characterized by excessive gambling and spending, as well as hypersexuality. (PC-R. 560-61) Mr. Windom, not normally a heavy drinker, drank a six-pack of beer on the night before the charged crimes. (PC-R. 562) People with brain damage are more sensitive to the effects of alcohol and are less able to resist the temptations of mental illness. (PC-R. 562-63) Dr. Pincus stated that Mr. Windom's combined brain damage and mental illness decreased his capacity to control his behavior and added that the mental illness led to increased paranoia. (Id.) Brain damage prevented Mr. Windom from controlling the impulses created by the paranoia. (Id.)

Dr. Pincus stated, within a reasonable degree of medical certainty, that at the time of the crimes, Mr. Windom was unable to distinguish right from wrong or to premeditate the crimes for which he was charged. (PC-R. 564) Further, Dr. Pincus stated that the statutory mental health mitigating factors are applicable to Mr. Windom's case. (PC-R. 568-69) Dr. Pincus testified that he feels Mr. Windom suffers from dissociative disorder and this is specifically indicated by his inability to remember the shooting of his girlfriend. (PC-R. 570)

On cross-examination, Dr. Pincus stated that Mr. Windom indicated to him that he had previously been arrested for drug-related crimes. (PC-R. 572) Dr. Pincus reviewed reports of drug arrests of Mr. Windom and stated that he does not feel Mr. Windom's

drug arrests in the months preceding the homicides were the source of Mr. Windom's paranoia. (PC-R. 576-78)

Dr. Pincus opined that the shooting of Johnnie Lee was motivated by Mr. Windom's delusion that Johnnie planned to kill him. (PC-R. 588-89) Dr. Pincus did not agree that the shooting of Johnnie was well-planned or that the consequences were considered. (PC-R. 594)

Dr. Pincus testified that both defense and state mental health experts agree that Mr. Windom is being truthful about this lack of recollection of shooting his girlfriend. (PC-R. 599)

Dr. Pincus explained that persons with frontal lobe damage lose control under pressure. (PC-R. 603) Dr. Pincus testified that there was a history of this loss of control in Mr. Windom. (PC-R. 603-04) Although brain damaged persons maintain considerable free will, the scope of that free will is seriously diminished when mental illness and a history of abuse are factored in. (PC-R. 606)

The primary character traits of Mr. Windom, as described by witnesses to Dr. Pincus, were kindness and generosity. (PC-R. 604)

Dr. Pincus stated that DOC records of Mr. Windom's postconviction incarceration were insignificant in terms of the causation of Mr. Windom's brain damage. (PC-R. 610)

Dr. Pincus opined that the shootings of Johnnie Lee and Valarie Davis were not premeditated, given Mr. Windom's mental state. (PC-R. 617)

Dr. Pincus stated that all of the mental health experts in the case believe Mr. Windom is being truthful about his auditory

hallucinations. (Id.) Mr. Windom mentioned the auditory hallucinations to Dr. Kirkland prior to trial. (PC-R. 630)

Dr. Craig Beaver testified at the evidentiary hearing that he is a licensed psychologist and was admitted as an expert in psychology and neuropsychology. (PC-R. 633, 638)

Dr. Beaver performed a psychological and neuropsychological evaluation of Mr. Windom and reviewed background materials related to Mr. Windom prior to the evaluation. (PC-R. 638) Dr. Beaver also reviewed a videotape of Mr. Windom taken at the police station after his arrest. (PC-R. 639) Dr. Beaver also administered a variety of neuropsychological tests to Mr. Windom, reviewed affidavits of witnesses, and reviewed the deposition of Dr. Sidney Merin. (PC-R. 640-42) Additionally, Dr. Beaver discussed the facts of the case and the trial evidence with postconviction counsel. (PC-R. 641) Dr. Beaver testified that Mr. Windom was not malingering on the neuropsychological tests. (Id.)

Dr. Beaver stated that his testing revealed Mr. Windom to be in the dull normal to borderline mentally deficient range of intelligence and having particular difficulty in communicating and understanding language. (PC-R. 642-43) Mr. Windom has a speech impediment that could be an indication of neurological impairment. (PC-R. 644) Mr. Windom shows evidence of brain dysfunction, demonstrated by poor performance on tests of reasoning, judgment, and problem solving. (PC-R. 643-54)

Dr. Beaver stated that persons with brain damage tend to be unable to cope with stress effectively and, based on his review, Mr.

Windom was under a high level of stress at the time of the charged crimes. (PC-R. 646-47) Dr. Beaver learned that 2 years prior to the instant crimes, Mr. Windom had been shot in a drive-by shooting in which a woman he was with was killed and that he was much more anxious and nervous after that incident. (PC-R. 647) Additionally, in the time leading up to the instant crimes, Mr. Windom had his home burglarized, had received threatening phone calls, and had been arrested. (PC-R. 648) All of these things contributed to Mr. Windom being in a state of stress. (Id.) Mr. Windom's family members described an abrupt change in Mr. Windom's behavior in the 2 weeks prior to the homicides, including a marked change in his normally neat personal appearance. (PC-R. 648-49) Further, Mr. Windom was speaking rapidly and not making sense. (PC-R. 650)

Dr. Beaver testified that in the period leading up to the crimes, Mr. Windom was suffering from paranoia and auditory hallucinations and further, showed marked signs of paranoia in the tests administered by Dr. Merin. (PC-R. 650-51) Mr. Windom was also in a manic stage just prior to the shootings. (PC-R. 652)

Dr. Beaver testified that there is a history of psychiatric illness in Mr. Windom's family, including psychiatric hospitalizations of his mother. (PC-R. 653) The Minnesota Muitiphasic Personality Inventory ("MMPI") performed by Dr. Merin indicates that Mr. Windom is at high risk for psychotic episodes. (PC-R. 653) A person with brain damage is less able to cope with mental illness than a non-damaged person. (PC-R. 654)

Mr. Windom had head injuries at birth and at age 16. (PC-R.

658-60)

Dr. Beaver opined that Mr. Windom had a variety of factors acting upon him at the time of the crimes, including low intellectual functioning, brain damage, mental illness, limited social upbringing, and current personal problems, all of which came to a head, causing Mr. Windom to lose control. (PC-R. 661-62) Dr. Beaver stated his opinion that, based on the combination of factors acting upon him, the statutory mental health mitigating factors are applicable to Mr. Windom's case. (PC-R. 663, 683) Mr. Windom's thinking at the time of the crimes was not rational or realistic. (PC-R. 663)

Dr. Beaver testified that, based on all of the factors acting on Mr. Windom, his ability to think and make rational decisions was impaired at the time of the crimes. (PC-R. 664-65)

Dr. Beaver opined that Mr. Windom's actions at the time of the crime were nonsensical and not indicative of premeditation. (PC-R. 667-68)

Dr. Beaver testified that Mr. Windom suffered from dissociative amnesia for at least part of the offense. (PC-R. 668) Further, Dr. Beaver stated his opinion that Mr. Windom was experiencing an acute psychotic episode at the time of the offense and bordered on being delusional. (PC-R. 670, 676) Dr. Beaver opined that Mr. Windom suffers from either bipolar disorder, depressive disorder with mood congruent psychotic feature, or paranoid schizophrenia, all of which are major mental illnesses (PC-R. 676) Dr. Beaver also stated his opinion that Mr. Windom suffers from dementia and has a learning disability. (PC-R. 672-73)

Given the combination of mental health problems acting on Mr. Windom, Dr. Beaver stated his opinion that at the time of the crime, Mr. Windom was confused, dazed, and in fear for his life. (PC-R. 681-83) Mr. Windom's ability to plan a murder was impeded. (PC-R. 681)

Dr. Beaver testified that he found numerous elements of non-statutory mitigation in reviewing Mr. Windom's case. (PC-R. 684) Mr. Windom grew up in a poverty-stricken home, had an abusive father and an emotionally unstable mother, and suffered from a speech impediment for which he was teased by other children. (Id.) Mr. Windom also had a bedwetting problem and was forced to go to school with his clothes smelling of urine. (Id.) Mr. Windom struggled in school, receiving essentially no education, and eventually dropped out. (PC-R. 686) These factors would place Mr. Windom at a greater risk for mental illness. (PC-R. 709) Dr. Beaver also found that Mr. Windom was caring towards others. (Id.)

Dr. Beaver stated that his review of witness statements do not change his opinion of Mr. Windom's mental state at the time of the shootings. (PC-R. 718)

Dr. Beaver testified that speaking with witnesses about Mr. Windom's behavior in the years and weeks leading up to the crimes was critical to his diagnosis and further, that he would have been "seriously hampered" in his evaluation had he not had access to this information. (PC-R. 675-78) Dr. Beaver stated that it would be his obligation as a mental health professional to request such materials. (PC-R. 678)

Dr. Beaver testified that evidence of head injury would cause him to recommend neuropsychological testing. (Id.)

Dr. Beaver stated that Mr. Windom does not show signs of either borderline or anti-social personality disorder. (PC-R. 675-76)

On cross-examination, Dr. Beaver stated that he does not consider Mr. Windom's behavior in committing the homicide of Johnnie Lee rational. (PC-R. 694) Dr. Beaver agreed that Mr. Windom's legal problems with drug charges contributed to the duress he was under at the time of the crimes, but they were not the motivating force behind the crimes. (PC-R. 699-700) Dr. Beaver stated his opinion that Mr. Windom's extreme emotional distress is the most likely explanation for the crimes. (PC-R. 715) Dr. Beaver opined that based on his review of Mr. Windom's history, the charged crimes were out of character for him. (PC-R. 702) Further, Dr. Beaver stated that people with frontal lobe dysfunction can have long periods of docile behavior before a triggering event brings about an explosive episode. (PC-R. 703) Mr. Windom did not have a history of acting out with disinhibited behavior. (PC-R. 704)

Dr. Sidney Merin testified on behalf of the state at the hearing. (PC-R. 1102) Dr. Merin is a clinical psychologist and was admitted as an expert in psychology and neuropsychology. (PC-R. 1113)

Dr. Merin conducted an evaluation of Mr. Windom. (PC-R. 1114) Dr. Merin reviewed the reports and depositions of Doctors Pincus and Beaver, read the proffered trial testimony of Dr. Robert Kirkland, and reviewed Mr. Windom's DOC medical records. (PC-R. 1116-19) Dr.

Merin also reviewed the videotape of Mr. Windom subsequent to his arrest. (PC-R. 1119)

Dr. Merin conducted tests of Mr. Windom aimed at measuring his ability to make judgments and control behavior. (PC-R. 1120) Mr. Windom was not malingering during the interview. (PC-R. 1130, 1184) Dr. Merin stated that Mr. Windom, during the evaluation, had no problem with initiative or inhibition. (PC-R. 1126)

Dr. Merin was aware of a history of head injury in Mr. Windom. (Id.) Dr. Merin testified that Mr. Windom is of low intelligence and that there is a documented family history of low intelligence. (PC-R. 1128) Indicative of this was the low fund of information Mr. Windom demonstrated upon testing. (PC-R. 1133) Dr. Merin estimated Mr. Windom's I.Q. to be in the low 80's. (PC-R. 1149) Mr. Windom's speech is impaired. (Id.)

Dr. Merin administered an MMPI. (PC-R. 1132-72) Dr. Merin stated that Mr. Windom's MMPI score indicated suspicion and paranoia and his scores on the schizophrenia, mania, and depression scales of the MMPI were elevated. (PC-R. 1176, 1183)

Dr. Merin reviewed Mr. Windom's background and related that Mr. Windom grew up impoverished and uneducated, suffered from a bladder control problem for which he was made fun of, and suffered from a learning disability. (PC-R. 1179)

Dr. Merin opined that at the time of the crimes, Mr. Windom suffered from dissociative amnesia. (PC-R. 1191) Dr. Merin also stated that his opinion is that Mr. Windom suffers from an unspecified personality disorder. (PC-R. 1192) Dr. Merin further

stated that he did not find evidence of brain damage in Mr. Windom. (PC-R. 1197) Rather, Mr. Windom is a "slow thinker." (Id.)

Dr. Merin stated that he did not believe the statutory mental health mitigating factors apply and that Mr. Windom knew what he was doing at the time of the crime. (PC-R. 1199-1201)

On cross-examination, Dr. Merin testified that he last testified on behalf of a defendant in a postconviction action approximately 7 years ago and that most of his work is forensic, rather than clinical. (PC-R. 1207-09)

Dr. Merin conceded that a possible reason for Mr. Windom's low scores on inference and inductive reasoning tests is brain damage. (PC-R. 1218-21) A possible reason for Mr. Windom's low score on the finger tapping test, the Peabody Picture Test, and the Boston Naming Test, tests which measure frontal lobe performance, is brain damage. (PC-R. 1222-28)

Dr. Merin stated that he administered an incomplete intelligence test to Mr. Windom and, as a result, could not compute Mr. Windom's full scale I.Q. (PC-R. 1234)

Dr. Merin testified that the MMPI results indicated paranoia in Mr. Windom. (PC-R. 1236) Dr. Merin stated that the schizophrenia scale of the MMPI can be used to diagnose schizophrenia and that Mr. Windom's scores on this scale were significantly elevated. (PC-R. 1237) Dr. Merin felt that Mr. Windom's scores on the schizophrenia scale simply indicated that he was "weird." (PC-R. 1240) Dr. Merin conceded that the high schizophrenia scores could indicate schizoid personality disorder. (PC-R. 1241) The MMPI also indicated that Mr.

Windom is obsessive, manic, and depressed. (PC-R. 1238-39, 1243) Dr. Merin determined Mr. Windom's MMPI scores for paranoia, schizophrenia, obsessiveness, mania, and depression to be psychologically significant. (PC-R. 1243) Dr. Merin opined that Mr. Windom's score on the MMPI indicates someone with either bipolar disorder or psychotic depression. (PC-R. 1244) Mr. Windom's score does not indicate anti-social personality disorder. (PC-R. 1245)

Dr. Merin is aware that witnesses found Mr. Windom's behavior and appearance in the weeks leading up to the shootings unusual. (PC-R. 1247) Mr. Windom was suffering from a sleep disorder and his speech was incoherent during this time. (Id.) Dr. Merin stated that these factual circumstances could indicate bipolar disorder. (PC-R. 1248) Also, information that Mr. Windom was an excessive spender, gambled, and was hypersexual could indicate bipolar disorder. (PC-R. 1254)

Dr. Merin recalled his deposition statement that someone in Mr. Windom's state of paranoia may have interpreted the actions of Johnnie Lee as life threatening. (PC-R. 1251)

Dr. Merin reviewed Dr. Pincus' report. (PC-R. 1259) Dr. Merin stated that he did not find anything unreasonable in Dr. Pincus' findings. (PC-R. 1261) Dr. Merin reviewed Dr. Beaver's report and found it to be good, despite disagreeing with the ultimate conclusions. (PC-R. 1262-63)

Dr. Merin testified that he did not review any of the affidavits relating to Mr. Windom's behavior in the weeks prior to the shootings. (PC-R. 1274)

Dr. Robert Kirkland testified that he is a psychiatrist and that he evaluated Mr. Windom for competency and sanity at the time of trial. (PC-R. 760) Dr. Kirkland was not retained to evaluate Mr. Windom for the penalty phase. (PC-R. 761) Dr. Kirkland was appointed on August 14, 1992, did his evaluation of Mr. Windom three days later, and issued his report to Judge Russell on August 18, 1992. (Id.) The trial began on August 25th. (PC-R. 762)

In his report, Dr. Kirkland indicated that he lacked sufficient information to determine Mr. Windom's sanity at the time of the crime. (Id.) Further, Dr. Kirkland asked for such information, but never received it. (Id.) Dr. Kirkland did not recall being able to make a diagnosis of Mr. Windom. (PC-R. 763) Dr. Kirkland had no information at the time of trial regarding head injuries in Mr. Windom. (PC-R. 764)

Dr. Kirkland was provided with 3 volumes of background materials on Mr. Windom by postconviction counsel. (PC-R. 765) This material would have been helpful at trial. (Id.)

Dr. Kirkland stated that it would have been professionally difficult, if not impossible, to conduct an adequate evaluation with the information he had. (Id.) Dr. Kirkland would have asked specific questions had he been asked to evaluate Mr. Windom for penalty phase. (PC-R. 766) Dr. Kirkland did not evaluate Mr. Windom for applicability of the statutory mental health mitigators. (PC-R. 767) He did not evaluate Mr. Windom for non-statutory mitigation. (Id.)

Dr. Kirkland stated that it would be appropriate for the defense attorney to provide him with background information on the

client. (PC-R. 780)

On cross-examination, Dr. Kirkland related that Mr. Windom's trial attorney gave him practically no information. (PC-R. 774) At the time of Dr. Kirkland's evaluation, Mr. Windom had no recollection of shooting his girlfriend, Valerie Davis. (PC-R. 776)

Gloria Windom testified that she is Mr. Windom's younger sister and is one of nine children who grew up in Winter Garden, Florida. (PC-R. 719-20) As a child, Mr. Windom was "slow" and had speech and bladder control problems, resulting in teasing by other children. (PC-R. 720-21) Mr. Windom's bladder control problem began at age 13. (PC-R. 721) The family had no washer or dryer and Mr. Windom would often have to wear clothes that were soiled. (Id.) The family was very poor and had "nothing." (Id.) Mr. Windom's father worked as a fruit picker and often gambled away what little money he made. (Id.) The Windoms did not have health insurance and as a result, medical care was not an option. (PC-R. 722) The Windoms had no car and never had enough food. (Id.) Gloria testified that her father was abusive and would beat the children for no reason. (PC-R. 723) Once, her father beat her mother in the head with a tire iron, almost killing her. (Id.)

Gloria was told that when Mr. Windom was born, he hit his head on the floor during the delivery. (Id.) Mr. Windom was in a car accident at approximately age 15 where he suffered a concussion and was hospitalized for several days. (PC-R. 723) As an adult, Mr. Windom attempted to keep himself well-dressed and groomed, but in the weeks prior to the crime, Mr. Windom's appearance changed. (PC-R.

725) He was disheveled, smelled bad, and stopped wearing a shirt or shoes. (PC-R. 725, 727.) Gloria stated that Mr. Windom did not drink alcohol. (PC-R. 725) Mr. Windom gambled on "everything." (PC-R. 726)

Gloria stated that she is not an investigator and does not know what mitigating evidence is. (PC-R. 738) Mr. Leinster did not hire an investigator. (Id.)

Mr. Windom's lawyers never asked Gloria about his background, but she would have testified to such matters had she been asked to. (PC-R. 728)

On cross-examination, Gloria testified that she was the main contact with Curtis' trial attorney, Ed Leinster, but Leinster did not want to talk to mitigation witnesses that Gloria procured. (PC-R. 728-29) Gloria told Mr. Leinster that Curtis needed psychological help. (PC-R. 730) Gloria never talked to Dr. Kirkland. (Id.)

Lois Tatum testified that she is Mr. Windom's oldest sister and that she witnessed her mother's labor with Mr. Windom. (PC-R. 740-41) Her mother was attempting to walk to the bed when the delivery occurred and Mr. Windom hit his head on the cement floor. (PC-R. 741) Lois does not remember Mr. Windom being taken to the hospital as a result.(PC-R. 742) Lois remembers Mr. Windom being in a car accident as a teenager. (Id.) The vehicle flipped several times, rendering Mr. Windom unconscious. (PC-R. 743) After the accident, Mr. Windom suffered headaches and began to have difficulties with his speech. (PC-R. 745)

Lois recalls meeting Mr. Windom's trial attorneys, but never

having a discussion with them. (Id.) Lois would have testified at trial had she been asked to do so. (PC-R. 746)

Eddie Windom testified that he is Mr. Windom's younger brother. (PC-R. 782) Curtis had speech and bladder control problems as a child, resulting in name calling by other children. (PC-R. 783-84) Mr. Windom's father was the only income provider and he often gambled away the money he was able to make. (PC-R. 785) He was also abusive to the children and their mother, often without reason. (Id.) Eddie described the Windom home as never having enough food. (PC-R. 786)

Eddie related that Mr. Windom became, because of childhood teasing, very meticulous about his appearance as he got older, wanting to become "close to perfect." (Id.) Mr. Windom never drank or used drugs. (Id.) Eddie related that during the weeks preceding the crimes, Mr. Windom's appearance suffered. (PC-R. 737) Specifically, he did not wear a shirt or shoes, his hair was unkempt, and he wore the same dirty clothes continuously. (Id.) Eddie stated that Curtis had plenty of brand new clothes that he could have worn. (PC-R. 788) Also, Eddie testified that in the weeks leading up to the crimes, he often saw Curtis driving around at 3 or 4 a.m. (PC-R. 788)

Eddie testified that he did not meet Mr. Barch, but did meet Mr. Leinster once when he took money to him. (PC-R. 790) Eddie stated that he wanted to talk to Leinster, but Leinster said he was too busy. (Id.) Leinster would not discuss the case. (PC-R. 791)

Had Eddie been called to testify at the trial, he would have. (PC-R. 792)

On cross-examination, Eddie testified that he was surprised to hear that Curtis had been involved in the shootings. (PC-R. 795)

Willie Mae Rich testified that she is a neighbor of the Windoms and knew Curtis from the time he was born. (PC-R. 889) Willie Mae saw Mr. Windom in the weeks preceding the crimes, either on the street or in the restaurant she was managing. (Id.) Willie Mae had a conversation with Mr. Windom during this time period and noted that he acted strange. (PC-R. 890) He was hyper, shaking, and dirty, which was different from his normal manner and appearance. (PC-R. 890-91) Willie Mae saw Mr. Windom walking the street without a shirt or shoes. (PC-R. 891) Willie Mae stated that she engaged Mr. Windom in a conversation in order to tell him that she heard someone was going to kill him. (PC-R. 892) Mr. Windom replied that he had heard that too, but did not know who wanted to kill him. (Id.)

Willie Mae talked to Kurt Barch once prior to trial, but never spoke to Ed Leinster who failed to show up at an appointment he scheduled with Willie Mae. (PC-R. 893) Mr. Barch asked questions relating to Mr. Windom's character. (PC-R. 893) Willie Mae testified that she came to the trial and encountered Mr. Leinster outside the courtroom prior to court. (PC-R. 894) Willie Mae stated that "you could smell alcohol all over him." (Id.) Other people smelled alcohol on Mr. Leinster as well. (Id.)

Willie Mae would have testified at trial had she been asked to do so. (PC-R. 895)

On cross-examination, Willie Mae stated that Mr. Windom was a

well-mannered young man who got along with most people. (PC-R. 897) The only person Willie Mae remembers Mr. Windom having differences with is Mary Lubin. (Id.) Willie Mae recalled an incident where Mr. Windom was shot. (PC-R. 899)

Upon court examination, Willie Mae testified that the incident where she smelled alcohol on Mr. Leinster occurred just outside the courtroom. (PC-R. 902) She could smell the alcohol on his body. (PC-R. 903)

Mary Jackson testified that she is employed by the Department of Health and has a master's degree in criminal justice. (PC-R. 905) Mary attended Mr. Windom's trial and came into contact with his lawyer, Ed Leinster. (Id.) Mary and Ed Leinster were speaking outside the courtroom during a recess and Mary noticed that Leinster "reeked very strong of alcohol." (PC-R. 905-06) The two were approximately one foot apart. (PC-R. 906) This was the only time Mary spoke to Leinster. (Id.) Mary was at the courthouse because she had been subpoeaned by the state. (Id.)

On cross-examination, Mary stated that she testified at trial and that the conversation with Mr. Leinster took place the same day that she testified. (PC-R. 907-09)

Charles Brown testified that he knows Mr. Windom and that they grew up together in Winter Garden. (PC-R. 910) Charles testified that he was in Winter Garden the day of the shootings and he heard people talking about Johnnie and Mr. Windom. (Id.) Charles talked to both Johnnie and Mr. Windom that day. (Id.) Charles was approximately 150 yards away from the shooting of Johnnie Lee when it

occurred and had a clear view of the incident. (PC-R. 912) Charles did not see Jack Luckett at the scene of the incident. (Id.) Charles did not hear Mr. Windom say anything prior to shooting Johnnie. (PC-R. 911) Mr. Windom did not try to escape following the shooting of Johnnie Lee. (Id.) This incident seemed out of character for Mr. Windom. (PC-R. 912)

Charles was not contacted by Mr. Windom's trial attorneys. (Id.) Had he been asked, he would have testified truthfully. (Id.)

Eddie James Windom, Curtis Windom's oldest brother, stated that when Curtis was in his early 20's, he was a nice, well-dressed, well-groomed young man. (PC-R. 915)

On the day of the incident, Eddie James encountered Curtis behind Brown's Bar, shaking and holding a gun. (Id.) Curtis kept saying that he had shot Johnnie Lee. (PC-R. 916) Curtis was talking "real fast." (PC-R. 917) Curtis said nothing about shooting anyone else. (Id.) Andre Walker was also there behind the bar. (Id.) Curtis put the gun to his own head and tried to shoot, but Eddie James put his finger inside the trigger guard and prevented Curtis from shooting himself. (Id.) Eddie James then jumped behind a tree because he was not sure what Curtis would do next. (Id.) Curtis did not seem to know who Eddie James was. (PC-R. 918) Eddie James does not recall hearing any police sirens while they were behind the bar. (PC-R. 919) There was a lot of commotion going on and Curtis seemed oblivious to it. (Id.) As Curtis started walking away from the area behind the bar, Eddie James and Andre Walker followed him. (PC-R. 920) When Curtis got to the road, Eddie James tried to grab him and

take the gun away. (Id.) At that point, Mary Lubin drove up and yelled at Curtis, asking why he shot her daughter. (Id.) Mary Lubin then reached for something under her car seat. (Id.) Eddie James jumped into some bushes at this point because he was afraid of Mary shooting at both he and Curtis. (Id.) Eddie James knew Mary Lubin to carry a gun. (PC-R. 921) After Mary Lubin was shot, Eddie James and Andre Walker disarmed Curtis and took him to Walker's house. (Id.)

Lena Windom testified that she is Mr. Windom's mother and that when she delivered Mr. Windom, "he dropped out on the floor." (PC-R. 923) Lena's neighbors called the doctor because the Windoms did not have a phone. (PC-R. 924)

Judge Dorothy Russell testified that she presided over Mr. Windom's trial proceedings in 1992. (PC-R. 936) Judge Russell was familiar with Mr. Windom's trial attorney, Ed Leinster. (PC-R. 937) Judge Russell was aware prior to the Windom case that Leinster had legal troubles related to the ingestion of alcohol and cocaine. (PC-R. 941) Judge Russell stated that in all cases where Leinster was involved, she observed for signs of intoxication and made a point of trying to smell Leinster's breath for signs of alcohol use. (Id.) Judge Russell "watched with Leinster probably more than any lawyer that came before me because I knew he had more problems." (PC-R. 942) Judge Russell stated that during Mr. Windom's case, she did not observe Leinster to be under the influence of alcohol or drugs. (PC-R. 943)

On cross-examination, Judge Russell agreed that she was not with Mr. Leinster at all times throughout Mr. Windom's trial and that

the only time she saw Leinster was in the courtroom. (PC-R. 952-53) Judge Russell has no idea if Leinster was under the influence of alcohol when preparing for Mr. Windom's trial. (PC-R. 953) Judge Russell stated that in her experience as a prosecutor and judge, she has never known a defense attorney to begin conducting depositions one week prior to trial. (PC-R. 954) In her honor's experience, a defense attorney would "probably not" retain a mental health expert 2 weeks prior to trial in a triple homicide case. (PC-R. 955)

Jeff Ashton testified that he prosecuted the Windom case and that he knew Ed Leinster prior to the Windom trial. (PC-R. 1044, 1047) Ashton stated he was familiar with Leinster's normal speech and demeanor. (PC-R. 1045) Ashton opined that Leinster did not appear to be under the influence of alcohol or drugs during the Windom trial. (PC-R. 1048) Ashton did not recall smelling alcohol on Mr. Leinster during trial. (Id.) Ashton stated that Leinster's appearance during trial was "droopy-eyed" which was Leinster's normal appearance, an appearance which would be abnormal for most persons. (PC-R. 1053)

Ashton stated that he would have put on evidence of drug involvement had the "door been opened" to do so. (PC-R. 1064) Ashton did not put this evidence on in the guilt phase because of appellate prospects, but was prepared to put it on during the penalty phase. (PC-R. 1065) Ashton stated that he made this intention known to Leinster. (Id.) Ashton stated that a federal drug task force was looking into Mr. Windom's drug involvement and that he submitted a memorandum to State Attorney Lawson Lamar regarding the issue. (PC-R.

1058-61) Ashton opined that Mr. Leinster's failure to put on a mental health expert at penalty phase prevented him from bringing out evidence about Mr. Windom's drug involvement. (PC-R. 1080)

On cross-examination, Ashton stated that he was aware that Leinster had problems with alcohol and cocaine. (PC-R. 1074) Ashton knew Leinster had an arrest history, including arrests for DUI. (PC-R. 1075) Ashton did not know what Mr. Leinster was doing while preparing for Mr. Windom's case. (PC-R. 1077) Ashton conceded that a defense motion *in limine* regarding Mr. Windom's drug involvement may have prevented such evidence from being introduced. (PC-R. 1081)

Janna Brennan testified that she assisted Jeff Ashton in prosecuting Mr. Windom and was familiar with Ed Leinster. (PC-R. 1089-90) Brennan testified that she did not notice that Leinster was under the influence of drugs or alcohol. (PC-R. 1090) Brennan conceded that she was never present with Mr. Leinster outside of court and does not know what he did while away from court. (PC-R. 1094)

Brennan stated that Leinster "wasn't flippant" during proceedings. (PC-R. 1092)

On cross-examination, Brennan stated that she did not recall record statements Leinster made during the penalty phase about having a "tee time" scheduled and waiving closing argument. (PC-R. 1093) Brennan opined that she did not think Leinster's reference, during closing argument, to being "the firm of Christ and Houdini" was flippant. (PC- R. 1096)

Ed Leinster testified telephonically from Lake Correctional

Institution, a prison within the Florida Department of Corrections. (PC-R. 821) Leinster represented Mr. Windom at trial. (PC-R. 805) This may have been Leinster's first capital murder trial, although Leinster is not sure. (Id.) Leinster did not recall attending any CLE courses related to capital defense or preparation of a mental health defense prior to representing Mr. Windom. (PC-R. 806) Leinster took no law school courses related to mental health and the law. (Id.)

Leinster was Mr. Windom's lead attorney, but eventually asked Kurt Barch to assist him. (Id.)

Leinster reviewed the reports of Doctors Pincus and Beaver prior to his testimony. (PC-R. 807) Leinster testified that if he had experts who could have testified that Mr. Windom has brain damage and was insane at the time of the crimes, he would have used them. (PC-R. 808) Leinster stated that he would have used such experts regardless of whether the state would have presented evidence that Mr. Windom was a drug dealer. (Id.) Leinster also stated that if he had experts who could have testified that the statutory mental health mitigators applied to Mr. Windom, he would have used them despite the state's attempt to present evidence that Mr. Windom was a drug dealer. (PC-R. 808-10) Leinster would have used evidence of Mr. Windom's mental illness. (PC-R. 810) If Leinster had expert mental health testimony that Mr. Windom could not have formed the intent necessary for the aggravating factor of cold, calculated, and premeditated, he would have used it. (Id.) Leinster did not remember Dr. Kirkland testifying at trial and does not remember any specific

dealings with Kirkland. (PC-R. 812) Leinster testified that he had no strategic reason for failing to obtain a confidential mental expert and that his reliance on Dr. Kirkland was probably faulty. (PC-R. 820) Leinster opined that if Mr. Windom has brain damage and mental illness, the jury should have heard about it. (PC-R. 843) Leinster has never presented a defense where brain damage was an element thereof. (PC-R. 846)

Leinster testified that he assumed a first-degree murder conviction was inevitable as to victim Johnnie Lee, regardless of what he did at trial. (PC-R. 813) Leinster stated that based on this view, he was concerned about his credibility in challenging the first-degree charge as to Johnnie Lee. (Id.) Leinster testified that he had no conversations with Mr. Windom regarding conceding guilt as to the first-degree murder of Johnnie Lee. (PC-R. 814) Mr. Windom did not agree to this strategy. (Id.)

Mr. Windom waived the presentation of mitigating evidence during the penalty phase based on Leinster's advice. (PC-R. 817) Leinster stated that his strategy for not presenting mitigating evidence during penalty phase was that it would open the door to evidence that Mr. Windom was a drug dealer. (Id.) Leinster did not have a strategy for failing to file a motion *in limine* regarding evidence of drug dealing. (Id.)

Leinster did not hire an investigator despite having an order from the court for investigation costs. (PC-R. 818) Leinster stated that he did talk to Mr. Windom's family in preparation for trial. (PC-R. 819) Leinster stated that Mr. Barch was responsible for the

penalty phase of the case. (Id.)

Leinster has no idea where his files pertaining to the Windom case are. (PC-R. 821) Leinster is not currently a member of the Florida Bar. (Id.)

On cross-examination, Leinster testified that he "wouldn't have bet money" that he could have avoided a first-degree conviction for victim Johnnie Lee. (PC-R. 826)

Leinster opined that he would have used brain damage evidence without regard for opening the door to evidence of drug dealing, but he would not have done so with evidence of poor upbringing or childhood trauma. (PC-R. 828)

When questioned about potentially putting Mr. Windom on the stand to explain his actions, Leinster testified that Mr. Windom could not have explained why he acted as he did. (PC-R. 830) Leinster remembers very little of the Windom trial. (PC-R. 838)

Leinster testified that he hoped to obfuscate things during the trial. (PC-R. 840-41)

Kurt Barch testified that in 1992 he shared office space with Ed Leinster and assisted Leinster with the Windom case. (PC-R. 848)

Leinster asked Barch to be responsible for developing mitigation evidence. (PC-R. 849) There was no investigator on the case. (Id.) Barch was told by friends of Mr. Windom that he should hire an investigator, preferably an African-American, because Barch would have less success gaining information in the Winter Garden community. (PC-R. 850) Barch told Leinster, after talking with some witnesses, that Leinster needed to hire an investigator to look into

guilt phase, as well as penalty phase issues. (PC-R. 851) Barch told Leinster that the witnesses would not open up to him. (PC-R. 869) An investigator was never hired. (PC-R. 852) Barch learned that there was mitigation evidence which could be presented, including positive character attributes and mental health evidence. (PC-R. 851) Barch relayed this information to Leinster. (PC-R. 861) Barch was aware of the car accident that Mr. Windom had been in and talked to the treating physician. (PC-R. 852) Leinster was responsible for dealing with Dr. Kirkland. (PC-R. 853) Barch heard nothing of a "fugue state" defense until Kirkland testified at trial. (Id.)

Barch did not participate in trying the guilt phase and made no strategic decisions. (PC-R. 854) Leinster made the decision not to put on penalty phase witnesses. (Id.) Barch stated that this decision was made out of a fear that the state would elicit evidence that Mr. Windom was a drug dealer. (Id.) Barch testified that he and Leinster did not discuss the strategy with Mr. Windom. (PC-R. 856)

Barch stated that Leinster did not pay a lot of attention to the case and was "at home most of the time." (PC-R. 857) Barch stated that he covered for Leinster "a lot" during 1992, getting continuances and negotiating pleas for Leinster. (Id.) Barch covered for Leinster in court "almost every day." (PC-R. 859) Barch testified that "Ed drank a lot, he was forgetful, he was not attentive to his cases, and quite frankly, his main importance was not to provide a legal service but to collect money from clients." (PC-R. 858) Barch would often cover for Leinster's drunkenness, including with Judge Russell. (PC-R. 859) Barch stated that despite

his explanations on Leinster's behalf, Judge Russell "probably knew where Ed was." (PC-R. 883)

On cross-examination, Barch testified that he was "in and out" of the courtroom during Mr. Windom's trial. (PC-R. 861) Barch stated that it is "hard to say" whether Leinster was under the influence of alcohol during trial because Leinster successfully hid his alcoholism. (PC-R. 862) Leinster had alcohol-related shakes during trial. (PC-R. 863) Leinster also had the flu at the beginning of trial. (Id.)

Barch stated that he does not remember Mr. Windom's family telling him about Mr. Windom's head injury at birth. (PC-R. 866)

Barch stated that one of the guilt phase witnesses he spoke with witnessed the Mary Lubin shooting and had seen her reaching for a gun. (PC-R. 868) Barch does not think Leinster contacted this witness. (PC-R. 870)

A mitigation witness told Barch that Mr. Windom helped out financially in the community, once donating money to support youth athletic programs. (PC-R. 868) Barch also learned that Mr. Windom had saved the life of his sister. (PC-R. 878)

Barch was in the courtroom when Leinster waived the presentation of mitigation witnesses. (PC-R. 871) Regarding the waiver, Barch stated "We did not discuss it with Mr. Windom." (PC-R. 872) Barch disagreed with Leinster's statement in the trial record to Judge Russell that Leinster discussed waiving the presentation of mitigation with Mr. Windom. (PC-R. 877) Barch recalled being with Leinster during the entire lunch break when Leinster said he spoke

with Mr. Windom. (Id.)

Robert Norgard testified that he is a member of the Florida Bar and has extensive experience in capital cases. (PC-R. 966-73) Mr. Norgard was admitted as a capital defense expert. (PC-R. 974)

Norgard stated that prior to 1992, there were CLE programs in the area of capital defense that attorneys could avail themselves of. (PC-R. 977) Norgard testified that a "Life Over Death" seminar took place from January 30 through February 1, 1992 and that the seminar was available to all licensed attorneys. (PC-R. 978-79) There was a session on penalty phase investigations and numerous sessions on mental health evidence. (PC-R. 979-81)

Norgard testified that the community standard for conducting the defense of a capital trial was firmly established as of 1992. (PC-R. 983) As of 1992, it was clearly established within the defense community that an extensive investigation into the defendant's background must be done. (PC-R. 984) The wide range of non-statutory mitigation was well recognized. (Id.) Norgard testified that 300-500 hours of investigation is necessary for developing mitigation evidence. (Id.) In 1992, there was an expectation within the defense community, that persons conducting the preparation of mitigating evidence would have specialized knowledge. (PC-R. 986)

The community standard in 1992 dictated that an attorney initially associate with a confidential mental health expert and, when determining whether a not guilty by reason of insanity plea was appropriate, the community standard necessitated consultation with an

expert. (PC-R. 987-89) The expert should be provided with the greatest amount of information possible and it is the duty of the defense lawyer to provide this information regardless of whether the expert asks for it. (PC-R. 992-93) The attorney should have the expert evaluate for competency, sanity, and non-statutory and statutory mitigation. (PC-R. 994) If the expert is unfamiliar with mitigation evidence, he should be educated as to such. (PC-R. 995) In addition to expert consultation, evaluation of an insanity defense would involve investigation of lay witnesses. (PC-R. 990)

An attorney trying a capital case should be aware of the clear distinction between the premeditation necessary for a first-degree murder conviction and the intent level necessary to support the aggravating factor of cold, calculated, and premeditated. (Id.) Norgard testified that as of 1992, waiver of mitgation had to be preceded by the client being fully informed of the evidence available. (PC-R. 998) Without that full disclosure, a knowing and intelligent waiver is not possible. (Id.) Norgard stated that consulting with the client for one hour in a capital case is inadequate. (PC-R. 1000) The concept of waiving the statutory mitigating circumstance of "no significant prior criminal history" was well established by 1992. (PC-R. 1034) Also, the inadmissability of non-statutory aggravation was well established by 1992. (PC-R. 1035)

On cross-examination, Norgard testified that a mitigation investigation may reveal negative information about the defendant and that a motion *in limine* may be necessary to keep such negative

information away from the jury. (PC-R. 1030) Norgard stated that competent counsel would get a ruling from the judge as to whether the presentation of certain mitigating evidence would "open the door" to negative information. (PC-R. 1037)

It is important to provide a mental health expert with all possible information about a defendant's possible motivations for the crime. (PC-R. 1032) This would include information about the defendant's behavior in the weeks or years leading to the crime. (PC-R. 1036)

SUMMARY OF THE ARGUMENT

(I)(A) The lower court erroneously denied Mr. Windom relief on his claim that he was denied effective assistance of counsel at the guilt phase of trial. Trial counsel failed to adequately investigate and prepare a guilt phase defense, specifically a mental health defense, when such a defense was viable. Trial counsel also failed to pursue an available self-defense as to the shooting of victim Mary Lubin. Trial counsel's failure was not the result of strategy, reasonable or otherwise. Further, trial counsel's substance abuse affected his representation of Mr. Windom.

(I)(B) The lower court erroneously denied Mr. Windom relief on his claim that he was denied effective assistance of counsel at the penalty phase of trial. Trial counsel failed to adequately investigate and prepare a mitigation case when such mitigating evidence was readily available. Trial counsel waived the

presentation of mitigating evidence to the jury without strategy, reasonable or otherwise, and without investigating available mitigating evidence. Further, trial counsel's substance abuse affected his representation of Mr. Windom.

(I)(C) The lower court erroneously denied Mr. Windom's claim that trial counsel affirmatively harmed his case by making damaging statements and conceding the state's case for aggrvation and the applicability of the death penalty.

(II)(A) The lower court erroneously denied Mr. Windom's claim that he is innocent of first-degree murder and of the death penalty consistent with the fifth, sixth, eighth, and fourteenth amendments.

(II)(B) The lower court erroneously denied Mr. Windom's claim that the penalty phase jury instructions were incorrect under Florida law and shifted the burden to Mr. Windom to prove that death was inappropriate. Further, the trial court employed a presumption of death in sentencing Mr. Windom and trial counsel was ineffective for failing to object to these errors.

(II)(C) The lower court erroneously denied Mr. Windom's claim that the jury received inadequate guidance regarding the CCP aggravating circumstance and trial counsel was ineffective for failing to object.

(II)(D) The lower court erroneously denied Mr. Windom's claim that his sentences of death are predicated upon an automatic aggravating circumstance.

(II)(E) The lower court erroneously denied Mr. Windom's claim that he has been denied effective representation due to the rules

prohibiting his lawyers from interviewing jurors.

STANDARD OF REVIEW

The constitutional arguments advanced in Argument I of this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690 (1996) and Stephens v. State, 748 So.2d 1028 (Fla. 1999).

ARGUMENT I
THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Mr. Windom presented evidence substantiating his claims for which he was granted a hearing.

A. The Lower Court Erroneously Denied Mr. Windom Relief On His Claim That He Was Denied Effective Assistance Of Counsel Pretrial And At The Guilt/Innocence Phase Of Trial When Counsel Failed To Adequately Investigate, Prepare A Defense, Including The Preparation Of A Mental Health Expert, Challenge The State's Case And Further, That Trial Counsel's Chronic Substance Abuse Affected His Performance In Representing Mr. Windom.

In order to prevail on his claim of ineffective assistance of counsel, Mr. Windom must prove two elements, deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that counsel's performance was deficient, Mr. Windom "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Id. at 688. To establish prejudice Mr. Windom "must show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Based on the evidence presented at the evidentiary hearing below, Mr. Windom can prove both elements of Strickland.

Further, a criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 753 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessell, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct a proper investigation into her client's mental health background and to ensure that the client is not denied a professional and professionally conducted mental health evaluation. See O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Maudlin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

At the evidentiary hearing below, evidence was presented that trial counsel for Mr. Windom conducted a woeful investigation and preparation for trial. As a result, available evidence that would have supported a mental health defense at guilt phase was not

presented. This evidence was readily available through adequately prepared mental health experts and lay witnesses. Counsel, without reasonable strategy, failed to present this evidence. Trial counsel's failure in this regard prejudiced the guilt phase of Mr. Windom's trial.

1. Expert Testimony

At the evidentiary hearing, two defense experts and one state expert testified regarding Mr. Windom's mental state at the time of the charged crimes.

Dr. Jonathan Pincus testified that he is a neurologist and that neurology is the study of mental illness that affects the brain. (PC-R. 509) Dr. Pincus conducted a neurological assessment of Mr. Windom and prepared a report of that assessment. (PC-R. 522) Additionally, Dr. Pincus reviewed background materials, materials he described as the type typically reviewed by mental health experts, provided by postconviction counsel. (PC-R. 524) Dr. Pincus also reviewed a videotape taken of Mr. Windom at the police station shortly after his arrest. (PC-R. 525) Further, Dr. Pincus spoke with members of Mr. Windom's family. (PC-R. 528) Mr. Windom, in Dr. Pincus' opinion, was not malingering during the assessment. (PC-R. 547)

Dr. Pincus summarized his findings, stating that Mr. Windom was psychotic at the time of the crimes, is mentally ill, and is brain-damaged. (PC-R. 529)

Dr. Pincus testified that the portion of Mr. Windom's brain that is damaged, the frontal lobe, is responsible for motivation, judgment, and conforming behavior to societal norms. (PC-R. 532) Dr.

Pincus stated unequivocally that Mr. Windom suffers from brain damage. (PC-R. 549) Dr. Pincus identified in Mr. Windom's history several possible causes of brain damage. (PC-R. 550-52)

Dr. Pincus testified that at the time of the charged crimes, Mr. Windom was psychotic, suffering from auditory hallucinations whereby a voice was telling him "he had to die." (PC-R. 557) Mr. Windom was also suffering from delusional paranoia at the time of the incident in that he thought people were plotting against and seeking to kill him. (Id.) Mr. Windom's family members related to Dr. Pincus that Mr. Windom had a history of this type of paranoia. (PC-R. 558) Further, at the time of the incident, Mr. Windom was tense, unable to sleep, and had become unusually disheveled. (PC-R. 560) Dr. Pincus also stated that, at the time of the incident, Mr. Windom was manic, characterized by his excessive gambling. (Id.)

Dr. Pincus testified that the combination of Mr. Windom's brain damage and mental illness decreased his capacity to control his behavior. (PC-R. 563) Further, Mr. Windom's brain damage decreased his ability to control the impulses of paranoia. (Id.)

In Dr. Pincus' opinion, based on his entire evaluation, Mr. Windom's capacity to distinguish right from wrong was seriously compromised. (PC-R. 564) Further, Mr. Windom was unable to distinguish right from wrong or premeditate the crimes with which he was charged. (Id.)

Dr. Craig Beaver testified at the hearing that he is a licensed psychologist and performed an evaluation of Mr. Windom. (PC-R. 638) As part of his evaluation, Dr. Beaver reviewed background materials

related to Mr. Windom, reviewed a videotape taken of Mr. Windom just after being arrested, reviewed affidavits of witnesses, discussed the facts with postconviction counsel, and administered a variety of neuropsychological tests. (PC-R. 638-41) Dr. Beaver stated that Mr. Windom was not malingering on the administered tests. (PC-R. 641)

Dr. Beaver testified that his testing revealed Mr. Windom to be in the borderline mentally deficient range of intelligence and brain damaged. (PC-R. 642-43) Dr. Beaver explained that brain damaged persons do not cope with stress effectively and that Mr. Windom was under a high level of stress at the time of incident. (PC-R. 646-47) Dr. Beaver learned from Mr. Windom's family that in the 2 years preceding the incident, Mr. Windom had been shot at, burglarized, and received threatening phone calls, all of which contributed to his high level of stress. (PC-R. 647-48) Mr. Windom's family described a marked change in his behavior just prior to the incident. (PC-R. 648) In the two weeks preceding the incident, Mr. Windom became unusually disheveled and his speech became rapid and nonsensical. (PC-R. 649-50)

Dr. Beaver stated that in the period leading up to the alleged crimes, Mr. Windom was suffering from auditory hallucinations and paranoia. (PC-R. 650) Dr. Beaver related that the tests of state expert Dr. Sidney Merin, which Dr. Beaver reviewed, reveal paranoia in Mr. Windom. (PC-R. 651) Mr. Windom was also manic during this period. (PC-R. 652)

Dr. Beaver learned that there is a history of mental illness in Mr. Windom's family. (PC-R. 653) Further, Dr. Merin's testing

indicates that Mr. Windom is at high risk for psychiatric episodes. (Id.) Dr. Beaver explained that brain damaged persons are ill-equipped to cope with mental illness. (PC-R. 654)

Dr. Beaver testified that based on all of the factors acting upon Mr. Windom at the time of the crime, including low intelligence, brain damage, mental illness, limited social upbringing, and ongoing personal problems, Mr. Windom "lost it." (PC-R. 662) At the time of the incident, Mr. Windom was unable to think and make rational decisions. (PC-R. 664-65) Dr. Beaver explained that Mr. Windom was experiencing an acute psychotic episode at the time of the offense, bordering on being delusional. (PC-R. 670, 676)

Dr. Beaver testified that his evaluation of Mr. Windom would have been inadequate without background materials and witness interviews and had he not been provided with such, it would have been his obligation as a mental health professional to notify the attorney. (PC-R. 677-78)

Dr. Sidney Merin testified on behalf of the state at the evidentiary hearing. (PC-R. 1102) Dr. Merin is a psychologist and conducted an evaluation of Mr. Windom. (PC-R. 1102, 1114) As part of his evaluation, Dr. Merin conducted neurological tests of Mr. Windom and reviewed the depositions and reports of Doctors Pincus and Beaver, the proffered trial testimony of Dr. Robert Kirkland, Mr. Windom's DOC records, and the videotape of Mr. Windom shortly after his arrest. (PC-R. 1115-20)

Dr. Merin stated that Mr. Windom was not malingering during the evaluation. (PC-R. 1130, 1184)

Dr. Merin administered an M.M.P.I. to Mr. Windom for which the schizophrenia, mania, and depression scales were elevated. (PC-R. 1176, 1183) Dr. Merin determined these elevated scales to be psychologically significant. (PC-R. 1243) The M.M.P.I. also indicated suspicion and paranoia. (PC-R. 1176) In Dr. Merin's opinion, Mr. Windom's M.M.P.I. scores indicate someone with either bipolar disorder or psychotic depression. (PC-R. 1244)

Dr. Merin did not review any of the witness affidavits related to Mr. Windom's behavior in the weeks leading up to the shootings. (PC-R. 1274) Despite this, he opined that Mr. Windom was able to know what he was doing and distinguish right from wrong at the time of the shootings. (PC-R. 1201-02) Further, Dr. Merin testified that he does not find anything unreasonable about Dr. Pincus' findings. (PC-R. 1261)

Dr. Robert Kirkland testified that he is a psychitrist and was appointed to evaluate Mr. Windom for competency and sanity prior to trial. (PC-R. 760) Dr. Kirkland was appointed on August 14, 1992 and performed his evaluation on August 17, one week prior to trial. (PC-R. 761) In his report submitted to the trial court on August 18, Dr. Kirkland indicated that there was insufficient information to determine Mr. Windom's sanity at the time of the shootings. (PC-R. 762) Dr. Kirkland testified at the evidentiary hearing that he asked Mr. Windom's trial counsel for such information, but never received it. (Id.) Dr. Kirkland did not recall being able to make a psychiatric diagnosis of Mr. Windom. (PC-R. 763) Dr. Kirkland explained it would have been professionally difficult, if not

impossible, to conduct an adequate evaluation with the information he possessed at trial. (PC-R. 765)

Dr. Kirkland received three volumes of background materials from postconviction counsel and stated that this information would have been helpful at trial. (Id.) Dr. Kirkland stated that it would have been appropriate for trial counsel to provide him with background information. (PC-R. 780) Trial counsel gave Dr. Kirkland practically no information. (PC-R. 774) Dr. Kirkland knew nothing other than what Mr. Windom was charged with. (PC-R. 775)

2. Lay Witness Testimony

Gloria Windom, Mr. Windom's younger sister, testified that Mr. Windom always tried to keep himself well-dressed and groomed, but in the weeks prior to the shootings, his appearance changed. (PC-R. 723-25) Mr. Windom became disheveled, smelled bad, and stopped wearing a shirt or shoes. (PC-R. 725)

Gloria stated that she expressed to Mr. Windom's trial counsel that Curtis needed psychological help. (PC-R. 730) Gloria never talked to Dr. Kirkland. (Id.)

Lois Tatum, Mr. Windom's oldest sister, testified that she recalls Mr. Windom suffering two head injuries; being dropped on his head at birth and a rollover car accident as a teenager. (PC-R. 741-43) Mr. Windom was unconcious after the car accident and was taken to the hospital. (PC-R. 750) After the car accident, Mr. Windom suffered headaches. (PC-R. 745)

Eddie Windom, Mr. Windom's younger brother, testified that Mr. Windom was normally very fastidious about his appearance, but in the

weeks preceding the charged crimes, Mr. Windom's appearance suffered. (PC-R. 786-87) Also, during this period just prior to the shootings, Eddie would see Mr. Windom driving around at 3 or 4 am. (PC-R. 788)

Eddie stated that he only met Mr. Windom's trial attorney once and that was to make a payment for legal services. (PC-R. 790)

Willie Mae Rich, a long time neighbor of the Windoms, testified that she saw Mr. Windom in the weeks preceding the crimes and that he acted strange. (PC-R. 890) At this time, Mr. Windom was hyper, shaking, and dirty. (Id.) Mr. Windom was walking the streets without a shirt or shoes. (PC-R. 891) This was the opposite of his normal appearance. (Id.) In a conversation that Willie Mae and Mr. Windom had, she informed him that someone was going to kill him. (PC-R. 892) Mr. Windom replied that he had heard this, but did not know who it was that wanted to kill him. (Id.)

Charles Brown, who grew up with Mr. Windom, testified that he was in Winter Garden on the day of the shootings. (PC-R. 910) Charles had a clear view of the shooting of Johnnie Lee and stated that Mr. Windom did not say anything prior to the shooting. (PC-R. 911) Mr. Windom did not try to escape following the shooting. (Id.)

Eddie James Windom, Mr. Windom's oldest brother, testified that on the day of the incident he encountered Mr. Windom behind Brown's Bar, shaking and holding a gun. (PC-R. 915) Cutis was talking "real fast" and tried to shoot himself in the head, but Eddie James stopped him from doing so. (PC-R. 917) Curtis did not seem to know who Eddie James was. (PC-R. 918) Eddie James stated that there was a lot of commotion going on, but Curtis seemed oblivious to it. (Id.)

3. Legal Expert Testimony

Robert Norgard, admitted as an expert in capital defense, testified that by 1992 there were CLE programs available, including numerous sessions on mental health evidence, that attorneys could avail themselves of. (PC-R. 977-81) By 1992, the community standard for capital defense dictated that when determining the applicability of an insanity defense, association with a confidential mental health expert was necessary. (PC-R. 989) Norgard stated that it is the duty of the defense attorney to provide the expert with the greatest amount of information possible and that the client should be evaluated for, among other things, sanity at the time of the offense. (PC-R. 992-94)

Norgard explained that, in addition to expert consultation, evaluation of an insanity defense would involve investigation of lay witnesses. (PC-R. 990)

Norgard added that it is important to provide a mental health expert with all possible information about motivation for the offense, including information regarding the client's behavior in the time immediately preceding the offense. (PC-R. 1032, 1036)

In addition to Norgard, Judge Dorothy Russell testified that in her experience, a defense attorney would not retain a mental health expert two weeks prior to trial in a triple homicide case. (PC-R. 955)

4. Trial Attorney's Substance Abuse

Relevant to the inquiry into trial counsel's performance in preparing a mental health defense is the extent to which Leinster was

suffering from the affects of alcoholism during Mr. Windom's trial. On this point, Kurt Barch testified that Ed Leinster did not pay a lot of attention to the case and "was at home most of the time." (PC-R. 857) Barch related that he covered for Leinster "a lot" during 1992, covering for him in court "almost every day." (PC-R. 859) Barch testified that "Ed drank a lot, he was forgetful, he was not attentive to his cases, and quite frankly, his main importance was not to provide a legal service but to collect money from clients." (PC-R. 858) Barch explained that he would often have to cover for Leinster's drunkenness. (PC-R. 859) Barch added that it is "hard to say" whether Leinster was under the influence during the Windom trial because Leinster successfully hid his alcoholism. (PC-R. 862) However, Leinster did have alcohol-related shakes during the trial. (PC-R. 863)

Willie Mae Rich testified that when she encountered Mr. Leinster outside the courtroom during trial, "you could smell alcohol all over him." (PC-R. 893) Mary Jackson testified that when she was speaking with Leinster outside court during a trial recess, he "reeked very strong of alcohol." (PC-R. 906) At the time, Jackson and Leinster were approximately one foot apart. (Id.)

Judge Russell testified that she was aware prior to the Windom case that Leinster had problems with alcohol and cocaine. (PC-R. 941) Although she could not detect that Leinster was intoxicated during the Windom trial from her vantage point, she "watched with Leinster probably more than any lawyer that came before me because I knew he had more problems." (PC-R. 942-43) Judge Russell added that she has

no idea if Mr. Leinster was under the influence of alcohol when preparing for Mr. Windom's trial. (PC-R. 953)

5. Trial Attorney's Response

At the evidentiary hearing, Ed Leinster testified he represented Mr. Windom in this case and that it may have been his first capital trial. (PC-R. 805) Leinster stated that prior to Mr. Windom's trial, he had not attended any CLE courses related to capital defense generally or preparation of a mental health defense specifically. (PC-R. 806) Leinster took no law school courses related to mental health and the law. (Id.)

Prior to the evidentiary hearing, Leinster reviewed the reports of Doctors Pincus and Beaver. (PC-R. 807) Leinster testified that if he had experts who could testify that Mr. Windom was insane at the time of the offense and suffered from brain damage, he would have used them, regardless of the state presenting evidence that Mr. Windom was a drug dealer. (PC-R. 808) Leinster would have used evidence of Mr. Windom's mental illness had he been aware of it. (PC-R. 810)

Leinster did not remember Dr. Kirkland testifying at trial and does not remember any specific dealings with Dr. Kirkland. (PC-R. 812)

Leinster testified that he assumed a first-degree murder conviction was inevitable as to victim Johnnie Lee, regardless of what he did at trial. (PC-R. 813)

Leinster stated that he did not hire an investigator on the case despite having an order from the court for investigation costs.

(PC-R. 818)

Leinster conceded that he had no strategic reason for failing to obtain a confidential mental health expert and that his reliance upon Dr. Kirkland was probably faulty. (PC-R. 820)

Kurt Barch testified that he assisted Ed Leinster in representing Mr. Windom and that Leinster was responsible for dealing with Dr. Kirkland. (PC-R. 853) Barch did not participate in trying the guilt phase and made no strategic decisions. (Id.)

6. Strickland Analysis

As the testimony from the evidentiary hearing clearly demonstrates, a viable mental health defense was available to Mr. Windom at his trial. Both Doctors Pincus and Beaver, supported by the testimony of lay witnesses, testified that Mr. Windom was insane at the time of the shootings, was delusional, paranoid, and brain damaged. Further, trial counsel had witnesses available to support a self-defense theory as to the shooting of Mary Lubin. Yet, trial counsel's deficient preparation and investigation left such viable defenses dormant. The lower court, despite finding that Mr. Leinster devoted "far less time . . . in preparing his case" than that required by community standards and that Leinster's pretrial discovery was "minimal at best", held that Leinster was not ineffective at the guilt phase of Mr. Windom's trial. (PC-R. 2625-26) The lower court's Strickland holding is erroneous.

The lower court, in essence, finds that Leinster's performance in his guilt phase preparation and presentation was not deficient because of a "tactical approach" Leinster adopted in regard to

evidence that Mr. Windom was a drug dealer. (PC-R. 2626) The Court's finding in this regard is flawed. This is so because there simply was no "tactical approach" in Leinster's inaction. Leinster did not obtain a confidential mental health expert and stated that he had no strategic reason for failing to do so. (PC-R. 820) Dr. Kirkland, appointed by the Court just prior to trial, testified that he was provided with no background information on Mr. Windom and that "it would have been professionally difficult, if not impossible, to conduct an adequate evaluation" with the information he did have. (PC-R. 774, 765) The information he did have was merely what Mr. Windom had been charged with. (PC-R. 775) Most telling, Leinster testified that if he had evidence of a mental health defense at guilt phase, he would have used it despite any state attempt to put on evidence of drug dealing by Mr. Windom. (PC-R. 808) Thus, the only conclusion to be arrived at here is that a mental health defense was not pursued at trial because it was not investigated or considered to any degree. A "tactical approach" never entered the equation. The lower court's assessment of Leinster's performance as "tactical" is not supported by the facts, including Leinster's own concession that he would have utilized a viable mental health defense. As the lower court found, Mr. Leinster's preparation for trial was abysmal, precluding any arguable "tactic" with regard to foregoing a mental health defense.

The problem with the court's analysis is simple. Leinster never, to any degree, investigated, analyzed, or considered an available mental health defense to weigh against the possibility of

the introduction of negative information. There was no "tactical approach." Tactics involve informed decision making, which Leinster's representation of Mr. Windom was devoid of.

As to prejudice, the lower court finds that the mental defense presented at the evidentiary hearing, through experts and lay witnesses, does not undermine confidence in the outcome of the trial verdict. (PC-R. 2630, 2641) Specifically, the Court seems to find that had a mental health defense been presented, the state would have put on damaging evidence that Mr. Windom was a drug dealer. However, both experts at the evidentiary hearing testified that Mr. Windom's alleged involvement in drug activity did not change their opinion regarding his mental state at the time of the shootings. (PC-R. 572-78, 699-700) Further, this finding by the lower court again ignores Leinster's testimony that he would have used testimony such as that presented at the

evidentiary hearing, regardless of any state intent to use evidence of drug activity. Further, it seems obvious that the mere fact that Mr. Windom was allegedly a drug dealer pales in prejudicial effect when compared to the compelling mental defense available. Assuming *arguendo* that this was a strategy, it was not reasonable. Additionally, evidence of Mr. Windom's drug activity was arguably introduced through witness Kenny Williams at trial (R. 384-85), rendering any alleged strategy meaningless.[1]

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[1]As stated, the prosecution's argument below and the lower court's holding as to performance and prejudice seem to be tied to the notion that if trial counsel had presented a mental health defense, the state could have presented evidence

The state's argument below, and the Court's similar ruling, that a mental health defense would have "opened the door" to evidence of drug activity suggesting motive, is belied by the fact that the state never attempted to use Mr. Windom's drug activity as evidence of, as the state incorrectly suggests it was, motive. Clearly, if the State believed these shootings were motivated by Mr. Windom's alleged drug dealing, they would have presented such evidence, unrestrained by any defense Mr. Windom may have presented. However, they did not because, simply put, drug activity was not the motivation for the crime. The state's argument below, and the lower court's acceptance of that argument is an after-action attempt to justify the total lack of advocacy by Mr. Leinster.

Further, Leinster failed to file a motion *in limine* in order to obtain a judicial ruling as to whether evidence of drug activity would have been at all admissible. The fact that no such motion was filed calls into question whether this possibility ever entered Leinster's mind. Had Leinster in fact contemplated the possibility of the introduction of negative information, one would think that a motion *in limine* would have been filed. Robert Norgard testified that competent counsel would have filed such a motion and the lower court agreed with that assessment. (PC-R. 2648). The lower court's contention that it "cannot conceive" of a trial court granting such a

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that Mr. Windom was involved in drugs. Notably, at trial, the court prohibited testimony regarding any alleged drug activity by Mr. Windom (R. 375) and allowed Dr. Kirkland to testify regarding "fugue state" evidence (R. 580-94). This would seem to belie the state's present argument and the lower court's Strickland holding.

motion is pure speculation. Whether or not the lower court would itself have granted the motion is not dispositive under Strickland.

In terms of the lay witness testimony presented at the evidentiary hearing regarding a mental health defense, the lower court additionally finds no prejudice because the witnesses were cumulative to that presented at trial. (PC-R. 2630) The lower court's finding in this regard ignores a crucial distinction. The trial witnesses merely testified that *the day of the shootings* Mr. Windom acted strange. At the evidentiary hearing, witnesses provided testimony as to Mr. Windom's normal behavior and the subsequent marked change in the weeks, and even years, preceding the shootings. Such testimony was supportive of the mental health experts opinion that Mr. Windom was suffering a psychotic breakdown. Thus, the lower court's conclusion that lay witness testimony was cumulative is erroneous. Again, Mr. Windom would point out that Mr. Leinster inexplicably failed to hire an investigator to develop such lay witness testimony.

The lower court's findings as to the failure to present a mental health defense are not in concert with this Court's Strickland precedent. In Brown v. State, 755 So.2d 616 (Fla. 2000), this Court held that counsel was not ineffective in failing to present a mental health defense. In so holding, this Court noted that trial counsel in Brown "immediately engaged the services" of a mental health expert and discussed the possibility of a mental health defense with multiple experts. Id. at 626. Further, counsel in Brown interviewed lay witnesses for purposes of evaluating a mental health defense.

Id. at 626, 628. Trial counsel in Brown also utilized the services of an investigator to interview witnesses and obtain records. Id. at 627. Leinster's performance in Mr. Windom's case is in marked distinction. Leinster's consultations with Dr. Kirkland, who was appointed only two weeks before trial and whose evaluation was by his own admission inadequate, were, if at all, brief. Leinster hired no investigator, despite having approved court costs to do so, and his investigation of lay witnesses was scant, at best.

Leinster's representation of Mr. Windom is also distinguishable from that of counsel in Carroll v. State, 815 So.2d 601 (Fla. 2002). There, this Court held that counsel was not ineffective in presenting a mental health defense. In doing so, this Court cited to the fact that counsel interviewed and presented the testimony of several lay witnesses who witnessed the defendant's behavior in the weeks and hours leading up to the crime. Id. at 611. Further, counsel called several mental health experts, one who had examined the defendant within days of the crime, who testified that the defendant was psychotic and likely insane at the time of the offense. Id. at 611-12. Obviously, Leinster's performance falls far short of counsel in Carroll, given that Leinster presented none of the evidence available to him, including both lay and expert testimony.

Thus, Leinster's representation of Mr. Windom with regard to a mental health defense does not approach the level of advocacy found acceptable by this Court under Strickland. Leinster simply ignored evidence of his client's mental deficiency at the time of the shootings. Leinster failed to consult with a confidential expert,

failed to associate a neuropsychologist, did not provide background materials to the court-appointed expert, and failed to present available lay witnesses to support an insanity defense. Contrary to the lower court's holding, Leinster did not provide effective representation to Mr. Windom. The state's argument below, and the lower court's related holding, that Leinster's actions were strategy, is simply not plausible given that Leinster did nothing to ascertain the viability and strength of a mental health defense to begin with.

Additionally, the lower court curiously finds that Mr. Windom produced no evidence that a viable self-defense theory was available as to the shooting of Mary Lubin (PC-R. 2630). This finding is erroneous in that Eddie James Windom testified that he saw Lubin reach for something just prior to the shooting and Kurt Barch testified that he interviewed a witness who stated that he witnessed the Lubin shooting and saw Lubin reaching for a gun (PC-R. 868). Thus, such a defense was supportable and the lower court's finding is erroneous.

The lower court's finding as to the effect of Leinster's alcohol abuse is also flawed. The Court discounts the testimony of Mr. Windom's "relatives." (PC-R. 2629) However, the lay witnesses who smelled alcohol on Leinster at trial, Mary Jackson and Willie Mae Rich, are not relatives of Mr. Windom. Further, the Court finds that Kurt Barch saw no evidence of alcohol abuse by Leinster. (PC-R. 2629) This finding by the Court mischaracterizes Barch's testimony. In fact, Barch testified that Leinster generally drank to excess and that it is hard to say whether Leinster was drunk during trial

because he hid his alcohol use so effectively. (PC-R. 858, 862) Further, Leinster was suffering from alcohol-related shakes during trial. (PC-R. 863) The lower court's dismissal of Mr. Leinster's substance abuse is unsupported by the weight of the evidence.

It should be concerning to this Court that Mr. Windom was represented at trial by a lawyer who the trial judge, by her own admission, had to monitor constantly for signs of intoxication. (PC-R. 941) Judge Russell made a point of smelling Leinster's breath for signs of alcohol. (Id.) The lack of any confidence that Mr. Windom was adequately represented should be obvious. Any suggestion that it is acceptable for a trial judge to ensure adequate representation by ferreting out a defense lawyer's intoxication is an insult to the Florida Bar and the legal profession.

In sum, Ed Leinster's advocacy on behalf of Mr. Windom at guilt phase was woefully inadequate. Leinster, for reasons possibly related to his own substance abuse, failed to prepare any defense on behalf of Mr. Windom. More specifically, Leinster failed to uncover and develop evidence of a mental health defense. Leinster's failure to present such a defense was not the result of strategy, but simple neglect. Further, that failure undermines the confidence in Mr. Windom's trial proceedings.

B. The Lower Court Erroneously Denied Mr. Windom Relief On His Claim That He Was Denied Effective Assistance Of Counsel At The Sentencing Phase Of His Trial When Counsel Failed To Adequately Investigate And Prepare A Mitigation Defense, Including The Preparation Of Mental Health Evidence, And Counsel Conceded The Existence Of Aggravating Factors And Further, That Trial Counsel's Chronic Substance Abuse Affected His Performance In Representing Mr. Windom.

In order to prevail on his claim of ineffective assistance of counsel, Mr. Windom must prove two elements, deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that counsel's performance was deficient, Mr. Windom "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Id. at 688. To establish prejudice, Mr. Windom "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Based on the evidence presented at the evidentiary hearing below, Mr. Windom can prove both elements of Strickland.

Further, a criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessell, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background and to ensure that the client is not denied a professional and professionally conducted mental health evaluation.

See Fessel; O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Maudlin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

At the evidentiary hearing, evidence was presented showing the availability of numerous elements of mitigation, both statutory and non-statutory. This evidence included testimony of mental health experts demonstrating that Mr. Windom suffers from mental illness and brain damage. There was also testimony from mental health experts that statutory mental health mitigation applies in Mr. Windom's case. In addition to mental health experts, family and friends of Mr. Windom testified. These lay witnesses provided testimony supporting the mental health experts and independent non-statutory mitigation. The testimony of these mental health experts and lay witnesses was available at the time of trial, but not presented by counsel. Counsel's failure in this regard was neither strategic or reasonable and failed to meet the bare requirements under Strickland and Ake.

1. Mental Health Experts

Dr. Jonathan Pincus, a neurologist, conducted a neurological assessment of Mr. Windom. (PC-R. 511) In addition to the physical assessment, Dr. Pincus reviewed background materials, the reports of other mental health experts in the case, a videotape of Mr. Windom taken shortly after arrest, and DOC records of Mr. Windom's postconviction incarceration. (PC-R. 524-27) Further, Dr. Pincus spoke with members of Mr. Windom's family. (PC-R. 528)

Dr. Pincus found, based on his assessment, that Mr. Windom

suffers from impairment of the frontal lobe of the brain, the portion of the brain responsible for judgment and conforming behavior. (PC-R. 530-32) Dr. Pincus found that Mr. Windom performed poorly on the physical tests he administered, suffers from a longstanding speech impediment, and is unable to read above a seventh grade level, all factors which indicate brain dysfunction. (PC-R. 542-49) Dr. Pincus noted two possible causes of Mr. Windom's brain damage, the fact that he was dropped on his head during birth and a major car accident as a teenager. (PC-R. 550-52) Mr. Windom's family members related to Dr. Pincus that Mr. Windom became increasingly withdrawn and paranoid after the car accident. (PC-R. 553)

Dr. Pincus also found, based on his evaluation, that at the time of the shootings, Mr. Windom was psychotic, suffering from auditory hallucinations and delusional paranoia. (PC-R. 557) Mr. Windom's family related to Dr. Pincus a history of paranoia and mania in the years and weeks leading up to the shootings. (Id.) Dr. Pincus explained that brain damaged persons are less able to deal with mental illness effectively, a factor which made Mr. Windom increasingly impulsive. (PC-R. 563) Mr. Windom also suffers from a dissociative disorder. (PC-R. 570)

Dr. Pincus found that both the "extreme emotional disturbance" and "substantial impairment" statutory mitigating factors were present in Mr. Windom's case. (PC-R. 568-69)

Dr. Pincus also noted elements of non-statutory mitigation in his evaluation, including severe physical abuse by Mr. Windom's father that left scarring, and a bladder control problem which

resulted in merciless teasing by other children. (PC-R. 553-54) Dr. Pincus stated that the physical abuse could be a cause of Mr. Windom's brain damage. (Id.) Also, the primary character traits of Mr. Windom, as described by witnesses to Dr. Pincus, were kindness and generosity. (PC-R. 604)

Dr. Pincus noted that Mr. Windom did not malinger during the neurological assessment. (PC-R. 547)

Dr. Craig Beaver, a psychologist, performed a psychological and neuropsychological evaluation of Mr. Windom. (PC-R. 638) As part of his evaluation, Dr. Beaver reviewed background materials, affidavits of witnesses, and a videotape of Mr. Windom made shortly after arrest. (PC-R. 638-40) Additionally, Dr. Beaver administered a battery of neuropsychological tests to Mr. Windom and discussed the facts of the case with postconviction counsel. (Id.) Dr. Beaver noted that Mr. Windom did not malinger on the tests that were administered. (PC-R. 641)

Dr. Beaver testified that his testing revealed Mr. Windom to be in the dull normal to borderline mentally deficient range of intelligence, with particular difficulty in communicating and understanding language. (PC-R. 642-43) Mr. Windom has a speech impediment for which therapy was required. (PC-R. 643) Dr. Beaver stated that the speech impediment could be an indication of brain damage. (PC-R. 644) Dr. Beaver added that Mr. Windom shows signs of brain damage, including poor performance on tests of reasoning and judgment. (PC-R. 643-45) Dr. Beaver also noted that Mr. Windom suffered head injuries at birth and at age 16. (PC-R. 658-60)

Dr. Beaver stated that people with brain damage do not deal with stress effectively and that Mr. Windom was under a high level of stress at the time of the shootings. (PC-R. 646-47) Dr. Beaver learned from Mr. Windom's family that in the two years previous to the shootings, he had been shot, burglarized, and received threatening phone calls. (PC-R. 647-48) Because of these events, Mr. Windom became more anxious and nervous. (PC-R. 648) In the two weeks prior to the shootings, Mr. Windom's family described an abrupt change in his behavior whereby his personal appearance and hygiene declined greatly and he began speaking rapidly and nonsensically. (PC-R. 648-50)

Dr. Beaver testified that in the period leading up to the shootings, Mr. Windom suffered from paranoia and auditory hallucinations. (PC-R. 650-51) Mr. Windom was also in a state of mania during this period. (PC-R. 652) Dr. Beaver found in his evaluation that Mr. Windom has a family history of mental illness, including several stays by his mother in a psychiatric hospital. (PC-R. 653) Dr. Beaver added that brain damaged persons are less able to deal with mental illness. (PC-R. 654)

Dr. Beaver stated his opinion that at the time of the shootings, a variety of factors were acting upon Mr. Windom, including low intelligence, brain damage, mental illness, limited social upbringing, and ongoing personal problems, all of which combined to cause Mr. Windom to lose control. (PC-R. 661-62) Dr. Beaver testified that the statutory mental health mitigating factors of "extreme emotional disturbance" and "substantial impairment" are

applicable in Mr. Windom's case. (PC-R. 663, 683) Further, Mr. Windom's ability to make rational decisions was impaired at the time of the shootings and he was suffering an acute psychotic episode. (PC-R. 664-65, 670) Dr. Beaver's assessment is that Mr. Windom was in fear of his life at the time of the shootings. (PC-R. 683)

Dr. Beaver explained that, long-term, Mr. Windom suffers from either bipolar disorder, depressive disorder with mood congruent psychotic feature, or paranoid schizophrenia, all major mental illnesses. (PC-R. 676)

Dr. Beaver found numerous elements of non-statutory mitigation in his evaluation of Mr. Windom, including extreme poverty, an abusive father, an emotionally unstable mother, a speech impediment, a bladder control problem, and essentially no education. (PC-R. 684-86) Additionally, Dr. Beaver found that Mr. Windom was caring toward others. (PC-R. 709)

Dr. Beaver noted that speaking with witnesses and reviewing background materials was essential to his mental health evaluation and that he would have been "seriously hampered" in his evaluation without these tools. (PC-R. 675-78) Dr. Beaver stated that it is his obligation as a mental health expert to notify the attorney of the need for such materials. (PC-R. 678)

Finally, Dr. Beaver testified that Mr. Windom does not show signs of either borderline or anti-social personality disorder. (PC-R. 675-76)

Dr. Merin, the state's mental health expert, testified that Mr. Windom has a history of head injuries, is of low intelligence, and

has a speech impediment. (PC-R. 1126-28, 1149) Dr. Merin found a documented family history of low intelligence. (PC-R. 1128)

Dr. Merin administered an M.M.P.I. to Mr. Windom which indicated suspicion and paranoia. (PC-R. 1176-77) Further, the schizophrenia, mania, and depression scales on the M.M.P.I. were elevated. (PC-R. 1176, 1183) Dr. Merin found these indications to be psychologically significant. (PC-R. 1243) Ultimately, Dr. Merin concluded that Mr. Windom's M.M.P.I. score is indicative of someone with bipolar disorder or psychotic depression. (PC-R. 1244)

Dr. Merin conducted a battery of neuropsychological tests and ultimately opined that Mr. Windom does not suffer from brain damage, but conceded that a possible reason for Mr. Windom's low scores on the tests is brain damage. (PC-R. 1218-21) Rather than being brain damaged, Dr. Merin concluded that Mr. Windom is just a "slow thinker." (PC-R. 1197)

Dr. Merin's evaluation revealed that Mr. Windom grew up impoverished and uneducated. (PC-R. 1179) Also, Mr. Windom suffered from a learning disability. (Id.) Further, Mr. Windom had a bladder control problem as a child, something for which he was made fun of by other children. (Id.)

Dr. Robert Kirkland testified that he evaluated Mr. Windom at the time of trial, but not for penalty phase purposes. (PC-R. 761) Dr. Kirkland did not evaluate Mr. Windom for the applicability of statutory mental health mitigation or non-statutory mitigation. (PC-R. 767)

Dr. Kirkland had no information regarding Mr. Windom's history

of head injuries. (PC-R. 764)

Mr. Windom's trial attorney provided Dr. Kirkland with practically no information. (PC-R. 774) Dr. Kirkland testified that background materials on Mr. Windom would have been helpful at trial. (PC-R. 765) Dr. Kirkland explained that it would have been appropriate for Mr. Windom's trial attorney to provide him with background information and that it is practically impossible to conduct an evaluation with the information he had. (PC-R. 780, 765)

2. Lay Witnesses

At the evidentiary hearing, several lay witnesses testified to numerous elements of non-statutory mitigation as well as providing testimony supporting the findings of mental health experts.

Gloria Windom, Mr. Windom's younger sister, testified that there were nine children in the Windom family and that they all grew up in Winter Garden, Florida. (PC-R. 720) Gloria stated that the Windom family was very poor and had "nothing." (PC-R. 721) Mr. Windom's father was a fruit picker and gambled away much of the money he made. (Id.) The Windoms did not have health insurance and thus, medical care was not an option. (PC-R. 722) The Windoms had no car and there was never enough food. (Id.)

Gloria related that as a child, Mr. Windom was "slow" and had stuttering and bladder control problems. (PC-R. 720) Mr. Windom's bladder control problems began at a young age and because the family had no washer or dryer, he would often have to wear clothes that were soiled. (PC-R. 721) As a result of his bladder control problem, Mr. Windom was teased by other children. (Id.)

Gloria stated that Mr. Windom's father was abusive, beating the children for no reason. (PC-R. 723) Mr. Windom's father once beat his mother nearly to death with a tire iron. (Id.)

Gloria explained that Mr. Windom suffered head injuries at birth and in a car accident as a teenager. (Id.) After the car accident, Mr. Windom was hospitalized for several days. (Id.)

Further, Gloria testified that she was the main family contact with Mr. Windom's trial attorney, but he did not want to talk to the mitigation witnesses that she procured. (PC-R. 729) Mr. Windom's lawyer never asked Gloria about Mr. Windom's background, but she would have testified to such matters if asked. (PC-R. 728)

Lois Windom, Mr. Windom's oldest sister, testified that she witnessed her mother's labor with Mr. Windom. (PC-R. 741) Her mother was attempting to walk from a bathroom to a bed when the delivery occurred and Mr. Windom landed on the floor with his head. (Id.) Mr. Windom was not taken to the hospital. (PC-R. 742) Lois also recalled Mr. Windom being in a serious car accident as a teenager where the vehicle flipped several times and Mr. Windom was rendered unconscious. (PC-R. 743) Lois related that after the accident, Mr. Windom suffered headaches and began to have difficulty with his speech. (PC-R. 745)

Lois recalled meeting Mr. Windom's trial attorney, but never having a discussion with him. (Id.) Lois would have testified at trial had she been asked to do so. (PC-R. 746)

Eddie Windom, Mr. Windom's younger brother, described the Windom home as never having enough food. (PC-R. 786) Eddie described

his father as being abusive. (PC-R. 785) Further, Mr. Windom's father was the only income provider and often gambled away the money he was able to make. (Id.) Eddie related that Mr. Windom had bladder control and speech problems as a child. (PC-R. 783-84) As a result of the bladder control problem, Mr. Windom was called names such as "pissy" by other children. (PC-R. 784) Eddie stated that Mr. Windom never drank or used drugs. (PC-R. 786)

Finally, Eddie testified that he only met Mr. Windom's trial attorney once and that he was too busy to talk to Eddie. (PC-R. 790) Eddie stated that he would have testified at trial had he been asked to do so. (PC-R. 792)

Willie Mae Rich testified that she has known Mr. Windom from the time he was born. (PC-R. 889) Willie Mae testified that Mr. Windom was a well-mannered young man who got along with most people. (PC-R. 897) Willie Mae recalled an incident where Mr. Windom was shot. (PC-R. 899) Willie Mae stated that she would have testified in front of the jury had she been asked. (PC-R. 895)

Lena Windom, Mr. Windom's mother, testified that when she delivered Mr. Windom, "he dropped out on the floor." (PC-R. 923) Lena stated that she did not call a doctor because the family did not have a phone. (PC-R. 924)

3. Legal Expert Testimony

Robert Norgard, an attorney, was admitted as a capital defense expert and testified that prior to 1992 there were numerous available CLE programs regarding capital cases. (PC-R. 977-81) Norgard stated that the community standard for conducting capital cases, firmly

established as of 1992, required extensive investigation into the client's background. (PC-R. 983-84) Norgard explained that 300-500 hours of investigation is necessary for developing mitigation. (PC-R. 984) In 1992, a wide range of non-statutory mitigation was well recognized. (Id.)

Norgard stated that the community standard in 1992 dictated that an attorney consult with a confidential expert and provide that expert with the greatest amount of information possible, including information about a defendant's possible motivations for the crime. (PC-R. 987-92, 1032) It is the duty of the attorney to provide this information regardless of whether the expert asks for it. (PC-R. 992) The expert should evaluate for the existence of statutory and non-statutory mitigation. (PC-R. 994)

Norgard explained that by 1992, the concept of waiving the statutory mitigating circumstance of "no significant prior criminal history" in order to prevent the state's introduction of such history, was firmly established. (PC-R. 1034) Further, by 1992, a waiver of mitigation had to be preceded by the client being fully informed of the available evidence being waived. (PC-R. 998) Without such a disclosure, a knowing and intelligent waiver was not possible. (Id.)

Norgard also testified that competent counsel would seek an *in limine* ruling as to whether the presentation of mitigating evidence would "open the door" to presentation of negative information by the state in rebuttal. (PC-R. 1037)

4. Trial Attorney's Substance Abuse

Relevant to the inquiry into trial counsel's performance is the extent to which Leinster was suffering from the effects of alcoholism before and during Mr. Windom's trial. On this point, Kurt Barch testified that Ed Leinster did not pay a lot of attention to the case and "was at home most of the time." (PC-R. 857) Barch related that he covered for Leinster "a lot" during 1992, covering for him in court "almost every day." (PC-R. 859) Barch testified that "Ed drank a lot, he was forgetful, he was not attentive to his cases, and quite frankly, his main importance was not to provide a legal service but to collect money from clients." (PC-R. 858) Barch explained that he would often have to cover for Leinster's drunkenness. (PC-R. 859) Barch added that it is "hard to say" whether Leinster was under the influence during the Windom trial because Leinster successfully hid his alcoholism. (PC-R. 862) However, Leinster did have alcohol-related shakes during the trial. (PC-R. 863)

Willie Mae Rich testified that when she encountered Mr. Leinster outside the courtroom during trial, "you could smell alcohol all over him." (PC-R. 893) Mary Jackson testified that when she was speaking with Leinster outside court during a trial recess, he "reeked very strong of alcohol." (PC-R. 906) At the time, Jackson and Leinster were approximately one foot apart. (Id.)

Judge Russell testified that she was aware prior to the Windom case that Leinster had problems with alcohol and cocaine. (PC-R. 941) Although she could not detect that Leinster was intoxicated during the Windom trial from her vantage point, she "watched with Leinster probably more than any lawyer that came before me because I knew he

had more problems." (PC-R. 942-43) Judge Russell added that she has no idea if Leinster was under the influence of alcohol when preparing for Mr. Windom's trial. (PC-R. 953)

5. Trial Attorney's Response

Ed Leinster, Mr. Windom's trial attorney, testified that he thinks this was his first capital trial although he is not sure. (PC-R. 805) Leinster did not take any law school courses or subsequent CLE courses related to the presentation of a mental health defense. (PC-R. 806) Leinster stated that he has never presented a defense where brain damage in the client was implicated. (PC-R. 846)

Leinster reviewed the reports of Doctors Pincus and Beaver prior to the evidentiary hearing and stated that if he had evidence of statutory mental health mitigation, mental illness, and brain damage, he would have used it regardless of the state's intention to put on evidence that Mr. Windom was a drug dealer. (PC-R. 808-10, 828) Leinster would have used evidence of mental illness and that Mr. Windom could not form the intent necessary to prove the CCP aggravating factor. (PC-R. 810)

Leinster explained that the presentation of mitigating evidence to the jury was waived on his advice based on a fear that the state would introduce "drug" evidence in rebuttal. (PC-R. 817) However, Leinster stated that he did not have a strategic reason for failing to file a motion *in limine* regarding drug evidence. (PC-R. 817)

Leinster testified that he did not hire an investigator despite having an order from the court to cover the costs. (PC-R. 818)

Leinster had no strategic explanation for his failure to obtain

a confidential mental health expert. (PC-R. 820) Further, Leinster stated that his reliance on Dr. Kirkland was probably faulty. (Id.)

Kurt Barch, who assisted Leinster in representing Mr. Windom, testified that Leinster asked him to develop mitigating evidence. (PC-R. 849) Friends and family of Mr. Windom told Barch an investigator should be hired, preferably an African-American, because Barch would have less success gaining information in Mr. Windom's community. (PC-R. 850) Barch explained to Leinster that witnesses were not opening up to him and that an investigator needed to be hired, but this was never done. (PC-R. 851-52, 869)

Barch determined that mitigation evidence existed, including positive character traits and mental health evidence, and relayed this to Leinster. (PC-R. 851, 861) Barch was aware of the car accident Mr. Windom was in and talked to the treating physician. (PC-R. 852) Barch testified that Leinster was responsible for dealing with Dr. Kirkland. (PC-R. 853)

Barch explained that the decision to waive the presentation of mitigating evidence was made by Leinster without any consultation or discussion with Mr. Windom. (PC-R. 856)

6. Strickland Analysis

The aforementioned testimony verifies that Mr. Windom's penalty phase proceedings did not serve to individualize him in the eyes of the jury, the very purpose of mitigation evidence and essence of a reliable penalty phase. See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). In its order denying relief, the lower court found that the deficient performance and prejudice prongs of Strickland had not been

met. (PC-R. 2647) However, the lower court erred in failing to follow this Court's Strickland precedent.

The lower court, in assessing Leinster's failure to present penalty phase evidence, reasons again that it was Leinster's strategy not to present a "full-blown background mitigation defense in front of the jury." (PC-R. 2646) First, Leinster not only did not present a "full-blown" mitigation defense to the jury, he presented no defense at all. He called no witnesses at the penalty phase. Further, the court's labeling of Leinster's action as strategy is erroneous because Leinster failed to have a mental health expert evaluate Mr. Windom for penalty phase and failed to investigate lay witnesses who could have provided non-statutory mitigation.

Interestingly, the lower court finds that Mr. Leinster's approach at penalty phase, rather than putting on witnesses and presenting evidence, was to argue to the jury in closing that Mr. Windom's actions were crazy and bizarre. (PC-R. 2647) The problem with this strategy, even assuming it can be called that, is that there was no valid evidence presented from which to make such an argument. The basis of the argument was non-existent, a fact likely not lost on the jury.

Additionally, the lower court finds that because the jury was instructed on statutory mental health mitigation and still voted for death, that the testimony of Doctors Pincus and Beaver would not have effected the outcome. (PC-R. 2647) This finding is simply illogical. The jury had no evidence for which to find the existence of statutory mitigation and were likely confused by being instructed so. Stated

simply, the instruction was meaningless and hollow without evidence to support it.

Again, the lower court addresses the prejudice prong of Strickland by citing to the possibility that the state would have introduced evidence of "drug activity" if Leinster had presented mitigating evidence to the jury. (Id.) The lower court's holding is erroneous in that such dubious evidence would not have been admissible at the penalty phase. See Hildwin v. State, 531 So.2d 124 (Fla. 1988) (holding that in the absence of a conviction, the jury is not to be told of any arrests or pending criminal charges); Mendoza v. State, 700 So.2d 670 (Fla. 1997) (supporting the holding of Hildwin); and Perry v. State, 801 So.2d 78 (Fla. 2001) (presentation of improper non-statutory aggravation constituted grounds for reversal). Mr. Windom would point out that had the state felt such evidence was admissible as indicative of motive, surely it would have presented it at guilt phase. It did not.

Further, Leinster failed to file a motion *in limine* in order to obtain a judicial ruling as to whether evidence of drug activity would have been at all admissible. The fact that no such motion was filed calls into question whether this possibility ever entered Leinster's mind. Robert Norgard testified that competent counsel would have filed such a motion and the lower court agreed with that assessment. (PC-R. 2648) The lower court's contention that it "cannot conceive" of a trial court granting such a motion is pure speculation. (PC-R. 2649) Whether or not the lower court would itself have granted the motion is not dispositive under Strickland.

In evaluating whether or not Mr. Windom knowingly and intelligently waived the presentation of mitgation, the lower court mischaracterizes the evidence presented at the hearing. Specifically, the court finds that Kurt Barch conceded that Leinster "could have" discussed the waiver. (PC-R. 2649) In actuality, all Barch conceded was that Leinster represented to the trial court that he had discussed the waiver with Mr. Windom and that Leinster "could have" discussed it with Mr. Windom at some point. (PC-R. 877) However, Barch stated that he did not "see how he (Leinster) could have talked to Curtis" at the point in which he told the court he did. (PC-R. 876) The lower court's conclusion that a valid waiver of mitigation occurred because Leinster in fact discussed the waiver with Mr. Windom is not supported by the evidence.

Rather than a valid waiver of mitigation, such as that found in this Court's opinion in Koon v. State, 619 So.2d 246 (Fla. 1993), the "waiver" in this case was bogus. The instant case is similar to Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). In Blanco, the 11th Circuit found counsel's representation "objectively deficient" and prejudicial where counsel failed, with his client's acquiescence, to present witnesses at the penalty phase of trial. Id. at 1499. The court found that counsel in Blanco failed to conduct a reasonable investigation, a failure resulting from simple deficiency, not strategy. Id. The 11th Circuit rejected the district court's finding that counsel made a strategic choice to forego the presentation of mitigating evidence because of a fear that the defendant's "criminal background" would be exposed to the jury. Id.

at 1502. In rejecting the strategy reasoning of the district court, the 11th Circuit noted trial counsel's statement that mitigation should be presented to the jury and the fact that the defendant's criminal status had been presented to the jury. Id. In further rejecting Blanco's waiver of mitigation as valid, the 11th Circuit noted that "'the lawyer must first evaluate potential avenues and advise the client of those offering potential merit.'" Id. (quoting Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986)).

As in Blanco, Leinster failed to investigate what mitigating evidence was in fact available. The waiver of mitigating evidence was uninformed and thus, invalid. It is impossible to have a knowing, intelligent waiver without knowing what is being waived. Further, in contrast to the situation in Blanco, Leinster likely did not even discuss the uninformed waiver with Mr. Windom.

The aforementioned testimony verifies that the penalty phase proceedings did not serve to individualize Mr. Windom, the very purpose of mitigation evidence and essence of a reliable penalty phase. See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). In its order denying relief, the lower court found that the deficient performance and prejudice prongs of Strickland had not been met. However, in sustaining Mr. Windom's sentence, the lower court erred in failing to follow this court's Strickland precedent.

Recently, in Ragsdale v. State, 798 So.2d 713 (Fla. 2001), this Court remanded for a new penalty phase after finding counsel ineffective for failing to present available statutory and non-statutory mitigation. Specifically, counsel failed to present

evidence of Ragsdale's impoverished and abusive upbringing, brain damage, low intelligence, learning disability, and statutory mental health mitigation. Such available mitigating evidence is virtually identical to that not presented at trial, but presented at the evidentiary hearing, in the instant case.

Notably, in Ragsdale, Dr. Sidney Merin testified on behalf of the state at the evidentiary hearing as he did in the instant case. Id. at 718. This Court, in evaluating Dr. Merin's testimony in Ragsdale, pointed out that while Dr. Merin disagreed with Ragsdale's expert as to ultimate conclusions, Merin did testify to the existence of valuable mitigating evidence. Id. Such was also the case here, where Dr. Merin testified that Mr. Windom was possibly bipolar or psychotically depressed (PC-R. 1124), possibly brain-damaged (PC-R. 1218-28), suffers from a learning disability and low intelligence (PC-R. 1179), and was not malingering (PC-R. 1184).

In Rose v. State, 675 So.2d 567 (Fla. 1996), this Court ordered a new penalty phase because counsel did not obtain school, hospital, prison, and other records. Rose 675 So.2d at 572. Certainly, in Rose, as in this case, the evidence presented in postconviction was far more compelling than that presented at trial. See also Phillips v. State, 608 So.2d 778 (Fla. 1992) (prejudice established by strong mental mitigation: which was "essentially unrebutted"); Mitchell v. State, 595 So.2d 938 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So.2d 1288 (Fla. 1991) (prejudice established by

evidence of statutory mitigating factors and abusive childhood); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (quality of mitigating evidence presented at hearing established that counsel's errors deprived defendant of a reliable penalty phase proceeding); see also Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997); Lush v. State, 498 So.2d 902 (Fla. 1986); Breedlove v. State, 692 So.2d 874 (Fla. 1997); LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Heiney v. State, 620 So.2d 171 (Fla. 1993); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995); and Chandler v. United States, 193 F.3d 1297 (11th Cir. 1999).

State and federal courts have repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See, e.g. Deaton v. Dugger, 635 So.2d 4, 8 (Fla. 1993); Phillips; Lara; Stevens v. State, 552 So.2d 1082 (Fla. 1989); Bassett v. State, 541 So.2d 596 (Fla. 1989); State v. Michael, 530 So.2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So.2d 1154, 1155-56 (Fla. 1984); Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575,

adhered to on remand, 739 F.2d 531 (11th Cir. 1984). In this case, counsel utterly failed in his representation of Mr. Windom. Counsel completely failed to investigate the existence of mental health mitigation. Additionally, counsel's investigation of lay witnesses who could provide non-statutory mitigating evidence was scant, if not non-existent. Further, at the penalty phase of Mr. Windom's trial, counsel inexplicably and without reason, waived the presentation of mitigating evidence.

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). In the instant case, Ed Leinster conceded that he would want to present evidence of brain damage and statutory mental health mitigation, without regard for what the state may present in rebuttal.

Had the jury heard the true scope of Mr. Windom's impoverished upbringing, physical abuse, brain damage, mental illness, and positive character traits, there is no reasonable probability that the results of the sentencing phase of the trial would not have been different. Strickland, 466 U.S. at 694. Having heard none of the mitigating evidence available, the jury was incapable of making an individualized assessment of the propriety of the death sentence in this case.

In Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Federal Court of Appeals explained the essential constitutional mandate the

United States Supreme Court has annunciated and emphasized:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Tyler v. Kemp, 755 F.2d 531, 743 (11th Cir. 1985) (citations omitted).

Therefore, in preparing and presenting penalty-phase evidence, counsel's highest duty is to individualize the human being in jeopardy of losing his or her life. See, e.g, Harris v. Dugger; Middleton v. Dugger; Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not

pursue a strategy, but "simply failed to make the effort to investigate").

Had Mr. Windom's jury and judge been presented with the poignant, powerful mitigation now of record and available at trial, there is a reasonable probability that the outcome would have been different.

Mr. Windom was entitled to expert psychiatric assistance when the state made his mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

The mental health expert plays a critical role in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

Under the Ake standard, Ed Leinster failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). Dr. Kirkland was appointed by the trial court at the last hour and then, his evaluation of Mr. Windom was so lacking as to be absurd. Dr. Kirkland had no records on Mr. Windom, talked to no witnesses, reviewed no police reports, and saw Mr. Windom only once for two hours. The only information Dr. Kirkland had was the charge in the indictment. By Dr. Kirland's own admission, his evaluation of Mr. Windom was inadequate and unprofessional, rendered so by counsel's failures. The testimony of Doctors Pincus and Beaver, as previously set forth, stands in stark contrast.

Finally, the evidence presented at the evidentiary hearing demonstrated who Curtis Windom was as a human being, his frailties and virtues. The testimony of lay and expert witnesses presented was available to counsel at the time of trial. Yet, counsel neglected this powerful mitigating evidence and choose to present absolutely nothing. Such evidence could and should have been presented at trial. Had it been presented, there is a reasonable probability that Mr. Windom would not now be facing a death sentence.

C. The Lower Court Erroneously Denied Mr. Windom Relief On His Claim That Counsel Affirmatively Harmed His Case By Making Damaging Statements To The Court And Conceding The State's Case.

Ed Leinster's penalty phase opening statement began as follows:

MR. LEINSTER: Yes. Since I'm the same individual that was largely unsuccessful in convincing anyone here that Mr. Windom did not do everything the state said he did and in the degree that they said he did, I hope that I can at least keep your attention through this particular phase.

We had gotten an agreement, we thought that you would not whisk from the guilty phase into the electric chair. Now, somewhere as we speak on this planet, there are people who are actually having fun.

MR. ASHTON: Your honor, let me object. This is not an opening from the facts, it is a show.

MR. LEINSTER: Sit down.

MR. ASHTON: I'm sorry?

THE COURT: Mr. Leinster, I want you to come here.

(BENCH CONFERENCE OFF THE RECORD.)

THE COURT: Okay, Mr. Leinster.

MR. LEINSTER: One more time. I am not one of those people. This is not fun. Nothing about this has been fun. Trying a first-degree murder case is about as brutal as it gets. I wasn't there, I didn't participate. My job is to try to save a man's life, end of story. *You made your decision. It wasn't too tough.*

Broad daylight, what can you say? I would have to be the firm of Christ and Houdini to have made anything out of this other than what it clearly was.

(PP. R. 26-27) (emphasis added)

After reassuring the jury regarding their guilt verdict, Leinster confided to the Court that essentially no mitigation existed: "Nobody really has much to say other than [Mr. Windom] is a good fellow, probably to them in the past." (PP. R. 45) Leinster

then stood and delivered his closing argument to the jury:

> *...Curtis Windom doesn't deserve pity. He doesn't deserve anything for what he did. I agree with you, it was--I agree with Jeff [Ashton], it was cold. The two aggravating factors are that it was premeditated. Well, that is part of the charge. Anybody that could commit first-degree murder, it is premeditated. So that is aggravated.*
>
> *And the other is that it was cold in the sense that any killing is cold. It is, by definition. The mitigation factors you will be asked to consider, some of them don't make any sense at all.*
>
> ...
>
> *Some of them talk about whether or not the individual was under extreme mental or emotional disturbance at the time. I never told you he was crazy.*

(PP-R. 96-97) (emphasis added) One might expect the prosecutor to be the speaker of the foregoing remarks, but, incredibly, it was Mr. Windom's own lawyer. Elsewhere in his closing argument, Leinster told the jury that Mr. Windom "did everything a human being could probably do to deserve [the death penalty]." (PP-R. 92) He also told the jury that Mr. Windom "is not a good fellow." (PP-R. 94) Further, he declared that Mr. Windom's crime "wasn't a mistake. It was a horrible, brutal act." (PP-R. 95)

That Mr. Windom's own attorney would implicitly urge the jury to return a death recommendation is so outrageous as to defy belief. Leinster's unreasonable failure to present any mitigation was itself inexcusable, but to further tip the scales against his client was a gross violation of Leinster's duty of advocacy. "[A] vital difference exists between not producing any mitigating evidence and

emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence." Douglas v. Wainwright, 714 F. 2d 1532, 1557 (11th Cir. 1983), vacated, 468 U.S. 1206 (1984), adhered to on remand, 739 F. 2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

Leinster abandoned his role as a zealous advocate during the penalty phase. He presented no mitigation; he represented to the court that no mitigation existed; and he, in effect, argued to the jury that Mr. Windom deserved to be executed. On direct appeal, Justice Anstead condemned Leinster's handling of the penalty phase:

> [D]efense counsel's approach to the jury at sentencing was tantamount to a concession of the existence and validity of the State's case for aggravation. The only substantial appeal to the jury by defense counsel was directed to the efficacy of the death penalty, rather than the merits of its invocation in this particular case.

Windom v. State, 656 So.2d 432, 441 (Fla. 1995) (Anstead, J., concurring in part and dissenting in part; joined by Grimes, C.J.).

Moreover, Leinster's argument reflects a total ignorance of Florida capital sentencing law: he erroneously assumed (and argued to the jury) that the cold, calculated, and premeditated aggravating factor applied automatically, simply because Mr. Windom was convicted of first degree murder. However, as this Court has repeatedly pronounced, "CCP encompasses something more than premeditated first-degree murder." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); see also, Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (CCP

requires "heightened premeditation"); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) ("calculation" constitutes a careful plan or prearranged design); Porter v. State, 564 So. 2d 1060 (Fla. 1990). Leinster's failure to know this basic principle of Florida law constituted ineffective assistance. In its order denying relief on this issue, the lower court erroneously adopts Leinster's perception that a finding of first-degree murder necessitates the application of the CCP aggravator: "Mr. Windom had already been convicted of first-degree murder and Mr. Leinster was facing a daunting task. . . It would have strained his credibility, thereby contributing to the difficulty of this task, to argue the verdict was unjust to the same jury which would be imposing a sentence." (PC-R. 51) The lower court makes the same mistake Leinster was guilty of. That is, equating the guilty verdict with a necessary application of CCP. Thus, the lower court's basis for denial is erroneous as a matter of law.

The prejudice to Mr. Windom practically leaps off the pages of the transcript. Leinster conceded the existence of an aggravating factor, CCP, that did not even apply to the facts of the case. On direct appeal, this Court struck the CCP aggravator with respect to two of the homicides. Windom v. State, 656 So. 2d at 439.

Leinster also failed to object to the jury instruction given by the Court regarding the CCP aggravator. The Court instructed Mr. Windom's jury as follows:

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

(PP. R. 102.) No narrowing instruction was given. This Court has held that this instruction is unconstitutionally vague and likely to cause jurors to automatically characterize first-degree murder as involving the CCP aggravator. Jackson v. State, 648 So. 2d 85 (Fla. 1994). Moreover, this instruction fails to adequately channel sentencer discretion and is likely to be applied in an arbitrary manner. In spite of the instruction's constitutional defects, however, Leinster failed to make a proper objection. This was deficient performance which prejudiced Mr. Windom.

Leinster's actions in making damaging statements to the jury and court were inexcusable. Such actions effectively conceded the state's case for aggravation. More shockingly, the statements bordered upon conceding to the jury that his client deserved the death penalty. When considered singularly, or in combination with trial counsel's inexplicable failure to present mitigating evidence to that same jury, such statements prejudiced the outcome of Mr. Windom's trial.

ARGUMENT II

Although the lower court granted an evidentiary hearing on some claims, the court summarily denied the balance of Mr. Windom's claims. The lower court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Mason v. State, 489 So.2d 734 (Fla. 1986). The claims that the lower court denied summarily are addressed below. As to some of the claims, Mr.

Windom concedes that the issue has previously been decided adversely to his position. Mr. Windom respectfully urges this Court to revisit those issues.

A. The Lower Court Erroneously Denied An Evidentiary Hearing On Mr. Windom's Claim That He Is Innocent Of First-Degree Murder And Innocent Of The Death Penalty Consistent With The Fifth, Sixth, Eighth, And Fourteenth Amendments.

At the outset of this argument, Mr. Windom concedes that this court has previously decided aspects of the argument adversely to his position. Mr. Windom respectfully urges this Court to revisit the issue.

Mr. Windom is innocent of first degree murder and innocent of the death penalty. Mr. Windom was convicted and sentenced to death in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding Florida law.

The United States Supreme Court has held that, where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). This Court has recognized that innocence of the death penalty constitutes a claim. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

Innocence of the death penalty is also shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Windom's trial court relied upon two aggravating circumstances to support his death sentence: (1) cold, calculated, and premeditated; and (2) prior

conviction of a violent felony.

Mr. Windom's jury was given unconstitutionally vague instructions on one of the aggravating circumstances relied upon by the judge to support Mr. Windom's death sentence: cold, calculated, and premeditated. This Court struck the CCP aggravator as to two of the death sentences. However, there was insufficient evidence to support these aggravating circumstances. As a result, these two aggravating circumstances cannot be relied upon to support Mr. Windom's death sentence. This is especially true given the mitigation in this case.

The CCP instructions were erroneous, vague, and failed to adequately channel the sentencing discretion of the judge and jury or genuinely narrow the class of persons eligible for the death penalty. In sum, insufficient aggravating circumstances exist to support Mr. Windom's death sentence.

Furthermore, Mr. Windom's death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the overwhelming evidence of mitigating evidence discussed elsewhere render the death sentence disproportionate. Mr. Windom is innocent of the death penalty.

To the extent that trial or appellate counsel failed to adequately raise this issue, Mr. Windom was denied effective assistance of counsel .

B. The Lower Court Erroneously Denied An Evidentiary Hearing On

Mr. Windom's Claim That His Sentence Of Death Violates The Fifth, Sixth, Eighth, And Fourteenth Amendments Because The Penalty Phase Jury Instructions Were Incorrect Under Florida Law And Shifted The Burden To Mr. Windom To Prove That Death Was Inappropriate And Because The Trial Court Employed A Presumption Of Death In Sentencing Mr. Windom And Trial Counsel Was Ineffective For Failing To Object To These Errors.

At the outset of this particular argument, Mr. Windom concedes that this Court has previously decided this particular issue adversely to his position. However, Mr. Windom respectfully requests that this Court revisit this issue and retreat from its prior rulings. Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given **if the state showed the aggravating circumstances outweighed the mitigating circumstances.**

State v. Dixon, 283 So. 2d 1 (Fla. 1973) (emphasis added). See also Mullaney v. Wilbur, 421 U.S. 684 (1975). This straightforward standard was never applied at the penalty phase of Mr. Windom's capital proceedings.

The instructions given to Mr. Windom's jury were inaccurate and dispensed misleading information regarding who bore the burden of proof as to whether a death or a life recommendation should be returned. Defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). The trial court shifted to Mr. Windom the burden of proving whether he should live or die by instructing the jury that it was their duty to render an opinion on

life or death by deciding "whether mitigating circumstances exist[ed] that outweigh the aggravating circumstances." (PP. R. 101-102) In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital postconviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden of proof as to sentence. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital postconviction actions. Defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

The burden-shifting effect of these jury instructions was exacerbated by the state's closing argument in penalty phase. Although Florida law places the burden of proof on the state to establish each aggravating circumstance and prove that the aggravating factors outweigh the mitigating factors, the state attempted to shift this burden to Mr. Windom. At one point, the prosecuting attorney argued to the jury that they need only decide if the mitigation produced was sufficient to outweigh the aggravating factors. (PP. R. 88.) The jury was left with the impression that Mr. Windom carried the burden of overcoming the weight of the aggravating factors argued by the state. To the extent that trial counsel failed to object to the state's misleading argument, trial counsel was ineffective.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and

Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Windom's penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Windom, but also unless Mr. Windom proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Windom to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Windom to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard instruction given to the jury violated state law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987),

the instructions provided to Mr. Windom's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also, Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

The standard which the trial court used to instruct Mr. Windom's jury, and upon which the trial court relied, is an abrogation of Florida law and Eighth Amendment principles. See, McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Windom, the capital defendant, was required to establish that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation sufficient to outweigh aggravation.

After numerous unconstitutional instructions, there can be no doubt that the jury understood that Mr. Windom had the burden of proving whether he should live or die, especially given the fact that the jury at no time was ever properly instructed.

The instructions violated Florida law and the Eighth and

Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Windom on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Windom's Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. Since the jury in Florida is a sentencer, it must be properly instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Windom is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

Counsel's failure to object to the erroneous instructions was

deficient performance under the principles of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life.

C. The Lower Court Erroneously Denied An Evidentiary Hearing On Mr. Windom's Claim That His Sentences Of Death Are Premised Upon Fundamental Error Because The Jury Received Inadequate Guidance Concerning The Aggravating Circumstance "Cold, Calculated, And Premeditated" And Trial Counsel Was Ineffective For Failing to Object To This Error.

At the outset of this argument, Mr. Windom acknowledges that this Court has previously decided certain aspects of the claim adversely to his position. Mr. Windom respectfully urges the Court to revisit the issue and retreat from its prior holdings.

The Court gave the following instruction to Mr. Windom's jury concerning the cold, calculated, and premeditated aggravating factor ("CCP"):

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

(PP. R. 102.) No narrowing instruction was given. This Court has held that this instruction is unconstitutionally vague and likely to cause jurors to automatically characterize first-degree murder as involving the CCP aggravator. Jackson v. State, 648 So. 2d 85 (Fla. 1994). Moreover, this instruction fails to adequately channel sentencer discretion and is likely to be applied in an arbitrary manner.

For the foregoing reasons, Mr. Windom's death sentences are premised on fundamental error. Although this Court held on Mr.

Windom's direct appeal that the CCP aggravator did not apply to two of the homicides, this did not cure the fundamental error. The fact remains that Mr. Windom's jury received inadequate guidance when it was instructed concerning this aggravating factor, leading it to improperly find and weigh the aggravator. This tainted the jury's sentencing recommendation. The jury in Florida is a co-sentencer, and its recommendation is entitled to great weight. To the extent that counsel failed to object, counsel was ineffective.

D. The Lower Court Erroneously Denied An Evidentiary Hearing On Mr. Windom's Claim That His Sentences Of Death Are Predicated Upon An Automatic Aggravating Circumstance, Contrary To The Eighth And Fourteenth Amendments.

At the outset of this argument, Mr. Windom concedes that this Court has previously decided this particular issue adversely to his position. However, Mr. Windom respectfully requests that this Court revisit the issue and retreat from its prior rulings.

Mr. Windom's jury was instructed that it could find and consider the "prior conviction of a violent felony" aggravator. In Mr. Windom's case, each of his contemporaneous convictions served as an aggravator for the others. This led to the illogical and unfair result that the last homicide was considered a "previous offense" for purposes of aggravating the first. Had the State been unable to use Mr. Windom's contemporaneous convictions to aggravate each other, this aggravating factor would not apply at all: Mr. Windom had no prior violent felony convictions prior to this case.

The use of Mr. Windom's contemporaneous convictions to

aggravate each other resulted in the application of an automatic aggravating circumstance. Mr. Windom thus began his penalty phase facing a default sentence of death, before any evidence was presented to the jury. This was a violation of the Eighth and Fourteenth Amendments: an automatic aggravator fails to narrow the class of persons for whom death is an appropriate penalty, fails to channel sentencer discretion, and results in the arbitrary imposition of the death penalty. To the extent Mr. Windom's counsel did not object to this aggravating circumstance, counsel was ineffective.

E. The Lower Court Erroneously Denied An Evidentiary Hearing On Mr. Windom's Claim That He Was Denied His Rights Under The First, Sixth, Eighth, And Fourteenth Amendments And Denied Effective Representation Due To The Rules Prohibiting Mr. Windom's Lawyers From Interviewing Jurors To Determine If Constitutional Error Existed.

At the outset of this argument, Mr. Windom concedes that this Court has previously decided this particular issue adversely to his position. However, Mr. Windom respectfully requests that the Court revisit this issue and retreat from its prior rulings.

The ethical rule that prevents Mr. Windom from investigating any claims of jury misconduct or racial bias that may be inherent in the jury's verdict is unconstitutional.

Under the Fifth, Sixth, Eighth and Fourteenth Amendments, Mr. Windom is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. Misconduct may have occurred that Mr. Windom can only discover through juror interviews. Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So.

2d 594 (Fla. 1957).

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights. Mr. Windom should have the ability to interview the jurors in this case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting them. The failure to allow Mr. Windom the ability to interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

Rule 4-3.5(d)(4) is unconstitutionally vague. The language of the rule fails to put counsel on notice of what behavior is subject to disciplinary action. By its terms the rule requires only that counsel provide notice to the court and opposing counsel of her intention to interview jurors. The rule is to be interpreted in accordance with the complementary evidentiary rule found in ' 90.607(2)(b), Florida Statutes. Powell, 652 So. 2d at 356. This means the eventual determination of whether the attorney's conduct was proper will be made on the basis of information that could not have been known to the attorney before the interview took place, i.e., whether the juror can testify to overt prejudicial acts or extraneous influences on the verdict. Because the cases describing what evidence, once discovered through juror interviews, inheres in the verdict and what does not, counsel are unable to determine in

advance of conducting interviews whether their actions will subject them to discipline.

Mr. Windom must be permitted to interview the jurors in his case. Mr. Windom may have constitutional claims for relief that can only be discovered through juror interviews. However, Mr. Windom is incarcerated on death row and is unable to conduct such interviews. He has been provided counsel who are members of the Florida Bar. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, precludes counsel from contacting jurors and conducting an investigation into constitutional claims that would be discovered through interviews.

In light of the evidence that the deliberations of Florida capital juries frequently and to a shocking degree consider factors extrinsic to the verdict and engage in overt prejudicial acts, Mr. Windom must be permitted to interview the jurors who contributed to his death sentence in order to assess the extent to which Mr. Windom may have been prejudiced. See Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995). Certainly, juror misconduct during the guilt phase of Mr. Windom's trial would warrant a new trial. Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991). And misconduct during penalty phase proceedings comes under even greater scrutiny due to the Eighth and Fourteenth Amendment restrictions on capital sentencing. See Gardner v. Florida, 430 U.S. at 357-358.

For the foregoing reasons, Mr. Windom asks that this Court declare rule 4-3.5(d)(4), Rules Regulating the Florida Bar, unconstitutional and allow his legal representatives to conduct discrete, anonymous interviews with the jurors who sentenced him to

death.

CONCLUSION AND RELIEF SOUGHT

Mr. Windom prays that his convictions and sentences of death be vacated on the grounds stated herein and that this Court grant any further appropriate relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, has been furnished by first class mail, postage prepaid to Scott Browne, Assistant Attorney General, Office of the Attorney General, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa FL 33607, on this ___ day of October, 2002.

CERTIFICATION OF TYPE SIZE AND STYLE

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