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IN THE SUPREME COURT OF FLORIDA
CASE NO: SC2025-1179

CURTIS WINDOM,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA
Lower Tribunal No. 1992-CF-1305

INITIAL BRIEF OF THE APPELLANT

DEATH WARRANT SIGNED

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REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Curtis Windom will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. art. V, § 3(b)(1); *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record on direct appeal are designated as follows:

> "V" followed by the volume number followed by "R" for the page number for the transcript of the guilt phase trial proceedings held on August 25-28, 1992 (mislabeled in the record on appeal as February 25-28, 1992), consisting of four volumes of 732 pages. Additionally, the bate stamp from the Clerk found at the bottom right-hand corner of the transcript will be referred to as "ROA" followed by the

number. Example – the entire guilt phase trial transcript record is at (V4/TrR1-732/ROA283-1016).

"R" followed by the page number for the 392 pages numbered consecutively consisting of Volume I – transcript of penalty phase proceedings held on September 23, 1992 (R1-113); Volume II – transcript of the sentencing proceedings held on November 10, 1992 (R114-134); Volumes III and IV - consisting of the pleadings filed in the case (R135-392); and the supplemental record on appeal (SupplR393-595) consisting of transcripts of both pre-trial and post-trial hearing and other pleadings.

References to the postconviction record in Case No. SC01-2706 are designated "V" for the ROA volume number, followed by "PC-R" for the bate stamp number. Where the bate stamp is difficult to see, the record may be additionally cited using the transcript number in the upper right-hand corner of the page as "PCTr" followed by the transcript page number.

References to the successive postconviction record filed for the Case No. SC16-1371 are designated "S-PCR" followed by the page number.

References to the successive postconviction record filed for the current appeal are designated "SPCR" followed by the page number.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS

The procedural history and facts presented at the trial were summarized by this Court in its direct appeal opinion. In part, they are as follows:

On March 3, 1992, Mr. Windom was charged by indictment with three counts of first-degree murder and one count of attempted murder. The guilt-phase of Mr. Windom's trial took place from August 25, 1992 through August 28, 1992. On September 23, 1992, the jury recommended Death for the killings, and on November 10, 1992, Judge Russell sentenced Mr. Windom to death.

Mr. Windom appealed his convictions and sentences to this Court, alleging thirteen errors by the trial court. In 1995, this Court struck the circuit court's finding that the CCP aggravator was applicable to the murders of Valerie Davis and Mary Lubin and also held that the circuit court had erred in admitting certain "community impact" evidence.[1]

[1] *Windom v. State*, 656 So.2d 432 (Fla. 1995) (Anstead, J. dissenting in part), cert. den., 516 U.S. 1012 (1995.)

Post-Conviction

On August 4, 2000, Mr. Windom filed an Amended Rule 3.850 post-conviction motion seeking relief from his convictions and sentences. Mr. Windom raised twenty–one claims for relief, and Judge Russell recused herself from presiding over the motion. The Honorable Stan Strickland thereafter presided over the evidentiary hearing on the claims of the motion from June 4, 2001 to June 7, 2001. On November 1, 2001, the circuit court entered an Order denying all of the claims in the Amended Rule 3.850 Motion.

Mr. Windom appealed the denial of the motion to this Court, arguing, inter alia, that the circuit court erred in denying the ineffective assistance of counsel claims, which were, he alleged, particularly egregious. Mr. Windom also filed a Petition for a Writ of Habeas Corpus, raising three claims for consideration on first impression by this Court. In a single order, this Court denied Mr. Windom's Petition for the Writ of Habeas Corpus and affirmed the circuit court's Order denying the Amended Rule 3.850 Motion to acate the convictions and sentences, including the death sentences.[2]

[2] *Windom v. State*, 886 So. 2d 915 (Fla. 2004.)

Federal Habeas Litigation

On September 20, 2004, Mr. Windom filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254 in the United States District Court for the Middle District of Florida, Orlando Division, Case No. 6:04 – cv-1378 – Orl – 28 KRS. On November 28, 2007, The U.S. District Court denied Mr. Windom's Petition for a Writ of Habeas Corpus without an evidentiary hearing. *Windom* v. *Sec'y, Fla. Dept Corr.,* No. 04-cv-01378-ORL, 2007 WL 9725062 (M.D. Fla. Nov. 2, 2007).

Mr. Windom appealed the denial to the United States Court of Appeals of the Eleventh Circuit. The two claims for ineffective assistance of counsel were allowed to be raised pursuant to the AEDPA, and the Eleventh Circuit denied relief on August 10, 2009.[3] A subsequent Petition for a Writ of Certiorari to the U.S. Supreme Court was denied.[4]

Relevant Successive Motions

On October 15, 2013, Mr. Windom received information from

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[3] *Windom v. Sec'y, Fla. Dept. of Corr.,* 578 F.3d 1227, 1237 (11th Cir. 2009).

[4] *Windom v. McNeil,* 559 U.S. 1051 (2010).

his clemency attorney, William J. McClellan, that Jack Luckett, an important state witness, had a pending drug charge at the time he testified for the State against Mr. Windom. On May 27, 2014, Mr. Windom filed a *pro se* motion with the Eleventh Circuit Court of Appeals for leave to file a successive Habeas Petition in the US District Court, alleging that the State failed to disclose *Brady*[5] evidence that this key witness had a pending charge for trafficking in cocaine at the time that he testified for the prosecution. Mr. Windom further alleged that this information constituted newly discovered evidence as he only recently learned about the pending charges from his attorney, Mr. McClellan. On June 26, 2014, The Eleventh Circuit denied the motion for leave to file a successor Habeas Corpus Petition pursuant to 28 U.S.C. Sec. 2244 (b) as well as a conjoined Petition for 28 U.S.C. Sec. 2251 Habeas Corpus Relief by a prisoner under sentence of death.[6]

On August 18, 2014, Mr. Windom filed a *pro se* motion in state court for new counsel alleging that his court appointed attorney,

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[5] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[6] *In Re: Curtis L. Windom, SR.*, No. 14-12411-P (11th Cir. June 26, 2014).

Harry Brody, failed to file a successive motion for post-conviction relief alleging a *Brady* violation, on the basis that the State failed to disclose a pending drug trafficking charge against a key state witness, Jack Luckett. On September 4, 2014, the trial court denied the *pro se* motion for new counsel, which Order was amended on September 17th. On September 9, 2014, Mr. Windom filed another *pro se* motion, Successive Motion for Post-Conviction Relief, alleging the *Brady* violation himself. This *pro se* motion was also denied and stricken on September 17, 2014, as it was found Mr. Windom was represented by counsel. This Court denied Mr. Windom's pro se appeal on February 2, 2015, No. SC14-2189.[7]

On October 15, 2014, court appointed attorney, Harry Brody, filed Successior [sic] Motion for New Trial Pursiant [sic] to Rules 3.851 and 3.852 alleging the *Brady* violation. On June 15, 2015, Harry Brody and the State were present before the trial court. The trial court appointed conflict counsel. On September 16, 2015, the trial court appointed CCRC-Middle to represent Mr. Windom, *nunc pro tunc* June 15, 2015. On April 4, 2106, the trial court

[7] *Windom v. State*, 160 So. 3d 901 (Fla. 2015).

allowed CCRC-Middle to argue the successive 3.851 motion filed by Mr. Brody. This motion was argued during the Case Management Conference held on June 15, 2016. The trial court denied Mr. Windom an evidentiary hearing on the motion and denied the successive motion on July 5, 2016. This Court affirmed the trial court's order. *Windom v. State,* No. SC16-1371, 2017 3205278 (Fla. July 28, 2017).

On January 5, 2017, Defendant filed a successive motion for postconviction relief based on *Hurst v. State,* 147 So. 3d 435 (Fla. 2014). The Court summarily denied the motion on March 7, 2017. Defendant appealed. The Florida Supreme Court affirmed the summary denial. *Windom v. State,* 234 So. 3d 556 (Fla. 2018). On October 1, 2018, the U.S. Supreme Court denied Defendant's petition for writ of certiorari. *Windom v. State,* 586 U.S. 860 (2018).

On July 28, 2025, Governor Ron DeSantis signed a death warrant. Defendant's execution is currently scheduled for August 28, 2025 at 6:00 p.m.

STANDARD OF REVIEW

This is an appeal from a Successive Motion under Fla. R. Crim. P. 3.851. Motions filed under R. 3.851, Collateral Relief after Death Sentence Has Been Imposed and Affirmed on Direct Appeal, must meet the following criteria:

> (e) Contents of Motion.
>
> > (2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).
>
> ---
>
> (d) Time Limitation.
>
> > (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
> >
> > > (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

The Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. *See, Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

SUMMARY OF THE ARGUMENTS

Mr. Windom's right to counsel under the Sixth Amendment to the United States Constitution was violated when the State allowed an attorney not qualified to represent clients in capital murder cases, where the State was seeking the death penalty, to handle Mr. Windom's case. At the time that trial counsel represented Mr. Windom, there were no special qualifications imposed for capital attorneys. The trial record indicates counsel was out of his league. He did not have the slightest notion how to handle complicated mental health investigation and presentation at either the trial or the penalty phase stages of a capital trial. Today standards have evolved and the rules in place now would have prevented this injustice.

Therefore, applying evolving standards of decency, which have been recognized for Eighth Amendment protection, to other critical protections under the Constitution, would entitle Mr. Windom to a reversal of his convictions and a new trial.

Mr. Windom's due process rights were violated under the Fifth and Fourteenth Amendments to the United States Constitution and corresponding sections of the Florida Constitution. The abbreviated scheduling order imposed upon Windom prevented his ability to be meaningfully heard during the post-warrant litigation. This due process violation is amplified by newly discovered evidence provided by the victims' families, including the Lee, Davis, and Lubin families, regarding mitigation. The violations to Mr. Windom's due process rights and the newly discovered evidence require this Court to enter a stay of execution and vacate Mr. Windom's sentence of death.

CLAIM ONE

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

In 1992, when Curtis Windom was appointed representation to defend against charges of first-degree murder, the only requirement necessary for an attorney to handle a capital case was that he be licensed and in good standing. He could be fresh out of law school and have just passed the Florida Bar. The training seminars that attorneys now attend to learn how to defend a capital case, *Death Is Different*, for instance, did not become available until 1995, according to the Florida Association of Criminal Defense Attorneys ("FACDL"). Fla. R. Crim. P. 3.112 setting standards for capital representation was not in effect until 1999. ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases were not revised until 2003. Justice Sandra Day O'Connor was quoted by the Death Penalty Information Center as saying in 2001, "After 20 years on (the) high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country. Perhaps it's time to look at minimum

standards for appointed counsel in death cases and adequate compensation for when they are used."[8]

While *Strickland*[9] was decided in 1984, the minimum standard for an attorney to be considered competent to represent a capital defendant has evolved beyond what was acceptable in 1992. Mr. Windom has sought justice time and time again to redress the injustice of being represented by incompetent counsel. The concept of "evolving standards of decency" was first applied to the Eighth Amendment and what should be considered cruel and unusual punishment. However, the concept of decency in a civilized society should not be limited to punishment, but must apply to all constitutional principles, most especially, the fundamental right to counsel. It is about time, literally the eleventh hour, to acknowledge that Mr. Windom never received the right to competent counsel as we recognize that right today.

1. <u>Circuit Court Order – Denied claim as untimely</u>

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[8] Death Penalty Information Center, Standards for Counsel in Capital Cases, https://deathpenaltyinfo.org/policy-issues/policy/death-penalty-representation/standards-for-counsel-in-capital-cases

[9] *Strickland v. Washington*, 466 U.S. 668 (1984).

The Circuit Court denied Mr. Windom's current successive postconviction motion because it was of the opinion that applying evolving standards of decency to the Sixth Amendment right to counsel is not an established fundamental right. [SPCR1301] Therefore, the court reasoned that the claim is not cognizable under rule 3.851(d)(2)(B), exceptions to filing a motion after deadlines set out in the rule. [*Id.*] However, the legal precedent to consider evolving standards of decency was well *established* over 100 years ago. While the fundamental right to counsel has been established, the evolving standards have not been *applied* to other constitutional protections, although the United States Supreme Court has indicated in *Weems*[10] and created in *Trop*[11] the foundation for doing so. This claim is not asking the court to create a new fundamental right to counsel but to recognize that what it means to have the right to counsel continues to evolve and Mr. Windom was denied that right. This Court should find this claim is timely filed.

A. <u>History of "Evolving Standards of Decency"</u>

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[10] *Weems v. United States,* 217 U.S. 349 (1910).

[11] *Trop v. Dulles*, 356 U.S. 86, 101 (1957).

In 1910, in *Weems v. United States*, the Supreme Court found that a constitution "must be capable of wider application than the mischief which gave it birth." The Court further developed this principle over the following decades. In *Trop v. Dulles*, citing *Weems*'s, the Court recognized, "…the words of the [Eighth] Amendment are not precise and their scope is not static." The Court further found, "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In several cases during the early 2000s[12], the Court developed a two-part test to determine whether a punishment was inconsistent with the evolving standards of decency. First, the Court looks for objective indicia of a national consensus.[13] As part of this step, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[14] Second,

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[12] See *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking down capital punishment for individuals with intellectual disabilities); *Roper v. Simmons*, 543 U.S. 551 (2005) (striking down capital punishment for juveniles under 18 years of age.

[13] *Atkins*, 536 U.S. at 311–12; *Roper*, 543 U.S. 563–67.

[14] *Atkins*, 536 U.S. at 312 (citation and internal quotations omitted).

the Court will add to this criteria its own independent judgment.[15] *Id*. In other words, the Court will come to a consensus as to whether the majority of the Court finds there is "reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, at 313.

To date, the Court has yet to extend the application of the Eighth Amendment's "evolving standards of decency" test. However, while *Weems* is an Eighth Amendment case, "its analysis transcends this one amendment by discussing the requirements for all constitutional principles to be effective: specifically, the capacity for evolution."[16] The implication is that the "evolving standards of decency" test should be used to analyze other constitutional protections where decency and public conscience would be implicated. *Id*.

B. <u>Evolving Guidelines and Standards for Capital Attorneys</u>

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[15] *Atkins*, at 312. *Roper*, 543 U.S. at 563.

[16] *Rethinking the Fundamental: Applying the Evolving Standards of decency Test to the Court's Evaluation of Fundamental Rights*, Nick Wolfram, UC Law Constitutional Quarterly, Fall 2024, Vol. 51, No. 1, Article 6, pg. 167.

In 1992, when prosecutors were seeking the death penalty for Mr. Windom, the American Bar Association Guidelines[17] provisions under standard, 5-2.2 Eligibility to Serve, recognized:

> There is no more demanding task for a criminal lawyer than that of representing a person accused or convicted of a capital offense. The selection of such attorneys within an assigned counsel system therefore takes on critical importance. The U.S. Congress recognized this concept when it limited representation for state prisoners under sentence of death in federal habeas corpus proceedings to lawyers with significant experience in criminal law and procedure,(citing The Anti-Drug Abuse Act, 21 U.S.C. § 848 (q)(4)(B) and (q)(9)(1991).)

The guidelines encouraged lawyers to submit their names to a court appointed list rather than shun criminal defense law. [See, 1992 ABA Guidelines, Commentary at pg. 33] The ABA also discussed and encouraged the need for training programs. *Id.* at pg. 35. Additionally, they found there is a duty for an attorney not competent to handle a criminal case to decline court appointment. *Id.*

While the trial bar began to see the need to attract qualified attorneys to the complex practice of criminal defense law, the process

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[17] 1992 ABA Guidelines, 5-2.2, Criminal Justice Providing Defense Services Standards, pg. 35.

of training lawyers to represent clients facing the death penalty was still in its formative state. The Florida Association of Criminal Defense Lawyers (FACDL) presents a yearly death penalty seminar to help train attorneys handling capital cases. However, their 2024 agenda labeled, *Death is Different FACDL'S 30TH Death Penalty Seminar,* demonstrates that these seminars were not offered when Mr. Windom was appointed trial counsel. [SPCR1231] Even if they were, Mr. Windom's attorney testified that Mr. Windom's case was his first capital trial that involved a penalty phase and that he had no special training to handle a death penalty first-degree murder case. [V2/PCR314-15; PCR805] In fact, he had not attended any continuing legal education courses related to mental health defenses, as a lawyer, nor taken any such courses while in law school. *[Id.*, at 315; PCR806]

It was not until 1997 that the Florida Supreme Court "…established the Committee on Minimum Standards for Attorneys in Capital Cases to study and recommend for the Court's review minimum standards to ensure the competency of court-appointed

counsel in death penalty cases." Finally, in 1999, The Florida Supreme Court adopted Rule 3.112, and stated[18]:

> Under our procedural and adversarial system of justice, the quality of lawyering is critical. For that reason, trial judges responsible for the appointment of counsel in cases where the very life of the defendant is at risk must take care to appoint well-qualified lawyers. .... This Court has an inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues inherent in death penalty cases. This Court, over the years, has reviewed countless ineffective assistance of counsel claims alleging incompetence of counsel at both the trial and appellate levels.

Over time, these standards have evolved and the Florida Supreme Court has since adopted several amendments that dealt with extending coverage to private counsel,[19] expanding coverage to the five Offices of Criminal Conflict and Civil Regional Counsel,[20] and

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[18] *In re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So.2d 610, 613-14 (Fla. 1999).

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

[20] *In re Amendments to Florida Rule of Criminal Procedure 3.112-Minimum standards for Attorneys in Capital Cases*, 3 So.3d 1175 (Mem) (Fla. 2009); *In re Amendments to Florida Rule of Criminal Procedure 3.112-Minimum Standards for Attorneys in Capital Cases*, 993 So.2d 501 (Mem) (Fla. 2008).

extending the rule's coverage to include postconviction counsel.[21] It is important to note that the Florida Supreme Court found these rules were necessary, "Based on…ongoing concerns as to the quality of the judicial process in capital cases, [the] Court in 1997 appointed a select committee of highly qualified and experienced judges and lawyers to study and recommend for…review minimum standards to ensure the competency of court-appointed lawyers in capital cases."[22]

A filing by the Florida Public Defenders Association[23] captures how the rules for capital attorneys continued to evolve through the early part of this century:

> The ABA promulgated guidelines to remedy the systemic problem of subpar representation in capital cases. FN24[24] The United States Supreme Court has repeatedly referred to the ABA guidelines as "guides to determining what is

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[21] *In re: Amendments to the Florida Rules of Judicial Administration; the Florida Rules of Criminal Procedure; and the Florida Rules of Appellate Procedure – Capital Postconviction Rules*, 39 Fla. L. Weekly S467 (Fla. July 3, 2014).

[22] *In re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, at 759 So.2d 612.

[23] *In re: Amendments to the Florida rules of Criminal Procedure*, Case No. SC15-177, Comments from the Florida Public Defender Association Regarding Proposed Amendment to Florida rule of Criminal Procedure 3.112, pg. 7, filed March 30, 2015.

[24] FN24 - See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. Feb. 2003), 31 Hofstra L. Rev. 913 (2003) (hereinafter "ABA Guidelines").

> reasonable" with regard to the performance of counsel. FN25[25] The proposed amendment to Fla. R. Crim. P. 3.112(f)(3) conflicts with numerous mandates contained within the Guidelines and should cause this Committee oppose the adoption of the proposed amendment.
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> Death penalty cases are unique. They have become so complex and specialized that "defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." FN26[26] As such, they call for the only the most experienced, competent, and dedicated of defense attorneys. The ABA requires that a capital defense attorney demonstrate "a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases."FN27[27]

Currently, under Fla. R. Crim. P. 3.112, Minimum Standards for Attorneys in Capital Cases, Mr. Windom's lead trial attorney would not meet today's evolved standards to be qualified to represent him. He did not satisfy several provisions of our current Fla. R. Crim. P. 3.112(f), Lead Trial Counsel, which states that lead counsel assignment should be given to attorneys who:

> (3) have… prior experience as lead defense counsel or co-counsel in at least two state or federal cases tried to completion in which the death penalty was sought.

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[25] FN25 - *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

[26] FN26 - ABA Guidelines at 923.

[27] FN27 - ABA Guidelines, 5.1(B)(1)(b), at 961.

(5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and

(6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and

(7) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

COMMITTEE COMMENTS to Fla. R. Crim. P. 3.112 state in part:

> The experience and continuing educational requirements in these standards are based on existing local standards in effect throughout the state as well as comparable standards in effect in other states. Specifically, the committee considered the standards for the appointment of counsel in capital cases in the Second, Sixth, Eleventh, Fifteenth, and Seventeenth Circuits, the statewide standards for appointing counsel in capital cases in California, Indiana, Louisiana, Ohio, and New York, and the American Bar Association standards for appointment of counsel in capital cases.

These Committee Comments show that Mr. Windom meets the first prong of the evolving standards of decency outlined in *Atkins* which looks for reliable objective evidence of contemporary values in the legislation enactment of rules and/or laws. *See, Atkins*, at 312. *Roper*, 543 U.S. at 563. In the case of capital defense attorney

standards, the second prong of the evolving standards test is in effect combined with the first prong, because the courts promulgate these rules. So, the Court adding its own independent judgment to the national consensus of the citizenry and the legislature is already taken into consideration when they approve the rules for appointment of capital counsel.

2. Circuit Court Order – Denied claim as procedurally barred

The circuit also found that the claim is procedurally barred because Mr. Windom has already raised Florida's lack of standards in previous pleadings. [SPCR1301-02] The Order, at SPCR1302, found:

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

First, in the direct appeal, appellate counsel argued that the trial court failed to conduct an adequate hearing regarding the

competency of trial counsel. *See, Windom v. State*, 656 So.2d 432, 437 (Fla. 1995). The Initial Brief for the Direct Appeal,[28] at page 43, claimed that Mr. Windom advised the court on two different occasions that he had no idea what was going on in his case, and that his visits with counsel did not last even 10 minutes. [SupplR400-01, 462] The last complaint to the court was the day before trial when Mr. Windom told the court "…I'm in the blind.". [SupplR462] Counsel confirmed he had only visited his client three times and that he was taking depositions the week before trial. [SupplR463-64, 559-60] This Court denied the appeal finding, "Defendant did not ask the trial court to discharge his counsel because of incompetence, and the record is unclear as to whether defendant in fact was dissatisfied with his counsel." *Windom*, 656 So.2d, at 437. There is nothing in the allegations against trial counsel or the trial court that indicates trial counsel should not have been allowed to serve as Mr. Windom's attorney because he was not qualified to handle a death penalty case. The

[28] Initial Brief of Appellant, *Windom, v. State*, Case No. SC80,830, filed November 24, 1995.

appeal concerned the failure of the trial court to conduct a *Nelson*[29] hearing to determine "if reasonable cause exists to believe counsel is not rendering effective assistance." Initial brief, at pg. 44.

Allegations against trial counsel were again raised in postconviction where postconviction counsel gave a thorough presentation and argument showing how the trial attorney did not provide effective assistance of counsel. In Footnote 5, *Windom v. State*, 886 So.2d 915 (Fla. 2004), this Court found that postconviction counsel raised "Florida's lack of standards for counsel in capital cases led to the post-conviction court's tolerance of an incompetent attorney." The opinion makes no further findings or analysis of that claim beyond Footnote 5.

Looking to the circuit court's postconviction order, we begin to uncover what was pled and how it was reviewed at that level. The postconviction order[30] referenced by the circuit court in the current appeal [SPCR1302], states, "Mr. Windom alleges Florida's lack of

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[29] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), approved by *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988).

[30] Order Denying Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence Pursuant to Rule 3.850, pg. 3, filed November 1, 2001.

standards for counsel in capital cases led to the Court's tolerance for an attorney who was 'patently unqualified,' an alcoholic who was later disbarred and imprisoned for DUI. However, this is not an ineffective assistance of counsel claim, and it is not cognizable in a postconviction motion." The claim was also treated as procedurally barred because Mr. Windom appealed the fact that the trial court should have conducted a *Nelson* hearing. The claim was then summarily denied without further consideration. [SPCR1305]

At no time, in either the direct appeal or in the R.3.850 motion for postconviction relief was the issue of attorney standards fully analyzed from the perspective of a Sixth Amendment violation under evolving standards of decency. No reviewing court considered the *qualifications* of trial counsel except through the lens of "ineffective assistance of counsel" (IAC) under *Strickland*. The judicial system failed Mr. Windom as much as his counsel. The courts would not even consider the fault of the judicial system because they were narrowly analyzing the claims as a postconviction claim under IAC which they found did not apply to the judicial system. The judicial system has avoided responsibility for this failure for far too long. It is time to apply the evolving standards of decency established in *Trop*

to the Sixth Amendment and finally give fair consideration to Mr. Windom's claim that his counsel should not have been allowed to handle a death penalty case without the proper experience and training. This Court should find this claim is not procedurally barred.

3. <u>Circuit Court Order – Attorney was not court appointed</u>

Additionally, the circuit court order mentions that Mr. Windom was not utilizing a conflict attorney but had privately retained counsel. [SPCR1304] The implication appears to be that originally the first rule that finally created standards for competent representation (in 1999) only applied to counsel provided to indigent capital defendants.

Trial counsel was retained by Mr. Windom's sister. [SupplR393-422] However, five months before trial, the court found Windom, who had been jailed since his arrest, insolvent for purposes of costs. [SupplR419-20] In jail, Windom had no apparent source of income. It is therefore clear that he had no funds to hire other counsel prior to trial. This is especially true in light of the fact that he did not pay for his original trial counsel. This is not a case where the defendant

had other options if the court was unwilling to hold a *Nelson* hearing and appoint counsel, an appointment for which he was qualified and entitled. (See, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)).

The issue of whether trial counsel was court-appointed or retained by a family member should not sway this Court that Mr. Windom was not entitled to a *Nelson* hearing nor to whether the State is responsible for allowing an unqualified attorney to handle this case. The circuit court order goes on to note that the standards were revised in 2002 to include "all attorneys." [SPCR 1304] This fact supports the argument that standards have evolved. Additionally, a court's concern about whether an attorney is providing competent representation applies to all defendants before the court, even to defendants who have unwittingly hired an unqualified attorney to represent them. And *Nelson* is not necessarily limited to court-appointed counsel . *See,* e.g., *Beatty v. State*, 606 So.2d 453 (Fla. 4th DCA 1992). The judicial system may not avoid responsibility just because the State did not provide the attorney. The State allowed the attorney to practice as a death penalty capital attorney, *then* when

the trial court was made aware of issues concerning representation, it ignored them.

Mr. Windom has established that his claim is timely, not procedurally barred and that he has standing. Mr. Windom will now demonstrate how representation by an unqualified attorney was prejudicial. The claims of ineffective assistance of counsel should be analyzed today from the perspective of the judicial system which bears responsibility for the violation of Mr. Windom's Sixth Amendment right to counsel. If we consider first that an unqualified attorney was allowed to handle the case, *then* review his ineffectiveness, and add to that the *Brady* issue of critical evidence not being disclosed – when all the issues which have been analyzed piecemeal are considered as a whole – prejudice is evident.

C. <u>Incompetent Counsel</u>

Mr. Windom has repeatedly sought relief from the injustice of being represented by incompetent counsel. It should have shocked the conscience of the trial court who was put on notice that Mr. Windom's counsel was not making the effort that a capital attorney should afford a client. Rather counsel seemed to treat Mr. Windom's

case as if it was a simple grand-theft auto. Eleven days before trial, the court asked counsel if he had taken depositions, yet. Counsel replied that they were set for the following week. [SupplR559-60] Mr. Windom let the court know that his attorney had not been communicating with him and that he did not know what was going on. [SupplR462-64, Initial Brief at 43] Appellate counsel captured the disturbing circumstances of the meager representation given Mr. Windom, which fell short of what should be expected of a capital attorney. Apparently in 1995, a befuddled client who advised the court he did not know what was going on with his defense was not enough information to require a court to inquire whether Mr. Windom was being represented by competent counsel. *See, Windom v. State*, 656 So.2d 432, 437 (Fla. 1995). While the court was blatantly on notice that counsel was not handling a first-degree murder case properly, the system blamed the defendant for not complaining loudly enough that his attorney was not doing his job. Mr. Windom could not be sure since he was superficially informed of events and the court did not inquire further.

Mr. Windom's direct appeal could have also mentioned that on August 14, 1992, a week before trial (and *2 months after* the court

granted defense motion to have Mr. Windom evaluated by a psychiatrist), counsel had not gotten around to giving the court an Order, and didn't realize he needed to do so. [Suppl.R554- 57] On August 17, 1992, Dr. Kirkland gave Mr. Windom a mental status exam. With barely enough time to have Mr. Windom seen by an expert, Dr. Kirkland did not form an opinion about Mr. Windom's sanity at the time of the offenses. His report indicates in would have needed 2-3 weeks to do such a review. [SPCR1233] During the August 14th motions hearing, the court's frustration with counsel's sloppy representation of Mr. Windom seems apparent from her questions of counsel. Where was the decency at that time to care that Mr. Windom was not being zealously represented, knowing the State was seeking death?

Sadly, the only defense that was presented to Mr. Windom's mental condition at the time of the shootings was the psychiatrist testifying that Mr. Windom made statements that could be consistent with him being in a fugue state. The psychiatrist was presented to merely testify that "it's possible he is telling the truth about that." [V4/R570] There was no testing, no review of evidence, no objective criteria to analyze the statements. The trial court was painfully

aware of the absurdity of presenting Dr. Kirkland to tell the jury that Mr. Windom was in a fugue state without "any kind of objective evidence of brain damage or mental incapacity, or any history of epilepsy or amnesia." However, the court found, "It's his only defense. It's the only thing [counsel's] going to present on his behalf. And I'm concerned that, as crazy as I think the idea of the fugue state defense is, I'm going to let the Doctor testify to that." [V4/R573]

Surely by 2025, we evolved enough to realize we cannot in good conscience put someone to death who was represented by someone who seems to be making it up as he goes along. In fact, he needed the court to tell him what the appropriate order would be to present his witnesses and evidence of this fugue state. [V4/R574-75] When the defense star witness took the stand, Dr. Kirkland told the jury it is "possible" that Mr. Windom was in a fugue state, but not "reasonable or likely." [V4/R584] Dr. Kirkland gave the jury an example of a patient who did experience a fugue state. In order to determine that the person was in that state, "They had several experts who examined him at great length, including video-taping interviews and so forth." [V4/R586]

Counsel had never been properly trained to handle this type of expert witness and it showed in his presentation. [V16/PC-R805-06, PCTr314-15] Dr. Kirkland, appointed by the Court *a week before 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-R774, 765) The information he did have consisted of just being advised of what Mr. Windom had been charged with. (PC-R. 775) Postconviction counsel argued on Mr. Windom's behalf that counsel was ineffective because he "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." [PC Moton at pg. 54] Postconviction counsel also pointed out, " 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." [PC motion at pg. 55]

Mr. Windom's legitimate concerns about the woefully inadequate representation he received were nevertheless dismissed by the circuit court. Significantly, the circuit court added in its opinion that a claim that an attorney is "patently unqualified" is not cognizable as an ineffective assistance of counsel claim. [SPCR1302] Under evolving standards of decency this issue would be cognizable. This is not an impermissibly repetitive filing of the same ineffective assistance of counsel claim. The perspective is different and issues may be interrelated but, as the trial court noted, "Florida's lack of standards for counsel in capital cases" … "is not an ineffective assistance of counsel claim." *Id.* This issue was summarily denied and does not appear to have been addressed by the Florida Supreme Court. *Windom v. State*, 886 So.2d 915 (Fla. 2004). Under today's evolving standards, this claim is finally ripe for consideration and relief.

Today, counsel would have retained the experts to lay convincing foundation to this defense, as was presented by postconviction counsel. Postconviction counsel retained a neurologist and neuropsychologist to establish brain damage and insanity at the time of the offense. Trial counsel admitted during the

evidentiary hearing that he would have put on that defense if he knew about it, even if he also would have had to let the jury know about Mr. Windom's involvement with drug sales. [PCR808] However, being unfamiliar with penalty phase presentations, counsel settled for quizzing a court appoint competency psychiatrist about what could be a possible defense to Mr. Windom's actions – rather than actually pursuing and establishing that Mr. Windom meets the criteria for an affirmative defense of insanity at the time of the offense. Incomprehensibly, trial counsel also opted for no penalty phase defense *whatsoever* because he failed to do any mental illness investigation which could be used as mitigation for the penalty phase. He was not able to do more than work with the expert the court appointed for its own purposes (to confirm defendant's mental status to proceed to trial.) The expert was not appointed to assist trial counsel to explore a defense to or mitigating evidence for the crimes charged.

This claim is distinguished from an ineffective assistance of counsel claims under *Strickland* in that the issue is about the justice system allowing a lawyer to represent a client facing such dire circumstances despite not being qualified to do so. Today, we have

standards which would have prevented this situation from occurring. Mr. Windom repeatedly tried to get our courts to recognize counsel's ineffectiveness. Perhaps from the perspective of challenging the system and its failure to ensure standards were in place to produce attorneys that could properly advocate for their client, his plea for relief will finally be heard. Applying evolving standards of decency principles to the Sixth Amendment right to counsel in criminal prosecutions would enable a court to remedy a constitutional violation that was not given its due gravity when it occurred, but can finally be rectified as our system of justice has progressed.

4. <u>Circuit Court Order – Denied claim as meritless</u>

The court's Order also denied Mr. Windom's motion finding that prior court rulings have found trial counsel was not ineffective because he had a reasonable "strategy" [in presenting no defense.] [SPCR1303] In other words, we do not need to consider whether trial counsel was unqualified to represent Mr. Windom because the court will find there was no prejudice, he was not ineffective.

The rejection of claims of ineffective assistance of counsel (IAC) based on the State's go to argument that counsel had a "strategy" is

an often-misused principle that sweeps under the carpet and excuses actions that are indefensible. The alleged "strategy" must be considered reasonable and the attorney must have actually had the strategy, not an ad hoc excuse for incompetence. Furthermore, as mentioned above, this finding completely disregards that trial counsel admitted he would have used these experts if he had known about the possible defenses and mitigation they could provide - whether or not the prosecutor threatened to bring drugs into the narrative. [V16/PC-R839-40, PCTr318-19]

The issue of IAC may have already been decided, but the postconviction court did not have the benefit of knowing the State's witness, who established motive and premeditated intent, was under prosecution for a serious felony at the time he testified[31]. This would have cast a different light onto those findings. We should not be so quick to conclude that if this case was analyzed today with all the evidence that has been uncovered, the result would be the same.

The prejudice of allowing an unqualified attorney to represent Mr. Windom could be established now that we also understand how

[31] The State stipulated to this fact during the *Huff* hearing on August 5, 2025.

weak the State's case was concerning the issue of premeditation and intent. It can be deduced from the evidence that there was a drug sting in progress and the police were closing in. [V17/PC-R1063] Mr. Windom had already been arrested.[32] Postconviction counsel established through their experts that Mr. Windom was also suffering from delusional paranoia at the time of the incident. [V15/PC-R557] He and Jack Luckett were acquaintances and "talked a lot.". [V2/TrR321,326/ROA603,608]

We know now that the State's star witness, Jack Luckett, was also a drug dealer. He had good reason to garner favor with the State right after the shooting occurred. Eventually, as he probably anticipated, he also found he was under prosecution for drug trafficking[33] – but he had positioned himself to be a State witness. In other words, Luckett was motivated from the start to give the police useful information about Mr. Windom.[34] Consideration of his prior

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[32] Orange County Florida Clerk's Docket – 1991-CF- 012937-A-O, and 1991-CF-012936-A-O, *State v. Curtis Windom.*

[33] Orange County Florida Clerk's Docket – 1992-CF-008204-A-O, *State v. Jack Luckett.*

[34] Note also that the killings occurred on February 7, 1992, but Mr. Luckett's statement was not reduced to writing until April 3, 1992, giving him plenty of time to contemplate his situation.

consistent statement should be mindful of that fact. And if his initial statement was so dependable, why did the State feel the need to reinforce it with additional motivation – his arrest for trafficking three (3) weeks before trial, along with only a $25,000 bond. Ultimately, the State reduced Mr. Luckett's trafficking charge to a lesser included offense and gave him five years of probation. They also had no objection to early termination of his sentence.[35] (It would appear that Luckett's strategy worked.)

Being able to challenge Jack Luckett's credibility removes the State's argument against the affirmative defense of insanity. He was the only witness to Mr. Windom's *statements* about intent. However, on cross-examination, Mr. Luckett admitted that Mr. Windom is not a violent person and his behavior was completely different than the Curtis Windom everybody knew. (V2/TrR327/ROA609)

Unfortunately, the State sought a win, rather than justice, and failed to inform the Defense about the recent arrest and that Luckett

[35] See, Copy of interoffice memo to JA from State Atty. Office, [S-PCR304]

was out on bond. All of this information and argument were presented in a successive postconviction motion in Case No. SC16-1371. Unfortunately, the motion was denied as untimely and due to the previous findings of no IAC. *Windom v. State*, 2017 WL 3205278 (Fla. July 28, 2017).

The fact that standards have evolved which would have prevented the unqualified attorney who represented Mr. Windom from taking his case is not meritless. Today, if this Sixth Amendment violation is finally redressed from the perspective of the responsibility the justice system bears, then all the facts of this case may be reviewed. We now have an opportunity to correct several system failures: The lack of standards that did not ensure a qualified attorney handled this complicated case concerning life and death; realize this attorney was not only unqualified but also ineffective in both phases of the trial; and review key evidence withheld by the State, evidence that unlocks the truth. As a very different picture emerges so should there be a different verdict.

5. Circuit Court Order – Denied Rule 3.112(c) is retroactive

The circuit court order also found that standards for attorneys should not be applied retroactively. [SPCR1304-05] The court looked to the text of Rule 3.112(c) regarding minimum standards for attorneys in capital cases and found that it does not mention that it should have retroactive application.

This claim seeks relief from a violation of the Sixth Amendment right to counsel. This right has long been established and it should be applied pursuant to evolving standards of decency to a fundamental constitutional protection. This claim is not wholly dependent on the text which finally created the necessary standards which require that an attorney handling a capital case in Florida must have the proper experience and training. This claim seeks to do more than enforce a rule of criminal procedure. Rather, Mr. Windom is asking the judicial system to recognize its responsibility in creating the opportunity for the injustice he experienced to occur.

D. Retroactivity

As the awareness and consciousness of humanity rises, the time is ripe to apply evolving standards of decency to the Sixth

Amendment right to counsel. As the United state Supreme Court found in *Weems*:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.
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> In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. (Emphasis added.)

Weems v. United States, 217 US 349, 373 (1910).

As to the argument that standards for counsel have been evolving for some time therefore this issue should have been raised sooner, fundamental fairness would support the retroactive application of this violation to the failure of a system that has acknowledged the constitutionally indispensable right to counsel, but has yet to acknowledge its part in denying it. This Court has

found that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925. *See also*, Justice Anstead's prescient dissent in *Johnston v. State*, 904 So.2d 400, 417-429 (Fla. 2005), and at FN 14, the long list of decisions that have been applied retroactively. And again from *Witt,* at 926, "Uniquely, capital punishment, on the one hand, connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death."

"In considering the ideal of individual fairness in capital cases," this Court, in *Witt*, held:

> … two countervailing considerations must be weighed. First, if punishment is ever to be imposed for society's most egregious crimes, the disposition of a particular case must at some point be considered final notwithstanding a comparison with other individual cases. Second, we cannot ignore the purpose for our post-conviction relief procedure in cases where a death penalty has been imposed, for Florida's post-conviction relief rule came about as a narrow response to *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). That decision, it will be recalled, first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding. The *Gideon* decision constituted a change of law of such magnitude that it was applied

> retroactively in order to remedy the basic constitutional injustice of prior felony trials without counsel.[12]"

Witt v. State, 387 So.2d 922, 927 (Fla. 1980). It is significant that this Court cited to *Gideon* as part of its discussion and consideration of when a ruling should be retroactive. While *Gideon* concerned the State's duty to provide counsel to an indigent defendant charged with a felony, has the State honored the intent of this holding if it did not provide any standards to ensure that an attorney is qualified to be counsel in a defendant's capital murder case? If not, then the ruling becomes a superficial statement of what ought to be without meaningful substance. In considering retroactivity as applied to evolving standards of decency to a Sixth Amendment guarantee, the issue raised in this case is as significant as the *Gideon* holding.

This Court in *Witt* noted the following "essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. *Stovall v. Denno,* 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct.

1731, 14 L.Ed.2d 601 (1965); *Brewer v. State,* 264 So.2d 833, 834 (Fla. 1972); *State v. Steinhauer,* 216 So.2d 214, 219 (Fla. 1968), *cert. denied,* 398 U.S. 914, 90 S.Ct. 1698, 26 L.Ed.2d 79 (1970)." While the issue in this case is not exactly a new rule, rather the application of an already established legal precedent to another fundamental protection guaranteed by our Constitution, this Court will likely look to *Witt* for guidance concerning retroactivity.

The first two prongs are addressed by the realization that we must set aside Mr. Windom's death sentence because a society that has evolved enough to understand his trial counsel should not have been permitted by law to handle Mr. Windom's case must take responsible for that failure. The justice system should realize it cannot confidently allow someone to be executed when the underlying system shares blame for counsel's incompetence. In 1999, standards were finally created and evolved further in 2002. It is not likely there are many capital death sentences left pending that were tried without properly qualified counsel.

As to the third prong, applying evolving standards of decency to ineffective assistance of counsel cases that have this additional

failure of an unqualified attorney, because the system had no standards in place, would narrow the number of cases affected and not be overly burdensome. However, it would allow courts to correct Sixth Amendment violations that were previously swept under the carpet. This is especially true because most indigent defendants would have been represented by a public defender or registry counsel. While hardly foolproof against a situation like Mr. Windom's, it is highly likely that at least most public defenders had the necessary experience and training before being assigned a capital case that included the State's Notice of Seeking Death. Likewise, registry counsel would not likely be chosen if not found by the court administrators and/or judicial administration to be qualified. A defendant that can easily afford to defend a capital murder charge would be able to hire a big law firm where the partners are able to retain the most qualified attorneys from the Florida Bar. It is reasonable to assume, then, that the situation that Mr. Windom was in – a family member tried to help him, hired private counsel, and unknowingly hired someone that should not have been allowed to represent him, this situation will not create an unacceptable number of cases for the judicial system in its wake. The justice system should

not be overwhelmed or terribly burdened. This would not be a justification for denying Mr. Windom the benefit of applying our evolving standards of decency to his case.

The time has come for our justice system to acknowledge that the failure to provide standards for capital attorneys is a violation of the Sixth Amendment due to evolving standards of decency. It is essential that the evolving standards claim be recognized through an adjudication of the issue raised and not stand on dictum. *See*, *Stovall v. Denno*, 388 U.S. 293, 301(1967). Today, society's conscience cannot allow its justice system to remain indifferent to its role in a constitutionally deficient process. This Court should vacate Mr. Windom's judgment and death sentence and grant him a trial with a properly trained capital attorney.

CLAIM TWO

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

Due process under the law requires notice and opportunity to be heard. *See*, U.S. Constitution Fifth and Fourteenth Amendments

and Fla. Con. Art. I, Sec. 9. The Circuit Court entered a scheduling order over postconviction counsel's objection. [SPCR1149-1153; 1168; 1171-1174]. The scheduling order hindered Windom from the opportunity to be heard in a meaningful manner.

Due process requires a sincere opportunity to be heard. Article I, Section 9 of the Florida Constitution and the Fifth Amendment of the United States Constitution provides that "**no person shall be deprived of life,**... without due process of the law." (emphasis added). It is well established that the opportunity to be heard requires "a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

"Meaningful[36]" is defined as "having a meaning or purpose; significant." The abbreviated schedule imposed by the circuit court and this Court's scheduling order prohibited Windom from engaging in the post-warrant litigation within the definition of "meaningful."

[36] "Meaningful." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/meaningful. Accessed 9 Aug. 2025.

Although Windom is not asserting that he was denied access to his attorney, the limited access to speak with his attorney further hampered his ability to be heard in a meaningful manner. The oppressive time constraints placed upon postconviction counsel exacerbated counsel's limited access to speak and consult with Mr. Windom prior to the filing of his successive postconviction motion.

Governor DeSantis signed Mr. Windom's death warrant on Tuesday July 29, 2025 in the evening thus only allowing postconviction counsel telephonic communication with Mr. Windom the following day. Postconviction counsel was prevented from meeting with Mr. Windom on Thursday due to the execution of Edward J. Zakrzewski, taking place at Florida State Prison. It was not until Friday August 1, 2025, that postconviction counsel was able to meet with Mr. Windom and discuss his successive postconviction motion. Florida State Prison does not allow for legal visitations or calls on Saturday or Sunday. Postconviction counsel was ordered by the circuit court to file their successive motion Sunday August 3, 2025 no later than 11 am. Mr. Windom was prevented from participating in the successive postconviction motion filed on his

behalf in a considerable way, and thus disturbing his due process right to be heard in a "meaningful manner."

1. Circuit Court Order – Denied due process claim as meritless.

The circuit court summarily denied claim two of Defendant's Successive Motion to Vacate Judgement of Conviction and Sentence of Death. [SPCR1305-1309] The circuit court found that "[f]air notice of all deadlines was provided, the deadlines reasonably conveyed the required information about those deadlines, and Defendant was given an opportunity to respond." [SPCR1307] The circuit court ruled, that defendant's argument that the abbreviated schedule violated his due process, was meritless. "The Florida Supreme Court has repeatedly held that the expedited warrant litigation schedule does not violate a defendant's due process rights" and cited to this Court's recent opinions in *Zakrzewski v. State*, *Bell v. State*, and *Tanzi v. State*. [Id.]

A. This Court's reliance on *Asay* and *Barwick* are distinguishable from Windom's case, and cases that preceded it.

Counsel is not oblivious of the fact this Court has steadily rejected the claim that the expedited process of warrant litigation

violates due process. However, this Court's recent decisions regarding the "expedited process of warrant litigation," do not provide insight into the Court's reason.

In *Zakrzewski v. State*, 2025 WL 2047404 (Fla. 2025), this Court addressed the issue simply by writing:

> We reject this claim, as this Court recently did in other cases challenging the death warrant time period. *See Tanzi*, 407 So. 3d at 393; *Bell v. State*, No. SC2025-0891, 50 Fla. L. Weekly S155a, S163, ––– So.3d ––––, ––––, 2025 WL 1874574, at *17 (Fla. July 8), cert. denied, No. 25-5083, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d ––––, 2025 WL 1942498 (U.S. July 15, 2025)).

In *Tanzi v. State*, this Court rejected petitioner's argument writing:

> The warrant litigation schedule does not violate Tanzi's due process rights. "Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016) (citing *Huff*, 622 So. 2d at 983). This Court has previously rejected the argument that a 30-day "compressed warrant litigation schedule" denies a capital defendant "his rights to due process." *See Barwick v. State*, 361 So. 3d 785, 789 (Fla. 2023). Tanzi has not shown how the warrant schedule denied him notice or an opportunity to be heard. Thus, the circuit court rightly denied his claim as it pertained to the compressed schedule.

407 So. 3d 385, 391 (Fla. 2025). This Court made the same findings in *Bell v. State*, 2025 WL 1874574 (Fla. 2025), citing *Tanzi* and *Barwick*, in making its decision.

The Court's reliance on *Asay*[37] and *Barwick*[38] are distinguishable from Windom's case, and cases that preceded it. In *Asay v. State*, he argued that "his lack of registry counsel violated his right to due process." 210 So. 3d at 27. This Court found that he "fail[ed] to state when he was denied notice or opportunity to be heard at any stage of his postconviction proceedings" and held that "due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Id.* (*citing*, *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993) (*finding* "that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard")).

In *Barwick*, this Court addressed the compressed warrant litigation schedule which was raised as a single issue arguing due process violation along with ineffective assistance of postconviction

[37] 210 So. 3d 1 (Fla. 2016).

[38] 361 So. 3d 785 (Fla. 2023).

counsel. 361 So. 3d 785 (Fla. 2023). This Court affirmed the circuit court's summarily denial of the "consolidated claim, finding that Barwick was not denied due process because he did not allege that he was ever denied notice or an opportunity to be heard and that he was not denied effective assistance of postconviction counsel because he has no right to effective assistance of postconviction counsel." *Id.* 789. This Court in *Barwick* also cites to *Asay v. State*, in its finding that "[d]ue process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Id.* at 790.

B. <u>Windom has established a due process violation and identified at what stage of the proceedings he was denied a meaningful opportunity to be heard.</u>

Windom specifically wrote in his successive postconviction motion:

> The full impact of the due process violation cannot be fully presented to this Court because simply, one cannot know what they do not know. [SPCR1200].

This simple statement became reality on August 5, 2025, the morning of the *Huff* hearing when Windom learned of newly discovered evidence.

On the morning of the *Huff* hearing, Windom's counsel learned of mitigating evidence that was presented during Clemency on behalf of Mr. Windom. Windom brought this to the circuit court's attention and highlighted that the newly discovered evidence highlights the flaws with the abbreviated schedule imposed upon Windom. [SPCR1288] Windom immediately acted upon this new information filing Defendant's Emergency Motion for Stay of Execution (herein "Emergency Motion"). [SPCR1497-1509]

Windom asserted three arguments in his Emergency Motion: newly discovered evidence; violation of *Brady*; and lastly, the newly discovered evidence and withheld evidence in violation of Brady, established the death penalty as applied to Curtis Windom is unconstitutional. The circuit court found that the information was in fact newly discovered but failed the second prong of *Dailey v. State*, 239 So. 3d 1280 (Fla. 2021). [SPCR1562]

The circuit court order found that the recordings and letters failed to meet the second prong of newly discovered evidence. [Id.] The circuit court reasoned that the recordings and letters:

> …do no go to any of the mitigating factors under the 1991 death penalty statute… and may have marginal value under the 2025 version of section 921.141(7)(h), whether they would yield a lesser sentence is entirely speculative. [Id.]

The circuit court went on to find:

> the statements as they are written and/or recorded now would most likely not be admissible at trial. Section 921.141, Florida Statutes (2025) prohibits victim impact statement from addressing what sentence a defendant should receive. [SPCR1562]

The circuit court's findings failed to consider the newly discovered mitigation contained compelling mitigation regarding Mr. Windom's character and potential for rehabilitation. The circuit court's findings only considered the mitigation from the lens of what would be inadmissible evidence to a jury for proper consideration. While the statements regarding the victims' families all preferring a life sentence, and not death, would be inadmissible to a jury, the significant mitigation regarding Mr. Windom's positive impact on their lives and positive character evidence, would be properly admissible for the jury's consideration during penalty phase. The significant impact of all the victims' family members providing such testimony would carry great weight with the jury and trial court. Additionally, the mitigation, character evidence, and evidence of

rehabilitation potential could be properly considered by the trial court during further sentencing proceedings.

2. <u>Circuit Court Order – Denied admissibility of newly discovered evidence.</u>

The newly discovered evidence revealed a 2013 video was made of Curtisia Windom Willingham and Jermey Lee for the Clemency proceedings and numerous letters from the three affected families, the Lee, Lubin, and Davis families, that provided both mitigation on behalf of Curtis Windom and the families' stance on Windom's sentence of death.

Curtisia Windom Willingham was the daughter of Valerie Davis and the granddaughter of Mary Lubin. Ms. Willingham is also the daughter of Curtis Windom. In the video she expressed that she disagrees with the death sentence her father received. She also states that she lost her mother and grandmother at a young age and describes the loss she would experience as a result of Curtis Windom's execution. She goes on to express that her children, Curtis Windom's grandchildren deserve to grow up with their grandfather in their life. Ms. Willingham explicitly stated she doesn't feel the execution "will equal justice because it still won't bring back [her]

mom or [her] grandmother, or Johnnie Lee." ("Mitigation Video," at 2 minutes and 22 seconds). Ms. Willingham goes on in the video to describe how having her father in her life, however limited, has helped her. She goes on to state that: "him being taken away from me, I just don't think it will help at all. It would hurt more than it will help." [SPCR1516] ("Mitigation Video," at 3 minutes and 42 seconds). She states clearly and unequivocally "I honestly don't feel a life for a life equals justice." [SPCR1516] ("Mitigation Video," at 0 minutes and 58 seconds).

It was also learned on August 5, 2025, that Johnnie Lee's son, Jeremy Lee, also video recorded a statement in support of Curtis Windom's Clemency proceeding. [SPCR1516] ("Mitigation Video," at 6 minutes and 42 seconds). Jeremy Lee also expressed in the video that he disagreed with Curtis Windom's death sentence. Mr. Jeremy Lee stated in the video:

> …my opinion Curtis Windom shouldn't catch the death penalty strictly because I do not believe in it but not only that, I heard stories on how him and my dad was close and the whole situation on how people put things in his head and made him believe my father was against him when he really wasn't - well I don't really know if he was or not but that paint the picture to me that other people would put

> things in Curtis's head that made him believe that my father was against him… So, I honestly think he shouldn't catch the death penalty, … when God's ready for him to go, I think it should be his time to go and I don't think we should kill him… Let him finish his time out and when he's ready for him to go, he'll be gone.
>
> [SPCR1516] ("Mitigation Video," at 7 minutes and 6 seconds).

Jeremy Lee continues in the video expressing that he heard positive things about Curtis Windom from people. Jeremy Lee also explicitly states that:

> I talked to a couple of my family members, we agree that he shouldn't catch the death penalty, we don't think he should be free but it's not our decision to give him death- Life or death. So, I think him being in prison is enough punishment. I don't think death will make it any better. It's not going to bring my father back or the other people.
>
> [SPCR1516] ("Mitigation Video," at 9 minutes and 27 seconds). (emphasis added).

In addition to the video recorded statements, undersigned counsel became aware of letters written by the next of kin of victims and relatives of Curtis Windom, written in 2013. [SPCR1517-1545] Significantly, Channing D. Ellison, wrote a letter providing her position on Curtis Windom's death sentence. Channing D. Ellison is the child of Valerie Davis, the grandchild of Mary Lubin, and is unrelated to Curtis Windom. [SPCR1519] In her letter she wrote:

> It has been over 20 years since the murders of my mother and grandmother and I do not feel that an execution for Curtis is necessary. He has been on death row ever since and I feel like that is a death sentence in itself… I have forgiven Curtis along with my siblings and we feel that everyone deserves a second chance.

[SPCR1519] She also writes about the unique position her sister is in. "My sister was only 9 months old when the incidents happened and I would not want her to lose her father because she has developed a great relationship with him." [Id.]

Vickie Lee-Crum, the sister of Johnnie Lee, also wrote a letter in support of Mr. Windom, expressing her sentencing desires to the Clemency board. [SPCR1527] She wrote in her handwritten letter:

> They gave Curtis the death sentence and I don't believe in the death penalty. If the death penalty will bring my brother back then yes, but it won't. I don't feel God put man on earth to judge people in whether they die or live.

[SPCR1527]

The newly discovered letters provide additional mitigation regarding Mr. Windom and would have been admissible as mitigation. Florida Statute § 921.141 (1992). In 1992, trial courts considered both statutory mitigation and non-statutory mitigation. [SupplR355-363] The letters provide significant mitigation which

would be extremely compelling to the jury and the sentencing court. This is particularly so, given that all three of victims' families themselves provide mitigation on behalf of Curtis Windom, beyond their desires that his life be spared.

The letters capture the positive impact Mr. Windom had on each of them and the positive impact he had on his community. This further corroborates the non-statutory mitigator considered by the trial court in its sentencing order. The trial court found little weight to the non-statutory mitigator that "the Defendant assisted people in the community." [SuppR361] The trial court opined that because of Mr. Windom's unemployment status, the trial court found "…it difficult to believe…"[SuppR362] Perhaps she would have believed the victims" families. Additionally, although not admissible evidence to a jury, the fact that the all three of the victims' families have expressed their desire to spare Mr. Windom's life, should be extremely compelling for this Court's consideration.

A. The circuit court's due process violation prevented the newly discovered evidence claim from being fully developed and thus the claim is not meritless.

Two prongs must be satisfied when seeking to vacate a death sentence based on newly discovered evidence. First, "the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.'" *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (citing, *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-1325 (Fla. 1994)). The circuit court already found this prong has been satisfied. [SPCR1562]

Secondly, the newly discovered evidence must be of such nature "'that the newly discovered evidence would probably yield a less severe sentence'—i.e., a life sentence —rather than an acquittal." *Damren v. State*, 397 So. 3d 607, 610 (Fla. 2023) (*citing*, *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (*quoting Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013)). The word "probably" is understood to mean "more likely than not" standard of prejudice. *Damren*, 397 So. 3d at 611.

The newly discovered evidence satisfies prong two of newly discovered evidence given the substantial and compelling nature of the mitigation that would be proper for the court's consideration. The

newly discovered evidence would be extremely compelling for the jury and the court's consideration in determining Mr. Windom's sentence of death because juries care about what victims' think.

B. The newly discovered mitigation shifts the scales, showing that mitigation outweighs the aggravators in Windom's case.

Determining whether the punishment of death has been applied to the *most aggravated* case requires a careful weighing process of the aggravators and mitigation. *State v. Dixon*, 283 So. 2d 1,7 (Fla. 1973). "Discretion and judgment are essential to the judicial process, and are *present at all stages* of its progression – arrest, arraignment, trial, verdict, and *onward through final appeal*." *Id.* at 6. (emphasis added). The weighing process of the aggravators and mitigation is not a quantitative process "…but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." *Id.* at 10.

There is no punishment as unique or final as death. "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique

penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Justice Stewart, concurring). "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The death penalty is to be reserved for "*only the most aggravated* and unmitigated" cases. *Dixon*, 283 So. 2d at 7 (emphasis added); *Crook v. State*, 908 So. 2d 350, 357 (Fla. 2005) (citing, *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993)). The newly discovered evidence would show that Mr. Windom's case is not a class of first-degree murder the death penalty is intended to punish. Windom's case is simply not the most aggravated and least mitigated.

3. <u>Conclusion</u>

Florida Rules of Criminal Procedure, Rule 3.851(h), anticipates post-warrant litigation initiated by the governor's signing of a death warrant. The post-warrant litigation thus invokes due process as provided in the United States and Florida Constitution. This Court "has recognized that postconviction proceedings must comport with due process." *Roberts v. State*, 840 So. 2d 962, 971 (Fla. 2002).

Because of the abbreviated scheduling order and extremely rushed time frame, Mr. Windom has not been able to fully develop a more thorough and compelling presentation of mitigation and his rehabilitation, a presentation which the victims' families seem to also desire.

There is no greater need for due process protection than when the State is taking someone's life. There is no greater time for a meaningful opportunity to be heard than when the State is taking someone's life. The need for due process is rooted in the very foundation of what it means to have a civilized society. The standards of decency demand due process when someone's life is scheduled to end at the hands of the State of Florida.

CONCLUSION AND RELIEF SOUGHT

The fundamental right to counsel is stated in the Sixth Amendment of our Constitution. The concept that the Constitution is not a static document has already been established for over a hundred years. The United States Supreme Court has already recognized that standards of decency evolve. All that is left is to

finally *apply* this concept to all the fundamental protections guaranteed by the Constitution.

A system that is in the business of killing people and feeling justified about doing the very thing it is executing someone for doing, should at least be impeccable. Perhaps the most relevant time to confirm that the system stands on this high ground where it promised it would stand, to the citizens who have supported executions, is when a warrant is actually signed. Until then, a death sentence has not been carried to fruition. However, before that final step in the process proceeds, can the system say with utmost confidence that it has been impeccable?

There should be no complaint that this standard is too high. Going back thousands of years to the Ten Commandments, killing has been proscribed. Our laws make taking a life the highest criminal offense.

To avoid unconscionable hypocrisy, there can be no complaint that this standard is difficult to achieve. If we did not believe that this review is necessary, then prisoners would simply be pulled from their cells at any hour and taken to the execution chamber without needing further notice to counsel and opportunity to be heard one

last time. The truncated briefing schedule has been recently reduced by 33%, as the government rushes to set records for killing people. This final review should be a meaningful, legitimate process rather than a superficial, perfunctory simulation of a legal process.

In light of the facts and legal arguments presented above, Mr. Windom contends that his constitutional right to counsel under the Sixth Amendment, and Due Process rights under the Constitution of the United States, and corresponding provisions of the Florida Constitution, have been violated. Mr. Windom respectfully requests that his convictions and death sentence be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.100.

Counsel further certifies that this entire Brief contains 14,731 words.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 11th day of August, 2025, the foregoing Initial Brief has been electronically filed with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: The Honorable Chief Judge of the Ninth Judicial Circuit Court of Florida, Lisa T. Munyon, lmunyon@ninthcircuit.org, LShorten@ninthcircuit.org; the Honorable Michael Kraynick, Circuit Judge, mkraynick@ninthcircuit.org; mberrios@ninthcircuit.org; C.

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WE HEREBY FURTHER CERTIFY that a copy has also been furnished via U.S. mail, this 11th day of August, 2025, to Curtis Windom, DOC # 368527, at Florida State Prison, P.O. Box 800, Raiford, Florida 32083.

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