No. _____

IN THE

Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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Appendix A

Florida Supreme Court Opinion affirming circuit court's denial of Petitioner's motion for post-conviction relief and renewed motion to determine intellectual disability, dated March 16, 2017. *Wright v. State*, 213 So. 3d 881 (Fla. 2017).

KeyCite Red Flag - Severe Negative Treatment
Certiorari Granted, Judgment Vacated by Wright v. Florida, U.S.Fla., October 16, 2017

213 So.3d 881
Supreme Court of Florida.

Tavares J. WRIGHT, Appellant,
v.
STATE of Florida, Appellee.

No. SC13–1213
|
March 16, 2017

Synopsis

Background: Defendant was convicted in the Circuit Court, Polk County, Richard George Prince, J., of two counts of first-degree murder, one count of carjacking with a firearm, two counts of armed kidnapping with a firearm and two counts of robbery with a firearm, and, after defendant waived his right to a penalty phase jury, was sentenced to death for each murder and life imprisonment for each of the other convictions. Defendant appealed, and the Supreme Court, 19 So.3d 277, affirmed. Defendant filed motion for postconviction relief and filed a renewed motion to determine intellectual disability. The Circuit Court, Polk County, Donald G. Jacobsen, C.J., denied motions. Defendant appealed.

Holdings: The Supreme Court held that:

defendant failed to establish that he was intellectually disabled, as basis for challenging death sentences;

defendant, who validly waived his right to a penalty-phase jury, was not entitled to any postconviction relief under *Hurst v. Florida*, which held that Sixth Amendment requires a jury to make the findings of fact necessary to impose death;

any deficiency of penalty-phase counsel in failing to acquire certain records directly from defendant's schools was not prejudicial so as to constitute ineffective assistance;

defendant failed to demonstrate ineffective assistance in penalty-phase counsel's presentation of expert testimony in support of mitigating circumstances;

defendant failed to establish prejudice from penalty-phase counsel's purported failure to present witnesses to rebut or elaborate on defendant's prior convictions for battery that occurred while he was in prison during pendency of his trial;

trial counsel's failure during guilt phase to present witnesses to impeach credibility of jailhouse informants to whom defendant allegedly made confessions was not ineffective assistance; and

any deficiency on part of trial counsel in failing to object to certain guilt-phase closing arguments was not prejudicial.

Affirmed.

Canady and Polston, JJ., concurred in result.

***886** An Appeal from the Circuit Court in and for Polk County, Donald G. Jacobsen, Chief Judge—Case No. 532000CF002727A0XXXX

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Stephen D. Ake, Assistant Attorney General, Tampa, Florida, for Appellee

REVISED OPINION

PER CURIAM.

This case is before the Court on appeal from an order denying Tavares Jarrod Wright's initial motion to vacate his convictions and sentences under Florida Rule of Criminal Procedure 3.851, as well as Wright's renewed motion to determine intellectual disability filed pursuant

to Florida Rule of Criminal Procedure 3.203. We have jurisdiction. See Art. V, § 3(b)(1), Fla. Const.

FACTS AND BACKGROUND

On November 13, 2004, a jury found Wright guilty of two counts of first-degree murder, two counts of kidnapping, two counts of robbery, and one count of carjacking. See Wright v. State, 19 So.3d 277, 289 (Fla. 2009). After Wright waived his right to a penalty phase jury, the trial court sentenced Wright to death for each murder, as well as life imprisonment for each of his other convictions. See id. at 289–91.

On direct appeal before this Court, we detailed the facts leading up to Wright's convictions and sentences:

> With the aid of codefendant Samuel Pitts, Wright carjacked, kidnapped, robbed, and murdered David Green and James Felker while engaged in a three-day crime spree that spanned several areas in Central Florida. [FN2] During the crime spree, Wright was connected multiple times to a stolen pistol that matched the caliber of casings discovered at the scene of the murders. The trial court allowed the State to present evidence of these collateral acts to demonstrate the context in which the murders occurred and to explain Wright's possession of the murder weapon.
>
> > [FN2] Wright and Pitts were tried separately for the murders. Pitts was convicted of two counts of first-degree murder and other offenses related to this incident. He received sentences of life imprisonment for the murders.
>
> The spree began when Wright stole a pistol and a shotgun from the Shank family's residence in Lakeland on Thursday, April 20, 2000. On the Friday morning following the burglary, Wright used the pistol to commit a drive-by shooting in a neighborhood near the Shank residence. [FN3] That evening, Wright and Samuel Pitts abducted Green and Felker in Lakeland, drove Green's vehicle approximately fifteen miles to Polk City, and murdered the victims in a remote orange grove. Wright shot one victim with a shotgun, which was never recovered, and the other victim with a pistol that used the same caliber bullets as the gun stolen from the Shank residence. Wright then abandoned the victim's vehicle in a different orange grove in Auburndale. In nearby Winter Haven, Wright used the Shank pistol in a carjacking that occurred during the morning hours on Saturday, April 21, 2000. That afternoon, law enforcement responded to a Lakeland apartment complex based on reports of a man matching Wright's description brandishing a firearm.
>
> ***887** [FN3] For the drive-by shooting, Wright was convicted of attempted second-degree murder and two counts of attempted felony murder.
>
> When an officer approached, Wright fled, but he was eventually arrested in the neighboring mobile home park. Ammunition matching the characteristics of the ammunition stolen from the Shank residence was found in his pocket. The stolen pistol was also recovered near the location where Wright was arrested. Almost a week later, the bodies of the victims were discovered. Thus, the following facts are presented in chronological order to demonstrate the geographical nexus of the offenses and to provide a complete picture of the interwoven events surrounding the double murders.
>
> **The Crime Spree**
>
> **The Shank Burglary: Thursday, April 20, 2000**
>
> On Thursday, April 20, 2000, Wright unlawfully entered a Lakeland home with two accomplices. Wright testified that they separated to search the house for items to steal. In one bedroom, Wright found and handled a plastic bank filled with money. One of his accomplices discovered a 12–gauge, bolt-action Mossberg shotgun and a loaded Bryco Arms .380 semi-automatic pistol with a nine-round clip in another bedroom.... The accomplice also found four shells for the shotgun in a dresser drawer. In exchange for marijuana, Wright obtained possession of the pistol from the accomplice.
>
> When Mark Shank returned home after work to discover his firearms missing, he notified the Polk County Sheriff's Office of the burglary. The Sheriff's Office lifted latent prints from the house, including several from the plastic bank. An identification technician with the Sheriff's Office matched the latent palm print lifted from the plastic bank to Wright's palm print, confirming that Wright was inside the house where the Shank firearms were stolen. The following day, Wright used the stolen pistol during a drive-by shooting in a nearby Lakeland neighborhood.

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The Longfellow Boulevard Drive–By Shooting: Friday, April 21, 2000

At approximately 9 a.m. on Friday, April 21, 2000, Carlos Coney and Bennie Joiner observed a black Toyota Corolla approaching slowly on Longfellow Boulevard as they were standing outside a nearby house. Wright and Coney had been embroiled in a continuing dispute since their high school days. Joiner made eye contact with Wright, who was sitting on the passenger side. The car made a U-turn and slowly approached the house again. Wright leaned out the passenger side window and fired multiple shots. One bullet struck Coney in his right leg. Coney's neighbor carried the wounded man to a car and drove Coney and Joiner to a Lakeland hospital where a .380 caliber projectile was removed from Coney's leg.

While Coney was being treated at the hospital, crime-scene technicians collected cartridge casings and projectiles from the Longfellow Boulevard scene. Two projectiles had entered the house and lodged in the living room wall and table. One spent .25 caliber casing and three spent Winchester .380 caliber casings were recovered from the driveway and the street. The projectile recovered from Coney's leg and the one removed from the living room table were fired from the .380 pistol stolen from the Shank residence. [FN5] The recovered casings definitely had been loaded in the stolen pistol, but the firearms analyst could not state with precision that they had been fired from the pistol because the casings lacked the necessary identifying characteristics.

***888** [FN5] However, a .380 handgun could not have fired the .25 caliber bullet. No explanation for the different shell casing was presented at trial, though it was implied by the defense that an exchange of gunfire occurred between Wright and the victims. Coney and Joiner denied having a firearm at the Longfellow Boulevard residence.

Approximately one hour after the drive-by shooting, Wright unexpectedly visited James Hogan at a house in Lake Alfred, Florida. Lake Alfred is approximately fourteen miles away from the Longfellow Boulevard location. Wright testified that he and an accomplice from the Shank burglary and Samuel Pitts traveled to see Hogan because the accomplice wanted to sell the stolen shotgun. When they arrived, the accomplice attempted to show Hogan the shotgun, but Hogan was not interested. At that point, Wright pulled a small pistol from under the floor mat in the front seat of the vehicle. This placed Wright in possession of the possible murder weapon on the day of the murders.

The Double Murders in the Orange Grove: Friday, April 21, 2000

The trio remained with Hogan for approximately twenty minutes and then left together to return to the Providence Reserve Apartments on the north side of Lakeland. Wright and Samuel Pitts lived at that apartment complex with Pitts' family and girlfriend, Latasha Jackson. To support his theory of defense that he did not possess the pistol during the time the murders likely occurred, Wright testified that following the drive-by shooting, he informed Samuel Pitts of the details of the shooting. Wright explained that he had an obligation to disclose his actions to Pitts, who was the leader of a gang of which Wright was a member. According to Wright, the drive-by shooting upset Pitts, and Pitts demanded that Wright surrender the pistol. Wright asserted that he complied with Pitts' demand.

According to Wright's testimony, around twilight that Friday evening, a customer messaged Wright to inquire about procuring marijuana. Wright agreed to meet the customer at a supermarket parking lot and started walking toward the store. Shortly after 7:15 that evening, a female friend saw Wright walking down the street and offered him a ride, which Wright accepted. Then, without provocation, Wright said, “I ain't even going to lie, I did shoot the boy in the leg yesterday,” more likely than not referring to the Longfellow Boulevard drive-by shooting. When they arrived at the store, Wright exited the vehicle in the supermarket parking lot without further elaboration of the statement.

Some time that night, James Felker and his cousin, David Green, were abducted from that parking lot and murdered. The cousins left Felker's house at approximately 8 p.m. in Green's white Chrysler Cirrus for a night of bowling. Both men were carrying at least $100 at that time.

Several witnesses testified that Wright had willingly described the details of the abduction. Wright had informed the witnesses that he approached Felker and Green in the supermarket parking lot and requested a

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cigarette. When they refused, Wright pulled out a pistol and forced his way into the backseat of Green's vehicle. Wright then ordered Green to drive to the Providence Reserve Apartments, where Pitts entered the vehicle.

As this group left the apartments between 10 and 10:45 p.m., Wright ran a stop sign in the victim's car. A detective ***889** observed the traffic infraction and conducted a tag check as he followed the vehicle. The tag check reported that the license plate was registered to an unassigned Virginia plate for a blue, 1988, two-door Mercury, which did not match the vehicle to which it was attached.

After receiving this report, the detective activated his emergency lights and attempted to stop the white Chrysler. The Chrysler sped through another stop sign and accelerated to sixty miles per hour. The detective remained in pursuit for ten to fifteen minutes before his supervisor ordered the pursuit terminated. An all-county alert was issued to law enforcement to be on the lookout for the Chrysler. The identification developed from the pursuit connected Wright to the victim's vehicle on the night of the murders.

R.R., a juvenile who also lived at the Providence Reserve Apartments, testified that Wright informed him that Wright and Pitts drove the victims ten miles from the abduction site to a remote orange grove in Polk City. When the victims insisted that they had nothing to give the assailants, Wright exited the car. One of the victims also exited, possibly by force, and Wright shot him. The other victim then exited, and Wright shot him as well. While one of the men continued to crawl and moan, Pitts retrieved the shotgun from the trunk and handed it to Wright, who then shot this victim in the head execution-style. Wright and Pitts abandoned the bodies and drove away in the Chrysler. [FN6]

[FN6] Wright testified, to the contrary, that after he arrived at the supermarket, he conducted a drug transaction and then visited other apartments in the area to sell more drugs. After making stops at various apartments, he began walking back to the Providence Reserve Apartments. While he was walking, Pitts drove up in a white vehicle. Pitts asked Wright if he wanted to drive, and as Wright walked to the driver's side, he noticed blood on the vehicle. Wright suggested that they take the vehicle to an apartment to wash it. Wright testified that it was while they were driving to the apartment that the police chase occurred.

Sometime between 10 p.m. and midnight, Pitts and Wright drove the Chrysler to a Lakeland apartment complex to wash blood spatter off the vehicle. When they arrived at the apartment, Pitts ordered Wright to wash the car while Pitts removed items from the vehicle, including a phone, a black bag, and a Polaroid camera. Pitts placed the items in his sister's vehicle. She had arrived with R.R., who testified that when they arrived, Pitts and Wright were acting nervous and scared. On the ride back to the apartment complex, Pitts told R.R. "that they pulled off a lick and that things was getting crazy."

Wright testified that before Pitts left, he ordered Wright to burn the car and throw the weapon into a lake. Instead, Wright kept the pistol and later drove back to Hogan's house in Lake Alfred. Hogan suggested that Wright dump the car in an Auburndale orange grove, and Wright followed that suggestion.

The Winter Haven Carjacking: Saturday, April 22, 2000

In the vicinity of the Auburndale orange grove where the homicide victim's vehicle was abandoned, Ernesto Mendoza and Adam Granados were addressing a car battery problem in the parking lot of a fast-food restaurant. It was during those early morning hours of Saturday, April 21, that Wright allegedly approached them, pointed a small handgun at a female with them, and ***890** announced that he was going to take the car. [FN7] Wright immediately entered Mendoza's vehicle and sped away. Granados and Mendoza quickly entered a truck and pursued Wright. The car chase continued through several streets before Wright ran the vehicle onto the curb near a car dealership in Lake Alfred. Wright exited the vehicle, fired several gunshots at Granados and Mendoza, and then escaped across the car lot in the direction of James Hogan's house.

[FN7] Wright refused to testify about the details of [this] carjacking because he was not charged with this offense.

Several .380 caliber casings were also collected from this scene. These casings were later identified as having been fired from the pistol stolen from the Shank residence. One latent print was lifted from the interior side of

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the driver's window of Mendoza's car, and three were lifted from the steering wheel. All of these latent prints matched Wright's known fingerprints.

Hogan, whose house was within walking distance of the car dealership from which Wright was seen fleeing, testified that when he returned home at approximately 12:30 a.m. on Saturday, he found Wright seated there. Wright asked Hogan to drive him back to the Providence Reserve Apartments, and on the way there, Wright spontaneously said "they had shot these two boys," and that he had also "got into it with some Mexicans." Wright confessed to Hogan that they had transported two white men to an orange grove and shot both men with a pistol and a shotgun. Wright also confirmed that they engaged in a high-speed chase with police in Lakeland. However, at that point, Wright did not disclose the identity of the other person who aided in the murders.

The Providence Reserve Foot Chase and Subsequent Investigation: Saturday, April 22, 2000

After Hogan returned Wright to the apartment complex following the Winter Haven carjacking, Wright was observed throughout Saturday handling a pistol at the Providence Reserve Apartments. He also spoke with people regarding the murders. Wright confessed to R.R. that he received a cellular phone from a "lick," meaning it had been stolen. He also described to R.R. the details of the abduction and murders. Wright then gave the stolen phone to R.R.

Later that day, Wright was seated with Latasha Jackson on the steps of the apartment building, and Wright had a small firearm resting in his lap. During their conversation, Wright told Jackson that he shot two white men in an orange grove and that he had shot one in the head. Soon after this, the police responded to a report of an armed man, who matched Wright's description, at that location. [FN8]

[FN8] Wright was charged with aggravated assault related to this incident, but was acquitted.

A uniformed officer approached Wright and Jackson and stated that he needed to speak with Wright. Wright jumped over the balcony railing and raced down the stairs. As Wright ran from the apartment, his tennis shoes fell off. Jackson picked up the shoes and placed them by the apartment door. The police later seized these sneakers from the apartment during the murder investigation. James Felker's DNA was determined to match a blood sample secured from the left sneaker. Though Wright contended that the shoes were not his and that he had never worn them, both Wright and Pitts were required to try on the shoes. The shoes ***891** were determined to be a better fit for Wright than for Pitts.

Several officers chased Wright from the Providence Reserve Apartments to a nearby mobile home park, which was located across a field from the apartment complex. During the chase, the officers noticed Wright holding his pants pocket as if he carried something inside. Wright was arrested at the mobile home park, and his pocket contained live rounds and a box of ammunition containing both .380 Federal and Winchester caliber of rounds. This was the same caliber ammunition as that recovered from the drive-by shooting, the murders, and the carjacking.

After the police departed, a resident of that mobile home park entered her car to leave for dinner. Her vehicle had been parked there with the windows down when Wright had been arrested near her front door. As she entered her vehicle, she discovered a pistol, which was not hers. This weapon was determined to be the pistol stolen from the Shank residence.

Wright was taken into custody pending resolution of the aggravated assault charges. While Wright was in custody, Auburndale police officers discovered David Green's white Chrysler abandoned in an orange grove. Crime-scene technicians discovered blood on both the exterior of the vehicle and on the interior left side. Four of the blood samples from the vehicle matched James Felker's DNA profile. Further investigation revealed that prints lifted from multiple locations on the vehicle matched known prints of Wright. [FN9]

[FN9] None of the latent prints lifted from the Chrysler matched the known fingerprints of Pitts or R.R.

A deputy with the Polk County Sheriff's Office linked this abandoned vehicle with a missing persons report for David Green and James Felker. After the vehicle was discovered, the family of the victims gathered at the orange grove to search for any items that might aid in the missing persons investigations. Green had his personal Nextel cellular phone and a soft black bag filled with special computer tools that he utilized for his

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work in the Chrysler. A Polaroid camera had also been left in Green's vehicle. Green's fiancée discovered her son's jacket in that grove, but Green's workbag, tools, cellular phone, and camera were all missing from the vehicle.

A couple of days after the murders, Pitts attempted to sell the black bag that contained Green's computer tools to a pawnshop. R.R. assisted his stepfather in securing proceeds for the Polaroid camera from another pawnshop. The police had begun contacting pawnshops looking for the items missing from Green's car and recovered the black computer bag and the pawn tickets, which led them to Pitts and R.R. [FN10] Further investigation established that three latent fingerprints from the black bag matched Wright's known fingerprints.

[FN10] During trial, Green's fiancée identified the Polaroid camera as the one she purchased with Green. She also identified his black workbag.

Following the information obtained from the pawnshop, the police traveled to R.R.'s residence where they identified and seized the Nextel cellular phone Wright had given R.R. The phone seized from R.R.'s residence matched the serial number of David Green's phone. R.R. told the police that Wright, who was still in jail on the aggravated assault arrest, had given him the phone.

A few hours later, a detective questioned Pitts, who revealed the general location of the bodies. Six days following the disappearance of David Green and ***892** James Felker, their bodies were discovered in a remote orange grove in Polk City. Each man had been shot three times, and spent bullet cases surrounded the bodies. David Green was face-up, with bullet wounds in his chest and in his head. From his outstretched hand, the police recovered a wallet that contained Green's license. James Felker was face-down in the same area, with three bullet wounds in his head. Green's cause of death was determined to be multiple gunshot wounds to the chest, the forehead, and the back of his neck. A medical examiner removed a projectile from Green's face and a deformed projectile from his throat. Felker's cause of death was determined to be gunshot wounds to the head, one by a .380 caliber projectile to the forehead and two by a shotgun blast to the back of the head. Except for the gunshot wound to Green's chest, any of the gunshot wounds would have rendered the victims unconscious instantaneously.

Law enforcement never recovered the shotgun used in these murders. However, a Florida Department of Law Enforcement firearms expert inspected the pistol recovered from the mobile home park, which was identified as the pistol stolen from the Shank residence, and the firearms-related evidence collected from the various crime scenes. The expended projectiles from the pistol and those found in Wright's possession were of the same caliber but were different brands. Due to the damage sustained by some of the projectiles, the expert was unable to conclusively establish that the pistol stolen from the Shank residence fired all .380 caliber bullets discovered at the scene of the murders. However, the projectiles and the firearm were of the same caliber and displayed similar class characteristics. Five Federal .380 caliber casings discovered near the victims were positively identified as having been fired from the pistol. Thus, the stolen Shank pistol had likely been used in, and connected with, the Longfellow Boulevard drive-by shooting, the double murders of David Green and James Felker, and the Winter Haven carjacking.

The Trial

On October 18, 2004, Wright began his third trial on these charges.... The jury returned a guilty verdict on all seven counts and made specific findings that Wright used, possessed, and discharged a firearm, which resulted in death to another. Wright waived his right to have a penalty-phase jury. The jury was discharged after the trial court conducted a thorough colloquy and determined that the waiver was made knowingly, intelligently, and voluntarily.

During the combined penalty-phase and Spencer[v. State, 615 So.2d 688 (Fla. 1993),] hearing, the State presented impact statements from the victims' families. The State introduced the certified judgments and sentences from the Longfellow Boulevard drive-by shooting and from two incidents that occurred while Wright was imprisoned prior to the capital trial. [FN13] The State also presented the testimony of the victims of the jail-related felonies. Defense counsel stipulated that the contemporaneous capital convictions supported the aggravating circumstance of a prior violent felony.

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[FN13] Prior to the capital trial, Wright was convicted of two violent felonies while in custody—aggravated battery by a jail detainee and aggravated battery. In the former, Wright, along with several other inmates, attacked another detainee. In the latter, Wright attacked a jail detention deputy.

***893** The defense presented mitigation evidence of Wright's traumatic childhood through the testimony of his family, which included virtual abandonment and neglect by his parents. Two defense expert witnesses testified that Wright's exposure to cocaine and alcohol in utero caused some microcephaly, which is a condition that affects the size of the brain, and mild traumatic injury to Wright's brain. Though one defense expert determined that Wright has borderline intellectual functioning, including impairments in his frontal lobe functioning for reasoning and judgment, the expert testified that Wright did not satisfy the requirements for statutory mitigation ... or qualify as mentally retarded under section 921.137, Florida Statutes (2000)....

To the contrary, the other defense expert testified that Wright was of low intelligence, which approached that of mental retardation due to fetal alcohol syndrome. In that expert's opinion, Wright could not balance a checkbook, maintain a household, or keep his refrigerator stocked. However, this expert did not consider the recognized standardized intelligence tests required by section 921.137 to be the measure of mental retardation and conceded that under the statutory definition, Wright would not be considered mentally retarded.

A special hearing was held to specifically address whether Wright met the statutory criteria for mental retardation. Wright's scores from each doctor's evaluation fell within the borderline range, but did not drop below 70. Thus, the trial court found that under the statutory requirements, Wright was not mentally retarded. The court noted that there was evidence to the contrary, but held that such evidence did not fall within the purview of the applicable statute.

Following this hearing, the trial court found four aggravating circumstances, three statutory mitigating circumstances, and several nonstatutory mitigating circumstances. [FN16] The trial court concluded that the aggravating circumstances far outweighed the mitigation and that, even in the absence of any individual aggravating circumstance, the trial court would still find that the aggregate of the remaining aggravating circumstances outweighed all existing statutory and nonstatutory mitigating circumstances. Thus, the court imposed a death sentence for each count of first-degree murder and life sentences for each of the five noncapital felonies, all to run consecutively.

[FN16] The trial court found four aggravating circumstances: (1) Wright was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person (great weight); (2) Wright committed the felony for pecuniary gain (no weight); (3) Wright committed the homicide in a cold, calculated, and premeditated manner without any pretense of moral or legal justification [CCP] (great weight); and (4) Wright committed the felony for the purpose of avoiding or preventing lawful arrest (great weight).

The trial court found three statutory mitigating factors and gave them some weight: (1) Wright committed the offense while under the influence of extreme mental or emotional disturbance; (2) Wright's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) Wright was 19 years old at the time of the crime. Wright offered approximately 34 nonstatutory mitigating factors, and the trial court found the following: (1) Wright suffered emotional deprivation during his upbringing (some weight); ***894** (2) Wright's low IQ affected his judgment and perceptions (some weight); (3) Wright suffered from neurological impairments, which affected his impulse control and reasoning ability (some weight); (4) Wright suffered from low self-esteem (little weight); (5) Wright lacked the capacity to maintain healthy, mature relationships (little weight); (6) Wright had frustration from his learning disability (little weight); (7) Wright lacked mature coping skills (some weight); (8) Wright displayed appropriate courtroom behavior (little weight); and (9) Wright suffered from substance abuse during his adolescent and adult life (little weight).

Id. at 283–91 (some footnotes omitted). On September 3, 2009, we affirmed Wright's convictions and sentences. See id. at 305.

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On November 5, 2010, Wright filed a motion to vacate his judgment and sentence, which he amended on March 9, 2012. A Huff[1] hearing was held on September 6, 2011, to determine which claims merited an evidentiary hearing. An evidentiary hearing was held on October 16–18, 2012, during which Wright presented ten witnesses. The postconviction court denied Wright's amended motion in its entirety on May 22, 2013. Wright appealed.

On May 27, 2014, however, while Wright's postconviction appeal was pending before this Court, the United States Supreme Court issued its opinion in Hall v. Florida, in which it held Florida's intellectual disability scheme unconstitutional insofar as it conditioned presentation of evidence of adaptive functioning on a strict IQ score requirement. See —— U.S. ——, 134 S.Ct. 1986, 1990, 188 L.Ed.2d 1007 (2014). As a result, we relinquished jurisdiction of Wright's case and allowed Wright to file a renewed motion for determination of intellectual disability with the postconviction court, which he did. The postconviction court subsequently granted an evidentiary hearing on the renewed motion. During the evidentiary hearing for this motion, Wright presented six witnesses and the State presented thirteen witnesses. On March 26, 2015, the postconviction court denied Wright's renewed motion. Wright subsequently appealed that order and we reacquired jurisdiction.

From his amended motion to vacate judgment and sentences, Wright only appeals the denial of several claims of ineffective assistance of counsel, as well as his claim that the cumulative effect of those errors deprived him of a fair trial.[2] Specifically, with regard to his guilt phase trial, Wright maintains that his counsel were ineffective for failing to impeach two jail house informants and for failing to object to an improper comment made by the prosecutor during closing remarks. With regard to the penalty phase, Wright maintains that his counsel were ineffective for failing to challenge evidence related to a ***895** prior conviction presented in aggravation, as well as for failing to adequately investigate and present evidence of mitigation. From his renewed motion for intellectual disability, Wright appeals the finding that he is not intellectually disabled.

This review follows.

ANALYSIS

Wright's Renewed Motion for Determination of Intellectual Disability

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. In 2002, the United States Supreme Court interpreted the Eighth Amendment to categorically prohibit the imposition of a death sentence on someone who is intellectually disabled. See Atkins v. Virginia, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986))).

State law, however, governs the determination of which defendants are intellectually disabled for purposes of capital punishment. See id. at 317, 122 S.Ct. 2242 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (quoting Ford, 477 U.S. at 405, 106 S.Ct. 2595)). In Salazar v. State, 188 So.3d 799, 811–12 (Fla. 2016), this Court recently explained Florida's procedures for establishing and reviewing intellectual disability:

> "Florida law includes a three-prong test for intellectual disability as a bar to imposition of the death penalty." Snelgrove v. State, 107 So.3d 242, 252 (Fla. 2012). A defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See Hurst v. State, 147 So.3d 435, 441 (Fla. 2014) rev'd, Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); § 921.137(1), Fla. Stat. The defendant has the burden to prove that he is intellectually disabled by clear and convincing evidence. Franqui v. State, 59 So.3d 82, 92 (Fla. 2011); § 921.137(4), Fla. Stat. If the defendant fails to prove

any one of these components, the defendant will not be found to be intellectually disabled. Nixon v. State, 2 So.3d 137, 142 (Fla. 2009). In reviewing intellectual disability determinations, this Court has employed the standard of whether competent, substantial evidence supports the trial court's determination. See Cherry v. State, 959 So.2d 702, 712 (Fla. 2007); Brown v. State, 959 So.2d 146, 149 (Fla. 2007) ("This Court does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses."). "However, to the extent that the [trial] court decision concerns any questions of law, we apply a de novo standard of review." Dufour v. State, 69 So.3d 235, 246 (Fla. 2011).

In Hall v. Florida, —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court invalidated Florida's interpretation of its statute as establishing a strict IQ test score cutoff of 70. Hall explained that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning," and "[i]ntellectual disability ***896** is a condition, not a number." Id. at 2000, 2001. Accordingly, "[the Supreme Court] agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id. at 2001.

Following two evidentiary hearings, including one in which Wright was allowed to present evidence of adaptive functioning in accord with Hall, the postconviction court concluded that Wright had not proven that he is intellectually disabled by clear and convincing evidence. As we will explain, not only do we conclude that the postconviction court's findings are supported by competent, substantial evidence, but we are also convinced that Wright has failed to establish intellectual disability even by a preponderance of the evidence.[3] Accordingly, we affirm the postconviction court's order determining that Wright is not intellectually disabled.

Significantly Subaverage General Intellectual Functioning

As explained above, the first prong under Florida law requires a capital defendant to prove that he or she has an IQ low enough to qualify as having significantly subaverage general intellectual functioning. In Hall, the United States Supreme Court explained that for purposes of determining intellectual disability as a bar to execution, IQ scores are best evaluated as a range, taking into account the standard error of measurement (SEM) and other factors that can affect the accuracy of the score:

The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. ... Each IQ test has a "standard error of measurement[”] often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. ... An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.

....

The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies.... A score of 71, for instance, is generally considered to reflect a range between 66 ***897** and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence.... Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor.... In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Hall, 134 S.Ct. at 1995–96 (internal citations omitted).

In this case, the postconviction court considered expert testimony regarding Wright's IQ scores, how the SEM applies to those scores, how the practice effect applies to those scores, how the Flynn effect applies to those scores, and how Wright's effort may have affected the validity of those scores.[4] After considering that evidence,

the postconviction court found that Wright had not established by clear and convincing evidence that he is of significantly subaverage intellectual functioning. We agree and further hold that Wright has failed to establish this prong by even a preponderance of the evidence.

Wright has taken a total of nine IQ tests, seven of which were non-abbreviated IQ tests, and all of which reported full-scale IQ scores of 75 or above. When he was ten years old, Wright took three Wechsler Intelligence Scale for Children (WISC–R) tests, receiving full-scale IQ scores of 76 (February 1991), 80 (April 4, 1991), and 81 (September 11, 1991), respectively. On August 25, 1997, when Wright was sixteen years old, he took his next non-abbreviated IQ test, a Wechsler Adult Intelligence Scale, Revised Edition (WAIS–R), in which he attained a full scale IQ score of 75. On July 15, 2005, when Wright was twenty-four years old, he took a Wechsler Adult Intelligence Scale 3rd Edition (WAIS–III) and attained a full scale IQ score of 82. Ten days later, he took the same IQ test and attained a full-scale IQ score of 75. Thus, as the postconviction court noted, every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized under Florida law.

Moreover, the expert testimony in this case makes clear that even when adjusting the IQ scores to account for the SEM, Wright cannot prove significantly subaverage general intellectual functioning by even a preponderance of the evidence. Even taking the most favorable testimony concerning the application of the SEM to Wright's scores, at its lowest point, the most favorable range derived from Wright's scores dips just one point beneath the threshold of 70 required for a finding of significantly subaverage general intellectual functioning. Wright's expert witness, Dr. Kasper, testified that she adjusted all seven of Wright's scores for the SEM and concluded that the most accurate range of scores for Wright was derived from his first IQ examination—a WISC–R yielding a score of 76 in February 1991—because it would be free from practice effect concerns as it was Wright's first IQ test. Not only was the range yielded from Wright's first IQ test the most accurate, but it was also the lowest range. Upon applying the SEM to a 95% confidence interval, the range derived from that score was between 69 and 82. According to Dr. Kasper, given the 95% confidence interval, ***898** one could expect Wright to score within that range on nineteen out of twenty IQ test administrations, even taking the practice effect into account for subsequent administrations. Indeed, she testified that all of Wright's subsequent scores fell within that range. Most notably, however, Dr. Kasper agreed that Wright's score of 82 in 2005 was valid and free of any practice effect concerns, and she conceded that the score of 82 was within the 95% confidence interval she determined from applying the SEM to Wright's first IQ exam. Thus, we cannot conclude that Wright has satisfied this prong by even a preponderance of the evidence.

Strengthening our confidence in this result, the State's expert witness, Dr. Gamache, testified that he had concerns that Wright had malingered or not offered a full effort on all of his IQ tests. He reached this conclusion because in administering an IQ test to Wright, he also administered a Validity Indicator Profile test, which indicated that Wright did not expend a full effort. [5] From this experience, Dr. Gamache determined that Wright may have been malingering on all of his previous IQ exams because Wright had never been given a validity test during previous IQ exam administrations. Dr. Gamache explained that although Wright's previous evaluators did not detect any malingering, subjective judgment regarding validity of IQ examinations is notoriously poor. Finally, Dr. Gamache testified that although one can malinger and fake a low IQ, one cannot fake a higher IQ. Accordingly, he testified that Wright's highest IQ score of 82 was the most accurate representation of his IQ.

Therefore, Wright has not proven even by a preponderance of the evidence, and certainly not by clear and convincing evidence, that he is of subaverage intellectual functioning. For this reason alone, Wright does not qualify as intellectually disabled under Florida law. See Salazar, 188 So.3d at 812 ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.").

Concurrent Deficits in Adaptive Functioning

We further conclude that Wright cannot demonstrate by even a preponderance of the evidence that he suffers from concurrent deficits in adaptive functioning, the second prong of a finding of intellectual disability. In Dufour, we explained what this prong requires:

> As described in section 921.137(1) and rule 3.203(b), the term adaptive behavior "means the effectiveness or

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> degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." The definition in section 921.137 and Florida Rule of Criminal Procedure 3.203 states that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition, which this Court has interpreted to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there must be current adaptive deficits. See Jones v. State, 966 So.2d 319, 326 (Fla. 2007).

69 So.3d at 248.

In the past, we have looked to a variety of types of evidence to determine whether a postconviction court's order concerning intellectual disability is supported by competent, substantial evidence. Most commonly, we have relied on a postconviction court's consideration of expert testimony ***899** and its credibility determinations with regard to that testimony. See Diaz v. State, 132 So.3d 93, 121 (Fla. 2013). Likewise, we have relied on a postconviction court's consideration of lay witness testimony and its credibility determinations. On yet other occasions, we have also considered the facts of the underlying crime, including a finding of the CCP aggravating circumstance, as well as a defendant's testimony and other involvement during trial. See Hodges v. State, 55 So.3d 515, 526–37 (Fla. 2010); Phillips v. State, 984 So.2d 503, 511 (Fla. 2008); Jones, 966 So.2d at 328. In this case, all of these types of evidence refute that Wright has concurrent deficits in adaptive functioning.

First, there was expert testimony that Wright lacked concurrent deficits in adaptive functioning. Dr. Gamache, the State's expert, testified that Wright does not have concurrent deficits in adaptive functioning after interviewing Wright for five hours, during which time he administered an IQ test to Wright. Taking Wright's low socioeconomic status, lack of education, specific learning disability, and neighborhood culture into consideration, Dr. Gamache concluded that Wright failed to demonstrate sufficient deficits in all three of the accepted broad categories of adaptive functioning—conceptual skills, social/interpersonal skills, and practical skills.

With regard to conceptual skills, Dr. Gamache acknowledged that Wright has some deficits in reading and writing skills, but attributed them to a lack of education and his specific learning disability diagnosis, rather than intelligence. He also acknowledged that Wright has some deficits in self-direction and the ability to formulate goals or objectives, but none that are significant.

Ultimately, however, Dr. Gamache concluded that Wright's deficits in conceptual skills do not rise to the level required for a determination of intellectual disability because he observed that Wright: (1) rewrites draft blog entries in his own words; (2) fully communicates with other prisoners and prison staff; (3) listens to others and takes advice, as evidenced by his brief period requesting Kosher meals; (4) understands numbers and time; (5) knows the time allocated for prison activities; (6) manages his prison canteen fund and pays attention to his monthly statements; (7) managed his own funds as an adolescent to buy necessities; (8) conducted basic transactions before he was incarcerated; (9) was attentive to time and number issues during the examination; (10) identifies his attorneys by name and estimates the amount of time they have represented him; (11) knows the difference between legal mail and regular mail in the prison system; (12) understands that he needs his attorneys because he has no legal training; (13) is receptive to the suggestions of his attorneys; (14) wants his attorneys to prove that he did not commit the crimes for which he was convicted; (15) knows that he was sentenced to death and understands the reasoning for his sentence; and (16) has performed some work on his case.

Likewise, Dr. Gamache did not find that Wright has sufficient deficits with regard to social/interpersonal skills because he observed that Wright: (1) displayed good social skills during his examination and followed written and unwritten rules; (2) interacted effectively during the examination; (3) is able to engage in social conversation with others; (4) has counseled pen pals on how to deal with difficult situations; (5) appears to have adapted well to life on death row, as exhibited by his lack of disciplinary write-ups and ability to ask correctional staff for help; and (6) is able to effectively distinguish between friends and associates, as well as recognize and adapt to multiple levels of interpersonal interaction. Dr. Gamache further testified ***900** that Wright denied that he is a victim of exploitation.

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Finally, with regard to practical skills, Dr. Gamache observed that Wright (1) cares for his health by showering and grooming daily, as well as by engaging in self-care and health-oriented activities; (2) knows how to obtain the necessities for basic living and follow schedules; and (3) knew how to use public transportation in his community. Furthermore, although Wright did not have a driver's license because he could not pass the written portion of the driving examination, Wright knew how to drive a car. In addition, Dr. Gamache considered Wright's employment at a grocery store, Wright's gang activity, Wright's drug dealing, and Wright's statements that he lived independently between the ages of thirteen and eighteen.

Even without the testimony of Dr. Gamache, not even Wright's expert, Dr. Kasper, could establish that Wright has concurrent deficits in adaptive functioning. Rather, Dr. Kasper could only conclude that Wright currently has some deficits in the subcategory of conceptual skills, but not in the other categories of practical skills or social skills. Dr. Kasper explained that she twice administered the Adaptive Behavior Assessment Scales (ABAS–II) standardized test for adaptive functioning, which involves answering questions about a person's behavior on a scale of zero to three, zero indicating the person never performs certain behavior and three representing that the person always performs certain behavior. The first ABAS–II administration indicated that Wright had deficits in both conceptual skills and social skills. By Wright's second and most recent administration of the ABAS–II, however, Wright no longer demonstrated deficits in social skills, and therefore only had deficits in conceptual skills. This was the case even after Dr. Kasper adjusted the ABAS–II scores for the SEM. Thus, as Dr. Kasper explained, Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills sub-component of the adaptive skills prong. This is insufficient for a finding of intellectual disability in the context of this case when it is considered against all of the other significant evidence to the contrary presented, as explained below.

Moreover, Dr. Kasper conceded during cross-examination that her method of administering the ABAS–II was, at best, unorthodox. Although Dr. Kasper interviewed many people with regard to the ABAS–II questions, she filled out just one copy of the ABAS–II and filled in the answers herself by deciding which person's response among many was the most accurate response. She clarified that she would try to confirm the result with other responses and apply the weight of the evidence, but conceded that her response to each question required her to make a credibility determination among all the different responses. As she further conceded, this was not the normal way the ABAS–II is administered, giving us great pause in considering its validity.

Moreover, we need not limit ourselves to expert testimony alone to conclude that Wright does not have concurrent deficits in adaptive functioning. Wright gave extensive testimony during trial, where he told a coherent narrative of his version of the events. He testified at length and was not generally aided by leading questions. Furthermore, following his testimony, he endured a strong cross-examination by the State in which he demonstrated a clear understanding and unwavering invocation of his Fifth Amendment right against self-incrimination with regard to certain uncharged offenses he was repeatedly questioned about. Moreover, the record demonstrates multiple times that Wright assessed the performance of his ***901** counsel across all three of his trials, sometimes expressing dissatisfaction with their inability to elicit certain evidence that had been elicited during a previous trial. In addition, during an extensive colloquy, the trial court judge questioned Wright concerning his waiver of an advisory penalty phase jury and Wright appeared to understand all of the ramifications of such a waiver, a waiver we affirmed on direct appeal. Thus, competent, substantial evidence supports the postconviction court's determination that Wright's testimony during trial and interactions with the trial court refute his alleged deficits in adaptive functioning.

Furthermore, competent, substantial evidence supports the postconviction court's determination that the facts underlying Wright's convictions refute deficits in adaptive functioning. First, the trial court found that Wright committed the murder in a cold, calculated, and premeditated manner. See Phillips, 984 So.2d at 512 ("The actions required to satisfy the CCP aggravator are not indicative of mental retardation."). Specifically, the trial court found, and we affirmed, the findings that Wright had killed his victims execution style. Second, the complexity of the crime spree reflects someone who is likely not intellectually disabled. In addition, the State presented testimony from Aaron Silas, who drove the car during the Longfellow Boulevard drive-by shooting and

testified that Wright instructed him to turn the car around after spotting his victim, someone Wright previously knew.

The State also placed into evidence a transcript of a taped interview with a detective who interviewed Wright following his arrest and presented the detective as a witness. The interview is inconsistent with an intellectually disabled defendant. Wright admitted to running away from the police because he had marijuana in his possession, to discarding the marijuana, and to knowing that possession of marijuana was a crime. Wright was also questioned during the interview about the box of bullets he was carrying, to which he responded, "I think they was .380 bullets," and that he was holding the bullets for a friend. Then, when informed a .380 caliber handgun was found nearby, Wright denied knowledge of the gun. Furthermore, while it was the detective's practice to inquire about mental illnesses when he suspected it may be a concern, he did not feel the need to ask Wright whether he had been diagnosed with any mental illnesses.

Finally, the lay witness testimony from people who know Wright does not dissuade us from concluding that Wright cannot demonstrate concurrent deficits even by a preponderance of the evidence. Although Wright's witnesses testified to general issues, they all ultimately made concessions that suggest Wright lacks concurrent deficits in adaptive functioning. For instance, Wright's cousin conceded that Wright: (1) had a fast-paced job selecting items for shelving at a grocery store that Wright eventually learned to do on his own, albeit not fluidly; (2) has improved somewhat with regard to grammar and punctuation; (3) writes him cards from prison for the holidays and his birthday; (4) reads the Bible; (5) occasionally calls him on the phone; and (6) has the capacity to learn. Similarly, Wright's aunt conceded that Wright: (1) did not appear to have problems understanding her; (2) did not appear to have problems getting along with other people; (3) was always clean when she saw him; and (4) sent her cards and letters from jail on holidays like Mother's Day, Christmas, Thanksgiving, Easter, and sometimes her birthday.

Furthermore, the State presented the testimony of Samuel Pitts's sisters, Sandrea Allen, Darletha Jones, and Vontrese Anderson, the latter of whom Wright dated ***902** for two to three weeks. All three testified that they had known Wright, Wright never had trouble understanding them, and they never had trouble understanding him.[6] All three also testified to having observed Wright ride the city bus to varying degrees. Vontrese also testified that Wright would follow her around after they had ended their relationship, and that even though he was advised by law enforcement to end that activity, he would continue to follow her anyway. She believed Wright knew he was not supposed to follow her, but chose to follow her regardless. Vontrese added that Wright had memorized her phone number and that she received five or fewer jail calls from Wright, but she did not answer them, and that she had received a letter from the jail that appeared to be written by Wright.

Given that Wright has not even demonstrated by a preponderance of the evidence either of the first two prongs for a determination of intellectual disability, we conclude that he has not demonstrated that he belongs to that category of individuals that are categorically ineligible for execution.[7] We therefore affirm the postconviction court's determination that Wright is not among those intellectually disabled defendants that cannot be executed.

Wright's Amended Motion for Postconviction Relief

Hurst v. Florida

Prior to oral arguments in this matter, the United States Supreme Court issued its decision in Hurst v. Florida, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Supreme Court held that the Sixth Amendment requires a jury to make the findings of fact necessary to impose death. See id. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.").

Although Wright validly waived his right to a penalty phase jury during trial, he nevertheless made a facial claim that Florida's death penalty scheme is unconstitutional based on Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). At the time, we declined to address ***903** Wright's Ring claim because we concluded that his waiver of a penalty phase jury was valid:

> Wright knowingly, intelligently, and voluntarily waived his right to a penalty-phase jury, as evidenced by the trial court's colloquy with Wright during which the trial court explained the impact of a waiver and specifically informed Wright of the consequences on appeal. Wright confirmed that it was his knowing intention to waive his penalty phase jury. The trial court concluded that the waiver had been made after a full consultation with counsel, that it appeared to be a tactical decision on the part of the defense based on counsel's statements, and that the waiver was knowingly, intelligently, and voluntarily made.
>
> Wright does not present any evidence contrary to the finding of the trial court. In fact, Wright concedes that he waived his right to a penalty-phase jury, thus barring this claim, and submits that the waiver was a strategic decision based on the possible "contamination" of the jury by the trial court's admission of collateral-crime evidence during the guilt phase. Wright chose the trial court to be the finder of fact because it was his view that the trial court would be more likely to dispassionately consider the aggravating and mitigating circumstances in light of any emotional impact the collateral-crime evidence may have had on the guilt-phase jury. This is no different from the choice that every capital defendant must make when deciding whether to waive the right to a penalty-phase jury. Wright's strategic decision to present the penalty phase of the case to the trial court instead of a jury constitutes a knowing, intelligent, and voluntary waiver and a conscious abandonment of any Ring-based challenges to the constitutionality of Florida's capital-sentencing scheme.

Wright, 19 So.3d at 297–98. Nevertheless, prior to oral argument in this case, we sua sponte ordered the parties to file supplemental briefs discussing any application of Hurst v. Florida to his case.

Although Wright did not challenge the validity of his waiver of a penalty phase jury on direct appeal, he now attempts to challenge it on two bases. First, Wright contends that he waived his right to an advisory jury, rather than the jury required by the Sixth Amendment under Hurst v. Florida. Wright bases this contention on the fact that the trial court repeatedly referenced the advisory jury, rather than a jury in general terms. However, this reasoning is undermined by his attorney's explanation on the record during trial that Wright preferred that the judge determine whether a death sentence was appropriate because he felt that a judge would be more objective than the same jury that convicted him. Second, Wright challenges the validity of the waiver based on his alleged intellectual disability. However, as affirmed above, Wright is not intellectually disabled under Florida law.

Having reaffirmed the validity of Wright's waiver, we conclude that he is not entitled to any Hurst v. Florida relief. See Mullens v. State, 197 So.3d 16, 38–40 (Fla. 2016) (declining to grant Hurst v. Florida relief where the defendant had knowingly, voluntarily, and intelligently waived a penalty-phase jury prior to the decision in Hurst v. Florida).

Penalty–Phase Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of Counsel for his defence." U.S. Const. Amend. VI. This right, which was ***904** incorporated to the States through the Due Process Clause of the Fourteenth Amendment, includes the right to effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); see generally Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (incorporating Sixth Amendment right to assistance of counsel to the States).

However, not all ineffective assistance of counsel is unconstitutional. For this reason, a defendant seeking relief on this basis must establish both that his penalty phase counsel's performance was deficient and that the deficient performance prejudiced him so as to deprive him of a reliable proceeding. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hoskins v. State, 75 So.3d 250, 254 (Fla. 2011). Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, reviewing the postconviction court's legal conclusions de novo, but deferring to the postconviction court's factual findings that are supported by competent, substantial evidence. See Mungin v. State, 79 So.3d 726, 737 (Fla. 2011); Sochor v. State, 883 So.2d 766, 771–72 (Fla. 2004).

In Shellito v. State, 121 So.3d 445 (Fla. 2013), this Court further explained how Strickland applies in the penalty phase context:

> Penalty phase claims of ineffective assistance of counsel are also reviewed under the two-prong test established by Strickland, and "[i]n reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding." Hoskins v. State, 75 So.3d [at 254]. In determining whether the penalty phase proceeding was reliable, "the failure [of counsel] to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." Rose v. State, 675 So.2d 567, 571 (Fla. 1996).
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> "It is unquestioned that under the prevailing professional norms ... counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.' " Porter v. McCollum, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)); see also Hannon v. State, 941 So.2d 1109, 1124 (Fla. 2006) ("Pursuant to Strickland, trial counsel has an obligation to conduct a reasonable investigation into mitigation."). Moreover, counsel must not ignore pertinent avenues for investigation of which he or she should have been aware. See Porter, 558 U.S. at 40, 130 S.Ct. 447. "[I]t is axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " Hurst v. State, 18 So.3d 975, 1008 (Fla. 2009) (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052). However, "[c]ounsel's decision not to present mitigation evidence may be a tactical decision properly within counsel's discretion." Hannon, 941 So.2d at 1124. This Court has found counsel's performance deficient where counsel "never attempted to meaningfully investigate mitigation" although substantial mitigation could have been presented. Asay v. State, 769 So.2d 974, 985 (Fla. 2000).
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> ....
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> "Penalty phase prejudice under the Strickland standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and ***905** the mitigators and aggravators found by the trial court." Hurst, 18 So.3d at 1013. That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' " Porter, 558 U.S. at 44, 130 S.Ct. 447 (quoting Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052). "To assess that probability, [the Court] consider[s] 'the totality of the available mitigation evidence ...' and 'reweig[hs] it against the evidence in aggravation.' " Id. at 41, 130 S.Ct. 447 (quoting Williams v. Taylor, 529 U.S. [at 397–98], 120 S.Ct. 1495.

121 So.3d at 453–56.

Failure to Adequately Investigate or Present Mitigation

With regard to the penalty phase, Wright first contends that his trial counsel were ineffective in failing to adequately present evidence of mitigating circumstances. Although Wright may not be intellectually disabled for purposes of the categorical prohibition against execution under the Eighth Amendment, he can potentially demonstrate that his low IQ and mental health are mitigating circumstances sufficient to outweigh the aggravating circumstances. As a result, Wright contends that his penalty phase counsel were ineffective because they failed to: (1) acquire documents; (2) present lay witnesses; and (3) present expert witnesses demonstrating his low IQ and mental health as mitigating circumstances. We conclude that these claims are without merit.

Failure to Acquire Documents

During the postconviction evidentiary hearing, Wright's postconviction counsel presented Wright's complete school records, which included records from both Florida and New York. The records indicated that Wright had several Independent Education plans and that Wright was both emotionally handicapped and specific learning disabled. In addition, the records contained two school psychological reports that contained IQ scores. Wright contends that his penalty phase counsel were ineffective for relying on a family member for Wright's educational

documents in lieu of acquiring all of the school records directly from the schools. We disagree.

Notwithstanding any deficiency, competent, substantial evidence supports the postconviction court's findings that Wright cannot establish Strickland prejudice.[8] To establish prejudice, Wright must demonstrate a reasonable probability that he would have received a life sentence but for the deficiencies of counsel. See Gaskin v. State, 822 So.2d 1243, 1250 (Fla. 2002). Wright has not carried his burden because the documents would have merely been cumulative to the information that was presented during the penalty phase. See Diaz, 132 So.3d at 111–12 ("A defendant is not prejudiced by trial counsel's failure to present cumulative evidence." (citing Farina, 937 So.2d at 624)). Dr. Sesta testified during the penalty phase that he reviewed school records indicating that Wright took classes for emotionally handicapped students and had a learning disability. Wright's family members who testified during the penalty phase corroborated that ***906** information as well. They also added that Wright's mother was receiving social security benefits for Wright's disability. Therefore, Wright has not alleged any new information contained in the documents that was not previously presented. See id. at 111 (affirming postconviction court's finding of no prejudice for failure to acquire documents where the defendant "[did] not identify any specific facts contained in the documents that should have been brought to the attention of the judge ..."). Thus, Wright cannot demonstrate that he was prejudiced by the failure to acquire documents, and this claim fails. See Evans v. State, 946 So.2d 1, 12 (Fla. 2006) ("[B]ecause the Strickland standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." (quoting Whitfield v. State, 923 So.2d 375, 384 (Fla. 2005))).

Presentation of Expert Witnesses

Wright contends that his penalty phase counsel were ineffective for failing to present expert witnesses to discuss the Flynn effect, the practice effect, and Fetal Alcohol Syndrome as each relates to his IQ scores and intellectual disability.[9] We disagree.

As an initial matter, Wright has failed to establish deficiency. This Court has repeatedly held that penalty phase counsel is not deficient for relying on qualified mental health experts, even where postconviction counsel retains an expert with a more favorable opinion. See generally Diaz, 132 So.3d at 93; Bowles v. State, 979 So.2d 182 (Fla. 2008); Asay, 769 So.2d at 986; Jones v. State, 732 So.2d 313 (Fla. 1999). Wright's penalty phase counsel pursued the presentation of evidence of mitigating circumstances diligently and ultimately retained five expert witnesses. Indeed, trial counsel testified that they specifically retained Dr. Waldman and Dr. Sesta after the original experts did not find that Wright was intellectually disabled. Dr. Waldman was the first expert to conclude that Wright was intellectually disabled. Furthermore, as discussed above, the record reflects that Wright's trial counsel at times believed that Wright was bright, a conclusion that was reasonable in light of Wright's input with regard to objections across the three trials and his extensive testimony. Thus, Wright has not demonstrated deficiency, and this claim fails.

This claim further fails because Wright cannot demonstrate Strickland prejudice. As noted in the discussion pertaining to Wright's renewed motion for intellectual disability, the expert testimony indicated that Wright's first IQ score was his most accurate and that all of his subsequent IQ scores fell in the range derived from his first IQ score after adjusting for the SEM, notwithstanding any practice effect or Flynn effect concerns. Furthermore, there was testimony that Wright's IQ examinations were far enough apart in time that they would not have been affected by the practice effect. Moreover, during the penalty phase Dr. Waldman testified that Wright was profoundly impaired and he also testified extensively about Wright's Fetal Alcohol Syndrome, as well as Wright's low IQ.

***907** In addition, Wright has failed to demonstrate that any expert testimony would have changed the composition of the mitigating circumstances found. For instance, the trial court found the existence of two statutory mental health mitigating circumstances: (1) that Wright committed the offense while under the influence of extreme mental or emotional disturbance, and (2) that Wright's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. It assigned those two statutory factors some weight. The trial court

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also found one more statutory mitigating circumstance, that Wright was nineteen years old (some weight), as well as nine nonstatutory mitigating circumstances: that Wright (1) suffered emotional deprivation during his upbringing (some weight); (2) had a low IQ, which affected his judgment and perceptions (some weight); (3) suffered from neurological impairments, which affected his impulse control and reasoning ability (some weight); (4) suffered from low self-esteem (little weight); (5) lacked the capacity to maintain healthy, mature relationships (little weight); (6) was frustrated by his learning disability (little weight); (7) lacked mature coping skills (some weight); (8) displayed appropriate courtroom behavior (little weight); and (9) suffered from substance abuse during his adolescent and adult life (little weight).

Furthermore, the evidence of aggravating circumstances was significant. Two of the aggravating circumstances found, CCP and prior violent felony for the contemporaneous murders, are among the weightiest of aggravating circumstances. See Deparvine v. State, 995 So.2d 351, 381 (Fla. 2008) ("CCP[ ] is among the most serious aggravators set out in the statutory sentencing scheme."); Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002) (stating that prior violent felony conviction is among the weightiest aggravating circumstances in Florida's capital sentencing scheme). The trial court also found a third aggravating circumstance: that the murders were committed for the purpose of avoiding arrest. All three aggravating circumstances were assigned great weight. As a result, Wright has failed to demonstrate any reason that any expert testimony would have led to a different assignment of weight to the mental health mitigating circumstances and that a reweighing of the aggravating circumstances and mitigating circumstances would result in a life sentence. Thus, Wright cannot establish prejudice.

We therefore conclude that Wright has failed to establish Strickland ineffective assistance of counsel.

Failure to Present Lay Witness Testimony

Wright contends that his penalty phase counsel were ineffective for failing to present lay witness testimony from fellow inmates who characterized Wright as a follower, an outcast, intellectually slow, and pugnacious. [10] The postconviction court found that Wright did not establish either deficient performance or prejudice with regard to this claim. We agree.

With regard to prejudice, Wright has failed to demonstrate that the evidence elicited during the postconviction evidentiary hearing would not have been merely cumulative to the penalty phase testimony of his aunt and cousin. See ***908** Diaz, 132 So.3d at 111–12 ("A defendant is not prejudiced by trial counsel's failure to present cumulative evidence." (citing Farina, 937 So.2d at 624)). His aunt and cousin specifically testified that Wright was a follower, was slow, had low self-esteem, performed poorly in school, and was enrolled in special classes. They also testified that Wright's father was in a mental institution and that Wright was bullied by other children. As a result, Wright has failed to demonstrate that any new mitigating circumstance would be found or that the existing mitigating circumstances would have been assigned more weight. Therefore, this claim fails. See Evans, 946 So.2d at 12. [11]

Failure to Challenge Evidence of Aggravation

Wright claims that his counsel were ineffective for failing to present witnesses to rebut or elaborate on evidence of Wright's prior convictions for batteries that occurred while he was in prison during the pendency of his trial. This claim is meritless. Competent, substantial evidence supports the postconviction court's findings.

First, Wright has failed to establish prejudice. None of the evidence presented during the postconviction evidentiary hearing negates the fact that Wright had previous convictions for battery. Furthermore, even if those prior convictions were omitted, the trial court still considered Wright's contemporaneous convictions for first-degree murder of the other victim, carjacking, kidnapping, and robbery with a firearm in finding the prior violent felony conviction aggravating circumstance. As the postconviction court noted, the contemporaneous convictions were arguably more serious than the convictions Wright claims were not properly rebutted. As explained above, two of the three aggravating circumstances found below are among the weightiest aggravating circumstances. See Sireci, 825 So.2d at 887; Deparvine, 995 So.2d at 381–82. In addition, the previously undiscovered evidence concerning the attack on Cassada would have been merely cumulative to the

concessions elicited from Cassada during penalty phase cross-examination and the evidence presented by Wright's trial counsel. Specifically, evidence was introduced that one other person was convicted in connection with the attack on Cassada, and Cassada conceded that perhaps five individuals attacked him and he did not know whether Wright actually struck him. Thus, because Wright has failed to establish prejudice, we affirm the postconviction court's denial of this claim. See Evans, 946 So.2d at 12.

Moreover, the record reflects that Wright's trial counsel made a tactical decision to not present the testimony of other inmates concerning Connelly's alleged provocation of Wright. Wright's trial counsel testified that he did not consider the provocation sufficient justification for Wright to attack Connelly, and even if it were, presentation of such evidence would not have changed the fact that Wright was convicted for the attack. Furthermore, Wright's trial counsel represented Wright in the case concerning his attack on Connelly and presented those witnesses in that case. Thus, Wright's penalty phase counsel were well aware of the inmates' testimony when they elected to not present the inmates as penalty phase witnesses. In addition, Wright's lead penalty phase counsel testified that he did not consider the inmate witnesses to be good witnesses. The decision to not present rebuttal witnesses ***909** concerning the prior conviction for attacking Connelly was a reasonable tactical decision. Therefore, the postconviction court's findings that Wright's counsel were not ineffective for failing to present additional witnesses concerning Wright's prior battery convictions are supported by competent, substantial evidence.

Guilt Phase Ineffective Assistance of Counsel Claims

Wright first contends that his counsel rendered ineffective assistance of counsel by failing to present witnesses to testify as to the credibility of two jailhouse informants who testified during trial that Wright confessed to the murders. We disagree.

This Court has observed that mere disagreement by a defendant's subsequent counsel with a strategic decision of a predecessor does not automatically result in deficient performance. See Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). Indeed, reasonable trial strategy appears in a myriad of forms. One example is a trial counsel's decision to not call certain witnesses to testify. See Johnston v. State, 63 So.3d 730, 741 (Fla. 2011). Although the "sandwich" rule has been repealed since Wright's trial, this Court has held that a valid basis for deciding against calling witnesses to testify is the decision to preserve opening and closing remarks pursuant to the sandwich rule. See Van Poyck v. State, 694 So.2d 686, 697 (Fla. 1997). In addition, this Court has concluded that trial counsel's strategy of relying on cross-examination of a witness—in lieu of calling additional witnesses—was sound trial strategy. See Occhicone, 768 So.2d at 1048. Moreover, a failure to present cumulative evidence—even by mere omission rather than decision—does not constitute deficient performance. See Beasley v. State, 18 So.3d 473, 484 (Fla. 2009) (citing Darling, 966 So.2d at 378). These examples of reasonable strategy reflect this Court's observation that "[m]ore [evidence] is not necessarily better." Woods v. State, 531 So.2d 79, 82 (Fla. 1988).

Furthermore, notwithstanding the deficient performance of counsel, Strickland prejudice does not arise when a defendant's trial counsel fails to present evidence that would have been merely cumulative to evidence that was previously elicited during trial. See Sochor, 883 So.2d at 784. In the postconviction context, evidence presented during an evidentiary hearing is cumulative where the same evidence was previously elicited during trial through cross-examination. See Ponticelli v. State, 941 So.2d 1073, 1085 (Fla. 2006). Moreover, as discussed above, the omission of any noncumulative evidence must undermine confidence in the verdict.

Failure to Present Impeachment Witnesses

Competent, substantial evidence supports the postconviction court's findings that Wright has not established deficiency with regard to the decision to not present witnesses to impeach the credibility of Durant or Robinson. Rather, the record reflects that the decision was the product of reasonable trial strategy. For instance, trial counsel testified that he felt "Durant was such an easy target and so incredible" that he was not going to look for any witnesses to impeach him. The record further reflects that trial counsel extensively and successfully cross-examined Durant with the goal of discounting his credibility. In addition, trial counsel testified that they rejected the presentation of additional witnesses,

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with Wright's approval, to preserve opening and closing remarks. Moreover, trial counsel testified that he did not consider inmates to be strong witnesses and that he did not consider their testimony sufficient to justify ***910** sacrificing the retention of opening and closing remarks.

Wright also did not suffer prejudice. As an initial matter, Wright testified that he never confessed to either Durant or Robinson. Therefore, any testimony concerning the credibility of Durant or Robinson with regard to Wright's alleged confession would have been merely cumulative to Wright's testimony. Wright's attorneys extensively cross-examined each of them and even if their testimony was completely discredited, there were still other non-prisoner witnesses who testified that Wright confessed to them. Furthermore, this Court has previously concluded that prejudice was not established for failure to object to improper guilt phase prosecutorial comments when the evidence of guilt was strong. See Jones v. State, 949 So.2d 1021, 1032 (Fla. 2006) ("Given the strong evidence of Jones' guilt, including his confession to the murder and his possession of McRae's vehicle and ATM card, our confidence in the guilty verdict is not undermined by the prosecutor's guilt phase comment [that the murder was committed in a heinous, atrocious, and cruel manner.]"). Here, the remaining evidence of guilt was strong because, among other evidence, Wright's fingerprints were found on the car, he possessed the murder weapon, and blood attributed to one of the victims was found on a shoe attributed to Wright. Thus, this claim fails.

Failure to Object to Prosecutor's Closing Remarks

As a second claim against his counsel, Wright contends that his counsel were ineffective for failing to object to comments made by the State during guilt phase closing remarks. We disagree.

The comments at issue are the following:

> He used the gun on Friday. He shot a man with it. He certain[ly] doesn't have any problems shooting people. He shot Carlos Coney.
>
> When you have a carjacking and a murder like this that's senseless, it's an irrational act, and you cannot for the life of you understand why that happened. You'll never understand why T.J. Wright chose to shoot Carlos Coney or chose to shoot Felker and Green. It's—it's an irrational thing to do.
>
> Carlos Coney and Bennie Joiner both know the guy. He shoots them, a man that he knows. The man—the police come, he goes, "Yeah, who shot you?"
>
> "T.J. Wright shot me."
>
> ....
>
> You know, you can't believe T.J. This guy wants you to believe that somebody that he has an acrimonious relationship with, they don't get along, he's driving by, sees the guy, has a gun in his car, and tells his buddy turn around and go back, I want to talk to him.
>
> Bull crap. He wanted to shoot him. That's why he told [the driver] to turn around. That's exactly what he did. He shot him.
>
> ....
>
> But the second time, when you look at this map, after he dumped that car on Bolender Road and went and carjacked the Mexicans, he comes up to right there, and that's where he flees. That's where he shoots at Mr. Mendoza and the owner of the car who's since died in a car accident. That's where he shoots at him.

Wright, 19 So.3d at 294 n.18 (emphasis in original). On direct appeal, we admonished the State for those comments: "We caution the State that some of the arguments appear to have crossed the line into asserting that Wright's propensity for violence proved that he committed the murders." Id. at 294. Ultimately, however, we reviewed the comments for fundamental error. ***911** We concluded that the comments did not rise to fundamental error.

Despite the distinctions between the fundamental error standard and the Strickland prejudice standard, this Court has held that a previous finding upon appeal that statements by a prosecutor failed to rise to fundamental error precludes a determination of prejudice in the Strickland context. See Chandler v. State, 848 So.2d 1031, 1046 (Fla. 2003) ("Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice

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prong of the Strickland test."); Sheppard v. State, 62 So.3d 14 (Fla. 3d DCA 2011) (applying Chandler in a similar context); c.f. Clarke v. State, 102 So.3d 763 (Fla. 4th DCA 2012) (distinguishing Chandler because the Court had affirmed the direct appeal without a written opinion and therefore did not reveal whether it had found that no fundamental error occurred). Here, as noted above, this Court determined in a written opinion that the comments at issue did not rise to fundamental error. Therefore, Wright cannot now assert, a second time, that he was prejudiced by his trial counsel's failure to object to those comments.

We nevertheless briefly address the merits because Wright takes issue with this Court's previous conclusion that no fundamental error occurred. Wright believes that a concession by appellate counsel was self-serving because his counsel on direct appeal was his trial counsel and, consequently, his appellate counsel did not have an interest in admitting that he rendered ineffective assistance of counsel. However, we conclude that competent, substantial evidence supports the postconviction court's finding that Wright cannot establish Strickland prejudice. Here, the record supports the postconviction court's findings that there was strong evidence of Wright's guilt, including testimony of multiple confessions, the recovery of his fingerprints at the crime scene, and the recovery of blood of one of the victims from a shoe connected to Wright. As a result, even if we were to agree that Wright's counsel were deficient for failing to object, our confidence in the verdict is not undermined by the comments in this case when they are placed in context of the overwhelming evidence of guilt. See Jones, 949 So.2d at 1032. Thus, this claim fails.

Cumulative Error

This Court has recognized under unique circumstances that "[w]here multiple errors are found, even if deemed harmless individually, 'the cumulative effect of such errors' may 'deny to [the] defendant the fair and impartial trial that is the inalienable right of all litigants.' " See Hurst, 18 So.3d at 1015 (citing Brooks v. State, 918 So.2d 181, 202 (Fla. 2005) (quoting Jackson v. State, 575 So.2d 181, 189 (Fla. 1991))); see also McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007). However, this Court has repeatedly held that "where the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails." Israel v. State, 985 So.2d 510, 520 (Fla. 2008) (quoting Parker v. State, 904 So.2d 370, 380 (Fla. 2005)); see also Griffin v. State, 866 So.2d 1, 22 (Fla. 2003). In addition, individual claims that fail to meet the Strickland standard for ineffective assistance of counsel are also insufficient to establish cumulative error. See Israel, 985 So.2d at 520. Moreover, claims of error that have previously been presented to this Court on direct appeal or in postconviction and subsequently rejected cannot form the basis for a valid claim of cumulative error. See Rogers v. State, 957 So.2d 538, 555–56 (Fla. 2007) (citing ***912** Morris v. State, 931 So.2d 821, 837 n.14 (Fla. 2006); Melendez v. State, 718 So.2d 746, 749 (Fla. 1998)).

We affirm the postconviction court's findings that Wright has not established that he was deprived of a fair trial due to cumulative errors. As discussed above, with regard to every claim, Wright has failed to demonstrate that the postconviction court erred in finding no Strickland error occurred. As a result, he has not alleged a basis for cumulative error.

CONCLUSION

We affirm the postconviction court's denial of Wright's renewed motion for determination of intellectual disability and the postconviction court's order denying Wright's rule 3.851 motion. We also determine that Wright is not entitled to relief pursuant to Hurst v. Florida.

It is so ordered.

NO MOTION FOR REHEARING WILL BE ALLOWED.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

LAWSON, J., did not participate.

All Citations

213 So.3d 881, 42 Fla. L. Weekly S343

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Footnotes

1 Huff v. State, 622 So.2d 982 (Fla. 1993).

2 Wright does not appeal the denial of his other claims. With regard to the guilt phase, Wright had also claimed that: (1) his counsel were ineffective for failing to object to evidence of other crimes or wrongful acts, for failing to challenge victim family member testimony identifying certain items in evidence as belonging to the victims, for failing to investigate alibi witnesses, for failing to present evidence of fetal alcohol syndrome, and for failing to strike a juror from the jury; (2) the State unconstitutionally withheld exculpatory evidence; and (3) the State unconstitutionally presented conflicting theories to the jury. With regard to the penalty phase, Wright had also claimed that: (1) his counsel were ineffective for failing to assert that he should receive a life sentence due to the superior intelligence of his codefendant; (2) section 945.10, Florida Statutes, unconstitutionally withholds the identity of the execution team members; and (3) Florida's lethal injection protocol is unconstitutional.

3 Referring us to Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996), Wright also contends that section 921.137(4), Florida Statutes, is facially unconstitutional because the clear and convincing evidence standard creates too high of a risk that he will be mistakenly determined to not be intellectually disabled. However, in light of our holding today, we need not address this issue. Moreover, the claim is procedurally barred because Wright raised this claim for the first time in his written closing remarks during the supplemental postconviction evidentiary hearing. See Deparvine v. State, 146 So.3d 1071, 1103 (Fla. 2014) ("This argument was not specifically raised in either the initial postconviction motion, the reply to the State's response to the motion, or the amended postconviction motion. Deparvine raised this specific claim for the first time in closing arguments."); Darling v. State, 966 So.2d 366, 379 (Fla. 2007).

4 According to the expert testimony presented, the practice effect refers to a test taker's improvement in scores from taking the same test more than once within a short time period. The Flynn effect refers to a theory in which the intelligence of a population increases over time, thereby potentially inflating performance on IQ examinations.

5 In the IQ test administered by Dr. Gamache, Wright scored a 65. However, it is undisputed that this testing was rendered invalid by Wright's scores on the Validity Indicator Profile test administered the same day.

6 One of the State's witnesses, Toya Long Ford, testified that Wright had trouble understanding her and that she had to ask him yes or no questions. However, she further testified that Wright would talk to her about his mother's drug problems and his academic difficulties. Furthermore, Ford testified that Wright would abide by the rules whenever he visited her home and that Wright would come to her for food and safe haven, but also that Wright's visits became less frequent when she and her mother could no longer provide Wright with as much help as they had in the past.

7 We recognize that the postconviction court suggested that we conduct a new proportionality review due to its concerns that Wright is borderline intellectually disabled. This suggestion, however, is inconsistent with our precedent. See, e.g., McKenzie v. State, 153 So.3d 867, 884 (Fla. 2014) (denying a new proportionality review in postconviction for evidence the defendant chose not to present during the penalty phase); Lukehart v. State, 70 So.3d 503, 524–25 (Fla. 2011) (denying a new proportionality review in a petition for habeas corpus); Green v. State, 975 So.2d 1090, 1115 (Fla. 2008) (denying a new proportionality review due to a lack of new evidence); Farina v. State, 937 So.2d 612, 618 (Fla. 2006) (proportionality claim procedurally barred in postconviction). Moreover, Wright has failed to brief how a new proportionality review would apply to him and has, therefore, waived such a claim. See, e.g., City of Miami v. Steckloff, 111 So.2d 446, 447 (Fla. 1959) ("It is an established rule that points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs. An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs.").

8 Both parties appear to have conceded that the failure to acquire all of Wright's school documents constituted deficient performance. The postconviction court did not address deficiency in its order. Notably, however, penalty phase counsel testified that he believed that the school records demonstrated that Wright was not intellectually disabled, but merely a misbehaving student.

9 Wright also contends that his penalty phase counsel were ineffective for failing to retain Dr. Sesta as a confidential consultant and presenting him as an expert witness. However, this claim was not raised in Wright's amended 3.851 motion and the postconviction court did not address it in its order. Wright appears to have raised it for the first time on appeal and, as such, it is not preserved for appeal. See Deparvine, 146 So.3d at 1103.

10 Wright mentioned other lay witnesses in his postconviction motion, but he never presented them as witnesses during the postconviction evidentiary hearing. Therefore, any claims concerning them are waived. Ferrell v. State, 918 So.2d 163, 174 (Fla. 2005). Some of them were eventually called during the evidentiary hearing for Wright's renewed motion for

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determination of intellectual disability, but only after the postconviction court denied Wright's claim of ineffective assistance of counsel.

11 With regard to deficiency, the decision to limit the presentation of lay witness testimony appears in part to have been strategic based on Wright's penalty phase counsel's assessment of the inmate witnesses' credibility, which is a valid strategic reason for foregoing presentation of certain witnesses.

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No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix B

Florida Supreme Court Opinion reaffirming the denial of Petitioner's intellectual disability claim following a remand from the United States Supreme Court for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), dated September 27, 2018.
Wright v. State, 256 So. 3d 766 (Fla. 2018).

256 So.3d 766
Supreme Court of Florida.

Tavares J. WRIGHT, Appellant,
v.
STATE of Florida, Appellee.

No. SC13-1213
|
September 27, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Polk County, Richard George Prince, J., of two counts of first-degree murder, one count of carjacking with a firearm, two counts of armed kidnapping with a firearm and two counts of robbery with a firearm, and, after defendant waived his right to a penalty phase jury, was sentenced to death for each murder and life imprisonment for each of the other convictions. Defendant appealed, and the Supreme Court, 19 So.3d 277, affirmed. Defendant filed motion for postconviction relief and filed a renewed motion to determine intellectual disability. The Circuit Court, Polk County, Donald G. Jacobsen, C.J., denied motions. Defendant appealed. The Supreme Court, 213 So.3d 881, affirmed. Defendant petitioned for writ of certiorari. The United States Supreme Court vacated the Supreme Court's opinion and remanded for further consideration in light of *Moore v. Texas*, 137 S.Ct. 1039, 197 L.Ed.2d 416.

Holdings: The Supreme Court held that:

there was competent, substantial evidence for the postconviction court to conclude that defendant did not suffer from significant subaverage intellectual functioning, and

defendant could not demonstrate that he suffered from concurrent deficits in adaptive functioning.

Affirmed.

Canady, C.J. concurred specially.

Labarga, J., filed concurring opinion, in which Canady, C.J., and Polston, J., concurred.

Lawson, J., filed specially concurring opinion, in which Canady, C.J., concurred.

Pariente, J., filed opinion concurring in the result.

***768** An Appeal from the Circuit Court in and for Polk County, Donald G. Jacobsen, Chief Judge - Case No. 532000CF002727A0XXXX

Attorneys and Law Firms

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Opinion

PER CURIAM.

This case is before the Court on remand from the decision of the United States Supreme Court in *Wright v. Florida* (*Wright v. Florida*), —— U.S. ——, 138 S.Ct. 360, 199 L.Ed.2d 260 (2017), which granted certiorari and vacated our decision in *Wright v. State* (*Wright*), 213 So.3d 881 (Fla. 2017). In *Wright*, we affirmed the denial of Tavares Wright's intellectual disability (ID) claim. 213 So.3d at 912. After we released *Wright*, the Supreme Court issued *Moore v. Texas*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). Because that decision is potentially relevant to this case, the Supreme Court vacated and remanded to allow us to reconsider *Wright*. *Wright v. Florida*, 138 S.Ct. 360. Therefore, the issue is whether *Moore* impacted the denial of Wright's ID claim. For the reasons that follow, we hold that *Moore* does not require a different result in this case; therefore, we reaffirm the denial of Wright's ID claim.

FACTUAL AND PROCEDURAL BACKGROUND

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This Court detailed the underlying crimes in Wright's direct appeal. *Wright v. State* (*Wright I*), 19 So.3d 277, 283-91 (Fla. 2009) (affirming convictions and sentences). For the purposes of this proceeding, it is only germane that Wright was convicted of, and sentenced for, two counts of first-degree murder, two counts of armed kidnapping, two counts of robbery with a firearm, and one count of carjacking with a firearm. *Id.* at 283. Also, prior to sentencing, the trial court held a special hearing to determine if Wright had ID. *Id.* at 289-90. In 2010, Wright filed a postconviction motion, which the postconviction court denied. *Wright*, 213 So.3d at 894. While the appeal of that decision was pending before this Court, the Supreme Court issued its opinion in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). *Wright*, 213 So.3d at 894. Resultantly, this Court relinquished jurisdiction and remanded to the postconviction court, allowing Wright to file a renewed motion for determination of ID. *Id.*

The postconviction court granted an evidentiary hearing on Wright's renewed motion. *Id.* The evidentiary hearing took place on January 5-6, 2015, and February 11, 2015. During that hearing, Wright presented six witnesses, and the State presented thirteen witnesses. *Id.* at 894. [1] On March 26, 2015, the postconviction court denied Wright's renewed motion for determination ***769** of ID as a bar to execution. *Id.* Along with his other rejected postconviction claims, Wright appealed that order here, and we initially affirmed the decision in November 2016. Upon rehearing, we issued a revised opinion with limited changes on March 16, 2017.

Nearly two weeks later, on March 28, 2017, the Supreme Court issued its opinion in *Moore*. As a result of Wright's certiorari petition, the Supreme Court vacated *Wright* and remanded for reconsideration in light of *Moore*. The remand order follows in full:

> The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Florida for further consideration in light of *Moore v. Texas*, 581 U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017).

Wright v. Florida, 138 S.Ct. 360.

This review follows.

ANALYSIS

We resolve this case in three parts below: (1) the nature of the remand order; (2) the intelligence prong of the ID test; and (3) the adaptive functioning prong of the ID test.

However, as a preliminary matter, it is necessary to clarify what *Moore* did not change—our standard of review. As noted in *Glover v. State*, 226 So.3d 795 (Fla. 2017), neither *Hall* nor *Moore* "alter[ed] the standard for reviewing the trial court's determination as to whether the defendant is intellectually disabled." *Id.* at 809.

> In reviewing the circuit court's determination that [the defendant] is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So.3d 891, 895 (Fla. 2011). [This Court] "[does] not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007). However, [this Court] appl[ies] a de novo standard of review to any questions of law. *Herring*, 76 So.3d at 895.

Glover, 226 So.3d at 809 (alterations in original) (quoting *Oats v. State*, 181 So.3d 457, 459 (Fla. 2015)).

The Remand Order

First, we must dispel Wright's impression that the Supreme Court's vacation and remand indicates that it either reversed on the merits or intends for us to do so. The remand was in the form of a Supreme Court summary reconsideration order, which is colloquially known as a "GVR" (granted, vacated, and remanded). A GVR is a "mode of summary disposition, *though not necessarily on the merits*, [by] an order that grants certiorari, vacates the judgment below, and remands the case to the lower court

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for reconsideration in light of an intervening Supreme Court ruling." Stephen M. Shapiro et al., *Supreme Court Practice* 346 (10th ed. 2013) (emphasis added) (collecting cases as examples of GVRs with nearly identical language as the GVR here, including *Siegelman v. United States*, 561 U.S. 1040, 130 S.Ct. 3542, 177 L.Ed.2d 1120 (2010)); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711, 712 (2009). Although we have not explicitly addressed this subject, other courts have resoundingly determined that a GVR is neither a merits determination nor precedential case law:

> It is important to remember, however, that a GVR order is neither an outright reversal nor an invitation to reverse; it ***770** is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it. *See Pratt v. Philbrook*, 109 F.3d 18, 19-20 (1st Cir. 1997). The GVR order itself does not constitute a final determination on the merits; it does not even carry precedential weight. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001); *Henry v. City of Rock Hill*, 376 U.S. 776, 777, 84 S.Ct. 1042, 12 L.Ed.2d 79 (1964); *see also Lawrence*[*v. Chater*, 516 U.S. 163, 178, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996)] (Scalia, J., dissenting) (suggesting that the GVR ought to be termed "no fault V & R" because it represents a "vacation of a judgment and remand *without* any determination of error in the judgment below"). Consequently, we do not treat the Court's GVR order as a thinly-veiled direction to alter our course ....

Gonzalez v. Justices of Mun. Court of Bos., 420 F.3d 5, 7 (1st Cir. 2005); *see, e.g.*, *Kenemore v. Roy*, 690 F.3d 639, 642 (5th Cir. 2012) ("A GVR does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate."); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006) (same); *United States v. Norman*, 427 F.3d 537, 538 n.1 (8th Cir. 2005) (same); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 796 n.5 (8th Cir. 2005) (same); *Peterson v. BASF Corp.*, 711 N.W.2d 470, 474 n.5 (Minn. 2006) (same).

Upon receiving nearly identical *Moore* GVR orders, some courts have affirmed their original decisions as unchanged by *Moore*, *see Carroll v. State*, No. CR-12-0599, 2017 WL 6398236, at *2, *6 (Ala. Crim. App. Dec. 15, 2017), while others have remanded further for trial courts to determine *Moore*'s effect on each particular case, *see Long v. Davis*, 706 Fed. App'x 181 (5th Cir. 2017); *Henderson v. Davis*, 868 F.3d 314 (5th Cir. 2017). Wright, however, does not present or direct us to any case that has held a GVR, or a *Moore* GVR, requires a different result per se. Thus, consistent with other courts' consideration of these orders, we will not guess at the implied intentions of the Supreme Court's GVR order. Rather—following the plain language of the order—we simply reconsider this case in light of *Moore* to determine if a different outcome is warranted. *Wright v. Florida*, —— U.S. ——, 138 S.Ct. 360, 199 L.Ed.2d 260.

Intelligence Prong

Second, Wright contends that we erred by affirming the postconviction court's finding that he failed to satisfy his burden of proof on the intellectual functioning prong of the ID test. However, *Moore* does not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an ID determination; thus, Wright's claim fails again.

It is unconstitutional to impose a death sentence upon any defendant with ID. *Moore*, 137 S.Ct. at 1048; *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *see also* § 921.137(2), Fla. Stat. (2017). In Florida, section 921.137, Florida Statutes, defines ID with a three-prong test: (1) "significantly subaverage general intellectual functioning [(2)] existing concurrently with deficits in adaptive behavior and [(3)] manifested during the period from conception to age 18." § 921.137(1); *see* ***771** *Hall*, 134 S.Ct. at 1994.[2] To demonstrate ID, a defendant must make this showing by clear and convincing evidence. § 921.137(4).

With regard to the first prong, the statute defines the phrase "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." § 921.137(1). Currently, the mean IQ score of the general population is approximately 100; and each standard deviation

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represents about 15 points. *Hall*, 134 S.Ct. at 1994; DSM-5, at 37. Accordingly, the medical approximation of significant subaverage intellectual functioning is an IQ score of 70, plus or minus. *Hall*, 134 S.Ct. at 1994; DSM-5, at 37. There is a standard error of measurement (SEM) that affects each IQ score, which results in a range approximately 5 points above and below the raw IQ test score. *Hall*, 134 S.Ct. at 1995; DSM-5, at 37. Rather than interpreting IQ scores as a single, fixed number, medical professionals read IQ scores as a range to account for SEM. *Hall*, 134 S.Ct. at 1995; AAIDD-11, at 36. For this reason, the Supreme Court rejected the use of a strict 70-point ID cutoff in *Hall*, noting that courts must account for SEM because "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S.Ct. at 2000 (citation omitted) (quoting *Atkins*, 536 U.S. at 309 n.5, 122 S.Ct. 2242). This means that an "IQ test result of 75 [i]s squarely in the range of potential intellectual disability." *Brumfield v. Cain*, —— U.S. ——, 135 S.Ct. 2269, 2278, 192 L.Ed.2d 356 (2015).

As it pertains to the intelligence prong of the ID test, *Moore* generally embodies a simple affirmation of the principles announced in *Hall*. Following *Hall*, the Supreme Court again stated that when a defendant establishes an IQ score range—adjusted for the SEM—"at or below 70," then a court must "move on to consider [the defendant's] adaptive functioning." *Moore*, 137 S.Ct. at 1049. The high court explained further:

> In requiring the CCA [(the Texas Court of Criminal Appeals)] to move on to consider Moore's adaptive functioning in light of his IQ evidence, we do not suggest that "the Eighth Amendment turns on the slightest numerical difference in IQ score," *post*, at 1061. *Hall* invalidated Florida's strict IQ cutoff because the cutoff took "an IQ score as the final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." 572 U.S. at ——, 134 S.Ct. at 1995. Here, by contrast, we do not end the intellectual disability inquiry, one way or the other, based on Moore's IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.

Moore, 137 S.Ct. at 1050.

Both this Court and the postconviction court followed *Moore*'s subsequent instructions. ***772** In this case, both courts acknowledged that Wright's IQ score range—adjusted for the SEM—fell into the borderline ID range and the lowest end of the range dipped 1 point beneath 70; therefore, Wright was allowed to offer evidence of adaptive functioning. *Wright*, 213 So.3d at 897-98. Rather than disregarding the lower range of Wright's IQ scores, as the CCA did in *Moore*, both Florida courts properly considered all valid, SEM-adjusted scores and moved on to examine Wright's adaptive functioning. *Wright*, 213 So.3d at 898; *see Moore*, 137 S.Ct. at 1049. Neither *Hall* nor *Moore* requires a significantly subaverage intelligence finding when one of many IQ scores falls into the ID range. Instead, those cases instruct courts to be "informed by the medical community's diagnostic framework," not employ a strict cutoff, and consider other evidence of ID when clinical experts would do the same. *Hall*, 134 S.Ct. at 2000; *see Moore*, 137 S.Ct. at 1048-49. This Court and the postconviction court below followed that directive and properly considered all three prongs of the ID test. *Wright*, 213 So.3d at 895-902; *see Glover*, 226 So.3d at 810-11; *Oats*, 181 So.3d at 467-68.

Based on the competing medical testimony of Dr. Kasper and Dr. Gamache—along with numerous IQ test scores above 70 after SEM adjustments—there was competent, substantial evidence for the postconviction court to conclude that Wright failed to prove significant subaverage intellectual functioning by clear and convincing evidence. For instance, on his July 15, 2005, IQ test, Wright scored an 82 with a range of 79-86, which is well above the approximation for ID. The evidence presented supported the postconviction court's finding that Wright failed to satisfy his burden of proof on the significantly subaverage intelligence prong. This Court correctly held that finding to be supported by competent, substantial evidence. *Wright*, 213 So.3d at 898. Regardless, both decisions went further to consider adaptive functioning as described below. [3]

Accordingly, we need not alter our affirmance of the postconviction court's finding on the intelligence prong in light of *Moore*.

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***773 Adaptive Functioning Prong**

Lastly, Wright contends that we erred in affirming the postconviction court's finding that he failed to prove deficits in his adaptive functioning. Although *Moore* addressed the adaptive functioning prong, the decision does not change the outcome of Wright's claim here.

This issue relates to the second prong of the ID test: concurrent "deficits in adaptive behavior." § 921.137(1). The statute defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." *Id.* In Florida, the first prong (subaverage intelligence) must exist "concurrently" with the second prong, which this Court has interpreted to mean that the two must exist "at the same time" and "there must be current adaptive deficits." *Dufour v. State*, 69 So.3d 235, 248 (Fla. 2011); *see Jones v. State*, 231 So.3d 374, 376 (Fla. 2017); *Jones v. State*, 966 So.2d 319, 326 (Fla. 2007). [4] The AAIDD-11 and DSM-5 definitions are mostly similar to the statutory definition. *Compare* § 921.137(1), *with* DSM-5, at 37, *and* AAIDD-11, at 6, 43. Comparable to IQ scores, the AAIDD-11 recommends that adaptive deficits be established by standardized tests when an individual scores approximately two standard deviations below the population mean, with the results accounting for SEM. AAIDD-11, at 47; *see also* DSM-5, at 37.

The DSM-5 divides adaptive functioning into three broad categories or "domains": conceptual, social, and practical. DSM-5, at 37; *see also* AAIDD-11, at 43. The conceptual domain "involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-5, at 37. The social domain "involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment." *Id.* The practical domain "involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." *Id.* According to the DSM-5, adaptive deficits exist when at least one domain "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id.* at 38; *see* AAIDD-11, at 43. [5]

***774** Before delving into *Moore* and its application in this case, it is important to note that only one domain is at issue here: the conceptual. Both experts testified at the renewed ID determination hearing—including Wright's own expert—that Wright has no deficits in the social and practical domains that rise to the level of an ID determination. *Wright*, 213 So.3d at 900.

In *Moore*, the Supreme Court reversed because the CCA "deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply" when it found no adaptive deficits. 137 S.Ct. at 1050. Most of *Moore* focused on adaptive functioning. Specifically, the Supreme Court took issue with the CCA's analysis of adaptive functioning for three reasons: (1) "the CCA overemphasized Moore's perceived adaptive strengths"; (2) the CCA "concluded that Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related"; and (3) the "CCA's attachment to the seven [*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] evidentiary factors further impeded its assessment of Moore's adaptive functioning." *Moore*, 137 S.Ct. at 1050-51.

The CCA had reversed a state habeas court that applied current medical standards—the DSM-5 and AAIDD-11—and found the defendant to have ID. *Id.* at 1045-46. The habeas court applied medical standards to the substantial evidence of the defendant's adaptive deficits before concluding that there were deficits in all three domains. *Id.* In fact, both the state and defense experts agreed that the defendant's adaptive functioning scores were more than two standard deviations below the mean. *Id.* at 1047. Despite this, the CCA reversed, making its own findings and rejecting the lower court's findings, in part, for the failure to rely on *Briseno*. *Id.* at 1046. [6] *Briseno* adopted an ID definition from the 1992 edition of the AAIDD-11 (two editions prior to the current edition) which included a relatedness requirement. *Id.* at 1046. The relatedness requirement, that adaptive deficits be "related" to intellectual functioning deficits, has been removed from the AAIDD-11. *Id.* Still, the CCA held that the lower court should have applied the *Briseno* factors to determine whether the defendant

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demonstrated relatedness. *Id.* Those factors had no medical or legal authority to support them, and they reflected a misinformed layperson's understanding of ID; for instance, the first *Briseno* factor follows:

> Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

Id. at 1046 n.6. Furthermore, in making its findings, the CCA emphasized the defendant's adaptive strengths and concluded that the lower court "erred by concentrating on Moore's adaptive weaknesses." *Id.* at 1047. Contrary to the CCA's conclusion, the DSM-5 and AAIDD-11 expressly instruct clinicians to focus on adaptive deficits. DSM-5, at 33, 38; AAIDD-11, at 47. In fact, the AAIDD-11 states that "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD-11, at 47; *see* ***775** *Moore*, 137 S.Ct. at 1050. According to the Supreme Court, the CCA also erred by concluding that the defendant's academic failures and childhood abuse detracted from an adaptive deficit finding; this was an error because medical experts would consider those "risk factors" for ID rather than a basis to counter an ID determination. *Moore*, 137 S.Ct. at 1051.

On two occasions this Court briefly addressed the impact of *Moore* on Florida's ID analysis. *Glover*, 226 So.3d at 811 n.13; *Rodriguez v. State*, 219 So.3d 751, 756 n.6 (Fla. 2017). *Glover* concisely stated:

> The determination that Glover is not intellectually disabled was made under "the generally accepted, uncontroversial intellectual-disability diagnostic definition," which is the same three-part standard that this Court follows. *See Rodriguez*, 219 So. 3d [at 756 n.6] (quoting *Moore*[, 137 S.Ct. at 1045]). This distinguishes the trial court's determination in Glover's case from a Texas court's determination in a recent case, which the Supreme Court invalidated, in part, because the Texas court relied upon superseded medical standards to conclude that the defendant was not intellectually disabled. *See generally Moore*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416.

Glover, 226 So.3d at 811 n.13. As explained above and noted in *Glover*, neither section 921.137 nor this Court's interpretation of the statute has been superseded by medical standards. *Supra* pp. 772, 780–81 note 3, 12-13; *see generally* DSM-5, at 37; AAIDD-11, at 5. Unlike Texas, Florida does not maintain a relatedness requirement between the first two prongs. *See* § 921.137; *Moore*, 137 S.Ct. at 1046. [7] Further, this Court has never relied on or suggested in any way reliance on *Briseno* for the point of law that the Supreme Court rejected in *Moore*. As a general matter, therefore, *Moore* does not call Florida's adaptive functioning analysis into question. *See Glover*, 226 So.3d at 811 n.13; *Rodriguez*, 219 So.3d at 756 n.6. However, it is still necessary to determine if *Moore* affected the validity of Wright's ID determination.

The record in this case demonstrates that the postconviction court and the medical experts below relied on current medical standards. Even the State's expert, Dr. Gamache, used current medical expertise to inform his testimony. Moreover, the postconviction court demonstrated a willingness to engage with the clinical manuals and understand how they fit together with the case law. Unlike *Moore*, this Court did not reject the postconviction court's reliance on current medical standards. *Compare Moore*, 137 S.Ct. at 1045-47, *with Wright*, 213 So.3d at 899-902. Instead, we accepted the findings and affirmed the postconviction court's determination that Wright does not qualify as an ID defendant who cannot be executed. *Wright*, 213 So.3d at 902. In doing so, current medical understanding served as the basis for the rejection of Wright's claim, which differentiates this case from *Moore* where the CCA relied on outdated medical standards and lay perceptions of ID. *See Moore*, 137 S.Ct. at 1050-51. Furthermore, we did not rely on ID risk factors as a foundation to counter an ID determination. *See generally Wright*, 213 So.3d at 899-902; *see Moore*, 137 S.Ct. at 1051. Therefore, the only remaining basis from *Moore* that could even remotely entitle Wright to relief was an alleged overemphasis on adaptive ***776** strengths and improper focus on prison conduct. *Moore*, 137 S.Ct. at 1050.

In *Moore*, one of the reasons that the Supreme Court reversed was because the CCA "overemphasized" the defendant's adaptive strengths. *Id.* The CCA concluded

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that the defendant's adaptive strengths "constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits" even though the "medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* The Supreme Court further explained that "the CCA stressed Moore's improved behavior in prison" despite experts' "caution[ing] against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.* (quoting DSM-5, at 38). It is uncertain exactly where *Moore* drew the tenuous line of "overemphasis" on adaptive strengths. In fact, that uncertainty spawned the dissent's criticism. *Id.* at 1058-59 (Roberts, C.J., dissenting) ("The Court faults the CCA for 'overemphasiz[ing]' strengths and 'stress[ing]' Moore's conduct in prison, *ante*, at 1050, suggesting that some—but not *too much*—consideration of strengths and prison functioning is acceptable. The Court's only guidance on when 'some' becomes 'too much'? Citations to clinical guides." (alterations in original)). As lawyers, it seems counterintuitive that courts cannot consider certain connected adaptive strengths because the existence of certain connected strengths necessarily illustrates the absence of certain deficits. *See id.* at 1058-59 (Roberts, C.J., dissenting). For example, common sense dictates that if a defendant excels in algebra, then that fact demonstrates a lack of connected adaptive deficits in math reasoning (i.e., the conceptual domain). *See* DSM-5, at 37. Regardless of where the nebulous line of "overemphasis" is drawn, however, the *Moore* majority noted that "even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the *arbitrary offsetting of deficits against unconnected strengths* in which the CCA engaged." 137 S.Ct. at 1050 n.8 (emphasis added). [8] This clarification strikes at the heart of the Supreme Court's rationale and allows us to conclude that we did not "overemphasize" Wright's adaptive strengths to an extent that ran afoul of *Moore*. [9]

***777** Our opinion discussed some of Wright's adaptive strengths and behavior in prison, *Wright*, 213 So.3d at 899-902; whereas, *Moore*, the DSM-5, and AAIDD-11 all caution against overemphasis on that type of evidence. *Moore*, 137 S.Ct. at 1050; DSM-5, at 33, 38; AAIDD-11, at 47. Yet the crux of our decision rested on the competing expert medical testimony of Dr. Gamache and Dr. Kasper instead of independently weighing strengths and deficits or focusing on prison conduct. *Wright*, 213 So.3d at 899-900. Both experts agreed that Wright does not have sufficient deficits in the practical or social domains. *Id.* With regard to conceptual skills, we merely listed connected facts that Dr. Gamache relied upon to render his medical conclusion that Wright does not have adaptive deficits, which were all relevant and connected to the conceptual domain. *Id.* at 899. Although we discussed further evidence of Wright's abilities, the expert testimony, relevance of the evidence, and case posture all distinguish this case from *Moore*. *See id.* at 899-902.

In *Moore*, the habeas court relied on the expert testimony, based on current medical standards, which established that the defendant had adaptive deficits in all three domains. 137 S.Ct. at 1047. The CCA rejected those findings, making its own findings—based on outdated standards and the "wholly nonclinical *Briseno* factors"—to conclude that the defendant's strengths outweighed the significant deficits apparent in the record. *Id.* at 1047-48, 1053. Conversely, here, the postconviction court relied on contemporary expert medical testimony, weighed the evidence, made credibility determinations, and concluded that Wright does not have adaptive deficits in the conceptual domain. Instead of rejecting the lower court's findings to make our own, we accepted the findings and recited the competent, substantial evidence that supported them. *Wright*, 213 So.3d at 899-902. Furthermore, much of the evidence that the opinion detailed was directly relevant to the conceptual domain. *See id.* To a large extent, Dr. Gamache's findings with regard to conceptual skills related to Wright's ability to read and write, understand numbers and time, comprehend his current legal circumstances, and conduct monetary transactions prior to incarceration. *Id.* at 899. These findings all directly impact and are connected with adaptive functioning within the conceptual domain. *See* DSM-5, at 37 (identifying "memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations" as hallmarks of the conceptual domain). To the contrary, the CCA used completely unrelated adaptive strengths, such as living on the streets, mowing lawns for money, and playing pool, to outweigh the extensive evidence of adaptive deficits in all three domains. *Moore*, 137 S.Ct. at 1045-47. Accordingly, we conclude that the overemphasis issue, as identified by the Supreme Court in *Moore*, is not present here because we did not arbitrarily offset deficits with unconnected strengths, *see id.* at 1050 n.8; instead, we

simply relied on expert testimony with regard to connected adaptive deficits and the postconviction court's credibility determinations.

Likewise, we did not detrimentally rely on strengths that Wright developed in prison to justify our conclusion. *See id.* at 1050. The only portion of *Wright* that touched on prison conduct was our recitation of Dr. Gamache's findings. 213 So.3d at 899. Again, it is difficult to conclude ***778** where the Supreme Court drew the line for reliance on prison conduct as our only guidance is a single sentence "caution[ing] against reliance on adaptive strengths" developed in prison. *Moore*, 137 S.Ct. at 1050. [10] We relied on the credibility determination of the postconviction court, which was supported by competent, substantial evidence in the form of expert medical testimony. *Wright*, 213 So.3d at 899-900, 902. In light of those facts, we must conclude that we did not improperly rely on prison conduct.

As further evidence supporting the rejection of Wright's adaptive deficit claim, we noted that Wright gave extensive testimony at his trial, withstood cross-examination, and understood the ramifications of waiving his penalty phase jury during a waiver colloquy. *Wright*, 213 So.3d at 900-01. Also, we recounted that lay witnesses who knew Wright throughout his life—including his cousin and aunt—testified that he learned to work in a fast-paced shelving job at a grocery store, did not have problems understanding them, and knew how to use the city bus system. *Id.* at 901-02. All of that evidence cuts against a finding of adaptive deficits in the conceptual domain. *See* DSM-5, at 37.

At bottom, Wright's position is less about *Moore* than it is a mere reassertion that his expert, Dr. Kasper, was more reliable than the State's, Dr. Gamache. However, *Moore* did not change our standard of review: we still review a postconviction court's order for competent, substantial evidence, and we neither reweigh evidence nor second-guess credibility determinations on appeal. *Supra* p. 769. At the ID hearing, the parties presented all the evidence that they could muster, which resulted in an outcome adverse to Wright. Because that decision was supported by competent, substantial evidence, which we thoroughly detailed, *Wright*, 213 So.3d at 899-902, we can again conclude that Wright failed to prove adaptive deficits by clear and convincing evidence—a conclusion that *Moore* did not alter. *See Glover*, 226 So.3d at 809.

CONCLUSION

Based on the foregoing, we reaffirm the postconviction court's denial of Wright's ID claim.

It is so ordered.

LEWIS, QUINCE, POLSTON, and LABARGA, JJ., concur.

CANADY, C.J., concurs specially.

LABARGA, J., concurs with an opinion, in which CANADY, C.J., and POLSTON, J., concur.

LAWSON, J., concurs specially with an opinion, in which CANADY, C.J., concurs.

PARIENTE, J., concurs in result with an opinion.

LABARGA, J., concurring.

I fully concur with the majority that Wright is not entitled to relief in light of the Supreme Court's decision in *Moore v. Texas*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). I write separately to emphasize that the majority does not require consideration of the adaptive deficits ***779** prong of the intellectual disability determination where competent substantial evidence supports the circuit court's conclusion that the defendant failed to establish by clear and convincing evidence the significantly subaverage general intellectual functioning prong. Rather, the majority addresses adaptive functioning in response to the remand by the Supreme Court and the assertion by Wright that this Court's earlier decision was in contravention of Supreme Court precedent.

In the broader context, however, I agree with the general proposition that where a defendant has failed to establish any one of the three prongs of the intellectual disability determination by clear and convincing evidence, "the defendant will not be found to be intellectually disabled." *Williams v. State*, 226 So.3d 758, 768 (Fla. 2017) (quoting *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016)), *cert. denied*, —— U.S. ——, 138 S. Ct. 2574, 201 L.Ed.2d 297 (2018). *Moore* does not alter this premise. Rather, *Moore* followed the holding of *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d

1007 (2014), that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [the SEM (standard error of measurement)], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. In *Moore*, the Supreme Court reiterated that courts are required to "continue the inquiry and consider other evidence of intellectual disability *where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.*" 137 S.Ct. at 1050 (emphasis added). There, because the defendant's IQ score, adjusted for the SEM, presented a range of 69 to 79, the Texas Court of Criminal Appeals was required to "move on" to consider adaptive functioning. *Id.* at 1049.

Accordingly, where a defendant fails to demonstrate by clear and convincing evidence that his or her IQ score, when adjusted for the SEM, falls within the clinically established range for significantly subaverage general intellectual functioning, the inquiry need not continue. [11]

CANADY, C.J., and POLSTON, J., concur.

LAWSON, J., concurring specially.

I agree with that portion of the majority opinion explaining the nature and effect of the United States Supreme Court's summary reconsideration order. I also agree with the majority's conclusion that *Moore v. Texas*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017), has no impact on our review of the trial court's rejection of Wright's assertion that he is intellectually disabled as defined in section 921.137(1), Florida Statutes (2017). That statute contains a three-prong test for intellectual disability (ID) as a bar to imposition of the death penalty. *Id.* (defining ID as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18"). "If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." ***780** *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016). [12] As explained in our March 16, 2017, opinion in this case, Wright failed to prove the first prong of the ID test, "that he is of [significantly] subaverage intellectual functioning ... [and for] this reason alone, Wright does not qualify as intellectually disabled under Florida law." *Wright v. State*, 213 So.3d 881, 898 (Fla. 2017).

The majority opinion properly explains that "*Moore* does not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an ID determination." Majority op. at 770. In *Moore*, the Texas Court of Criminal Appeals (CCA) had applied its prior precedent in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), to reject the lower court's finding that Moore did possess significantly subaverage intellectual functioning (the first ID prong). *Moore*, 137 S.Ct. at 1046-47. The United States Supreme Court rejected the CCA's conclusion as "irreconcilable" with *Hall*, which "instructs that, where an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement." *Id.* at 1049 (internal quotation marks omitted). In this case, by contrast, both the trial court and this Court did account for the standard error of measurement (SEM) when concluding that Wright failed to establish significantly subaverage intellectual functioning. *Wright*, 213 So.3d at 897-98.

To the extent that the majority believes that *Moore* requires consideration of the second ID prong—deficits in adaptive functioning—when, *after giving full consideration to the SEM as directed by Hall*, the trial court properly concludes that the defendant has failed to prove the first prong, I disagree with the majority opinion. In *Moore*, the Supreme Court only addressed the second prong, adaptive functioning, because the defendant met his burden to establish the first prong. *See Moore*, 137 S.Ct. at 1049 ("Because the lower end of Moore's score range falls at or below 70 [when adjusted for the SEM], the CCA had to move on to consider Moore's adaptive functioning."). In contrast, because Wright's failure to establish significantly subaverage intellectual functioning (after accounting for the SEM) ends the ID inquiry, it should also end our analysis—as we have held in another post-*Moore* case. *See Quince v. State*, 241 So.3d 58, 62 (Fla. 2018) (holding that "specific factual findings as to whether [the defendant] had established that he meets either the second or third prongs of the intellectual disability standard ... were unnecessary ... because [where the defendant] failed to meet the significantly subaverage intellectual functioning prong (even when SEM is taken into account), he could not have met his burden to demonstrate that he is intellectually disabled").

However, I fully concur in the result in this case.

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CANADY, C.J., concurs.

PARIENTE, J., concurring in result.

The important holding of the United States Supreme Court's decision in *Moore v. Texas*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017), is that adaptive strengths do not overcome adaptive deficits and conduct in prison, a structured environment, should not be relied on in assessing adaptive functioning. *Id.* at 1050. These directives from the United States Supreme Court come from a consensus within the medical community as pointed out in *Moore*. *Id.* [13] However, I agree with ***781** the per curiam opinion that "*Moore* does not require a different result in this case." Majority op. at 768.

While we discussed adaptive strengths in our now-vacated opinion in *Wright v. State*, 213 So.3d 881 (Fla. 2017), we did not rely on the discussion of adaptive strengths to affirm the denial of Wright's intellectual disability claim. Additionally, our opinion briefly discussed Wright's conduct while in prison. *Id.* at 901-02. While there is nothing wrong with mentioning either adaptive strengths or conduct in prison, it is improper to rely on either factor to overcome the evidence of adaptive deficits to deny a defendant's intellectual disability claim. As the per curiam opinion notes, "*Moore*, the DSM-5, and AAIDD-11 all caution against overemphasis on that type of evidence." Majority op. at 777 (citing *Moore*, 137 S.Ct. at 1050; DSM-5, at 33, 38; AAIDD-11, at 47).

Nevertheless, I urge trial courts analyzing intellectual disability claims post-*Moore* to focus on the adaptive deficits and not to fall into the pitfalls of analyzing either adaptive strengths or deficits in the context of a prison environment. As the United States Supreme Court explained:

> In concluding that Moore did not suffer significant adaptive deficits, the CCA [14] overemphasized Moore's perceived adaptive strengths. The CCA recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money. *See* [*Ex parte Moore*,] 470 S.W.3d [481,] 522-523, 526-527 [(Tex. Crim. App. 2015)]. Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits, *see supra*, at 1045; App. to Pet. for Cert. 180a-202a. *See* 470 S.W.3d at 522-524, 526-527. But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. *E.g.*, AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); *see Brumfield* [*v. Cain*], 576 U.S. at ——, 135 S.Ct. [2269], 2281, 192 L.Ed.2d 356 [(2015)] ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.' " (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002))).
>
> In addition, the CCA stressed Moore's improved behavior in prison. 470 S.W.3d at 522-524, 526-527. Clinicians, however, caution against reliance on adaptive strengths developed "in a controlled setting," as a prison surely is. DSM-5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should ***782** be obtained."); *see* AAIDD-11 User's Guide 20 (counseling against reliance on "behavior in jail or prison").

Moore, 137 S.Ct. at 1050.

The holding of *Moore* is consistent with the views expressed in my concurring in part, dissenting in part opinion in *Dufour v. State*, 69 So.3d 235 (Fla. 2011), joined by Justice Quince and former Justice Perry. In that opinion, I explained the pitfalls of over-emphasizing a defendant's adaptive strengths and conduct exhibited while incarcerated:

> Specifically, the AAIDD and the DSM-IV stress that the focal point of adaptive behavior should be on the individual's limitations rather than demonstrated adaptive skills. An important reason for this policy is that "[t]he skills possessed by individuals with [intellectual disability] vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying."

James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 21 n.29 (2003).

The AAIDD, in its amicus brief to this Court, explains that the significant limitations in adaptive behavior must be based on objective measurements and not weighed against adaptive strengths. The purpose of the adaptive functioning prong is to ascertain whether the measured intellectual score reflects a real-world disability, as opposed to a testing anomaly. Thus for this prong, the diagnostician's focus must remain on the presence of confirming deficits. Accordingly, the AAIDD has specifically noted that "assessments must ... assume that limitations in individuals often coexist with strengths, and that a person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period." Am. Ass'n on Intellectual & Developmental Disabilities, *Definition of Intellectual Disability*, http://www.aaidd.org/content_100.cfm?navID=21 (last visited Jan. 14, 2011). Further, as the AAIDD correctly explains, much of the clinical definition of adaptive behavior is much less relevant in prisons, and in fact, a person with [intellectual disability] is likely to appear to have stronger adaptive behavior in a structured environment such as a prison than in society. The amicus brief of the AAIDD further points out that "[s]tereotypes and lay assumptions about people with [intellectual disability] can cloud or distort individual assessment."

The failure to take an objective approach to deficits in adaptive behavior can result in the perpetuation of misunderstanding [intellectual disability].

Id. at 258 (Pariente, J., concurring in part and dissenting in part).

In this case, however, I agree with the per curiam opinion that "the crux of our decision [in *Wright*] rested on the competing expert medical testimony of Dr. Gamache and Dr. Kasper instead of independently weighing strengths and deficits or focusing on prison conduct." Majority op. at 777. This Court, in affirming the postconviction court's denial of relief, relied primarily on the competent, substantial evidence presented through the testimony of both experts who agreed that Wright does not have sufficient deficits in the practical or social domains and the competing testimony presented with respect to the conceptual domain. Majority op. at 777.

Regardless of how this Court explained Wright's intellectual disability claim in its prior opinion, it is clear that the postconviction ***783** court properly analyzed Wright's claim. As the per curiam opinion aptly notes, "Wright's position is less about *Moore* than it is a mere reassertion that his expert, Dr. Kasper, was more reliable than the State's, Dr. Gamache." Majority op. at 778. For these reasons, I concur in result but do not agree with the unnecessary discussion of adaptive strengths and prison behavior.

All Citations

256 So.3d 766, 43 Fla. L. Weekly S404

Footnotes

1 In *Wright*, we recounted the evidence presented at the renewed ID hearing at length. 213 So.3d at 893-902. To avoid superfluity, the relevant evidentiary facts are included where appropriate below.

2 This definition parallels the current medical consensus surrounding the definition of ID. *See, e.g.*, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) (hereinafter DSM-5); American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 5 (11th ed. 2010) (hereinafter AAIDD-11). On the third prong, the postconviction court found that Wright's intellectual condition, whatever it may be classified as, preceded his eighteenth birthday. This finding is undisputed.

3 According to Justice Lawson's opinion, the fact that Wright failed to establish this first prong ends our inquiry. Concurring in result op. at 779–80 (Lawson, J.) (citing *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016)). Whether the failure on one prong of the ID test is dispositive as a general matter may be a question in a different case. *Compare Salazar*, 188 So.3d at 812 (stating that the failure on one prong of the ID test is dispositive), *with Oats*, 181 So.3d at 467-68 (holding that the failure on one prong of the ID test is not necessarily dispositive). Yet that is not the issue in this case. Here —on remand from the Supreme Court's GVR order—we are simply reconsidering Wright's claim to determine if *Moore*

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changed the outcome. As we explained above, Wright's SEM-adjusted IQ range fell 1 point below 70. *Supra* pp. 771–72. Therefore, the postconviction court properly allowed him to introduce evidence of his adaptive functioning, which we addressed on appeal. *Wright*, 213 So.3d at 897-98; *see also Moore*, 137 S.Ct. at 1049 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning."); *Hall*, 134 S.Ct. at 2001. The Supreme Court vacated *Wright* because *Moore* may have impacted the outcome of Wright's ID claim; thus we must determine if *Moore* altered our decision by reviewing its effect on our earlier analysis. Therefore, any discussion of *Salazar* or its potential conflict with *Oats* is unnecessary here, particularly because Wright clearly failed to establish either prong at issue. *See In re Holder*, 945 So.2d 1130, 1133 (Fla. 2006) ("Of course, we have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds.").

4 Wright challenges *Dufour*'s concurrent adaptive deficit requirement. Neither *Hall* nor *Moore* addressed the issue; yet both the AAIDD-11 and DSM-5 state that current adaptive deficits are the focus of this inquiry. AAIDD-11, at 54 ("Currently, adaptive behavior is defined and measured on the basis of the individual's typical present functioning."); DSM-5, at 38 ("[The second prong] is met when at least one domain of adaptive functioning ... is sufficiently impaired that ongoing support is needed."). Moreover, because intelligence and functioning deficits must present themselves during the developmental stage (prong three), it seems necessary that they exist at the same time (i.e., before a defendant turns eighteen). *See* DSM-5, at 38; AAIDD-11, at 11-12. Thus, with regard to his *Dufour* challenge, Wright's claim fails.

5 The DSM-5 differs from earlier editions in that adaptive deficits are now organized into three broad domains as opposed to numerous subcategories. Prior opinions held that defendants must show deficits in at least two of the previous smaller subcategories. *E.g.*, *Dufour*, 69 So.3d at 511; *Hodges v. State*, 55 So.3d 515, 534 (Fla. 2010); Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008). However, the new broad domains subsumed the previous subcategories; thus, currently, deficits in some of the subcategories are necessary to find a deficit in one of the broader domains. Yet, for all intents and purposes, the analysis is similar because deficits in the subcategories are still required to find deficits in the broader domains.

6 In Texas, the CCA is " 'the ultimate factfinder' in habeas corpus proceedings" rather than the court of first instance. *Moore*, 137 S.Ct. at 1044 n.2 (quoting *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)).

7 To the extent that this Court has discussed relatedness, it has been in the context of experts relying on the DSM-5—which retains the relatedness requirement—rather than imposing an arbitrary list of evidentiary factors like *Briseno*. *See Glover*, 226 So.3d at 810; *Hampton v. State*, 219 So.3d 760, 779 (Fla. 2017).

8 Ignoring this important qualification, Justice Pariente's opinion reads *Moore* far beyond its holding. Concurring in result op. at 780–81 (Pariente, J.) ("[A]daptive strengths do not overcome adaptive deficits and conduct in prison, a structured environment, should not be relied on ...."). The Supreme Court faulted the CCA for "overemphasiz[ing]" or "plac[ing] undue emphasis on adaptive strengths" and "caution[ing] against reliance on" prison conduct. *Moore*, 137 S.Ct. at 1050, 1052 n.9. This guidance, albeit muddled, is clearly a far cry from the bright-line prohibition that Justice Pariente reads into the language. Even after *Moore*, the mention of strengths and prison conduct in an ID opinion is not per se error; but —considering the Supreme Court's warnings—we must ensure our compliance with *Moore*.

9 At this point, we feel the need to express the difficult position that the States are placed in due to the Supreme Court's lack of clear guidance on this analysis. *See Moore*, 137 S.Ct. at 1058-60 (Robert, C.J., dissenting). We are asked to interpret and follow two clinical manuals that caution people like us from making untrained ID diagnoses. DSM-5, at 25 ("Use of DSM-5 to assess for the presence of a mental disorder by nonclinical, nonmedical, or otherwise insufficiently trained individuals is not advised."); *see* AAIDD-11, at 85-89. To make matters worse, those manuals occasionally contradict one another. *Compare* DSM-5, at 38 (maintaining relatedness requirement), *with* AAIDD-11, at 6, 8 (removing relatedness requirement). And although we need not follow everything in the latest clinical guide, *Moore*, 137 S.Ct. at 1049, the failure to do so is a potential ground for reversal, *id.* at 1053. This catch-22 that we find ourselves in at times underscores our reliance on expert medical opinions provided below and a postconviction court's corresponding credibility determinations.

10 For death defendants who have typically been in prison for some time, this lack of guidance is particularly problematic. For instance, the AAIDD-11 instructs that an adaptive functioning analysis centers on an individual's "present functioning," AAIDD-11, at 54, but it warns against considering prison functioning, *id.*, at 55. Moreover, the AAIDD-11 itself notes that there is a "growing need for research at the intersection of ID determination and forensic science, especially in relation to the measurement of adaptive behavior of individuals living in prisons." *Id.*

11 Of course, nothing prohibits a circuit court from reaching and considering all three prongs, especially in cases involving what may be considered a "close call." Doing so ensures that if, on appeal, this Court determines competent substantial evidence does not support the trial court's determination as to one prong, we will have a developed record to review the other prongs without reversing and remanding for further proceedings.

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12 *Salazar* is a unanimous per curiam decision from this Court, decided after *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014).

13 The two medical diagnostic standards relied on in *Moore* are the DSM and the AAIDD, current editions. "DSM-5" refers to the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. Additionally "AAIDD-11" refers to the eleventh edition of the American Association on Intellectual and Developmental Disabilities clinical manual. Both are considered the "current medical diagnostic standards." *Moore*, 137 S.Ct. at 1045.

14 "CCA" refers to the Texas Court of Criminal Appeals, Texas' court of last resort in criminal cases. *Moore*, 137 S.Ct. at 1044 n.1.

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No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix C

Circuit Court of the Tenth Judicial Circuit Order denying Petitioner's renewed motion for determination of intellectual disability, dated March 26, 2015.

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

RECEIVED BY
CCRC-MIDDLE
APR 01 2015

STATE OF FLORIDA,

Plaintiff,

Case No.: CF00-02727A-XX
(Supreme Court Case No.: SC13-1213)

v.

TAVARES J. WRIGHT,

Defendant.
_____/

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR DETERMINATION OF INTELLECTUAL DISABILITY AS A BAR TO EXECUTION UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.203

The above captioned matter came before the Court upon the Mandate issued by the Florida Supreme Court dated October 7, 2014, relinquishing jurisdiction in this case to the Trial Court to allow the Defendant to file a "renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." The Defendant filed *Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203* on October 10, 2014.

In the Defendant's *Renewed Motion,* the Defendant requested an evidentiary hearing, pursuant to Rule 3.203(e), Fla. R. Crim. P., and a renewed determination of intellectual disability of the Defendant in light of *Hall v. Florida*, 134 S.Ct. 1986 (2014). In his *Renewed Motion*, the Defendant " respectfully moves this Court to enter an order barring execution, under the sentence of death imposed by this Court in the above-styled case, because he is intellectually disabled." An Evidentiary Hearing on the Defendant's *Renewed Motion* was held on January 5 & 6, 2015, with a continuation of the Evidentiary Hearing on February 11, 2015.

The Court has heard testimony from numerous witnesses who have known the Defendant, some since his childhood, some during the months and years preceding the murders, (which occurred on April 21, 2000), and some who have known the Defendant while he has been incarcerated. The Court has also reviewed the testimony of the various witnesses presented during the course of the previous hearing on the Defendant's *Amended Motion to Vacate Judgment and Sentence* (which resulted in the *Order On Amended Motion to Vacate Judgment and Sentence,* entered on May 22, 2013 by this Court).

The Court has listened carefully to the testimony of numerous psychologists who have seen and evaluated the Defendant, including Dr. Kindelan, Dr. Freid, Dr. Kasper and Dr. Gamache. The Court has also reviewed various reports, contained in the court file, that were generated by doctors who have seen and evaluated the Defendant.

The Court has reviewed and taken judicial notice of the Court file, including the transcripts of the trial testimony of the Defendant, who testified in his first trial on March 27, 2003 (as reflected in the transcripts filed in the Court file on June 16, 2003 as volume I, at pages 83-198, and volume II, at pages 202-222). The Defendant provided testimony in his second trial on October 8, 2003, (as is recorded in transcripts filed in the Court file in volume 23, pages 2934 – 3114, and volume 24, pages 3118 – 3185).

The Court has further reviewed all the submissions (A-N) contained in the *Appendix to Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution*

under Florida Rule of Criminal Procedure 3.203, which accompanied the Defendant's *Renewed Motion*, filed on October 10, 2014.

In addition, the Court has listened to the CD of the interview of the Defendant by Dr. Gamache. (State's Exhibit #5, introduced in the recent Evidentiary Hearing).

The Court has also received and reviewed the parties written closing arguments.

The Court having reviewed the evidence, transcripts, reports, testimony, and other documentation described above; having reviewed, the case file, and the applicable case and statutory law; and being otherwise fully advised in the premises, finds as follows:

This Court has been tasked with the responsibility to determine if the Defendant meets the criteria set forth in Florida Statute Section 921.137 and Florida Rule of Criminal Procedure 3.203, to establish Intellectual Disability (formally known as Mental Retardation) which would prohibit the imposition of the death penalty to which the Defendant is currently sentenced. Florida Statute Section 921.137 (1) reads as follows:

> (1) As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the

> rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

Florida Statute Section 921.137 (4), among other things, states;

> If the court finds, by clear and convincing evidence (emphasis provided), that the Defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death…

In regard to the first prong of the evaluation (whether the Defendant demonstrates significantly subaverage general intellectual functioning), the Court finds that the Defendant has been tested numerous times and his I.Q. score has been documented to lie between 75 and 82. However, each of the tests performed upon the Defendant, and the separate individual score, only suggest a range of his I.Q. on the day he was tested. More specifically, each separate I.Q. score is subject to a standard error of measurement (SEM) which is generally understood to be approximately five points on either side of the recorded score. *Hall v. Florida*, 134 S.Ct. 1986, 1995 (2014). Further, the Court has heard testimony concerning the "*practice effect*" and the "*Flynn effect*" which can also affect the determination as to whether or not a test taker has a significantly subaverage general intellectual functioning.

In *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014), the United States Supreme Court quotes the following language from the DSM-5, at 37: ("[A] person with an I.Q. score above 70 may

have such severe adaptive behavior problems...that the persons actual functioning is comparable to that of individuals with a lower I.Q. score"). In this case, Mr. Wright has been diagnosed, at a minimum, as being borderline in general intellectual functioning. The United States Supreme Court in *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014) also stated:

> ... when a defendant's I.Q. score falls within the tests acknowledge and inherent margin of error, the Defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.

The Court finds that, while the Defendant's I.Q. scores do not demonstrate (by clear and convincing evidence) that the Defendant has significant subaverage general intellectual functioning, they do fall within the test's acknowledged and inherent margin of error, and therefore the Defendant is entitled to present, and have considered, evidence concerning the second prong of Florida Statue 921.137 (1) and/or Rule 3.203(b), Fla. R. Crim. P., relating to deficits in adaptive behavior.

Florida Statute Section 921.137 (1) defines "adaptive behavior" as the "effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected at his or her age, cultural group, and community". The DSM-5 (at page 37) describes adaptive functioning as involving adaptive reasoning in three domains: conceptual, social and practical. The DSM-5 further sets forth the specific categories of functioning to consider in each of those three domains.

The DSM-5 parallels and expands upon the criteria and categories set forth by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association as found in *Adkins v. Virginia,* 536 U.S. 304, 309 (2002), in footnote 3.

The American Psychiatric Association definition is also referred to in *Nixon v. State*, 2 So.3d 137, 143 (Fla. 2009), in footnote 6.

The Court has heard testimony from at least twenty-two witnesses who have known the Defendant either throughout his life, in the several months or years preceding the murders, and/or, during the Defendant's incarceration. They each testified as to their contact with the Defendant, their observations of his behavior, their impressions of his abilities, and his general overall functioning in society. The content of their testimony is thoroughly set out, and frequently quoted, in the party's Written Closing Arguments and therefore won't be reiterated here.

In addition to the testimony received from the Defendant's acquaintances, the Court has read and considered the Defendant's trial testimony, which the Court finds very telling and compelling in gauging the Defendant's intellectual functioning and adaptive behavior.

It is clear from all of the testimony presented that the Defendant grew up in a low socioeconomic environment. He did not receive much nurturing from his parents and fended for himself, with help from others, throughout most of his life. It is also clear that he was a slow

learner in school and never did well academically. He has been manipulated, bullied, and taken advantage of throughout his life.

However, Florida Statute Section 921.137 (4) requires the Defendant to prove by clear and convincing evidence that he suffers from intellectual disability as defined in Florida Statute 921.137 (1).

In *Dufour v. State*, 69 So.3d 235, 245 (Fla. 2011), The Florida Supreme Court stated:

> Clear and convincing evidence means evidence that is precise, explicit, lacking confusion, and of such weight that it produces a firm belief, without hesitation, about the matter and issue.

It is the Courts finding, and its conclusion, that the Defendant has failed to establish, by clear and convincing evidence, that he suffers from deficits in adaptive behavior which would rise to the level of declaring him, legally, as intellectually disabled under Florida Statute Section 921.137(1), when considered along with the other two prongs enumerated in Section 921.137(1), Fla. Stat., and/or Rule 3.203(b), Fla. R. Crim. P.

The Court notes that a question has previously been raised concerning the constitutionality of the clear and convincing evidence standard as was discussed in *Dufour v. State*, 69 So.3d 235 (Fla. 2011). However, Florida Statute 921.137 (4) requires that level of proof, which this Court has applied. Furthermore, in *Herring v. State*, 76 So.3d 891 (Fla. 2011), an opinion rendered after *Dufour*, the Florida Supreme Court specifically stated that the "a

defendant must prove each of the three elements by clear and convincing evidence." (at 895) But, also see *Snelgrove v. State*, 107 So.3d 242 (Fla. 2012), wherein the Florida Supreme Court declined to address the constitutional issue concerning the clear and convincing standard.

In regard to prong three of Florida Statute 921.137(1) and/or Rule 3.203(b), Fla. R. Crim. P., the Court finds by clear and convincing evidence that the Defendant's intellectual condition (whatever it is classified) has existed his entire life and therefore precedes his 18th birthday.

Having reached the conclusion that the Defendant has not met the legal standard of being intellectually disabled under Florida Statute 921.137(1) and/or Rule 3.203(b), Fla. R. Crim. P., this Court still recommends that a proportionality review be considered by the Florida Supreme Court.

Certainly, the Defendant is legally subject to a sentence of death for the two, cold, calculated and premeditated murders (that the sentencing Court gave great weight to as an Aggravator) which occurred in the course of a several day crime spree. However, this Court reads *Hall v. Florida*, 134 S.Ct. 1986 (2014) as an ongoing evolution in the consideration and determination as to who should be executed for the crimes they have committed. In *Hall*, 134 S.Ct., at page 1992, the United States Supreme Court states:

> No legitimate penological purpose is served by executing a person with intellectual disability. *Id.*, at 317, 320, 122 S.Ct. 2242. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.

> "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." Kennedy v. Louisiana, 554 U.S. 407, 420, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). Rehabilitation, ***1993*** it is evident, is not an applicable rationale for the death penalty. See Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses ... [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." Atkins, 536 U.S., at 320, 122 S.Ct. 2242. Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. See id., at 319, 122 S.Ct. 2242 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution").

In *Yacob v. State*, 136 So.3d 539, 546 - 547 (Fla. 2014) the Florida Supreme Court, citing *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990) states:

> ...because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in

> a case, and to compare it with other capital cases.

Justice Labarga, in his concurrence in *Yacob v. State* (at page 554) states:

> Thus, we review the existence of and weight to be given the aggravating factors and the mitigating factors through the lens of competent, substantial evidence and the trial court's sound discretion. In the end, however, it is our evaluation of the interplay of those factors that must be brought to bear and determining if the ultimate punishment-death-fits a particular nature of the crime **and** the specific circumstances of the offender in each case. (emphasis supplied)

Thus, the specific circumstances of Mr. Wright must be evaluated to determine whether the death penalty is appropriate in his circumstance. In *Wright v. State*, 19 So.3d 277 (Fla. 2009), the Florida Supreme Court conducted a proportionality review and considered the various mental health mitigators raised by the Defendant (see pages 289 – 291 of the opinion) but that proportionality review was conducted before the United States Supreme Court opinion in *Hall v. Florida*, 134 S.Ct. 1986 (2014).

In Justice Labarga's concurring opinion in *Yacob v. State*, 136 So.3d 539, 552 - 558 (Fla. 2014), he acknowledges that "the law set forth by the United States Supreme Court that death as a penalty for First Degree Murder "is reserved only for the most culpable Defendants committing

the most serious offenses" (at page 552); but there is an "evolving standard of decency that marks the progress of a maturing society" (at page 557); that proportionality must be "viewed less though a historical prism than according to the evolving standards of decency that mark the progress of a maturing society" (at page 557); and that the Florida Supreme Court (as a whole and each Justice individually) must determine that there is a "moral and legal certainty that the Defendant is deserving of the ultimate penalty..." (at page 557).

Justice Pariente, (concurring in part and dissenting in part with opinion), in *Dufour v. State*, 69 So.3d 235, 256 (Fla. 2011) recognizes an emerging jurisprudence on the evaluation of mental retardation in connection with the death penalty.

While this Court does not find that the Defendant meets the criteria to be <u>legally</u> declared intellectually disabled pursuant to Florida Statute 921.137 (1) and/or Rule 3.203 (b) Fla. R. Crim. P., it is this Courts recommendation that a further proportionality review be performed by the Florida Supreme Court in light of the Defendant's arguable intellectual disability. The Court notes that the Florida Supreme Court recently performed a proportionality review in a double homicide case that included mental health overtones in *Marquardt v. State,* ___ So.3d ____ 40 FLW S32 (Fla. January 22, 2015).

Based on the above, it is **ORDERED AND ADJUDGED** that *Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203* is **DENIED**. It is further **ORDERED AND ADJUDGED** that the Court has determined that the Defendant is not Intellectually Disabled, as defined in Section 921. 137, Fla. Stat., and/or Rule 3.203, Fla. R. Crim. P., and is therefore, eligible for the imposition of the Death Penalty to which the Defendant is currently sentenced. The Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED in Bartow, Polk County, Florida this ____ day of MAR 26 2015, 2015.

/s/ DONALD G. JACOBSEN

DONALD G. JACOBSEN, Circuit Judge

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I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 27th day of March, 2015.

CLERK OF THE CIRCUIT COURT

By: _____
Deputy Clerk

No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D

Florida Supreme Court Opinion affirming Petitioner's convictions and sentences, dated September 3, 2009. *Wright v. State*, 19 So. 3d 277 (Fla. 2009).

KeyCite Yellow Flag - Negative Treatment
Distinguished by Martin v. State, Fla., September 20, 2012

19 So.3d 277
Supreme Court of Florida.

Tavares J. WRIGHT, Appellant,
v.
STATE of Florida, Appellee.

No. SC05–2212.
|
Sept. 3, 2009.

Synopsis

Background: Defendant was convicted in the Circuit Court for Polk County, Richard George Prince, J., of two counts of first-degree murder, one count of carjacking with a firearm, two counts of armed kidnapping with a firearm and two counts of robbery with a firearm. Defendant appealed.

Holdings: The Supreme Court held that:

trial court did not abuse its discretion by admitting, as inextricably intertwined collateral-crime evidence, evidence of other crimes defendant committed during a three-day crime spree;

inextricably intertwined collateral-crime evidence did not impermissibly become a feature of the trial;

unfair prejudicial impact of inextricably intertwined collateral-crime evidence did not substantially outweigh its probative effect;

evidence was sufficient to establish cold, calculated, and premeditated (CCP) aggravator;

evidence was sufficient to establish the avoid-arrest aggravator; and

death penalty was proportionate, though codefendant received life sentences.

Affirmed.

Attorneys and Law Firms

***282** Byron P. Hileman, Jr., Winter Haven, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, FL, and Stephen D. Ake, Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

***283** PER CURIAM.

Tavares Jerrod Wright appeals his judgments of conviction and his sentences of death for the first-degree murders of David Green and James Felker, and his concurrent sentences for one count of carjacking with a firearm, two counts of armed kidnapping with a firearm, and two counts of robbery with a firearm. We have mandatory jurisdiction to review final judgments arising from capital proceedings, and we affirm Wright's convictions and sentences. *See* art. V, § 3(b)(1), Fla. Const.

We conclude that the trial court did not abuse its discretion in admitting evidence of inextricably intertwined collateral crimes. Additionally, we conclude that Wright knowingly waived his right to a penalty-phase jury, and thus has also waived his *Ring* [1] challenge. Finally, we conclude that there is competent, substantial evidence which supports the judgments and sentences entered by the trial court.

FACTS AND PROCEDURAL HISTORY

With the aid of codefendant Samuel Pitts, Wright carjacked, kidnapped, robbed, and murdered David Green and James Felker while engaged in a three-day crime spree that spanned several areas in Central Florida. [2] During the crime spree, Wright was connected multiple times to a stolen pistol that matched the caliber of casings discovered at the scene of the murders. The trial court allowed the State to present evidence of these collateral acts to demonstrate the context in which the murders occurred and to explain Wright's possession of the murder weapon.

The spree began when Wright stole a pistol and a shotgun from the Shank family's residence in Lakeland

on Thursday, April 20, 2000. On the Friday morning following the burglary, Wright used the pistol to commit a drive-by shooting in a neighborhood near the Shank residence.[3] That evening, Wright and Samuel Pitts abducted Green and Felker in Lakeland, drove Green's vehicle approximately fifteen miles to Polk City, and murdered the victims in a remote orange grove. Wright shot one victim with a shotgun, which was never recovered, and the other victim with a pistol that used the same caliber bullets as the gun stolen from the Shank residence. Wright then abandoned the victim's vehicle in a different orange grove in Auburndale. In nearby Winter Haven, Wright used the Shank pistol in a carjacking that occurred during the morning hours on Saturday, April 21, 2000. That afternoon, law enforcement responded to a Lakeland apartment complex based on reports of a man matching Wright's description brandishing a firearm.

When an officer approached, Wright fled, but he was eventually arrested in the neighboring mobile home park. Ammunition matching the characteristics of the ammunition stolen from the Shank residence was found in his pocket. The stolen pistol was also recovered near the location where Wright was arrested. Almost a week later, the bodies of the victims were discovered. Thus, the following facts are presented in chronological order to demonstrate the geographical nexus of the offenses ***284** and to provide a complete picture of the interwoven events surrounding the double murders.

The Crime Spree

The Shank Burglary: Thursday, April 20, 2000

On Thursday, April 20, 2000, Wright unlawfully entered a Lakeland home with two accomplices. Wright testified that they separated to search the house for items to steal. In one bedroom, Wright found and handled a plastic bank filled with money. One of his accomplices discovered a 12–gauge, bolt-action Mossberg shotgun and a loaded Bryco Arms .380 semi-automatic pistol with a nine-round clip in another bedroom.[4] The accomplice also found four shells for the shotgun in a dresser drawer. In exchange for marijuana, Wright obtained possession of the pistol from the accomplice.

When Mark Shank returned home after work to discover his firearms missing, he notified the Polk County Sheriff's Office of the burglary. The Sheriff's Office lifted latent prints from the house, including several from the plastic bank. An identification technician with the Sheriff's Office matched the latent palm print lifted from the plastic bank to Wright's palm print, confirming that Wright was inside the house where the Shank firearms were stolen. The following day, Wright used the stolen pistol during a drive-by shooting in a nearby Lakeland neighborhood.

The Longfellow Boulevard Drive–By Shooting: Friday, April 21, 2000

At approximately 9 a.m. on Friday, April 21, 2000, Carlos Coney and Bennie Joiner observed a black Toyota Corolla approaching slowly on Longfellow Boulevard as they were standing outside a nearby house. Wright and Coney had been embroiled in a continuing dispute since their high school days. Joiner made eye contact with Wright, who was sitting on the passenger side. The car made a U-turn and slowly approached the house again. Wright leaned out the passenger side window and fired multiple shots. One bullet struck Coney in his right leg. Coney's neighbor carried the wounded man to a car and drove Coney and Joiner to a Lakeland hospital where a .380 caliber projectile was removed from Coney's leg.

While Coney was being treated at the hospital, crime-scene technicians collected cartridge casings and projectiles from the Longfellow Boulevard scene. Two projectiles had entered the house and lodged in the living room wall and table. One spent .25 caliber casing and three spent Winchester .380 caliber casings were recovered from the driveway and the street. The projectile recovered from Coney's leg and the one removed from the living room table were fired from the .380 pistol stolen from the Shank residence.[5] The recovered casings definitely had been *loaded* in the stolen pistol, but the firearms analyst could not state with precision that they had been *fired* from the pistol because the casings lacked the necessary identifying characteristics.

Approximately one hour after the drive-by shooting, Wright unexpectedly visited James Hogan at a house in Lake Alfred, ***285** Florida. Lake Alfred is approximately fourteen miles away from the Longfellow Boulevard location. Wright testified that he and an accomplice from

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the Shank burglary and Samuel Pitts traveled to see Hogan because the accomplice wanted to sell the stolen shotgun. When they arrived, the accomplice attempted to show Hogan the shotgun, but Hogan was not interested. At that point, Wright pulled a small pistol from under the floor mat in the front seat of the vehicle. This placed Wright in possession of the possible murder weapon on the day of the murders.

The Double Murders in the Orange Grove: Friday, April 21, 2000

The trio remained with Hogan for approximately twenty minutes and then left together to return to the Providence Reserve Apartments on the north side of Lakeland. Wright and Samuel Pitts lived at that apartment complex with Pitts' family and girlfriend, Latasha Jackson. To support his theory of defense that he did not possess the pistol during the time the murders likely occurred, Wright testified that following the drive-by shooting, he informed Samuel Pitts of the details of the shooting. Wright explained that he had an obligation to disclose his actions to Pitts, who was the leader of a gang of which Wright was a member. According to Wright, the drive-by shooting upset Pitts, and Pitts demanded that Wright surrender the pistol. Wright asserted that he complied with Pitts' demand.

According to Wright's testimony, around twilight that Friday evening, a customer messaged Wright to inquire about procuring marijuana. Wright agreed to meet the customer at a supermarket parking lot and started walking toward the store. Shortly after 7:15 that evening, a female friend saw Wright walking down the street and offered him a ride, which Wright accepted. Then, without provocation, Wright said, “I ain't even going to lie, I did shoot the boy in the leg yesterday,” more likely than not referring to the Longfellow Boulevard drive-by shooting. When they arrived at the store, Wright exited the vehicle in the supermarket parking lot without further elaboration of the statement.

Some time that night, James Felker and his cousin, David Green, were abducted from that parking lot and murdered. The cousins left Felker's house at approximately 8 p.m. in Green's white Chrysler Cirrus for a night of bowling. Both men were carrying at least $100 at that time.

Several witnesses testified that Wright had willingly described the details of the abduction. Wright had informed the witnesses that he approached Felker and Green in the supermarket parking lot and requested a cigarette. When they refused, Wright pulled out a pistol and forced his way into the backseat of Green's vehicle. Wright then ordered Green to drive to the Providence Reserve Apartments, where Pitts entered the vehicle.

As this group left the apartments between 10 and 10:45 p.m., Wright ran a stop sign in the victim's car. A detective observed the traffic infraction and conducted a tag check as he followed the vehicle. The tag check reported that the license plate was registered to an unassigned Virginia plate for a blue, 1988, two-door Mercury, which did not match the vehicle to which it was attached.

After receiving this report, the detective activated his emergency lights and attempted to stop the white Chrysler. The Chrysler sped through another stop sign and accelerated to sixty miles per hour. The detective remained in pursuit for ten to fifteen minutes before his supervisor ordered the pursuit terminated. An all-county alert was issued to law enforcement to be on the lookout for the Chrysler. The identification developed from the pursuit ***286** connected Wright to the victim's vehicle on the night of the murders.

R.R., a juvenile who also lived at the Providence Reserve Apartments, testified that Wright informed him that Wright and Pitts drove the victims ten miles from the abduction site to a remote orange grove in Polk City. When the victims insisted that they had nothing to give the assailants, Wright exited the car. One of the victims also exited, possibly by force, and Wright shot him. The other victim then exited, and Wright shot him as well. While one of the men continued to crawl and moan, Pitts retrieved the shotgun from the trunk and handed it to Wright, who then shot this victim in the head execution-style. Wright and Pitts abandoned the bodies and drove away in the Chrysler. [6]

Sometime between 10 p.m. and midnight, Pitts and Wright drove the Chrysler to a Lakeland apartment complex to wash blood spatter off the vehicle. When they arrived at the apartment, Pitts ordered Wright to wash the car while Pitts removed items from the vehicle, including a phone, a black bag, and a Polaroid camera. Pitts placed

the items in his sister's vehicle. She had arrived with R.R., who testified that when they arrived, Pitts and Wright were acting nervous and scared. On the ride back to the apartment complex, Pitts told R.R. "that they pulled off a lick and that things was getting crazy."

Wright testified that before Pitts left, he ordered Wright to burn the car and throw the weapon into a lake. Instead, Wright kept the pistol and later drove back to Hogan's house in Lake Alfred. Hogan suggested that Wright dump the car in an Auburndale orange grove, and Wright followed that suggestion.

The Winter Haven Carjacking: Saturday, April 22, 2000

In the vicinity of the Auburndale orange grove where the homicide victim's vehicle was abandoned, Ernesto Mendoza and Adam Granados were addressing a car battery problem in the parking lot of a fast-food restaurant. It was during those early morning hours of Saturday, April 21, that Wright allegedly approached them, pointed a small handgun at a female with them, and announced that he was going to take the car.[7] Wright immediately entered Mendoza's vehicle and sped away. Granados and Mendoza quickly entered a truck and pursued Wright. The car chase continued through several streets before Wright ran the vehicle onto the curb near a car dealership in Lake Alfred. Wright exited the vehicle, fired several gunshots at Granados and Mendoza, and then escaped across the car lot in the direction of James Hogan's house.

Several .380 caliber casings were also collected from this scene. These casings were later identified as having been fired from the pistol stolen from the Shank residence. One latent print was lifted from the interior side of the driver's window of Mendoza's car, and three were lifted from the steering wheel. All of these latent ***287** prints matched Wright's known fingerprints.

Hogan, whose house was within walking distance of the car dealership from which Wright was seen fleeing, testified that when he returned home at approximately 12:30 a.m. on Saturday, he found Wright seated there. Wright asked Hogan to drive him back to the Providence Reserve Apartments, and on the way there, Wright spontaneously said "they had shot these two boys," and that he had also "got into it with some Mexicans." Wright confessed to Hogan that they had transported two white men to an orange grove and shot both men with a pistol and a shotgun. Wright also confirmed that they engaged in a high-speed chase with police in Lakeland. However, at that point, Wright did not disclose the identity of the other person who aided in the murders.

The Providence Reserve Foot Chase and Subsequent Investigation: Saturday, April 22, 2000

After Hogan returned Wright to the apartment complex following the Winter Haven carjacking, Wright was observed throughout Saturday handling a pistol at the Providence Reserve Apartments. He also spoke with people regarding the murders. Wright confessed to R.R. that he received a cellular phone from a "lick," meaning it had been stolen. He also described to R.R. the details of the abduction and murders. Wright then gave the stolen phone to R.R.

Later that day, Wright was seated with Latasha Jackson on the steps of the apartment building, and Wright had a small firearm resting in his lap. During their conversation, Wright told Jackson that he shot two white men in an orange grove and that he had shot one in the head. Soon after this, the police responded to a report of an armed man, who matched Wright's description, at that location.[8]

A uniformed officer approached Wright and Jackson and stated that he needed to speak with Wright. Wright jumped over the balcony railing and raced down the stairs. As Wright ran from the apartment, his tennis shoes fell off. Jackson picked up the shoes and placed them by the apartment door. The police later seized these sneakers from the apartment during the murder investigation. James Felker's DNA was determined to match a blood sample secured from the left sneaker. Though Wright contended that the shoes were not his and that he had never worn them, both Wright and Pitts were required to try on the shoes. The shoes were determined to be a better fit for Wright than for Pitts.

Several officers chased Wright from the Providence Reserve Apartments to a nearby mobile home park, which was located across a field from the apartment complex. During the chase, the officers noticed Wright holding his pants pocket as if he carried something inside.

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Wright was arrested at the mobile home park, and his pocket contained live rounds and a box of ammunition containing both .380 Federal and Winchester caliber of rounds. This was the same caliber ammunition as that recovered from the drive-by shooting, the murders, and the carjacking.

After the police departed, a resident of that mobile home park entered her car to leave for dinner. Her vehicle had been parked there with the windows down when Wright had been arrested near her front door. As she entered her vehicle, she discovered a pistol, which was not hers. This weapon was determined to be the pistol stolen from the Shank residence.

***288** Wright was taken into custody pending resolution of the aggravated assault charges. While Wright was in custody, Auburndale police officers discovered David Green's white Chrysler abandoned in an orange grove. Crime-scene technicians discovered blood on both the exterior of the vehicle and on the interior left side. Four of the blood samples from the vehicle matched James Felker's DNA profile. Further investigation revealed that prints lifted from multiple locations on the vehicle matched known prints of Wright. [9]

A deputy with the Polk County Sheriff's Office linked this abandoned vehicle with a missing persons report for David Green and James Felker. After the vehicle was discovered, the family of the victims gathered at the orange grove to search for any items that might aid in the missing persons investigations. Green had his personal Nextel cellular phone and a soft black bag filled with special computer tools that he utilized for his work in the Chrysler. A Polaroid camera had also been left in Green's vehicle. Green's fiancée discovered her son's jacket in that grove, but Green's workbag, tools, cellular phone, and camera were all missing from the vehicle.

A couple of days after the murders, Pitts attempted to sell the black bag that contained Green's computer tools to a pawnshop. R.R. assisted his stepfather in securing proceeds for the Polaroid camera from another pawnshop. The police had begun contacting pawnshops looking for the items missing from Green's car and recovered the black computer bag and the pawn tickets, which led them to Pitts and R.R. [10] Further investigation established that three latent fingerprints from the black bag matched Wright's known fingerprints.

Following the information obtained from the pawnshop, the police traveled to R.R.'s residence where they identified and seized the Nextel cellular phone Wright had given R.R. The phone seized from R.R.'s residence matched the serial number of David Green's phone. R.R. told the police that Wright, who was still in jail on the aggravated assault arrest, had given him the phone.

A few hours later, a detective questioned Pitts, who revealed the general location of the bodies. Six days following the disappearance of David Green and James Felker, their bodies were discovered in a remote orange grove in Polk City. Each man had been shot three times, and spent bullet cases surrounded the bodies. David Green was face-up, with bullet wounds in his chest and in his head. From his outstretched hand, the police recovered a wallet that contained Green's license. James Felker was face-down in the same area, with three bullet wounds in his head. Green's cause of death was determined to be multiple gunshot wounds to the chest, the forehead, and the back of his neck. A medical examiner removed a projectile from Green's face and a deformed projectile from his throat. Felker's cause of death was determined to be gunshot wounds to the head, one by a .380 caliber projectile to the forehead and two by a shotgun blast to the back of the head. Except for the gunshot wound to Green's chest, any of the gunshot wounds would have rendered the victims unconscious instantaneously.

***289** Law enforcement never recovered the shotgun used in these murders. However, a Florida Department of Law Enforcement firearms expert inspected the pistol recovered from the mobile home park, which was identified as the pistol stolen from the Shank residence, and the firearms-related evidence collected from the various crime scenes. The expended projectiles from the pistol and those found in Wright's possession were of the same caliber but were different brands. Due to the damage sustained by some of the projectiles, the expert was unable to conclusively establish that the pistol stolen from the Shank residence fired all .380 caliber bullets discovered at the scene of the murders. However, the projectiles and the firearm were of the same caliber and displayed similar class characteristics. Five Federal .380 caliber casings discovered near the victims were positively identified as having been fired from the pistol. Thus, the stolen Shank pistol had likely been used in, and connected with, the Longfellow Boulevard drive-by shooting, the

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double murders of David Green and James Felker, and the Winter Haven carjacking.

The Trial

On October 18, 2004, Wright began his third trial on these charges.[11] The jury returned a guilty verdict on all seven counts and made specific findings that Wright used, possessed, and discharged a firearm, which resulted in death to another. Wright waived his right to have a penalty-phase jury. The jury was discharged after the trial court conducted a thorough colloquy and determined that the waiver was made knowingly, intelligently, and voluntarily.

During the combined penalty-phase and *Spencer*[12] hearing, the State presented impact statements from the victims' families. The State introduced the certified judgments and sentences from the Longfellow Boulevard drive-by shooting and from two incidents that occurred while Wright was imprisoned prior to the capital trial.[13] The State also presented the testimony of the victims of the jail-related felonies. Defense counsel stipulated that the contemporaneous capital convictions supported the aggravating circumstance of a prior violent felony.

The defense presented mitigation evidence of Wright's traumatic childhood through the testimony of his family, which included virtual abandonment and neglect by his parents. Two defense expert witnesses testified that Wright's exposure to cocaine and alcohol in utero caused some microcephaly, which is a condition that affects the size of the brain, and mild traumatic injury to Wright's brain. Though one defense expert determined that Wright has borderline intellectual functioning, including impairments in his frontal lobe functioning for reasoning and judgment, the expert testified that Wright ***290** did not satisfy the requirements for statutory mitigation[14] or qualify as mentally retarded under section 921.137, Florida Statutes (2000).[15]

To the contrary, the other defense expert testified that Wright was of low intelligence, which approached that of mental retardation due to fetal alcohol syndrome. In that expert's opinion, Wright could not balance a checkbook, maintain a household, or keep his refrigerator stocked. However, this expert did not consider the recognized standardized intelligence tests required by section 921.137 to be the measure of mental retardation and conceded that under the statutory definition, Wright would not be considered mentally retarded.

A special hearing was held to specifically address whether Wright met the statutory criteria for mental retardation. Wright's scores from each doctor's evaluation fell within the borderline range, but did not drop below 70. Thus, the trial court found that under the statutory requirements, Wright was *not* mentally retarded. The court noted that there was evidence to the contrary, but held that such evidence did not fall within the purview of the applicable statute.

Following this hearing, the trial court found four aggravating circumstances, three statutory mitigating circumstances, and several nonstatutory mitigating circumstances.[16] The trial court concluded ***291** that the aggravating circumstances far outweighed the mitigation and that, even in the absence of any individual aggravating circumstance, the trial court would still find that the aggregate of the remaining aggravating circumstances outweighed all existing statutory and nonstatutory mitigating circumstances. Thus, the court imposed a death sentence for each count of first-degree murder and life sentences for each of the five noncapital felonies, all to run consecutively.

ANALYSIS

In this direct appeal, Wright challenges one aspect of the guilt phase and three aspects of the penalty phase, as follows: (1) whether the trial court erred in admitting collateral-crime evidence as inextricably intertwined with the offenses on trial, which Wright contends became a feature of the trial that rendered the probative value of this evidence to be substantially outweighed by its prejudicial effect; (2) whether the trial court erred in denying Wright's motions to declare Florida's capital-sentencing scheme unconstitutional pursuit to *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (3) whether the trial court erred in finding that the murders were committed in a cold, calculated, and premeditated manner; and (4) whether the trial court erred in finding that the dominant purpose for committing the murders was witness elimination to avoid arrest. We conclude that Wright has not demonstrated a basis for

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relief on any of these issues and that sufficient evidence supported each of the death sentences, which we further hold are proportionate punishments for Wright's capital convictions.

The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of the Inextricably Intertwined Collateral Crimes

Wright first asserts that the trial court abused its discretion when it denied his motion in limine to exclude collateral-crime evidence because the admission of this mass of evidence, which possessed an inflammatory nature, became a feature of the trial and caused the prejudicial effect of such evidence to substantially outweigh any probative value. After a hearing prior to the first trial, the trial court ruled that all of the collateral-crime evidence was admissible. During the third trial, the trial court adopted this prior ruling, but limited the evidence to instances where the collateral-crime evidence was admitted in the previous trials as inextricably intertwined with the crimes charged.

Evidence of Collateral Crimes Must Be Relevant

A trial court has broad discretion to determine the relevancy of evidence. Thus, we will not disturb a trial court's decision to admit inextricably intertwined evidence absent an abuse of discretion. *See Sexton v. State,* 697 So.2d 833, 837 (Fla.1997) (citing *Heath v. State,* 648 So.2d 660, 664 (Fla.1994)). The trial court's discretion is limited, however, by the evidence code. *See McDuffie v. State,* 970 So.2d 312, 326 (Fla.2007); *see also* ch. 90, Fla. Stat. (2000).

The prerequisite to the admissibility of evidence is relevancy. All evidence tending to prove or disprove a material fact is admissible, unless precluded by law. *See* §§ 90.401–90.402, Fla. Stat. (2000). Relevant evidence "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2000). Therefore, collateral-crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a *material* fact in issue, but is inadmissible when ***292** the evidence is relevant *solely* to prove bad character or propensity. *See* § 90.404(2)(a), Fla. Stat. (2000). The trial court correctly discerned that the admission of collateral-crime evidence as inextricably intertwined with the charged offenses is not considered *Williams*[17] rule evidence, which is a special application of the general relevancy rule for collateral crime. *See Taylor v. State,* 855 So.2d 1, 21 (Fla.2003).

Occasionally when proving the elements of a crime, it becomes necessary to admit evidence of other bad conduct to adequately describe the offense or connect the elements of the offense because the charged offense and the other conduct are significantly linked in time and circumstance. *See Griffin v. State,* 639 So.2d 966, 968 (Fla.1994). In other words, this evidence is admissible because it is a *relevant* and *interwoven* part of the conduct that is at issue. Where it is impossible to give a complete or intelligent account of the criminal episode without reference to other uncharged crimes or bad conduct, such evidence may be used to cast light on the primary crime or elements of the crime at issue. *See Zack v. State,* 753 So.2d 9, 17 (Fla.2000) (evidence of dissimilar robberies during weeklong crime spree admissible to "piece together the sequence of events leading up to this murder" and to place the "present case in perspective"). However, when there is a "clear break between the prior conduct and the charged conduct or it is not necessary to describe the charged conduct by describing the prior conduct, evidence of the prior conduct is not admissible on this theory." Charles W. Ehrhardt, *Florida Evidence* § 404.17, at 237 (2005 ed.).

Wright concedes that this collateral-crime evidence provided relevant evidence to the jury and instead focuses on the cumulative, prejudicial effect generated by the admission of this evidence. We conclude that the trial court did not abuse its discretion in admitting the inextricably intertwined collateral-crime evidence as relevant because it served several purposes: (1) linked Wright to one of the murder weapons and explained his possession of this weapon; (2) provided a geographical nexus for each event; and (3) established the context of Wright's three-day crime spree.

More specifically, the Shank burglary provided evidence to the jury of when and where the pistol was stolen, provided an explanation for the origin of the unrecovered shotgun, and linked Wright to the pistol. The Longfellow Boulevard drive-by shooting provided eyewitness testimony and ballistics to place the pistol stolen from the Shank residence in Wright's possession

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the morning before the murder. The high-speed car chase with the detective in Lakeland placed Wright in the victim's car at the Providence Reserve Apartment complex. This evidence corroborated R.R.'s testimony that Wright carjacked the murder victims and then traveled to the apartment complex. The detective's pursuit was also the first law enforcement contact with the victim's vehicle. Green and Felker had not been reported missing at this time. When the abandoned white Chrysler was recovered on April 22, a sheriff's lieutenant realized that it was probably the same vehicle from the Lakeland car chase, thus linking the vehicle recovered in a remote grove with the area of the Providence Reserve Apartment complex.

Further, the carjacking at 1 a.m. on Saturday, April 22, 2000, placed Wright within a few miles of the orange groves ***293** where the murders occurred and the vehicle was abandoned. It also provided ballistics and eyewitness testimony regarding Wright's possession of the murder weapon immediately following the murders. The Providence Road foot chase explained Wright's arrest and the discovery of the murder weapon. In that instance, the trial court attempted to limit introduction of evidence that the officers responded to the apartments because of a report of an aggravated assault, for which Wright was charged but was acquitted. Thus, there was no abuse of discretion in admitting this evidence for these limited purposes.

Feature of the Trial

Wright urges this Court to hold that the trial court abused its discretion by allowing the collateral evidence to become a feature of the trial or by allowing the prejudicial effect of the collateral evidence to far outweigh its probative value. Even when inextricably intertwined, such evidence cannot become a feature of the trial. *See Morrow v. State,* 931 So.2d 1021, 1022 (Fla. 3d DCA 2006) (citing *Bryan v. State,* 533 So.2d 744, 746 (Fla.1988)). To determine whether collateral-crime evidence became a feature of the trial, we do not solely measure the number of references the prosecution made to such evidence. *See Morrow,* 931 So.2d at 1022–23 (citing *Snowden v. State,* 537 So.2d 1383, 1385 (Fla. 3d DCA 1989)). However, voluminous references to a collateral crime *may indicate* a prohibited transgression, even if it is not the sole determining factor. *See Fitzsimmons v. State,* 935 So.2d 125, 129 (Fla. 2d DCA 2006) (evaluating the number of witnesses who testified concerning the collateral-crime evidence or the prosecutor's references to it during closing argument to determine whether it became a feature of the trial).

Wright asserts that this case is similar to those instances in which courts have held that inextricably intertwined evidence erroneously became a feature of the trial. For example, in *Thomas v. State,* 959 So.2d 427 (Fla. 2d DCA 2007), the Second District remanded for a new trial where the evidence of drive-by shootings subsequent to the charged offense became a prejudicial feature of the trial. The defendant was involved in a "war" with the victim, who was a drug dealer. *See id.* at 427. More than a year prior to the murder, the defendant had stolen $95,000 from the victim, causing the victim to place a contract for the murder of the defendant. *See id.* The defendant later shot the victim in a drive-by encounter. *See id.* The two days following the murder involved multiple drive-by shootings between associates of the defendant and the victim, which resulted in the defendant's apprehension and the discovery of the murder weapon. *See id.* at 428.

A distinguishing feature of *Thomas* is that the defendant there stipulated to killing the victim but argued the killing was in self-defense, which reduced the litigation to only the issue of the defendant's mental state at the time of the murder. *See id.* at 427–28. The defense agreed to the introduction of the stolen money, which explained why the murders occurred, and to limited details of the chase that led to the defendant's apprehension. *See id.* at 429. These admissible facts are very similar to the circumstances of Wright's case, where the Providence Road foot chase established Wright's arrest and the recovery of the murder weapon. The Second District did not deem those facts irrelevant; instead, the court reversed because the State introduced voluminous evidence of the drive-by shootings, which did not have any relevancy to the limited issues before the jury and was unnecessary to "adequately describe the deed" for which the defendant was being tried. *See id.* at 430. ***294** Thus, *Thomas* is clearly distinguishable from the present case because Wright's guilt remained an issue during the trial, which required the State to introduce evidence of the collateral events to connect Wright to possession of the weapons used in the murders and that he had been in the victim's car.

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Unlike *Thomas,* the volume of detailed testimony of the collateral events here did not equate to the State proceeding "almost as if it had ... consolidate[d] the various charges." *Id.* at 430. Wright incorrectly asserts that more than half of the witnesses who testified during trial related in whole or in part to the collateral-crime evidence. Approximately fourteen of the fifty-five witnesses testified exclusively with regard to collateral crimes. Some witnesses who testified with regard to direct evidence of the murders also mentioned the collateral crimes in passing. The trial court did not consider the testimony regarding the Providence Road foot chase to be a collateral crime because *mere possession* of a firearm by a non-felon is not a crime, and the court did not admit testimony relating to the collateral crime for which Wright was acquitted. The testimony of the remaining witnesses was directly related to the double homicide, and one State rebuttal witness disputed Wright's testimony. Even a quantitative analysis of the number of witnesses utilized does *not* indicate that the inextricably intertwined collateral-crime evidence became a voluminous feature of the trial beyond its relevant scope.

Another area that may reveal whether collateral crimes became a feature of the trial is the closing argument. *See Fitzsimmons,* 935 So.2d at 129. The State referenced the collateral crimes during its closing argument for two purposes: (1) to show that Wright possessed the firearm throughout the crime spree, and (2) to refute Wright's testimony that Samuel Pitts was in possession of the firearm during the time the murders occurred. The collateral crimes were discussed only for a few moments during the closing argument. This alone does not demonstrate that evidence of the collateral crimes became a feature of the trial.

We caution the State that some of the arguments appear to have crossed the line into asserting that Wright's propensity for violence proved that he committed the murders. For instance, the State maintained that Wright "doesn't have any problems shooting people." This theme was mentioned again in reference to the carjacking. [18]

***295** In *Consalvo v. State,* 697 So.2d 805 (Fla.1996), this Court stated that inextricably intertwined evidence may be admissible for one purpose, yet inadmissible for another purpose. *See id.* at 813 (citing § 90.107, Fla. Stat. (1995)); *see also Parsons v. Motor Homes of Am., Inc.,* 465 So.2d 1285, 1290 (Fla. 1st DCA 1985). Admission of material evidence does not automatically mean that such evidence may be received for *any probative value* that it may have on *any issue* before the court. The State in *Consalvo* improperly argued a collateral burglary as collateral-crime evidence in closing argument. The State had highlighted the similarities between the collateral burglary and the charged burglary and murder. We held that the State presented improper argument because the collateral burglary was admitted as evidence inextricably intertwined with the murder, *not* as collateral-crime evidence. Thus, the State's use of evidence of the collateral burglary exceeded the scope of its admission, which was to establish the entire context out of which the criminal action occurred.

Here, the evidence of collateral crimes was admitted for the limited purpose of tracing the possession of the firearm and the victim's vehicle to Wright and to map a geographical nexus of the murder. Multiple statements that Wright "certain[ly] doesn't have any problems shooting people" lean toward an impermissible propensity-toward-violence argument. *See* § 90.404(2)(a) (classifying as inadmissible evidence that is relevant solely to prove bad character or propensity). The State had received the benefit of each evidentiary ruling in that it was allowed to fully present its case, which included detailed testimony of the collateral crimes. However, when it cast Wright as a violent character who acts upon his desire to shoot people, the State abused this benefit by inappropriately taking it beyond the edge of propriety in contradiction of the evidence doctrine of Florida.

Ultimately, in *Consalvo,* we determined that the prosecutor's improper comments constituted harmless error because no objection was raised to that usage throughout the trial, and the similarities between the two crimes did not become a feature of the trial. We reach the same result here. Defense counsel did not object to the State's use of the evidence during closing argument. As a general rule, "failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." *Brooks v. State,* 762 So.2d 879, 898 (Fla.2000); *see also Poole v. State,* 997 So.2d 382, 390 (Fla.2008). The exception to this general rule is where the unpreserved comments rise to the level of fundamental error, which this Court has defined as "error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty ... could not have been obtained without

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the assistance of the alleged error.' " *Brooks,* 762 So.2d at 899 (quoting *McDonald v. State,* 743 So.2d 501, 505 (Fla.1999)). However, here it has been conceded that the prosecutor's closing argument was not so egregious as to be the basis for a challenge on appeal. In light of this concession and the lack of contemporaneous objection at the trial court level, we determine that the suspect comments during closing argument here were not properly preserved for appellate ***296** review and do not constitute fundamental error.

Prejudice

Wright also contends that the prejudicial impact of this testimony outweighed any probative value. Relevancy is not the only test for admissibility. In every case, the trial court must also balance whether the probative value of the relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *See* § 90.403, Fla. Stat. (2000). As a practical matter, generally any evidence introduced by the State during a criminal prosecution is prejudicial to a defendant. *See Sexton,* 697 So.2d at 837 (citing *Amoros v. State,* 531 So.2d 1256, 1258 (Fla.1988)). "[A] trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice *substantially* outweighs the probative value of the evidence should it be excluded." *Id.* (emphasis supplied).

> "Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Brown v. State,* 719 So.2d 882, 885 (Fla.1998) (quoting *Old Chief v. United States,* 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). This rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." *Steverson v. State,* 695 So.2d 687, 688–89 (Fla.1997). In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider *the need for the evidence,* the *tendency* of the evidence to suggest an *emotional basis for the verdict,* the *chain of inference* from the evidence necessary to establish the material fact, and the *effectiveness of a limiting instruction. Taylor v. State,* 855 So.2d 1, 22 (Fla.2003). The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt.

McDuffie v. State, 970 So.2d 312, 327 (Fla.2007) (emphasis supplied).

As a preliminary matter, Wright contends that the prejudicial impact of the collateral-crime witnesses could have been minimized by use of Wright's prior testimonial admissions to prove his possession of the murder weapon, thus limiting the prejudicial effect of the collateral-crimes witnesses' testimony. However, it is unlikely that the testimony from the prior mistrials could have been used save for impeachment purposes or by joint stipulation of counsel. At the beginning of the final trial, the defense requested that the trial court treat Wright's prior testimony as judicial admissions. The State attempted to reach a stipulation with Wright, but he declined to stipulate to the facts of any of the collateral crimes. Defense counsel asked the trial court to conduct a colloquy with the defendant to ensure this was Wright's decision. Therefore, the State's presentation of these witnesses was not in error because Wright affirmatively decided not to stipulate to these facts. On appeal, Wright does not specify how these facts could have been properly introduced without presenting the testimony of the collateral-crimes witnesses.

Considering the evidence that was admitted, the introduction of the drive-by shooting and the carjacking might imply Wright was a "violent man" because the acts were violent in nature and involved ***297** attempted murders and dangerous shootings. However, to excise the drive-by shooting and the carjacking from the trial would have eliminated the essential ballistics evidence that connected Wright and the pistol used in those crimes to the evidence found at the orange grove where the murders occurred. This link was necessary because the firearms expert was unable to conclusively state that the bullets recovered from the scene of the murders were fired from the Shank pistol. Instead, the expert was able to confirm that the bullet lodged in the Longfellow Boulevard house was fired by the Shank pistol and had a similar casing to those discovered in the orange grove. This ballistics evidence was highly probative to linking the Shank pistol with the murder. Furthermore, the carjacking placed Wright in possession of one of the murder weapons and in the vicinity of the murder scene immediately after

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the murders probably occurred. Thus, the carjacking and drive-by shooting were integral threads to weaving a complete story of the murders. To pluck any one thread may have unraveled the true evidence. Under the deferential standard of abuse of discretion, we conclude that the trial court did not abuse its discretion in allowing admission of this testimony.

Ring claim

Wright next asserts that the trial court erred in denying his motions to declare Florida's capital sentencing scheme unconstitutional pursuit to *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).[19] We affirm the trial court's denial of these claims for two reasons. First, Wright waived his right to a penalty-phase jury. *See Bryant v. State,* 901 So.2d 810, 822 (Fla.2005) (holding *Ring* claim legally insufficient where defendant waived his penalty-phase jury); *Lynch v. State,* 841 So.2d 362, 366 n. 1 (Fla.2003) (substantially similar). Wright knowingly, intelligently, and voluntarily waived his right to a penalty-phase jury, as evidenced by the trial court's colloquy with Wright during which the trial court explained the impact of a waiver and specifically informed Wright of the consequences on appeal. Wright confirmed that it was his knowing intention to waive his penalty phase jury. The trial court concluded that the waiver had been made after a full consultation with counsel, that it appeared to be a tactical decision on the part of the defense based on counsel's statements, and that the waiver was knowingly, intelligently, and voluntarily made.

Wright does not present any evidence contrary to the finding of the trial court. In fact, Wright concedes that he waived his right to a penalty-phase jury, thus barring this claim, and submits that the waiver was a strategic decision based on the possible "contamination" of the jury by the trial court's admission of collateral-crime evidence during the guilt phase. Wright chose the trial court to be the finder of fact because it was his view that the trial court would be more likely to dispassionately consider the aggravating and mitigating circumstances in light of any emotional impact the collateral-crime evidence may have had on the guilt-phase jury. This is no different from the choice that every capital defendant must make ***298** when deciding whether to waive the right to a penalty-phase jury. Wright's strategic decision to present the penalty phase of the case to the trial court instead of a jury constitutes a knowing, intelligent, and voluntary waiver and a conscious abandonment of any *Ring*-based challenges to the constitutionality of Florida's capital-sentencing scheme.

Moreover, even if Wright's waiver did not preclude review of this issue, we have repeatedly held that where a death sentence is supported by the prior-violent-felony aggravating circumstance, Florida's capital-sentencing scheme does not violate *Ring. See, e.g. Peterson v. State,* 2 So.3d 146, 160 (Fla.2009) (citing *Frances v. State,* 970 So.2d 806, 822 (Fla.2007), *cert. denied,* 553 U.S. 1039, 128 S.Ct. 2441, 171 L.Ed.2d 241 (2008); *Lebron v. State,* 982 So.2d 649 (Fla.2008)), *petition for cert. filed,* No. 09–5057 (U.S. June 25, 2009). Thus, relief is not warranted on this issue.

Aggravating Factors

Wright next challenges the finding of two aggravating circumstances: (1) that the murder was committed in a cold, calculated, and premeditated (CCP) manner, and (2) that the murder was committed to avoid arrest. A murder may be both cold, calculated, and premeditated and also committed to avoid arrest. The CCP aggravating circumstance focuses on the defendant's state of mind and the manner in which the defendant executed the capital offense, whereas the avoid-arrest aggravating circumstance focuses on the defendant's motivation for the crime. *See Rodriguez v. State,* 753 So.2d 29, 48 (Fla.2000). When an aggravating factor is challenged on appeal, we review the record to determine whether the trial court applied the correct rule of law for each aggravating circumstance, and, if so, whether competent, substantial evidence supports the trial court's finding. *See Douglas v. State,* 878 So.2d 1246, 1260–61 (Fla.2004) (quoting *Willacy v. State,* 696 So.2d 693, 695 (Fla.1997)). The record in this case contains competent, substantial evidence to support the trial court's finding as to each aggravating circumstance.

Cold, Calculated, and Premeditated

The CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant. *See Brown v. State,* 721 So.2d 274, 277 (Fla.1998). Wright first asserts that the trial court could not logically find CCP when it

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also found that the capital felony was committed while Wright was under the influence of an extreme mental or emotional disturbance at the time of the crime. One of the defense mental health experts indicated that Wright's neurological brain damage could have affected his ability to fully appreciate future consequences or to premeditate plans or intent. Wright maintains that his mental health condition would make it impossible for him to create a prearranged design to kill or to formulate "a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." *Evans v. State,* 800 So.2d 182, 193 (Fla.2001) (quoting *Nibert v. State,* 508 So.2d 1, 4 (Fla.1987)).

In *Evans,* this Court reasoned that even if a trial court recognizes and gives substantial weight to mental health mitigation, such does not necessarily mean that a murder was an act prompted by emotional frenzy, panic, or a fit of rage. *See* 800 So.2d at 193. "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." *Id.* (citing ***299** *Sexton,* 775 So.2d at 934). Though it is possible that the crime spree and events leading up to these murders may have emotionally charged Wright, his admissions to his actions at the time of the murder—abducting the victims, exiting the car, and shooting each victim execution-style—do not suggest a frenzied, spur-of-the-moment attack. In addition, while one expert's testimony very strongly indicated that Wright lacked the capacity to appreciate his criminality, that Wright suffered brain damage, and that Wright would have "trouble premeditating activities of daily living," the other three experts expressed the opinion that Wright's mental capabilities did not qualify him as being mentally retarded or under emotional duress at the time of the offenses.

In contrast to *Evans,* in *Woods v. State,* 733 So.2d 980 (Fla.1999), this Court rejected the CCP factor where the defendant had limited mental ability and apparently resorted to violence based upon the irrational belief that the victims were wrongfully keeping property from him. *See id.* at 992. Two key factors in *Woods* revolved around the defendant's low IQ and his irrational behavior, such as calling the police multiple times to report that the victims would not permit him to drive a vehicle that he claimed to have purchased. The evidence in the present case does not suggest that Wright's microcephaly led to any irrational beliefs or behavior beyond these criminal actions. Thus, although we recognize that certain evidence may indicate some inability for Wright to premeditate daily activities, we conclude that the mental health evidence does not eradicate the evidence that he committed these murders in a cold, calculated, and premeditated manner.

Indeed, the evidence reflects competent, substantial evidence to support each element of CCP. The cold element is generally found in those murders that are not committed in a heat of passion. *See Looney v. State,* 803 So.2d 656, 678 (Fla.2001) (quoting *Walls v. State,* 641 So.2d 381, 387–88 (Fla.1994)). The record is devoid of any evidence that Wright acted out of frenzy, panic, or rage. Two witnesses presented evidence of consistent admissions by Wright regarding how the murders occurred. Wright told these witnesses that he drove the victims to a remote, isolated orange grove ten miles from where they were carjacked. After the victims insisted that they had nothing to surrender, Wright exited the vehicle and shot one of the victims. Wright then shot the other victim, who was pleading that Wright not to commit the murder. While one of the victims was still breathing, crawling, and moaning, Wright shot him in the head with a shotgun. By their very nature, execution-style killings satisfy the cold element of CCP. *See Ibar v. State,* 938 So.2d 451, 473 (Fla.2006) (citing *Lynch v. State,* 841 So.2d 362 (Fla.2003); *Walls,* 641 So.2d at 388). Similar to the circumstances in *Walls* and *Ibar,* Wright had ample opportunity during the ten-mile abduction drive to the orange grove to reflect on his actions and abort any intent to kill. Instead, Wright chose to shoot each victim in the head at close range. *See Ibar,* 938 So.2d at 473. These actions establish the cold nature of the murders.

The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill. *See id.* (citing *Lynch,* 841 So.2d at 372). Wright armed himself before the carjacking with weapons that he had stolen from the Shank residence the previous day. The drive to the orange grove afforded Wright time to coldly and calmly make the final plan and decision to kill the victims. *See* ***300** *Knight v. State,* 746 So.2d 423, 436 (Fla.1998). Though some testimony suggests that the victims "resisted," this testimony did not indicate physical resistance. *Cf. Barwick v. State,* 660 So.2d 685, 686, 696

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(Fla.1995) (finding that murder was not committed in a calculated manner where it occurred after the victim resisted and during an unexpected struggle). One of the victims was found with his hand outstretched, holding his wallet. Each victim was shot multiple times, despite there being no indication of victim resistance or of a struggle that provoked the murder. Additionally, a shotgun is not a small, easily concealed weapon that can be conveniently and easily carried. Therefore, to carry both a shotgun and a handgun to the orange grove demonstrates calculation and premeditation.

Furthermore, to prove the element of heightened premeditation, the evidence must show that the defendant had a careful plan or prearranged design to kill, not to just simply commit another felony. *See Geralds v. State,* 601 So.2d 1157, 1163 (Fla.1992) (citing *Jackson v. State,* 498 So.2d 906, 911 (Fla.1986); *Hardwick v. State,* 461 So.2d 79, 81 (Fla.1984)). However, this element exists where a defendant has the opportunity to leave the crime scene with the victims alive but, instead, commits the murders. *See Alston v. State,* 723 So.2d 148, 162 (Fla.1998) (quoting *Jackson v. State,* 704 So.2d 500, 505 (Fla.1997)). In this case, Wright had ample opportunity, from the time he encountered the victims in the supermarket parking lot to when he stopped the car in the orange grove, to release the victims and leave the crime scene without committing two murders. Instead, when the victims stated that they had nothing to surrender, he exited the car and shot them both execution-style.

Finally, there is no evidence establishing a pretense of moral or legal justification for these murders. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.' " *Nelson v. State,* 748 So.2d 237, 245 (Fla.1999) (quoting *Walls,* 641 So.2d at 388). Wright does not dispute the lack of any pretense of moral or legal justification for the slayings, and the record lacks any indication of a single fact that could provide such justification.

While CCP may be established by circumstantial evidence, this Court will consider any reasonable hypothesis of innocence offered by the defense that might be inconsistent with and negate this aggravating factor. *See Gordon v. State,* 704 So.2d 107, 114 (quoting *Geralds v. State,* 601 So.2d 1157, 1163 (Fla.1992)). Though the "plan to kill" cannot be inferred solely from a plan to commit another felony, Wright failed to offer an alternative theory for the offenses, such as an unplanned killing in the course of a planned burglary. *See id.* at 1163–64. This is not a case where one hypothesis supports premeditated murder, and another cohesive, reasonable hypothesis supports an unplanned killing. *Cf. Geralds,* 601 So.2d at 1164 (vacating CCP where defendant presented a reasonable, alternate hypothesis, and the evidence regarding premeditation was susceptible to divergent interpretations).

In sum, Wright did not act out of frenzy, panic, or rage; he obtained a firearm in advance; he abducted and forced the victims to drive to a remote area where there would be no witnesses; and he shot the victims multiple times execution-style. *See Hartley v. State,* 686 So.2d 1316, 1323 (Fla.1996) (finding competent, substantial evidence of CCP with these same factors, along with defendant's confession and obtaining ***301** a getaway vehicle in advance). Thus, the trial court did not err in finding that this factor was proven beyond a reasonable doubt because there is competent, substantial evidence in the record that the murder was committed in a cold, calculated, and premeditated fashion without any pretense of moral or legal justification.

Avoid Arrest Aggravator

The avoid arrest aggravating circumstance, which is also referred to as witness elimination, applies when the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or to effectuate an escape from custody. *See* § 921.141(5)(e), Fla. Stat. (2004). Typically, this aggravator is applied to the murder of law enforcement personnel, but it has also been applied to the murder of a witness to a crime. *See Consalvo,* 697 So.2d at 819 (citing *Riley v. State,* 366 So.2d 19, 22 (Fla.1978)). Where the victim is not a law enforcement officer, the evidence must demonstrate beyond a reasonable doubt that "the sole or dominant motive for the murder was the elimination of the witness." *Preston v. State,* 607 So.2d 404, 409 (Fla.1992); *see also Reynolds v. State,* 934 So.2d 1128, 1157 (Fla.2006); *Connor v. State,* 803 So.2d 598, 610 (Fla.2001). In those circumstances, proof of the intent to avoid arrest or detection must be very strong and not based on mere speculation. *See Consalvo,* 697 So.2d at 819.

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Foremost, Wright conceded that this aggravator applied by stating in his supplemental amended memorandum in support of the imposition of a life sentence:

> 5) Witness Elimination § 921.141(5)(e). The *Defense concedes that the State has proven beyond a reasonable doubt that the two victims appear to have been killed ... in order for the perpetrator to avoid being caught in this case.* Again, as to the weight to be granted to this factor the court should reflect upon the roles of the co-defendants and the principals theory. Ultimately the defense concedes proof of the apparent motive to eliminate the witness. Due to the lack of [p]roof of the defendant's direct participation in the killings and the mental mitigation suggesting dominance by an intelligent authority figure in the co-defendant, the defense emphasizes that the quantum of culpability required for the imposition of the death penalty with regard to this defendant is absent.
>
> b. The State has proven beyond a reasonable doubt that the victims were killed to eliminate witnesses but the court should grant only some weight to this factor.
>
> In conclusion, the defense believes that the State has proven beyond a reasonable doubt only [a]ggravators number one, three and five.... The defense believes that the court should grant ... some weight ... for Witness Elimination.

(Emphasis supplied.) The memorandum was signed by both defense counselors.

On appeal, Wright now asserts that trial counsel did not concede that the aggravator had been proven beyond a reasonable doubt because defense counsel contended, during the sentencing hearing, that the court could "*presume* [Wright and Pitts] were eliminating witnesses" if the State's theory was true, but that a presumption is not equal to the standard of proof beyond a reasonable doubt. [20]

***302** This Court has held that an aggravator was not conceded where defense counsel attempted to emphasize that the State had not proven the aggravator beyond a reasonable doubt. *See Stephens v. State,* 975 So.2d 405, 417 (Fla.2007). However, defense counsel's contention at sentencing does not reflect this strategy. It is clear that the sentencing memorandum combined with the defense's "presumption" contention during the hearing conceded this aggravating factor.

Even so, the trial court found that avoiding arrest was proven beyond a reasonable doubt to be the dominant motive for the murder based on the following:

> The evidence established that the victims in the case at bar were car-jacked, *driven several miles to an isolated area* far outside the city where the car-jacking occurred, taken out into the *middle of an orange grove,* and shot from behind *execution style* while literally holding a cap and empty wallet in hand. Had the victims been merely dropped off and abandoned alive in this isolated area, restrained or even unrestrained, without the vehicle (which was taken) or means of communication such as the cellphone (which was also taken), it would likely have been a considerable period of time before the victims could have either gotten help or located other persons to hear a cry of alarm. The isolated nature of the area where the victims were eventually found assured any perpetrator of ample getaway time without the necessity of killing the victims.
>
> The murders of David Green and James Felker were witness elimination. They certainly posed *no physical threat to an abductor,* turned away as they were from their killer or killers, ballcap and wallet in hand. There is *no evidence of any violent resistance* as their vehicle and personal belongings were being taken. The killings were *not necessary to effectuate the carjacking, kidnappings, or armed robberies.*

(Emphasis supplied.)

We have upheld this aggravator in circumstances where the victim was taken from the initial location of the carjacking and driven to an isolated, remote place to be executed. *See Spann v. State,* 857 So.2d 845 (Fla.2003); *Philmore v. State,* 820 So.2d 919 (Fla.2002). In *Spann* and *Philmore,* which involved a murder by two codefendants, a random victim was carjacked, forced to a remote, isolated location, robbed of property, and murdered execution-style. The defendants in each case did not wear masks or gloves to conceal their identities. Similarly, there is competent, substantial evidence to support the trial court's findings that Wright drove the victims to a remote location where he could have abandoned them with ample time to escape detection, but instead chose to shoot them

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execution-style. Furthermore, there is no evidence to suggest that Wright attempted to conceal his identity. Thus, even without defense counsel's concession of this aggravator, the trial court did not err by finding that the dominant or sole motive of these murders was witness elimination.

Sufficiency

Although Wright has not asserted that the evidence is insufficient to support his convictions, we have an obligation to independently review the entire record to determine whether sufficient evidence ***303** exists. *See Bevel v. State,* 983 So.2d 505, 516 (Fla.2008); *see also* Fla. R.App. P. 9.142(a)(6). In making this determination, we review the facts in the light most favorable to the State to determine whether the record provides competent, substantial evidence that supports the existence of the elements of each capital offense. *See Simmons v. State,* 934 So.2d 1100, 1111 (Fla.2006). We have reviewed the record and conclude that the evidence is sufficient to support both of Wright's murder convictions on either theory of first-degree murder as well as each of his remaining five convictions.

Proportionality

Despite Wright's failure to raise proportionality on appeal, this Court is required to perform a proportionality analysis in each direct capital appeal. *See* Fla. R.App. P. 9.142(a)(6); *Floyd v. State,* 913 So.2d 564, 578 (Fla.2005). This Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. *See Tillman v. State,* 591 So.2d 167, 169 (Fla.1991). "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both *the most aggravated* and *the least mitigated* of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State,* 841 So.2d 390, 407–08 (Fla.2003) (emphasis supplied) (citation omitted). This review "is not a comparison between the number of aggravating and mitigating circumstances." *Sexton v. State,* 775 So.2d 923, 935 (Fla.2000) (quoting *Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990)). In deciding whether death is a proportionate penalty, we consider the totality of the circumstances and compare the present case with other capital cases in which this Court has found that death was a proportionate punishment. *See Urbin v. State,* 714 So.2d 411, 417 (Fla.1998). We have reviewed the nature of, and the weight given to, the aggravating and mitigating circumstances, and we approve the trial court's determination that death is a proportionate punishment in this case. *See Frances v. State,* 970 So.2d 806, 820 (Fla.2007), *cert. denied,* 553 U.S. 1039, 128 S.Ct. 2441, 171 L.Ed.2d 241 (2008).

Comparison to Other Cases

Here, Wright waived a penalty-phase jury, so the sentences were imposed by the trial court. The trial court found four aggravating factors: (1) Wright was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person (great weight); [21] (2) Wright committed the murders for pecuniary gain (no additional weight); (3) Wright committed the murders in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight); and (4) Wright committed the murders for the purpose of avoiding or preventing lawful arrest (great weight).

The trial court found three statutory mitigating circumstances: (1) the offenses were committed while Wright was under the influence of extreme mental or emotional disturbance (some weight); (2) Wright's capacity to appreciate the criminality of his conduct or to conform his ***304** conduct to the requirements of the law was substantially impaired (some weight); and (3) Wright was nineteen years old at the time of the crime (some weight). The court found several nonstatutory mitigators relating to Wright's background and mental health.

This Court has previously determined that the death penalty is a proportionate sentence in cases that involved multiple murders and extensive aggravation. *See Pearce v. State,* 880 So.2d 561 (Fla.2004) (finding three aggravating circumstances—CCP, prior violent felony, and murder committed during a kidnapping—and few mitigating circumstances); *Spann v. State,* 857 So.2d 845 (Fla.2003) (finding five aggravating circumstances —prior violent felony, murder committed in the course of a felony, avoid arrest, pecuniary gain, and CCP- and six nonstatutory mitigating circumstances); *Philmore v. State,* 820 So.2d 919 (Fla.2002) (twenty-one-year-old codefendant to Spann, finding five aggravators and eight

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nonstatutory mitigators). Each of these cases shares the factual circumstance of the defendant driving a victim to an isolated place and shooting him or her execution-style.

It is clear that the aggravating factors here support the imposition of the death penalty. In total, Wright was convicted of contemporaneous capital felonies for the double murders, five violent felonies for the carjacking, armed robberies, and kidnappings, three violent felonies from the drive-by shooting, and two violent felonies from the prison batteries. Additionally, the CCP aggravator is one of the most serious aggravators provided by the statutory sentencing scheme. *See Larkins v. State,* 739 So.2d 90, 95 (Fla.1999). Furthermore, a comparison of other cases reveals that this Court has upheld the imposition of the death penalty in cases involving similar aggravating circumstances. *See Jones v. State,* 690 So.2d 568, 571 (Fla.1996) (in calculated double murder, this Court found death proportionate with three aggravating circumstances—CCP, contemporaneous attempted murder of second victim, and pecuniary gain—and one statutory mitigating circumstance); *Pope v. State,* 679 So.2d 710, 716 (Fla.1996) (in violent beating and stabbing homicide, this Court held the death penalty proportionate where the two aggravating factors found—murder committed for pecuniary gain and prior violent felony—outweighed the two statutory mitigating circumstances—commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct—and three nonstatutory mitigating circumstances); *Heath v. State,* 648 So.2d 660, 666 (Fla.1994) (in robbery where defendant stabbed victim in the neck after ordering his brother to shoot the victim, this Court affirmed death sentence based on two aggravating factors of prior violent felony and murder committed during the course of a robbery, and the existence of one statutory mitigating circumstance).

When mental health mitigation reveals a mentally disturbed defendant, we have vacated the death penalty under appropriate circumstances even when the heinous, atrocious, and cruel aggravating circumstance was found. These cases are distinguishable, however, because generally only a single aggravator was found. *See Offord v. State,* 959 So.2d 187, 192 (Fla.2007) (discussing *Robertson v. State,* 699 So.2d 1343 (Fla.1997); *Kramer v. State,* 619 So.2d 274, 278 (Fla.1993); *Nibert v. State,* 574 So.2d 1059, 1063 (Fla.1990)). Here, Wright has three weighted aggravating factors.

Lastly, there is no evidence that this crime occurred during a "robbery gone bad," in which there is little or no evidence ***305** of what happened immediately before the victim was shot. *Cf. Jones v. State,* 963 So.2d 180, 188 (Fla.2007); *Terry v. State,* 668 So.2d 954, 965 (Fla.1996); *Sinclair v. State,* 657 So.2d 1138, 1142 (Fla.1995); *Thompson v. State,* 647 So.2d 824, 827 (Fla.1994). Thus, we conclude that a comparison of the factual circumstances of this case with other capital decisions demonstrates that Wright's death sentences are proportionate.

Culpability of Codefendant

Next, proportionality review requires us to consider the codefendant's sentence. Wright was tried and sentenced to death before Samuel Pitts' trial commenced. In May 2007, Samuel Pitts received a life sentence based on a jury recommendation. "In cases where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that 'equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.' " *Brooks v. State,* 918 So.2d 181, 208 (Fla.2005) (quoting *Shere v. Moore,* 830 So.2d 56, 60 (Fla.2002)).

We have rejected relative culpability arguments where the defendant sentenced to death was the "triggerman." *See, e.g., Ventura v. State,* 794 So.2d 553, 571 (Fla.2001); *Downs v. State,* 572 So.2d 895, 901 (Fla.1990). If the defendant is the primary shooter, this Court has stated in dicta that there would be no error in imposing the death penalty when an accomplice is also a triggerman where the evidence supports the sentencing judge's conclusion that the defendant's aggravating circumstances outweigh his or her mitigating circumstances. *See Garcia v. State,* 492 So.2d 360 (Fla.1986) (citing *Jacobs v. State,* 396 So.2d 1113 (Fla.1981)). "[A]n exercise of mercy on behalf of the defendant in one case does not [necessarily] prevent the imposition of death by capital punishment in the other case." *Alvord v. State,* 322 So.2d 533, 540 (Fla.1975). Though there was no eyewitness testimony to definitively determine which defendant was the triggerman, and the State advanced theories that both defendants were equal participants in the crime, the evidence presented

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at Wright's trial supports a determination that he shot the victims. With regard to each murder, the jury found that Wright used, possessed, and discharged a firearm, which resulted in death to another. As to the physical evidence, only Wright's fingerprints were found on the car, and Felker's blood was found on Wright's shoes. The jury apparently dismissed the assertion that the shoes actually belonged to Pitts, and the evidence demonstrated that the shoes fit Wright more closely than Pitts. Furthermore, appellate counsel conceded during oral argument that comparative culpability was not really an issue. Thus, Wright's death sentences are not disproportionate when compared to the life sentences received by codefendant Pitts.

CONCLUSION

For the reasons expressed above, we affirm Wright's convictions and sentences.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.

LABARGA and PERRY, JJ., did not participate.

All Citations

19 So.3d 277, 34 Fla. L. Weekly S497

Footnotes

1 *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

2 Wright and Pitts were tried separately for the murders. Pitts was convicted of two counts of first-degree murder and other offenses related to this incident. He received sentences of life imprisonment for the murders.

3 For the drive-by shooting, Wright was convicted of attempted second-degree murder and two counts of attempted felony murder.

4 The stolen shotgun was never recovered. References to the firearm stolen from the Shank residence relate to the automatic pistol.

5 However, a .380 handgun could not have fired the .25 caliber bullet. No explanation for the different shell casing was presented at trial, though it was implied by the defense that an exchange of gunfire occurred between Wright and the victims. Coney and Joiner denied having a firearm at the Longfellow Boulevard residence.

6 Wright testified, to the contrary, that after he arrived at the supermarket, he conducted a drug transaction and then visited other apartments in the area to sell more drugs. After making stops at various apartments, he began walking back to the Providence Reserve Apartments. While he was walking, Pitts drove up in a white vehicle. Pitts asked Wright if he wanted to drive, and as Wright walked to the driver's side, he noticed blood on the vehicle. Wright suggested that they take the vehicle to an apartment to wash it. Wright testified that it was while they were driving to the apartment that the police chase occurred.

7 Wright refused to testify about the details of the carjacking because he was not charged with this offense.

8 Wright was charged with aggravated assault related to this incident, but was acquitted.

9 None of the latent prints lifted from the Chrysler matched the known fingerprints of Pitts or R.R.

10 During trial, Green's fiancée identified the Polaroid camera as the one she purchased with Green. She also identified his black workbag.

11 The first trial began in March 2003, but resulted in a mistrial after the State's last rebuttal witness was presented. A second trial commenced in September 2003, but ended in mistrial because of a hung jury. Wright moved to recuse the trial judge after the second trial, because he had presided over four separate trials of Wright and sentenced Wright to the maximum penalty in each of the cases where Wright was convicted. These trials comprised the collateral crimes and prior felonies used in his capital trial. Consequently, a new trial judge presided over the proceedings.

12 *Spencer v. State,* 615 So.2d 688 (Fla.1993).

13 Prior to the capital trial, Wright was convicted of two violent felonies while in custody-aggravated battery by a jail detainee and aggravated battery. In the former, Wright, along with several other inmates, attacked another detainee. In the latter, Wright attacked a jail detention deputy.

14 A defendant may seek to show the mitigating circumstances that (1) under section 921.141(6)(b), Florida Statutes (2000), the “capital felony was committed while the defendant was under the influence of extreme mental or emotional

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disturbance," or that (2) "the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law was substantially impaired," pursuant to section 921.141(6)(f).

15 Section 921.137(1) defines mental retardation for purposes of the statutory determination to be "significantly subaverage general intellectual functioning," which is "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities," with "deficits in adaptive behavior and manifested during the period from conception to age 18." Consistently, we have interpreted this definition to mean a defendant seeking exemption from execution must establish an intelligence quotient score of 70 or below. *See Phillips v. State,* 984 So.2d 503, 510 (Fla.2008).

16 The trial court found four aggravating circumstances: (1) Wright was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person (great weight); (2) Wright committed the felony for pecuniary gain (no weight); (3) Wright committed the homicide in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight); and (4) Wright committed the felony for the purpose of avoiding or preventing lawful arrest (great weight).

The trial court found three statutory mitigating factors and gave them some weight: (1) Wright committed the offense while under the influence of extreme mental or emotional disturbance; (2) Wright's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) Wright was 19 years old at the time of the crime. Wright offered approximately 34 nonstatutory mitigating factors, and the trial court found the following: (1) Wright suffered emotional deprivation during his upbringing (some weight); (2) Wright's low IQ affected his judgment and perceptions (some weight); (3) Wright suffered from neurological impairments, which affected his impulse control and reasoning ability (some weight); (4) Wright suffered from low self-esteem (little weight); (5) Wright lacked the capacity to maintain healthy, mature relationships (little weight); (6) Wright had frustration from his learning disability (little weight); (7) Wright lacked mature coping skills (some weight); (8) Wright displayed appropriate courtroom behavior (little weight); and (9) Wright suffered from substance abuse during his adolescent and adult life (little weight).

17 *Williams v. State,* 110 So.2d 654 (Fla.1959).

18 For example, the State made the following statements during closing argument.

> He used the gun on Friday. He shot a man with it. *He certain[ly] doesn't have any problems shooting people. He shot Carlos Coney.*

(Emphasis supplied.)

> When you have a carjacking and a murder like this that's senseless, it's an irrational act, and you cannot for the life of you understand why that happened. *You'll never understand why T.J. Wright chose to shoot Carlos Coney* or chose to shoot Felker and Green. It's—it's an irrational thing to do.

(Emphasis supplied.)

> Carlos Coney and Bennie Joiner both know the guy. *He shoots them, a man that he knows.* The man—the police come, he goes, "Yeah, who shot you?"
>
> "T.J. Wright shot me."
>
> ....
>
> You know, you can't believe T.J. This guy wants you to believe that somebody that he has an acrimonious relationship with, they don't get along, he's driving by, sees the guy, has a gun in his car, and tells his buddy turn around and go back, I want to talk to him.
>
> Bull crap. *He wanted to shoot him.* That's why he told [the driver] to turn around. That's exactly what he did. *He shot him.*
>
> ....
>
> But the second time, when you look at this map, after he dumped that car on Bolender Road and went and carjacked the Mexicans, he comes up to right there, and that's where he flees. That's where *he shoots at Mr. Mendoza* and the owner of the car who's since died in a car accident. That's where he shoots at him.

19 In response to this issue, the State asserts that Wright improperly incorporated the *Ring* arguments from an initial brief in a separate appellate proceeding for a different defendant. Incorporation by reference or reference to issues from a brief in a separate and distinct case pending in this Court is improper. *See Johnson v. State,* 660 So.2d 637, 645 (Fla.1995). As in *Johnson,* we again advise appellate counsel to avoid this method of legal argument because it may place this Court or opposing counsel in the speculative position of guessing which arguments counsel deems relevant to its case. *See id.* at 645.

20 During the sentencing hearing, one of the defense attorneys stated:

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> There's a heavy assumption on the third point about avoiding arrest or witness elimination. Again, we're assuming what the facts in question are in this particular case. Certainly the State can say they had lots of other options, but we don't know what happened. We don't know what anyone was thinking, but *we can presume they were eliminating witnesses,* if they were both present, if it happened like the State's theory of the case is, and if it didn't happen like the defense theory of the case.
>
> (Emphasis supplied.)

21 As to this aggravating factor, this Court has repeatedly held that where a defendant is convicted of double murders arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim. *See, e.g., Francis v. State,* 808 So.2d 110, 136 (Fla.2001). Accordingly, the trial court correctly found that the conviction as to the Felker murder aggravated the conviction as to the murder of Green, and vice versa.

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No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E

Circuit Court of the Tenth Judicial Circuit order sentencing Petitioner, dated October 12, 2005.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY

STATE OF FLORIDA,
Plaintiff,

vs. CASE NO.: CF00-02727A-XX

TAVARES JERROD WRIGHT,
Defendant.
_____/

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SENTENCING ORDER

The Defendant, Tavares J. Wright, was tried by jury before this Court on October 18th, 2004 - November 13th, 2004. The jury returned a Verdict of guilty as charged in all seven Counts of the Indictment, including verdicts of guilty of First Degree Murder in the murder of David Green; guilty of First Degree Murder in the murder of James Felker; guilty of one count of Carjacking; guilty of two counts of Robbery With A Firearm; and guilty of two counts of Kidnapping, together with the jury making specific findings regarding the Defendant's use, possession, discharge, and discharge resulting in death or great bodily harm to another of a firearm.

Following this rendition of Verdict by the jury, the Defendant elected to waive a jury recommendation in the penalty phase. The Court, after determining that the Defendant's waiver of such jury recommendation was freely, knowingly, and voluntarily made, held a combined Spencer/Sentencing Hearing before the Court on May 10th, 2005. The State and the Defendant were both permitted to present additional evidence to the Court. Prior to this Hearing, the Court ordered and reviewed a comprehensive Pre-Sentence Investigation, which was furnished in full to both sides. The State presented additional evidence and argument regarding aggravating factors set forth by Florida Statute 921.141 which it sought to prove beyond a reasonable doubt. The Defendant presented additional evidence and argument which he contended showed statutory and non-statutory mitigating factors.

The last witness called to testify at this May 10th, 2005 Spencer/Sentencing Hearing, called by the Defense, raised a claim that the Defendant was mentally retarded; which claim, if established, would bar imposition of the death penalty for the first degree murders. The Court, after consultation with Counsel for both sides, elected to conduct subsequent hearings following additional testing of the Defendant, such that any claim of mental retardation could be addressed with both past and present test results in hand. A special hearing was thereafter held on September 22nd, 2005, where only the issue of mental retardation was addressed. Witnesses were examined and cross-examined by the attorneys. The Court thereafter heard additional argument on the issue of mental retardation, whereupon the Court found that the Defendant was not mentally retarded and did not meet the statutory criteria regarding mental retardation.

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Pursuant to the Court's ruling that imposition of the death penalty was not barred by mental retardation, the Court conducted an additional Hearing held September 28th, 2005 for the Defendant to be heard, if he wished, regarding sentencing. At that Hearing the Defendant elected to make a statement, which statement the Court has heard and considered.

This Court has heard the testimony and evidence presented before the jury in the guilt phase of the trial in the case at bar and, pursuant to the Defendant's election to waive a jury recommendation, the additional testimony, evidence, and the Defendant's statement presented during the penalty/sentencing phase of the trial conducted before the Court. The Court has now reviewed all such testimony, evidence, statement, comprehensive Pre-Sentence Investigation and argument presented at the numerous hearings held before this Court, and has had the benefit of reading and reviewing the several sentencing memoranda submitted from both the State and the Defense addressing statutory aggravating factors as well as statutory and non-statutory mitigating factors. The Court has considered in detail all arguments presented by counsel, whether presented orally at hearing or in writing, both in favor of and in opposition to the death penalty. The Court, being ever conscious of the fact that the Defendant is entitled to an individual consideration of all aggravating and mitigating circumstances raised, and being otherwise fully advised in the premises, now finds as follows:

AGGRAVATING FACTORS

1. **The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Florida Statute Section 921.141(5)(b)**

   The Court needs to address a number of matters which constitute the finding regarding this aggravator. Each of these will be addressed in turn.

   The jury found the Defendant guilty of both counts of First Degree Murder as charged in the Indictment. The State can first establish this aggravating factor merely by reliance upon this contemporaneous Verdict of guilty of First Degree Murder as to each of the two homicide victims, David Green and James Felker. Indeed, as the Defense has conceded in it's Supplemental Amended Memorandum Of Law In Support Of Imposition Of A Life Sentence, case law is clear that the State can use contemporaneous/simultaneous offenses in meeting it's burden of proving this aggravating factor beyond a reasonable doubt. Thus, based upon this jury's guilty Verdict as to each of the two counts of First Degree Murder, the Court finds, on that basis alone, that this aggravating factor has been proven beyond a reasonable doubt.

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The Court finds that this same jury, in the case at bar, found the Defendant guilty of the crimes of Carjacking, two counts of Kidnapping, and two counts of Robbery With A Firearm, all of which were charged in the same Indictment alleging the two counts of First Degree Murder. Although each of these other five counts are felonies involving the use or threat of violence to the person and the Court finds that these have been proven beyond a reasonable doubt, these charges need be merged with the two counts of First Degree Murder arrived at in the same rendition of verdict. The Court so merges them and gives them no separate consideration.

Beyond the seven (7) Counts of the Indictment in the case at bar, previously addressed by consideration and merger as aforesaid, the Court finds that the State has independently proven beyond a reasonable doubt six (6) other felonies involving the use or threat of violence to the person which do not require merger. Although their use is controverted, their existence is not. Per the Defendant's Supplemental Amended Memorandum Of Law In Support Of Imposition Of A Life Sentence; "The Defense concedes the State has proven six (6) violent felonies that were sentenced prior to this case."

The Court finds, insofar as the first three of these prior violent felonies, that the State has proven beyond a reasonable doubt that the Defendant has previously been convicted of Attempted Second Degree Murder With A Firearm, together with two counts of Attempted Felony Murder, for the attacks on Carlos Coney, Bennie Joiner, and Joseph Carter. As was established by testimony in the case at bar, this drive-by shooting by the Defendant saw the victim Carlos Coney actually struck by gunfire, requiring that he be rushed to the hospital by a neighbor for immediate treatment of the gunshot wound received.

The Defendant was also previously convicted of Aggravated Battery On A Jail Detainee. In that case, the Defendant was convicted of the brutal beating of fellow inmate Preston Cassada. Mr. Cassada, who testified at the Spencer/Sentencing Hearing held before the Court, testified that he was beaten to the point of unconsciousness, and remained in a coma for thirty days as a result of that attack. Mr. Cassada was left permanently impaired as a result of this aggravated battery.

The Defendant's violence in jail extended beyond a fellow inmate. The Defendant was also previously convicted of Aggravated Battery On a Corrections Officer for another brutal attack, this time perpetrated on Corrections Officer Walter Connelly. Mr. Connelly, who was the first witness called by the State in the Spencer/Sentencing Hearing held before the Court, testified that he had gone alone into that section of the jail to feed the inmates then being held in isolation. Mr. Connelly testified that

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the Defendant "sucker punched" him and thereafter "stomped" and "kicked him in the head over 50 times". Mr. Connelly testified that this beating was so severe that even after he was released following several days of hospitalization, he could only return to light duty, and eventually elected to retire as a result of the injuries sustained in this attack. Additionally, Mr. Connelly testified that the aftermath of this attack has required continuing medical and mental health treatment. Finally, the Defendant was also previously convicted of Battery on a Law Enforcement Officer, a case involving the separate and unrelated attack perpetrated upon Corrections Officer Dan Cooley.

Considering the contemporaneous capital and merged offenses in the case at bar as a single entity, and not adding any additional weight thereto by such merger, but considering for additional weight the proven six (6) violent felonies for which the Defendant was previously sentenced, the Court finds that this aggravating factor has been proven by the State beyond a reasonable doubt and gives it great weight.

2. **The capital felony was committed for pecuniary gain. Florida Statute 921.141(5)(f)**

The evidence presented in the case at bar established that not only was the vehicle that Mr. Green and Mr. Felker were driving in taken (the carjacking charge), but numerous items of the decedents' personal property were also taken, some of which were subsequently pawned, albeit that all pawning of such items was by persons other than the Defendant.

The Court finds that while the State has established beyond a reasonable doubt that pecuniary gain was intrinsically intertwined with the committing of each capital felony, the Court, considering the merger previously addressed, in the light of all testimony and evidence in the case, gives this aggravating factor no additional weight beyond that which the other aggravating factors as herein found are independently accorded.

The Court feels that it would be disingenuous to find that the capital felony was not committed for pecuniary gain when it finds that both of the victims were killed during the course of the ongoing carjacking and armed robberies. However, given the Court's findings as to the other aggravating factors which the Court finds to be proven by the State beyond a reasonable doubt, the Court is nonetheless unwilling to give this aggravating factor any independent weight, particularly given the Court's subsequent findings as to the cold, calculated, and premeditated aggravator hereinafter discussed.

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3. **The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Florida Statute 921.141(5)(i)**

Evidence in the case at bar established that the victims were carjacked and kidnapped, driven to an isolated rural area miles out of the city where the carjacking occurred, then taken out into the middle of an orange grove a considerable distance from the paved road in that isolated area, and then shot execution style. The decedents were shot from behind, while standing, side by side, and a coup de grace shot was administered, virtually straight down, after their bodies had fallen to the ground. The shots were fired from behind and at extremely close, near contact range.

These murders were not committed in the heat of the moment, or upon a certain urge in a burst of activity amidst a crowded setting or busy city street. Instead, these murders were committed at a distant and chosen spot of isolation, with the victims apparently compliant and still enough that they died side by side, from execution style shots fired from behind at extremely close range. There is absolutely no evidence of any moral or legal justification for these killings.

This Court is well aware of the heightened standard necessary in determining that the First Degree Murder involved was committed in a cold, calculated, and premeditated manner without any pretense of any moral or legal justification. As the Florida Supreme Court has stated in **Connor v. State**, 803 So.2d 598 (Fla. 2001) and **Jackson v. State**, 748 So.2d 85, 89 (Fla. 1994), " In order to establish ccp, the State must establish that the killing was the product of cool and calm reflection and was not an act prompted by emotional frenzy, panic, or a fit of rage (cold); that the Defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the Defendant exhibited heightened premeditation (premeditated); and the Defendant had no pretense of moral or legal justification."

The victims in this case were carjacked and kidnapped from an area adjacent to a major thoroughfare and taken from a crowded, well populated, well traveled area of the city and then driven miles away to a secluded area, where they were then taken to an even more secluded spot off the paved road, deep into a large orange grove, where they were killed execution style from gunshots fired from behind at exceptionally close range. The elapsed time and distance between the city site where the carjacking and kidnappings originated and the remote rural distant site where the murders occurred gave the Defendant a significant period of time to contemplate and

consider his alternatives. There is no evidence that the murders were performed in a rage or a panic. The Defendant chose the specific execution style manner, means, and site of death, choosing so isolated a rural location that the gunshots were unlikely to even be heard by anyone.

No mental health issue involving this Defendant (low IQ, learning disability, neurological impairment, or other mental defect, even when considered in the aggregate) reached such severity that it interfered with Tavares Wright's ability to perceive events, or to coldly plan and by prearranged calculated design carry out the heightened premeditated murders of David Green and James Felker. Indeed, the Court finds that the manner and means of death at this remote rural location, so well chosen and concealed that despite an extraordinary and extensive law enforcement search effort, day after day, from ground and air, the bodies yet remained undiscovered until a co-defendant led law enforcement to them, evinces how effective this premeditation, plan, and calculation were in evading detection.

The Court finds that these killings were done in a cold, calculated, and highly premeditated fashion, without any moral or legal justification. The Court finds that this aggravating factor has been proven by the State beyond a reasonable doubt and gives this aggravating factor great weight.

4. **The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Florida Statue 921.151 (5)(e)**

The evidence established that the victims in the case at bar were car-jacked, driven several miles to an isolated area far outside the city where the car-jacking occurred, taken out into the middle of an orange grove, and shot from behind execution style while literally holding a cap and empty wallet in hand. Had the victims been merely dropped off and abandoned alive in this isolated area, restrained or even unrestrained, without the vehicle (which was taken) or means of communication such as the cellphone (which was also taken), it would likely have been a considerable period of time before the victims could have either gotten help or located other persons to hear a cry of alarm. The isolated nature of the area where the victims were eventually found assured any perpetrator of ample getaway time without the necessity of killing the victims.

The murders of David Green and James Felker were witness elimination. They certainly posed no physical threat to an abductor, turned away as they were from their killer or killers, ballcap and wallet in hand. There is no evidence of any violent resistance as their vehicle and personal belongings were being taken. The killings were not necessary to effectuate the carjacking, kidnappings, or armed robberies.

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These murders were committed for the purpose of avoiding or preventing a lawful arrest via witness elimination.

Indeed, in the Defense's Supplemental Amended Memorandum Of Law In Support Of Imposition Of A Life Sentence, the Defense admits as much, stating: "The Defense concedes that the State has proven beyond a reasonable doubt that the two victims appeared to have been killed... in order for the perpetrator to avoid being caught in the case."; and: "Ultimately the Defense concedes proof of the apparent motive to eliminate the witness.".

This Court is well aware of the Florida Supreme Court's admonition that where the victim is not a law enforcement officer, the support evidence must be very strong to show that "the sole or dominant motive for the murder was the elimination of the witness." **Preston v. State**, 607 So.2d 404 (Fla. 1992). However, the Supreme Court has upheld this aggravator when the circumstances surrounding the crime clearly show it to be the dominant motive.

The Court finds, as the State has argued and the Defense has conceded, that the elimination of the witnesses in order for the perpetrator to avoid being caught in the case at bar was the dominant motive for the murders. The Court finds that each of these capital felonies were committed for the purpose of avoiding or preventing lawful arrest.

The Court finds that the State has proved this aggravating factor beyond a reasonable doubt. The Court gives this aggravating factor great weight.

MITIGATING FACTORS

The Court asked the Defense to prepare a memorandum suggesting all statutory and non-statutory mitigating factors which the Defendant wished to be addressed or considered by the Court. The Defense has prepared several such memoranda, a duplicity necessitated by the nature of the evidence introduced at the Spencer/Sentencing Hearing held before the Court and the subsequent specialized Hearing dealing with the claim of mental retardation. The Court, having found that the Defendant was not mentally retarded under the laws of the State of Florida, asked the Defense to prepare a final memorandum detailing all statutory and non-statutory mitigating factors which the Defense wished the Court to consider and address at sentencing. In response to the Court's request, the Defense submitted a Supplemental Amended Memorandum Of Law In Support Of Imposition Of A Life Sentence, which advances five statutory mitigating factors and thirty one (31) non-statutory mitigating factors. Each and every such suggestion of statutory and non-statutory

mitigation is hereinafter addressed in this Order, using the terminology chosen by the Defendant in the Defendant's Supplemental Amended Memorandum Of Law In Support Of Imposition Of A Life Sentence.

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STATUTORY MITIGATING FACTORS

1. **The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Florida Statute 921.141(6)(b)**

   From the evidence presented at Trial and at the Spencer/Sentencing Hearing, the Court is reasonably convinced that this mitigating factor exists.

   In so finding, however, the Court would note that while the Defendant unquestionably has mental or emotional issues of long standing duration (which will be hereinafter discussed) the Carjacking, Kidnappings, Armed Robberies, and Murders in the case at bar occur in short order immediately following an Armed Burglary (wherein the pistol utilized in these murders was stolen by the Defendant) and the drive-by shooting resulting in convictions of Attempted Second Degree Murder With A Firearm and two counts of Attempted Felony Murder (wherein the same pistol was utilized by the Defendant). The Court notes this only to point out that at the time the capital felonies were committed, numerous other serious offenses had already been recently committed and certainly some of the Defendant's then extant extreme mental or emotional disturbance was either created or exacerbated by the Defendant's election to participate in these preceding crimes.

   The Court finds that it is reasonably convinced of the existence of this statutory mitigator and the Court gives it some weight.

2. **The Defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor. Florida Statute 921.141(6)(b)**

   Considering all of the testimony and evidence presented in the case, both at the trial and at the Spencer/Sentencing Hearing, and notwithstanding the Defendant's testimony as to the existence of this factor, the Court is not reasonably convinced that this statutory mitigating factor exists. To the contrary, the Court is reasonably convinced that this statutory mitigating factor does not exist and that the testimony and evidence to the contrary of its existence is the more credible testimony and evidence presented.

The Court finds that this statutory mitigating factor does not exist. The Court therefore rejects the claimed existence of this statutory mitigating factor.

3. **The Defendant acted under extreme duress or under the substantial domination of another person. Florida Statute 921.141(6)(e)**

In accord with the earlier finding in the preceding paragraph, the Court is not reasonably convinced as to the existence of this statutory mitigating factor, the Defendant's testimony on this issue notwithstanding. Again, the Court finds that the testimony and the evidence taken as a whole is far more credible to the contrary of its existence.

The Court finds that this statutory mitigating factor does not exist. The Court therefore rejects the claimed existence of this statutory mitigating factor.

4. **The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Florida Statute 921.141(6)(f)**

The Court has heard considerable testimony regarding the state of the Defendant's mental health and cognitive problems, including learning disabilities.

From the testimony and evidence presented, the Court is reasonably convinced that this statutory mitigating factor has been established. Having so found, the Court gives this statutory mitigating factor some weight.

5. **The age of the Defendant at the time of the crime. Florida Statute 921.141(6)(g)**

It is uncontroverted that the Defendant was nineteen (19) years old at the time of the murders. While it is within the Court's discretion to find or not find age as a mitigator, under all attendant circumstances in the case at bar, the Court is reasonably convinced that this mitigating factor has been established.

This statutory mitigating factor, having been established, is given some weight by the Court.

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NON-STATUTORY MITIGATING FACTORS

In the Defense's Supplemental Amended Memorandum Of Law In Support Of The Imposition Of A Life Sentence, the Defendant has raised in enumerated paragraphs claims of thirty one (31) non-statutory mitigating factors which he wishes the Court to consider. The Court will hereinafter address each of these, referring to them by the same enumeration.

The Defendant has advanced a number of non-statutory mitigating factors which all deal with a single topic: the Defendant's emotional upbringing and emotional deprivation during his formative years. The Court is electing to treat as a single non-statutory mitigating factor all of the following enumerated paragraphs from the Defendants' Supplemental Amended Memorandum:

1. **The Defendant has an emotional age well below his chronological age.**
4. **The Defendant suffered from emotional deprivation during his formative years.**
5. **The Defendant had a deficiency of positive role models during his formative years.**
10. **The Defendant has had a lack of support.**
15. **The Defendant did not have the benefit of stable and nurturing parents during his formative years.**
16. **The Defendant's mother provided for his younger siblings with love and care which was not provided to the Defendant.**
30. **The Defendant was emotionally deprived.**

The Court consolidates paragraphs 1, 4, 5, 10, 15, 16 and 30 for purposes of this discussion, as each of these sections deals with the Defendant's emotional condition and, specifically, how that emotional condition was impacted by the Defendant's upbringing.

The Defendant argues that his poor family background, emotional deprivation during his formative years, lack of stable and nurturing parents, lack of other positive role models, and rejection compared to his siblings have resulted in an emotional hardship in his life which has placed him at an emotional disadvantage to those raised in more stable and nurturing environments.

The Court is reasonably convinced from the testimony and the evidence presented that the Defendant did suffer emotional hardships in his youth. That the Defendant did not enjoy the emotional support of his parents is uncontroverted. From the testimony presented, the Defendant's father was never a factor in his life, and the Defendant's mother, who had him when she was only seventeen, was neither

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consistent nor nurturing during the Defendant's minority, and largely left the Defendant to be raised by other family members without her active involvement.

The Court finds that these claims, as raised in paragraphs 1, 4, 5, 10, 15, 16 and 30 of the Defendant's Supplemental Amended Memorandum constitute, in the aggregate, a single non-statutory mitigating factor regarding emotional deprivation in the Defendant's upbringing.

The Court is reasonably convinced of the existence of this non-statutory mitigating factor and gives it some weight.

2. **The Defendant has a low IQ which affects his judgment and perceptions.**

The Court has heard extensive testimony regarding the Defendant's IQ, as measured by the standardized Wechsler Intelligence Scale Tests, Juvenile, Adult, Revised and Third Edition, administered a total of five times to the Defendant between 1991 and 2005, taken when the Defendant was age 9 or 10; age 16 years 6 months; age 22; and age 24. Per these tests, the Defendant's full scale I.Q. was 76 in 1991; 75 in 1997; 77 in 2003; 82 and 75 in separate tests conducted in 2005. From the testimony and evidence presented, each and every one of these scores reflects a lower IQ than average, albeit that none of these scores establishes mental retardation, as the Court has previously found at an earlier hearing.

The Court is reasonably convinced of the existence of this non-statutory mitigating factor and gives it some weight.

3. **The Defendant suffers from neurological impairments which affect his impulse control and reasoning ability.**

From the testimony and evidence presented the Court is reasonably convinced that this non-statutory mitigating factor exists, albeit not to the level that would render any of the Defendant's criminal activities non-volitional.

The Court is reasonably convinced of the existence of this non-statutory mitigating factor and gives it some weight.

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6. **The Defendant suffers from low self esteem.**

The Court has heard uncontroverted testimony that the Defendant suffers from low self esteem.

The Court is reasonably convinced that this non-statutory mitigator exists, however this non-statutory mitigator is given little weight.

7. **The Defendant suffers from frontal lobe impairment which would impact his judgment.**

The Court considers this claim to be duplicative of that which the Court found to exist in paragraph 3 above, where the Court was reasonably convinced that the Defendant suffered from neurological impairments which affect his impulse control and reasoning ability.

The Court having already found that the previous non-statutory mitigating factor existed, and the Court having previously given it some weight, no additional weight is given to this duplicative claim.

8. **The Defendant lacks the capacity to maintain healthy, mature relationships.**

From the testimony and evidence presented the Court is reasonably convinced that this non-statutory mitigator exists. However, the Court gives it little weight.

9. **The Defendant has been misunderstood because he has been perceived as oppositional.**

The Court finds that this non-statutory mitigator does not reasonably exist in the case at bar. Indeed, from the testimony and the evidence presented, the Defendant has been oppositional both when living at large in society and while incarcerated, and numerous witnesses have testified as to the Defendant's oppositional nature and acts. The Defendant has not been misunderstood, he has instead been understood as oppositional.

The Court finds that this non-statutory mitigating factor does not exist and rejects this as any type of mitigator.

11. **The Defendant has been frustrated because of his learning disability.**

The Court finds, from the testimony and the evidence presented, that the Defendant does have a learning disability. He was placed in Exceptional Student Education (ESE) classes while in school, and the Defendant finally dropped out of high school before graduating.

The Court is reasonably convinced of the existence of this non-statutory mitigating factor. However, the Court gives it little weight.

12. **The Defendant has difficulty with complex concepts.**

The Court finds that this claim is duplicative with claims number 2, 3, 7, and 11 above. The Court, being already reasonably convinced of the existence of those other non-statutory mitigating factors and having already accorded them certain weight, declines to find this as an additional factor and give it additional weight.

The Court finds that this subject matter has already been addressed and has already been accorded the weight that it deserves.

13. **The Defendant lacks mature coping skills.**

From the testimony and the evidence presented the Court is reasonably convinced that this non-statutory mitigator exists. The Court gives it some weight.

14. **The Defendant is vulnerable to influence.**

Albeit that there is testimony concerning the Defendant's willingness to adopt a lifestyle in accord with those negative influences he encountered, the Defendant was apparently invulnerable to any lasting positive influence from his ESE teachers; or from the Boot Camp personnel who attempted to instill their program's discipline and ethics into his life; or from those family members who testified as to their attempts to positively influence him during the course of his life.

The Court finds that this non-statutory mitigating factor does not exist and hence accords it no weight.

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17. **The Defendant's father is currently housed at the State Mental Hospital.**

As was earlier noted, the Defendant's father has apparently been a non-entity in the Defendant's life. The Defendant's father's total absence in the Defendant's life has already been accorded some weight in that first aggregate non-statutory mitigating factor addressed herein, which also addressed the total absence of involvement of the Defendant's father in the Defendant's life. Accordingly, the Court finds that the current placement of the Defendant's father at the State Mental Hospital, while uncontroverted, does not constitute a separate non-statutory mitigating circumstance.

Accordingly, albeit that the placement of the Defendant's father is uncontroverted, the Court rejects this placement as any type of mitigator given the existence of the earlier statutory mitigator concerning the father's absence from the Defendant's life and the weight accorded thereby.

18. **The Defendant has impaired judgment.**

The Court finds that this claim is duplicative to various claims found in paragraphs 1, 2, 3, 7, 11, 12 and 13 as earlier addressed. The Court has already found that these earlier addressed non-statutory mitigators exist and accorded them appropriate weight.

The Court, finding this claim to be duplicative, declines to be reasonably convinced of its existence as an additional non-statutory mitigating factor.

19. **The Defendant has the ability to be educated.**

The Court is not reasonably convinced, from the testimony and evidence presented, of the existence of this non-statutory mitigating circumstance. Hence, the Court finds that this non-statutory mitigating factor does not exist and the Court has accorded it no weight.

20. **The Defendant has found religion.**

Albeit that there has been some testimony presented alleging a jail-house conversion, the Court finds that the Defendant's actions while incarcerated belie any such verbal claims.

The Court finds that this non-statutory mitigating factor does not exist.

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21. **The Defendant has exhibited appropriate court room behavior.**

The Court is reasonably convinced of the existence of this non-statutory mitigating factor. However, the Court gives this factor little weight.

22. **The Defendant has a learning disability.**

The Court finds that this claim is duplicative to that claim previously addressed earlier in paragraph 11, claiming that the Defendant was frustrated by his learning disability. Since the Court has already made a finding of the existence of this earlier non-statutory mitigating factor, and accorded it appropriate weight, the Court finds this enumerated claim to be duplicative and does not accord it any additional weight beyond that earlier assessed.

23. **The Defendant could be a positive role model in open prison population.**

The Courts finds that by the very wording of this claim that it is not proven from the testimony and the evidence presented. While the Court agrees that all things are possible, and that at some point in the future the Defendant could possibly be a positive role model in open prison population, the Defendant has been anything but that in the past. Indeed, the Defendant's violence against a fellow inmate and corrections staff has been nothing but negative in the extreme. The Court wholly rejects this as a non-statutory mitigator, finding that it does not exist.

24. **The Defendant has suffered from substance abuse during his adolescent and adult life.**

The Court finds that this non-statutory mitigator has been established by the testimony and the evidence presented.

The Court is reasonably convinced of the existence of this non-statutory mitigating factor, but gives it very little weight.

25. **The Defendant has shown remorse.**

The Court is not reasonably convinced, from the testimony and evidence presented, of the existence of this non-statutory mitigating circumstance.

In the Defendant's own Supplemental Amended Memorandum, under this claim, the Defense has stated: "Wright maintains that he did not commit these offenses and as

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such cannot apologize to the victims families for something he feels he is falsely accused of herein." This is also reflected by the Defendant's own statement made for the Court's consideration at sentencing: "I admitted to driving the car, but I didn't have nothing to do with that murder that took place and I feel sorry for the victims' family, but I didn't have nothing to do with the murder."

Accordingly, the Court rejects any suggestion that this Defendant is contrite or remorseful and finds that this non-statutory mitigating factor does not exist.

26. **The Defendant has the ability to recognize his mistakes.**

The Court is not reasonably convinced, from the testimony and evidence presented, of the existence of this non-statutory mitigating circumstance.

The Defendant has continued his life of crime unabated by arrests, convictions, incarcerations or sentences previously imposed. While, given the wording of this particular claim, the Court might concede that the Defendant has the ability to recognize his mistakes, he certainly does not recognize his mistakes in any fashion such that he learns therefrom or modifies his behavior accordingly.

The Court finds that this non-statutory mitigating factor does not exist and rejects this as any type of mitigator in the case at bar.

27. **The amount of evidence of proving premeditation was not great.**

The Court is not reasonably convinced of the existence of this claimed non-statutory mitigator. The Court finds that this non-statutory mitigating factor does not exist.

28. **The Defendant was punished for not meeting "society's" expectations.**

While the Court would agree that the Defendant has been punished, by numerous prison sentences, for not meeting "society's" expectations to abide by the law and not commit criminal acts, the Court rejects any averment that such punishment was not warranted. In any other regard, the Court is not reasonably convinced of the existence of this claimed non-statutory mitigator. Hence, the Court finds that this non-statutory mitigating factor does not exist.

29. **The Defendant was failed by "The System."**

The Court does not find that this claim is supported by the testimony and the evidence presented. To the contrary, it appears that "The System" has taken numerous steps throughout the Defendant's life to meet certain needs and instill certain values which the Defendant's absent parents had neglected. From the testimony and evidence presented, the Defendant had special ESE classes, evaluations, and assistance to try and help him in school; the Defendant's family was provided with supplemental SSI money (due to his learning disabilities) in order to assist him; the Defendant's contacts with the juvenile system culminated in his being put through the Boot Camp program in an attempt to instill discipline and values. The Court rejects any assertion that "The System" failed the Defendant.

The Court finds that this non-statutory mitigating factor does not exist.

31. **The Defendant is mentally retarded.**

The Court has conducted an extensive special hearing on the issue of mental retardation concerning the Defendant. The Court has found that the Defendant is not mentally retarded. The Court has found that the Defendant does not meet the criteria for mental retardation. The Court has rejected those claims by the Defense that mental retardation should somehow be found by this Court in a manner not in accordance with the law. The Court has followed the law of the State of Florida in making the determination that the Defendant is not mentally retarded, specifying on the record at the special hearing the Court's findings and underlying rationale and declines to vary from those findings as made. Hence, the Court finds that this non-statutory mitigating factor does not exist.

The Court would note that it has earlier addressed, as a non-statutory mitigating factor in paragraph 2 above, those low scores by the Defendant on full scale IQ tests and, having previously found the existence of this non-statutory mitigator, has already given that factor appropriate weight. Thus, insofar as this present claim addresses any matters previously considered by the Court as a non-statutory mitigator under paragraph 2 above, the Court finds this claim to be duplicative and does not accord it any additional weight beyond that earlier assessed.

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CONCLUSION

The Court has now addressed all of the claimed aggravating factors as well as all of the claimed statutory and non-statutory mitigating factors addressed in the Memorandums of Law submitted by the State and the Defense.

In weighing the aggravating factors against the mitigating factors, the Court well understands that the process is not simply an arithmetic one. It is not enough to weigh the number of aggravators against the number of mitigators; the process is instead more qualitative than quantitative. The Court must and does look to the nature and quality of both the aggravators and the mitigators which it has found to exist.

The Court finds that the aggravating factors in this case far outweigh the statutory and non-statutory mitigating factors. The aggravating factors in this case are appalling. Indeed, the Court finds that even in the absence of any individual aggravator as found herein, that the Court would still find that the remaining aggravators; particularly the conviction of another capital felony in the case at bar and the six (6) prior violent felony convictions (independent of the non-capital violent felonies involved in the case at bar) would, as an aggregate of remaining aggravating factors, heavily outweigh all existing statutory and non-statutory mitigators. Thus, in weighing the aggravating factors against the mitigating factors, the scales of life and death tilt unquestionably to the side of death.

PROPORTIONALITY

The Court has considered and conducted a proportionality review involving consideration of the totality of the circumstances in the case at bar, and then comparing the instant case with other death penalty cases in considering whether death is inappropriate and the sentence of life without parole is appropriate. However, having conducted such a proportionality review, the Court concludes to the contrary.

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SENTENCE

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

It is the judgment and sentence of this Court that as to Count 4 of the Indictment, the First Degree Murder of David Green, the jury having returned a Verdict that the Defendant is guilty of First Degree Murder and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm; and during the commission of the crime the Defendant actually possessed a firearm; and during the commission of the crime the Defendant discharged a firearm; and during the commission of the crime the Defendant discharged a firearm which resulted in death or great bodily harm to another; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of the Court that you, Tavares J. Wright, are hereby sentenced to death.

It is the judgment and sentence of this Court that as to Count 5 of the Indictment, the First Degree Murder of James Felker, the jury having returned a Verdict that the Defendant is guilty of First Degree Murder and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm; and during the commission of the crime the Defendant actually possessed a firearm; and during the commission of the crime the Defendant discharged a firearm; and during the commission of the crime the Defendant discharged a firearm which resulted in death or great bodily harm to another; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of the Court that you, Tavares J. Wright, are hereby sentenced to death.

It is the judgment and sentence of this Court that as to Count 1 of the Indictment, Carjacking, the jury having returned a Verdict that the Defendant is guilty of Carjacking, and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm; and during the commission of the crime the Defendant actually possessed a firearm; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of this Court that you, Tavares J. Wright, are hereby sentenced to a term of life imprisonment, running consecutive to all sentences previously imposed, or presently being served, with credit for any and all time served.

It is the judgment and sentence of this Court that as to Count 2 of the Indictment, Kidnapping, involving David Green, the jury having returned a Verdict that the Defendant is guilty of Kidnapping, and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm, and during the commission of the crime the Defendant actually possessed a firearm; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of this Court that you, Tavares J. Wright, are hereby sentenced to a term of life imprisonment, running consecutive to all sentences previously imposed, or presently being served, with credit for any and all time served.

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It is the judgment and sentence of this Court that as to Count 3 of the Indictment, Kidnapping, involving James Felker, the jury having returned a Verdict that the Defendant is guilty of Kidnapping, and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm, and during the commission of the crime the Defendant actually possessed a firearm; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of this Court that you, Tavares J. Wright, are hereby sentenced to a term of life imprisonment, running consecutive to all sentences previously imposed, or presently being served, with credit for any and all time served.

It is the judgment and sentence of this Court that as to Count 6 of the Indictment, Robbery With A Firearm, involving David Green, the jury having returned a Verdict that the Defendant is guilty of Robbery With A Firearm, and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm, and during the commission of the crime the Defendant actually possessed a firearm; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of this Court that you, Tavares J. Wright, are hereby sentenced to a term of life imprisonment, running consecutive to all sentences previously imposed, or presently being served, with credit for any and all time served.

It is the judgment and sentence of this Court that as to Count 7 of the Indictment, Robbery With A Firearm, involving James Felker, the jury having returned a Verdict that the Defendant is guilty of Robbery With A Firearm, and further finding that during the commission of the crime the Defendant carried, displayed, used, threatened to use or attempted to use a firearm, and during the commission of the crime the Defendant actually possessed a firearm; the Court adjudicates you to be guilty of that offense and it is the judgment and sentence of this Court that you, Tavares J. Wright, are hereby sentenced to a term of life imprisonment, running consecutive to all sentences previously imposed, or presently being served, with credit for any and all time served.

Insofar as Counts 1, 2, 3, 6, and 7 of the Indictment, the Court has accepted and reviewed the filed Stipulation to Sentencing Scoresheet agreed to by the State and the Defense, with the Court today signing and filing a guidelines scoresheet reflecting Total Sentence Points of 628.8, with the lowest permissible prison sentence being 450.6 months and the maximum sentence being life in prison, such that the instant sentences on Indictment Counts 1, 2, 3, 6 and 7 are guideline sentences.

Given the death sentences imposed, the Court simply reserves jurisdiction for determination at subsequent Hearings, upon Motion of the State, of any sought imposition of restitution, fines, or costs.

In accordance with the death sentences imposed, it is further **ORDERED AND ADJUDGED** that you, Tavares J. Wright, will be taken by the proper authorities and transported to the Department of Corrections to be securely held by them on death row in Florida State Prison and there to be kept under close confinement until the date of your execution is set and until the sentence can be executed as provided for by law.

It is **ORDERED** that on such scheduled date of execution that you, Tavares J. Wright, shall be put to death for the murder of David Green and the murder of James Felker.

MAY GOD HAVE MERCY ON YOUR SOUL.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED at Bartow, Polk County, Florida, this 12TH day of October, 2005.

DICK PRINCE
Circuit Court Judge

copies furnished to:
John Aguero, Esquire, Assistant State Attorney
Byron P. Hileman, Esquire, Defense Counsel
David Carmichael, Esquire, Defense Counsel
Tavares J. Wright, Defendant

I certify that a copy of this order has been furnished to the State Attorney and the Defense Attorney, this 12 day of Oct. 2005.
RICHARD M. WEISS, Clerk of Courts
By Marsha Lynn
Deputy Clerk

FILED AND RECORDED
BOOK _____ PAGE _____
OCT 12 2005
RICHARD M. WEISS, CLERK
BY _____

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