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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Issue I

Ineffective Assistance of Counsel- Guilt Phase

A. Dr. Kirkland's Trial Testimony

In response to Mr. Windom's claim of ineffective assistance, Appellee argues that Mr. Leinster's employment and preparation of Dr. Kirkland was a viable, reasonable strategy. This argument ignores the obvious shortcomings of Dr. Kirkland at trial, particularly the woefully inadequate preparation, a deficiency that falls squarely at the feet of Mr. Leinster.

Dr. Kirkland was inadequately prepared to evaluate Mr. Windom and provide any meaningful diagnosis and, thus, assistance at trial. At the evidentiary hearing below, Dr. Kirkland testified that he was only retained to evaluate Mr. Windom a mere two weeks prior to trial and that the indictment was the only background information he had. Dr. Kirkland described what he received from Mr. Leinster as practically no information. (PC-R. 774). This is despite the fact that it would have been appropriate for the attorney to do so, both according to Dr. Kirkland and Robert Norgard, the defense legal expert who testified at the evidentiary hearing. (PC-R. 780, 992-93)

Appellee ignores the fact that Mr. Leinster, assuming *arguendo* that he made a strategic decision, did so in the blind, without preparing Dr. Kirkland at all. Rather than fully preparing the mental health expert, or for that matter preparing him to a minimally acceptable extent, Mr. Leinster failed to prepare Dr. Kirkland at all. Appellee maintains that Mr. Leinster's "strategy" of keeping the mental health expert uninformed was reasonable under the circumstances. However, contrary to Appellee's assertion that this was a reasonable legal strategy, the tact taken by Mr. Leinster is non-sensible. Without fully preparing the mental health expert to determine if and which guilt phase defenses may be viable, counsel simply did nothing, a strategy which can only be described as unreasonable, at best.

The "strategy" employed by Mr. Leinster left Mr. Windom without a viable guilt phase mental health defense, a defense which would have been available had Dr. Kirkland been adequately prepared. At trial, the court allowed Mr. Leinster put on Dr. Kirkland to testify to a "fugue state" defense (R. 580-94), a defense which the court should have, legally, never allowed at the guilt phase. Bunney v. State, 603 So.2d 1270 (Fla. 1992). Alas, Dr. Kirkland testified at trial, generally, as to the clinical definition of a fugue state and

further, testified on direct as follows:

> Q: Have you made any diagnostic find (sic) as to Mr. Windom as to whether he was or was not in a fugue state?
>
> A: No.
>
> Q: Is it reasonably, medically possibly (sic) that he was?
>
> A: That's two questions, Mr. Leinster. Is it reasonable and possible? Is it possible, yes. Is it reasonable or likely? No.
>
> Q: Okay. And you have had, what, one interview with him?
>
> A: Yes.

(R. 868). Dr. Kirkland further testified on cross-examination:

> Q: Based on the hypotheticals I have given you, Mr. Windom does not appear to be in a fugue state in this case based on the facts I gave you?
>
> A: Correct.

The foregoing reveals the negative nature of Dr. Kirkland's trial testimony and, additionally the woeful extent of Mr. Leinster's preparation of mental health testimony at Mr. Windom's trial. Dr. Kirkland merely testified to what a fugue state is generally, without any specific application to Mr. Windom whatsoever. Thus, Appellee's suggestion that Mr. Leinster's use of Dr. Kirkland, although not ultimately successful, was potentially viable, is not borne out by the

facts. Appellee's contention that Mr. Leinster used Dr. Kirkland to demonstrate Mr. Windom's "altered state of mind" is simply not credible. To the contrary, at trial, Dr. Kirkland's testimony buttressed the state's contention that Mr. Windom's mental state was sound and that the killings were the product of premeditation. Dr. Kirkland's testimony in no way allowed the defense to "attack the intent element of the crimes" as Appellee suggests.

Further, Dr. Kirkland, both at the time of trial and at the evidentiary hearing, stated clearly that his evaluation of Mr. Windom for sanity, the purpose for which he was appointed, was inadequate (PC-R. 762) Dr. Kirkland lacked sufficient information to determine Mr. Windom's sanity at the time of the crime, a fact which he advised the trial court of on August 18, 1992. (PC-R. 761). Not surprisingly, Dr. Kirkland never received such information. (PC-R. 762).

Appellee's suggestion that Mr. Windom's claim must fail because Mr. Windom did not demonstrate that Dr. Kirkland's opinions "would have changed" is both factually incorrect and legally fictitious. In fact, Dr. Kirkland never truly gave an opinion at trial regarding Mr. Windom's sanity at the time of the crime. As Dr. Kirkland advised the trial court at the time, he did not have sufficient information by which to make

a diagnosis of sanity *vel non*. Thus, there was no opinion that could have changed. Further, if Appellee is maintaining that Mr. Windom must, as a legal prerequisite, demonstrate that Dr. Kirkland's "opinion" has changed, the Appellee has not cited any legal authority showing such a requirement. The case cited by Appellee, Engle v. State, 576 So.2d 696 (Fla. 1991), does not stand for such a proposition. Contrastingly, the experts in Engle appear to have actually rendered opinions, as opposed to the instant case where Dr. Kirkland did not render an opinion as to sanity.

Dr. Kirkland's testimony and opinion(that Mr. Windom did not suffer from being in a fugue state)did not serve Mr. Windom well at his capital trial. In fact, the testimony was, as demonstrated by the testimony, harmful to Mr. Windom. Appellee's argument, in support of the lower court's order, that the benefit of Dr. Kirkland's testimony at trial demonstrates Mr. Leinster's efficient performance, does not survive scrutiny.

B. Neutralization of State's Motive Evidence

Appellee argues, in support of Mr. Leinster's representation of Mr. Windom, that by not having Dr. Kirkland fully evaluate Mr. Windom, Mr. Leinster was able to keep out damaging motive evidence. Appellee suggests, as was suggested

below, that the state was anxious to put on evidence that Mr. Windom was motivated to kill the victims because they were drug informants providing information against him. Further, that Mr. Leinster, by essentially keeping Dr. Kirkland completely in the dark regarding any background information about Mr. Windom or the case, did not "open the door" to that evidence which the state allegedly had and wanted to introduce.

As an initial matter, it is unclear why it would be necessary for Mr. Leinster to "open the door" to evidence of motive being introduced. Evidence of motive can be introduced in a first-degree murder prosecution to prove the required premeditation. Anderson v. State, WL 124468 (Fla. 2003). The theory of prosecution in this case was clearly premeditation and it has never been suggested otherwise. Assuming, *arguendo,* that the state had credible evidence Mr. Windom murdered any or all of the victims in this case because they were drug informants, the state could have put the evidence on in its case-in-chief.[1] It did not need testimony from a

[1]The only actual testimony the state has pointed out suggesting motive is that of Mary Jackson, who testified at the post-trial mitigation hearing that Mr. Windom told her he heard a rumor that Valerie Davis was going to inform against him. This is hardly powerful evidence of motive. In fact, it shows only that Mr. Windom may have been aware of a rumor. It certainly does not demonstrate that he acted upon such

mental health expert on behalf of Mr. Windom to "open the door" to such evidence.[2] In its order, the lower court ignores this fact and seems to accept the state's argument that it was somehow neutralized by Mr. Leinster's failure to develop available mental health evidence. To the extent that the state below, and Appellee in the instant appeal, argue that Mr. Leinster's representation prevented evidence of motive from being introduced into the trial, the argument ignores plain, black letter law.

Relatedly, Appellee argues, and cites the lower court's order in support, that Mr. Leinster's "strategy" prevented evidence of "Mr. Windom's activities as a successful drug dealer", short of motive, from being introduced at trial. (PC-R. 2633) Appellee argues that this evidence would have come in through valid cross-examination of experts such as Dr. Pincus and Dr. Beaver. Assuming that such cross-examination would have been allowed, the harm to Mr. Windom, relative to the powerful testimony of Doctors Pincus and Beaver, is

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information.

[2]It is also unclear why the testimony of Dr. Kirkland, under the state's theory, did not "open the door" to the type of questioning the state suggests. Dr. Kirkland was testifying, albeit vaguely, about Mr. Windom's mental state at the time of the crime. Why the state could not have tested his knowledge of the evidence suggested is not clear.

slight. See Harris v. State, 874 F.2d 756 (11th Cir.1989)(court could not conclude that effective counsel would have made strategic decision to forego mitigating evidence merely because its use would have allowed the state to add some prior unlawful acts to the proof already in the record). From a common sense perspective, it must be remembered that the jury in the case was presented with evidence that Mr. Windom shot four people in broad daylight. To add to that evidence the fact that Mr. Windom allegedly engaged in the sale of narcotics seems minor, especially balanced against testimony of mental health experts that Mr. Windom was insane, in addition to a wealth of other mental health evidence, at the time of the shootings.

Also on this point is the lower court's finding that calling mental health experts would have exposed Mr. Windom's "violent past as a drug dealer." (PC-R. 2632). Contrary to this lower court finding cited by Appellee, there is nothing in the evidence presented by the state, either at the trial or at the evidentiary hearing, showing that any of Mr. Windom's alleged drug involvement was violent. At the evidentiary hearing, the state introduced exhibits demonstrating two arrests of Mr. Windom for sale of cocaine, as well as a memorandum from Assistant State Attorney Jeff Ashton to State

Attorney Lawson Lamar regarding a federal drug investigation. (State's Exhibits 1, 3) None of this evidence demonstrates that Mr. Windom's alleged drug activity was violent. Thus, the lower court's analysis as to the prejudice of evidence suggesting Mr. Windom was a drug dealer is flawed.[3]

Regarding the memorandum, cited by Appellee in response, from Jeff Ashton to Lawson Lamar concerning "Operation Cookie Monster", the lower court makes much of its prejudicial effect, finding that had Mr. Leinster utilized mental health experts, evidence of Mr. Windom's motives, gained through the federal investigation, could have been exposed. (PC-R. 2633) However, a close examination of the memorandum demonstrates that the document proves the opposite of what the state argued below. The memorandum from Ashton advises Mr. Lamar of discussions with the United States Attorney's Office regarding the federal investigation. Ashton advises that, "according to" the Assistant United States Attorney, Mr. Windom suspected some of the homicide victims were cooperating with the federal investigation. Ashton further explains in the memorandum that the Assistant United States Attorney requested permission to

[3]Appellant would further point out that the lower court's characterization of Mr. Windom as a "remorseless killer" bent on revenge is not factually supportable in any way. (PC-R. 2635) There is no evidence, either in the trial record or postconviction record, demonstrating lack of remorse.

indict and seek death against Mr. Windom in federal court for the homicides. The basis of the federal indictment, Ashton explains, is the factual predicate, under the federal death penalty statute, that the homicide victims were killed "during the commission, furtherance of, or attempt to avoid apprehension or prosecution of a person committing a Federal narcotics law violation." (State's Exhibit 1(quoting the Federal death penalty statute, Title 21, Section 848)) In the balance of the memo, Ashton argues the advantages of allowing the federal government to seek murder charges under the federal death penalty statute. Importantly, Ashton writes:

> I don't know a great deal about the factual basis of the Federal drug indictments that are being handed down. I must assume that Mr. Byron and his superiors feel that they have a very strong case of proving the connection of the murder to ongoing drug violations. If you like, I will make further inquires of Mr. Byron as to the factual basis to establish the viability of the prosecution under that section.

(State's Exhibit 1) Underneath this paragraph in the memorandum is Mr. Lamar's handwritten response which reads: "This is determinative - you may work with Byron if you feel the CCE predicate is factually ample."

Two things appear obvious from the "Operation Cookie Monster" memorandum. One, the federal government was intent on seeking death under the federal statute and, two, the

Orange County State Attorney's Office was intent on allowing the federal government to do so, provided the important factual predicate could be established. Equally obvious by logical extension is that the factual predicate, that the victim's involvement in the drug investigation was the motive for the homicides, was never established by credible evidence. Thus, the suggestion by the state, and the lower court's like finding, that "Operation Cookie Monster" would have revealed Mr. Windom's motives for the killings and the fact that he "was a remorseless killer bent on revenge for those who informed on him" (PC-R. 2635), is unsubstantiated and arguably baseless. It seems apparent that the murder prosecution would have proceeded in federal court had a drug motive been established. Clearly, it was not.

As to Appellee's argument, and the lower court's finding, that the presentation of mental health experts would have exposed those experts to crucifying cross-examination regarding Mr. Windom's drug activities, this contention is not borne out by the evidence. Dr. Beaver was questioned about Mr. Windom's cocaine arrests and stated that he believed that although the arrests were on Mr. Windom's mind, they were not the motivation for the murder. (PC-R. 699-702) Further, when confronted with evidence of Mr. Windom's two cocaine arrests,

Dr. Beaver did not change any of his opinions regarding Mr. Windom's mental status. Dr. Pincus was likewise briefly cross-examined and stated that he had reviewed the arrest reports and that he did not feel the arrests were motivational as to the shootings in this case. As with Dr. Beaver, the arrest reports did not change any of Dr. Pincus' opinions. Thus, the prejudicial nature of the alleged cocaine activities which the Appellee suggests, and which the lower court relied on, is suspect at best. The fact is that the mental health experts below were aware of the arrests, were asked about the arrests on fairly benign cross-examination, and dealt with the issue effectively.[4]

C. Trial Attorney's Decision Uninformed

Appellee asserts that Mr. Leinster made a strategic decision not to present the testimony of mental health experts at the guilt phase of trial and that this strategy was designed to prevent the jury from hearing evidence that Mr.

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[4]As to Appellee's suggestion that mental health experts would have been confronted with "potential disorders",one being an antisocial personality disorder, the fact is that not one of the experts in this case testified that Mr. Windom suffers from an antisocial personality disorder. Not even Dr. Merin, who testified on behalf of the state, testified that Mr. Windom suffers from antisocial personality disorder. Appellant would also point out that under this Court's case law, antisocial personality disorder is a valid mitigating factor. Morton v. State, 789 So.2d 324 (2001).

Windom sold cocaine. However, Appellee, as well as the lower court, ignores one important factor in characterizing Mr. Leinster's representation as strategic. As the evidence demonstrates, Mr. Leinster did not investigate mental health and thus had no mental health evidence to weigh against the potential of exposing the jury to evidence of Mr. Windom's cocaine dealing. The extent of Mr. Leinster's development and investigation of mental health evidence was having Dr. Kirkland examine Mr. Windom once briefly and then ignoring Dr. Kirkland's admonition that he could not make a diagnosis as to Mr. Windom's sanity *vel non* without further information. Thus, Mr. Leinster's actions were not driven by strategy, but by ignorance.

Appellee's citations to Van Poyk v. State, 694 So.2d 686 (Fla. 1997), Gaskin v. State, 822 So.2d 1243 (Fla. 2002), and Bonin v. Calderon, 59 F.3d 815 (9th Cir.1995) are misplaced. For example in Bonin, the trial attorney had extensive background information and information gained from thorough psychological evaluations of the client when making the decision not to present mental health testimony.[5] Id. at 835.

[5]Appellant would point out that, to the extent Appellee is suggesting such, the cross-examination of mental health experts that would have resulted in Bonin is absolutely incomparable with any cross-examination that could have resulted from Mr. Windom's sale of cocaine.

The trial attorneys in Van Poyk and Gaskin were equally more informed than Mr. Leinster in the instant case.

The situation in the instant case is more like that of this Court's recent opinion in State v. Lewis, WL 31769281 (Fla. 2002). In Lewis, a mental health expert, Dr. Klass, saw the defendant pre-trial in one interview which the defendant cooperated. Lewis at 3. After the interview, Dr. Klass asserted, as Dr. Kirkland did here, that he needed further information before he could render a professional opinion.[6] Id. In affirming the lower court's finding of ineffective assistance of counsel at penalty phase in Lewis, this Court cited the obligation of defense counsel to investigate and prepare for trial.

Like trial counsel in Lewis, Mr. Leinster in the instant case did not investigate and prepare mental health evidence. Because he did not do so, Mr. Leinster could not effectively make a decision regarding strategy. As stated previously, counsel did not have knowledge as to what mental health evidence was available, in this case two very qualified mental

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[6]Also like Dr. Kirkland here, Dr. Klass testified at the evidentiary hearing that he reviewed records and information provided by postconviction counsel and that these records would have assisted in rendering a more complete diagnosis. Id. at 4. Dr. Klass did not testify that any of his opinions would have changed, to the extent he developed an opinion pre-trial.

health experts who testified that Mr. Windom was insane at the time of the crimes, and thus, Mr. Leinster could not balance anything against the prospect of evidence regarding cocaine dealing. Any tactic employed by Mr. Leinster regarding the presentation of mental health experts was ill-informed and, by definition, not a strategy.

The lower court's order engages in a fictional premise by ignoring the fact that Mr. Leinster completely failed to prepare mental health evidence, a fact testified to by Dr. Kirkland. (PC-R. 2633) Thus, the lower court's analysis is flawed in finding that Mr. Leinster engaged in a reasonable strategy.

Appellee maintains that Mr. Leinster's testimony below that if he had properly prepared experts, who would have testified to, among other things, insanity and brain damage, he would have used them at guilt phase, is not dispositive. While Appellant does not dispute this legal proposition as a general matter, Mr. Leinster's testimony in this regard is powerful evidence, both as to his lack of preparation at trial and the question of what a reasonable attorney would do in such a situation. Mr. Leinster's testimony in this regard clearly demonstrates that he did not adequately prepare mental health testimony at trial. His testimony at the hearing below

is a matter-of-fact concession to that point. It also must be remembered that Mr. Leinster testified at the hearing below that he would have used properly prepared experts regardless of cross-examination about cocaine dealing by Mr. Windom.

Appellee's suggestion that it acceptable for Mr. Leinster to make his own determination as to whether Mr. Windom suffers mental health deficiencies is not credible. Mr. Leinster is not a trained mental health professional and is thus not in a position to make such a determination. That determination, as testified to by legal expert Robert Norgard, is to made by a mental health consultant, not the attorney.[7] (PC-R. 987-93).

Mr. Leinster, quite simply, did not engage in a strategy that was fully informed. His decision making, as he admitted, was flawed. Thus, Appellee's argument, and the lower court's holding, that Mr. Leinster engaged in a reasonable strategy, is factually incorrect.

D. Prejudice Analysis as to Mental Health Experts

The lower court's order regarding the prejudice analysis

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[7]The fact that CCRC has previously made ineffective assistance of counsel claims against Mr. Norgard lacks any relevance to this appeal. It is additionally irrelevant that Mr. Windom privately retained Mr. Leinster in this case. Strickland v. Washington, 466 U.S. 688 (1984), held that defendants are entitled to reasonably effective assistance of counsel and Appellant is unaware of any "privately retained" exception to that constitutional principle.

under Strickland, as to the guilt phase, is flawed in several ways. Initially, it appears that the lower cort considered the fact that Mr. Leinster was able to present some evidence to the trial court at a post-trial mitigation hearing. (PC-R. 2627-28) It seems obvious that this fact is completely irrelevant to a claim of guilt-phase ineffectiveness. There is no bifurcated proceeding at guilt phase and the fact that Mr. Leinster was able to present some lay mitigation witnesses to the court post-trial does not lessen the prejudice of failing to present adequately prepared mental health experts who would have testified to insanity. To the extent the lower court relied on the existence of a post-trial mitigation hearing in its guilt-phase prejudice analysis, such analysis is flawed.

The lower court found, and Appellee has argued in support of, the fact that Dr. Pincus and Dr. Beaver were not credible and thus, no prejudice ensued as a result of the failure to call them at trial. (PC-R. 2636-42)

The lower court seems to focus on its belief that Dr. Pincus and Dr. Beaver did not have a grasp of the violent social setting within which Mr. Windom lived at the time the shootings occurred. (PC-R. 2640). While it is not clear how this directly relates to the credibility of their findings as

to sanity, the fact is, as mentioned before, Dr. Pincus and Dr. Beaver were aware of Mr. Windom's drug arrests and the fact that he had been shot in a drive-by shooting. (PC-R. 576-78, 699-700) Both Doctors stated that their knowledge of this information did not change their opinions as to Mr. Windom's mental status at the time of the shootings. (Id.)

The lower court also finds, in assessing the credibility of Doctors Pincus and Beaver, that they ignored Mr. Windom's statements on the day of the shootings. (PC-R. 2640). This is clearly not true. Both Doctors stated their knowledge and interpretation of these statements vis-a-vis Mr. Windom's mental status. (PC-R. 588-98, 693-96) Doctors Pincus and Beaver not only did not ignore Mr. Windom's alleged statements, they stated their opinion that these statements were not indicative of premeditation. Thus, the lower court's finding in this regard as to credibility and prejudice, is incorrect.

The lower court finds that "Perhaps... Mr. Leinster could have done more to obfuscate the facts..." by presenting the testimony of Doctor Pincus and Dr. Beaver, but that this would not have altered the outcome of trial. This statement by the lower court and its characterization of Dr. Pincus' and Dr. Beaver's testimony as "contrived" is completely out of line

with the mental health testimony presented by Mr. Windom below. Doctors Pincus and Beaver, as demonstrated below, are well-trained, authoritative, and respected professionals.[8] They were thoroughly prepared (PC-R. 523-28, 638-41) and offered reasonable, professionally based opinions.[9] The lower court's characterization of Dr. Pincus' and Dr. Beaver's testimony as "contrived", seemingly out of line with the lower court's own assessment of their professional status, is simply not supported by competent, substantial evidence.

E. Lay Witnesses

Appellee contends that the lower court's finding as to lay witnesses should be affirmed. However, both Appellee and the lower court ignore two important factors. The lower court essentially finds that the lay witnesses presented at the evidentiary hearing below were insignificant and did not contribute anything in addition to that brought out through Mr. Leinster's cross-examination of state witnesses at trial. (PC-R. 2629) This finding ignores testimony from lay witnesses

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[8]The lower court in fact found them to be "bright, articulate, and authoritative witnesses..." (PC-R. 2638)

[9]Appellee's argument that Dr. Beaver did not find Mr. Windom to be legally insane at the time of the crime is inconsistent with the lower court's holding. The lower court in fact held that Dr. Beaver gave such an opinion. (PC-R. 2632)

at the evidentiary hearing specifically contrasting Mr. Windom's usual behavior with that around the time of the shootings. (PC-R. 725-27, 787-88, 890-91). These witnesses testified that prior to the crimes Mr. Windom was neat and meticulous about his appearance, but that in the weeks leading up to the shootings this changed and Mr. Windom became disheveled, not wearing shoes or clean clothes. (Id.) This testimony would have provided specifics about Mr. Windom's normal behavior and his behavior leading up to the shootings rather that the generic testimony at trial that Mr. Windom "was acting strange" on the day of the shootings.

Further, the lower court seems to ignore the support this lay testimony would have provided to the expert testimony of Dr. Pincus and Dr. Beaver. Both Doctors testified to the importance of this type of testimony from lay witnesses in reaching their conclusions (PC-R. 557-63, 646-52)

The lower court misses two important points in discounting the lay testimony presented below. First, the testimony presented below was simply different than that presented at trial. The testimony at the evidentiary hearing provided a specific contrast of Mr. Windom's normal behavior and that leading up to the shootings. Also, the lower court ignores the importance lay testimony played in supporting the

mental health experts. To this extent, the lower court erred in assesing the prejudice of failing to present such witnesses.

Ineffective Assistance of Counsel- Penalty Phase

A. Trial Counsel's Decision Unreasonable

Appellee argues in support of the lower court's order that Mr. Leinster engaged in a reasonable strategy by failing to present any witnesses to the jury at the penalty phase of trial. However, Appellee and the lower court ignore a factual predicate of primary importance in coming to this conclusion.

As the 11th Circuit held in Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), trial counsel has a duty to investigate mitigating evidence to ensure that decisions about the presentation of evidence "flow from an informed judgment."

Id. at 763. In Harris, the lawyers for the defendant did not investigate his background, leading to an ignorance about the mitigation evidence available. Id. Such ignorance, the court held, prevented Harris' lawyers from making "strategic decisions" about whether to present mitigation to the penalty phase jury. Id. Thus, decisions made by trial counsel to forego the presentation of evidence cannot be, by definition, "strategic" if such decisions are uninformed.

Here, as demonstrated by the evidence presented below,

Mr. Leinster's decision to forego the presentation of mitigation was woefully uninformed. First, Dr. Kirkland testified that he was unable to give an opinion as to Mr. Windom's sanity as a result of being unprepared and that he was not retained to evaluate Mr. Windom for penalty phase. (PC-R. 761-62) Dr. Kirkland further stated that the type of information provided to him by postconviction counsel would have been helpful at trial. (PC-R. 765) At the hearing below, Doctors Pincus and Beaver testified to substantial mental health mitigation, both statutory and non-statutory. Combined with the contrast of trial and postconviction mental health experts is Mr. Leinster's concession that he would have presented mitigation at penalty phase if he had the testimony of Doctors Pincus and Beaver. (PC-R. 808-10) Leinster's testimony in this regard would have been unaffected by any state rebuttal evidence, specifically that portraying Mr. Windom as a drug dealer.[10] (Id.)

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[10]Notably, in Harris, the court rejected an argument by the state that no prejudice ensued as a result of counsel's uninformed decision due to the prospect of the state presenting evidence of prior criminality by Harris. The court stated: "[W]e cannot conclude that effective counsel would have made a strategic decision to forego (mitigation) merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case. Indeed, one of Harris' lawyers conceded that he would have used the evidence had he known about it." Id. at 764.

It is patently obvious that Mr. Leinster's decision not to present evidence at the penalty phase was uninformed.[11] Both Appellee and the lower court ignore the important fact that Mr. Leinster's decision, regardless of the wisdom of the decision otherwise, was uninformed. Thus, by definition, and consistent with the holding in Harris, Mr. Leinster's decision cannot be strategic or reasonable.

In arguing that Mr. Leinster made a reasonable decision to forego mitigation, Appellee ignores the common sense fallacy of such a decision. First, Mr. Leinster chose to present nothing to the jury in mitigation in a case he conceded was, in his opinion, an obvious first-degree murder case for which he had no defense and in fact presented no discernable defense.[12] It appears that Mr. Leinster concluded that the jury's death recommendation was a given factor, a

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[11]In addition to the mental health testimony presented at the hearing below, a wealth of non-statutory mitigation was presented, including, but not limited to, testimony regarding childhood abuse, poverty, physical defects, and a learning disability.

[12]Because of this, Mr. Leinster was left to make a generalized anti-death penalty argument to a jury of 12 people who had already stated their belief in the death penalty during voir dire. The resounding hollowness of such an argument has been recognized again and again. See Williams v. Taylor, 529 U.S. 420 (2000); Hardwick v. Crosby, WL 202867 (11th Cir. 2003); and Middleton v State, 849 F.2d 491 (11th Cir. 1988).

conclusion not unsupported given the lack of mitigating evidence presented. Mr. Leinster apparently relied on his ability to present mitigating evidence to the trial court at a separate proceeding. However, this ignores the great weight given to jury recommendations under Florida law and the dictate of Tedder v. State, 322 So.2d 908 (Fla. 1975). It further ignores the logic of such a decision. That is, if Mr. Leinster felt, as he apparently did, that the jury's recommendation was a given, there would be no harm in presenting mitigation to the jury and relying on the trial court's ability to subsequently override the recommendation. The decision simply defies the logic it claims to be driven by.

Appellee argues in support of the decision to forego mitigation that, like the decision to forego a mental health defense at guilt phase, the decision was reasonable given evidence the state would have presented. Specifically, evidence that Mr. Windom sold cocaine and that the shootings were
motivated by "Operation Cookie Monster."

As to the evidence indicating Mr. Windom sold cocaine, this evidence, as stated before, absolutely pales in comparison to the mitigating evidence available. This simple

evidence cannot be a reasonable basis on which to forego the powerful mitigating evidence available.

As stated completely in Argument I, the memorandum from Jeff Ashton to State Attorney Lawson Lamar regarding the federal drug investigation in Winter Park demonstrates exactly the opposite of what the state suggested, and what the lower court accepted (PC-R. 2633), below. The memorandum does not demonstrate proof, or even a suggestion of proof, of motive. The memorandum indicates that the federal government could not proceed with indictment on the murder charges because the government lacked the factual predicate necessary, that factual predicate being evidence that the shootings were motivated by the drug investigation. Therefore, the lower court's reliance on evidence of drug motive to support Mr. Leinster's decision as reasonable is factually flawed.[13]

As a final reply to Appellee's argument that the decision to forego presentation of mitigation was reasonable, Mr. Leinster's response to postconviction mitigation must not be forgotten. Mr. Leinster stated that if he had the testimony of adequately prepared mental health experts such as Doctors

[13]Appellee notes in response that at trial the state intended to call two law enforcement officers to testify to the details of the federal investigation. However, at the evidentiary hearing, neither officer, or any witness, testified to substantive evidence regarding the investigation.

Pincus and Beaver, he would have presented it to the jury in mitigation, regardless of evidence the state intended to present in rebuttal. (PC-R. 808-810) While it is true that Mr. Leinster's concession in this regard is not solely determinative, it is powerful testimony to the fact that his decision to forego mitigation, made in the blind, was not reasonable.

B. Waiver of Mitigation Uninformed

Appellee argues in support of the lower court's finding that Mr. Windom validly waived the presentation of mitigation consistent with Koon v. State, 619 So.2d 246 (Fla. 1993). This finding, like the lower court's finding that Mr. Leinster's decision to forego mitigation before the jury was reasonable, lacks a necessary factual predicate. Mr. Windom was not informed of the mental health mitigation available to him, nor a wide range of non-statutory mitigation. Thus, any waiver was not valid.

Rather than a valid waiver of mitigation, the waiver here, such as it was, is much like that in Deaton v. Dugger, 635 So.2d 4 (Fla. 1994). In Deaton, this Court found that "no evidence whatsoever was presented to the jury in mitigation... even though evidence presented at the rule 3.850 evidentiary hearing established that a number of mitigating circumstances

existed." Id. at 8. In affirming the trial court's holding that Deaton's record waiver of mitigation was invalid, this Court cited to the trial attorney's lack of preparation and resulting inability to convey to Deaton what evidence could be presented. Id. 8-9. Thus, Deaton's waiver of his fundamental right to call witnesses in mitigation "was not knowing, voluntary, and intelligent." Id. at 8.

Equally instructive is this Court's recent decision in State v. Lewis. In Lewis, this Court, in evaluating a waiver of mitigation in the context of an ineffective assistance claim, found:

> [The trial attorney] never sought out Lewis's background information and never interviewed other members of Lewis's family; therefore, he was unable to advise Lewis as to potential mitigation which these witnesses and records could have offered. The only witness who was available and willing to testify in favor of the defendant was a mental health expert who had merely talked with Lewis and had not yet reached a diagnosis because he did not have sufficient information.

Lewis at 7. In evaluating this evidence from Lewis, this Court set out the standard for evaluating waivers of mitigation:

> [T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated- this is an integral part of a capital case. Although a defendant may waive mitigation, he cannot

> do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.

Id. (footnotes omitted) Finding no valid waiver of mitigation, this Court affirmed the trial court's order granting a resentencing in Lewis.

As in Deaton and Lewis, there was no valid waiver of mitigation by Mr. Windom. Certainly, as to the mental health evidence that could have been presented at the penalty phase, Mr. Windom was not aware of this evidence because it had not been investigated and developed. Dr. Kirkland's testimony as to his ill preparation, as well as Mr. Leinster's concession that he would have used such evidence, reveal this fact. Mr. Windom could not have validly waived his fundamental right to present mitigation to the jury.

Appellee suggests that Mr. Windom's knowledge of mitigation is indicated by Mr. Barch's listing of lay witnesses on the record and the presentation of lay witnesses to the judge at post-penalty phase proceedings. First, none of the witnesses listed by Barch or presented to the trial judge involved mental health. Thus, even given Mr. Windom's alleged knowledge of these lay witnesses, it remains clear that he was not informed of available mental health evidence.

Further, the content of the lay testimony presented at the sentencing proceedings before Judge Russell pales in comparison to that presented at the evidentiary hearing. The lay testimony presented at the evidentiary hearing was much more powerful. Nothing in the record indicates that Mr. Windom was aware of the breadth of that evidence.

Appellee also argues, without legal support, that Mr. Windom's assertion of an invalid waiver is foreclosed because he failed to testify at the hearing below. In cases such as Lewis, Deaton, and Middleton, it does not appear that the defendants testified at the evidentiary hearing. Appellant knows of no legal rule requiring such testimony. The lower court's admonition that it is Mr. Windom's burden to prove his claim is correct. However, that burden is clearly satisfied by the balance of the testimony presented below.

C. Prejudice Analysis

Appellee argues, citing the lower court's order, that assuming *arguendo* Mr. Leinster's performance was deficient, no prejudice ensued under Strickland.

Appellee cites the lower court's somewhat inexplicable reference to the fact that the jury was instructed on the statutory mental health mitigating factors. (PC-R. 2647) It is unclear how this fact effects the prejudice analysis to be

conducted. This instruction was meaningless given that no evidence was presented, in either phase of trial, from which the jury could find a basis for statutory mitigation. The lower court's finding in this regard is in error.

In finding no prejudice, the lower court, as cited by Appellee, finds that the mitigating effect of the testimony presented below would have been offset by testimony about Mr. Windom's sale of drugs. (PC-R. 2648) Again, assuming such evidence would have been admissible, the fact that Mr. Windom sold drugs seems small when compared to the mitigation presented below. It must be remembered that the following mitigation was presented below, some of it by the state's own expert, Dr. Merin:

-psychosis
-mental illness
-brain damage
-head injuries
-delusional paranoia
-mania
-substantial impairment
-extreme disturbance
-dissociative disorder
-bipolar disorder
-depression
-dementia
-family history of mental illness
-learning disability
-borderline mentally deficient intelligence
-family history of low intelligence
-physical abuse
-bladder control problem
-speech impediment

-limited social upbringing
-poverty
-emotionally unstable mother
-limited education

Given this plethora of available powerful mitigation, it is hard to understand how the fact that Mr. Windom allegedly sold cocaine could be prejudicial.

The lower court's finding that evidence of drug motive for the shootings would have outweighed this extensive mitigation is again undercut by the state's lack of real evidence that the shootings were motivated by "Operation Cookie Monster." The Ashton/Lamar memorandum arguably suggests drugs were not a motive. Further, the only evidence ever presented by the state of motive was Mary Jackson's testimony. Jackson testified that Mr. Windom heard a rumor that Valarie Davis may be an informant. As stated previously, this is hardly damaging proof of motive.

Again, it must be remembered that Mr. Leinster himself testified that the mitigation presented below would have outweighed any damage done by evidence of drug dealing or drug motive. (PC-R. 808-10)

Appellee also argues that had experts such as Dr. Pincus and Dr. Beaver testified, they would have been impeached with testimony from Dr. Merin. As to credibility, the lower court

finds Dr. Merin more credible, but fails to sight any basis for this finding. The lower court holds that Dr. Merin's testimony was more logical and consistent. (PC-R. 2641). This finding by the lower court is conclusory, without any cited support. Further, the record reveals that Dr. Merin found that Mr. Windom had a history of head injuries (PC-R. 1126), is of low intelligence (PC-R. 1128), has a documented family history of low intelligence (Id.), is speech-impaired (PC-R. 1149), has an MMPI with elevated scores for schizophrenia, mania, and depression (PC-R. 1176), grew up in poverty (PC-R. 1179), is uneducated (Id.), suffered from a bladder control problem as a child (Id.), suffers from a learning disability (Id.), suffers from dissociative amnesia for periods of the crime (PC-R. 1191), possibly suffers from brain damage as indicated by low test scores (PC-R. 1218-21), has bipolar disorder or psychotic depression (PC-R. 1244), and **does not** have antisocial personality disorder (PC-R. 1245). Thus, even assuming *arguendo* that Dr. Merin is more credible, he provided powerful mitigation testimony on behalf of Mr. Windom.

Appellee states that Mr. Windom's reliance on Rose v. State, 675 So.2d 567 (Fla. 1996) and Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) is misplaced. Appellee cites the

fact that in Rose and Blanco, trial counsel "did not even investigate the defendant's mental status." Contrary to Appellee's argument, that is exactly what happened in the present case. Counsel's retention of Dr. Kirkland to see Mr. Windom one time and without any information other than the indictment is not an investigation into mental status. Dr. Kirkland's and Mr. Leinster's testimony supports that conclusion.

The conclusion of the lower court as to prejudice rests on two factors. One, that negative evidence regarding drugs would have neutralized the mitigation testimony of adequately prepared mental health experts and lay witnesses. Second, that state expert Dr. Merin was more credible than Doctors Pincus and Beaver. As stated, neither of these factors cited by the lower court support the lower court's constitutional finding as to prejudice.

D. Concession of the CCP Aggravator

Like Mr. Leinster at trial, Appellee and the lower court apparently understand that the aggravating factor of cold, calculated, and premeditated and the premeditation necessary for a first-degree murder conviction are synonymous. Clearly, they are not.

The lower court's statement that Mr. Leinster's

concession of the CCP aggravator is "taken entirely out of context" (PC-R. 2654)is simply not supportable given the clear statement Mr. Leinster made:

> ...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.

(PP-R. 96-97). The statement made by Mr. Leinster is in undeniable agreement with the prosecutor's argument in support of CCP. This concession is characterized by the lower court as "being realistic about the facts of the case." (Id.) The lower court's finding ignores the magnitude of such a concession, especially given that Mr. Leinster presented not one witness in mitigation and that CCP was one of only two aggravating factors. Further, Mr. Leinster was Mr. Windom's advocate, not his judge. By conceding the CCP aggravator, Mr. Leinster abandoned his duty of advocacy.

Appellee faults Mr. Windom for not suggesting an alternative argument to that made by Mr. Leinster. Frankly, it is difficult to formulate an alternative given the lack of

mitigation presented to the jury. However, had counsel presented the plethora of mitigation available, both statutory and non-statutory, innumerable avenues of argument could have been pursued.

Issue II

Regarding Issue II, as restated by Appellee, counsel will rely on his initial brief.

CONCLUSION

Based upon the foregoing arguments and upon the record, Mr. Windom respectfully urges the Court to vacate his convictions and sentences and to remand the case for a new trial, sentencing, or such other relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, 2002 North Lois Ave., Suite 700, Westwood Center, Tampa, Florida 33607, on this 27th day of March, 2003.

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