

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

ADRIENNE JOY SHEPHERD
FLORIDA BAR NUMBER 1000532
SHEPHERD@CCMR.STATE.FL.US

ALI A. SHAKOOR
FLORIDA BAR NUMBER 0669830
SHAKOOR@CCMR.STATE.FL.US

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 NORTH TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
(813) 558-1600

Counsel for Petitioner

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Wright v. Sec'y, Dep't of Corr., 20-13966, 2021 WL 5293405
(11th Cir. Nov. 15, 2021).

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13966

TAVARES J WRIGHT,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:17-cv-00974-WFJ-TGW

Before WILLIAM PRYOR, Chief Judge, JORDAN, and LUCK, Circuit Judges.

PER CURIAM:

In April of 2000, as part of a multi-day crime spree involving burglary, attempted murder, and carjacking, Tavares Wright and Samuel Pitts kidnapped David Green and James Felker in Lakeland, Florida. Shortly after the kidnappings, Mr. Wright murdered Mr. Green and Mr. Felker. *See Wright v. State*, 19 So.3d 277, 283–91 (Fla. 2009) (*Wright I*) (setting out the chronology of the crimes in detail).

After two mistrials, Mr. Wright was eventually convicted for those murders. He received two death sentences based on his convictions, and he now appeals the district court’s denial of his habeas corpus petition, which was filed pursuant to 28 U.S.C. § 2254.

We granted Mr. Wright a certificate of appealability on whether he is intellectually disabled and therefore ineligible for the death penalty under the Eighth Amendment. Following a review of the record, and with the benefit of oral argument, we affirm the district court’s denial of habeas relief on the intellectual disability claim.¹

¹ As we write for the parties, we assume their familiarity with the record. We therefore set out the procedural history and the facts only as necessary to explain our decision.

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I

Florida defines intellectual disability as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.” Fla. Stat. § 921.137(1) (2021). As Mr. Wright acknowledges, *see* Appellant’s Br. at 9, this definition comports with the standard set out by the Supreme Court in *Hall v. Florida*, 572 U.S. 701, 710 (2014).

On post-conviction review, the Florida Supreme Court found that Mr. Wright is not intellectually disabled, but the United States Supreme Court vacated and remanded for consideration of the intellectual disability issue in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017). *See Wright v. State*, 213 So.3d 881 (Fla. 2017) (*Wright II*), *vacated and remanded*, 138 S. Ct. 360 (2017) (Mem). On remand, the Florida Supreme Court again concluded that Mr. Wright is not intellectually disabled for two reasons. First, he “failed to prove significant subaverage intellectual functioning by clear and convincing evidence. For instance, on his July 15, 2005, IQ test, [he] scored an 82 with a range of 79-86, which is well above the approximation for [intellectual disability].” *Wright v. State*, 256 So.3d 766, 772 (Fla. 2018) (*Wright III*). Second, he “failed to prove adaptive deficits by clear and convincing evidence.” *Id.* at 778.

II

After the Florida Supreme Court’s decision in *Wright III*, the district court denied Mr. Wright’s amended petition for habeas relief. With respect to the Eighth Amendment intellectual disability

claim—which is the only claim before us—the district court concluded that it reasonably determined that Mr. Wright was not intellectually disabled for Eighth Amendment purposes, and that the Florida Supreme Court came to that determination in a manner consistent with controlling U.S. Supreme Court precedent.

On appeal, Mr. Wright asserts that the district court erred. First, he argues that the state court record proves by clear and convincing evidence that he is intellectually disabled and therefore ineligible for execution under the Eighth Amendment, as interpreted by *Atkins v. Virginia*, 536 U.S. 304 (2002). Second, and relatedly, he argues that the Florida Supreme Court’s resolution of his intellectual disability claim was an unreasonable application of clearly established law as set forth in *Atkins*, *Hall*, and *Moore*.

III

The district court’s denial of Mr. Wright’s habeas petition is subject to plenary review. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1313 (11th Cir. 2014). But under the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), Mr. Wright is entitled to relief only if the Florida Supreme Court’s adjudication of his intellectual disability claim was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or was “based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)–(2). This standard is “difficult to meet.” *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013) (internal quotation marks omitted).

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A defendant in Florida must demonstrate intellectual disability by clear and convincing evidence. *See* Fla. Stat. § 921.137(4). A determination as to intellectual disability is a finding of fact. *See Fults*, 764 F.3d at 1319. As a result, the Florida Supreme Court’s finding that Mr. Wright is not intellectually disabled is “presumed to be correct,” and he has the burden of “rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). *See Fults*, 764 F.3d at 1319.

Mr. Wright’s factual and legal arguments are intertwined. For purposes of clarity, we will first address the contention that the Florida Supreme Court unreasonably applied clearly established federal law. We will then consider the assertion that the Florida Supreme Court made an unreasonable determination of fact in concluding that he is not intellectually disabled.

IV

On the legal side, Mr. Wright does not claim that the Florida Supreme Court’s decision in *Wright III* was contrary to clearly established federal law; rather, he argues that it was an unreasonable application of that law. Under § 2254(d)(1)’s unreasonable-application clause, a prisoner is entitled to habeas relief only if “the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the case.” *Fults*, 764 F.3d at 1314 (cleaned up and citation omitted). An unreasonable application of clearly established federal law “must be objectively unreasonable, not merely wrong.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal quotation

marks and citation omitted). “[E]ven clear error will not suffice.” *Id.* (internal quotation marks and citation omitted). So, to obtain habeas relief, a “prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement.” *Id.* at 419–20 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Again, Mr. Wright contends that the Florida Supreme Court unreasonably applied the legal principles established in *Atkins*, *Hall*, and *Moore* to the facts of his case. As explained below, we disagree.

A

In *Atkins*, the Supreme Court held that executing intellectually disabled individuals violates Eighth Amendment protections against cruel and unusual punishment. But it tasked the states with developing appropriate ways to enforce this constitutionally-mandated restriction. *See* 536 U.S. at 317.

The Court in *Hall* clarified that states do not have “unfettered discretion to define the full scope of the constitutional protection,” but instead must establish a legal framework for determining intellectual disability that is “informed by the medical community’s diagnostic framework.” *Hall*, 572 U.S. at 719–21 (striking down Florida’s strict IQ cutoff as conclusive of intellectual disability without allowing for consideration of other evidence that may indicate intellectual disability).

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Hall recognized, consistent with clinical standards, that IQ scores are imprecise and best measured as a range rather than a single numerical score. *See id.* at 720. It further made clear 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 723. And it reaffirmed, as noted in *Atkins*, that “the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.” *Id.* at 710.

Moore then expanded on the second criterion of this definition and emphasized the importance of adhering to contemporary clinical standards in analyzing adaptive deficits. *See Moore*, 137 S. Ct. at 1053. There, a Texas appellate court had denied a defendant relief after relying on a seven-factor judicial test for determining intellectual disability. *See id.* at 1051 (rejecting the application of those factors to determine intellectual disability). The Supreme Court noted that the seven-factor test advanced lay perceptions—and outdated ones at that—of intellectual disability. *See id.* It rejected this approach as inconsistent with the rule established in *Hall*, and it criticized the Texas appellate court’s analysis of Bobby Moore’s adaptive functioning for “deviat[ing] from prevailing

clinical standards and from the older clinical standards the court claimed to apply.” *Id.* at 1050.

The Texas appellate court, the Supreme Court explained, had “overemphasized [Mr.] Moore’s perceived adaptive strengths” when it concluded that he did not suffer significant adaptive deficits. *Id.* This was problematic because “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.” *Id.* (emphasis in original).

Moore was in many ways a straightforward application of *Hall*. But it also emphasized that adaptive deficits—specifically, “significant limitations in conceptual, social, or practical adaptive skills,” *id.* (quoting American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 47 (11th ed. 2010) (AAIDD-11)), are “not outweighed by the potential strengths in some adaptive skills.” *Id.* See also *id.* (“deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits”) (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 38 (5th ed. 2013) (DSM-5)).

With these legal principles in mind, we now turn to the Florida Supreme Court’s decision in *Wright III*.

B

Mr. Wright first challenges the Florida Supreme Court’s finding with respect to prong one of the Florida statute, which mimics the first criterion of the widely accepted diagnostic

framework: significantly subaverage general intellectual functioning. *See* Fla. Stat. § 921.137(1). The Florida statute defines the statutory phrase “significantly subaverage general intellectual functioning” as “performance that is two or more standard deviations from the mean score on a standardized intelligence test.” *Id.* The medical approximation of significant subaverage intellectual functioning is therefore an IQ score of 70, give or take. But *Hall*, of course, instructs that courts must account for a standard error of measurement (SEM), which here is a range of plus or minus five points. *See Hall*, 572 U.S. at 720. *See also* DSM-5, at 37.

The record reflects that Mr. Wright took a total of nine IQ tests, beginning at age 10. We consider six of these tests in determining whether Mr. Wright had subaverage intellectual functioning for the purpose of capital sentencing, and these six reported scores are between 75 and 82. *See* Appellant’s Br. at 13–15.²

² Two of the nine tests were Weschler Abbreviated Scale of Intelligence (WASI) tests, which Mr. Wright contends cannot be considered in the context of capital punishment because the WASI is not explicitly listed as a permissible test in Fla. Admin. Code. R. 65G-4.011(1). *See* Appellant’s Br. at 14 n. 10. We assume, without deciding, that the WASI tests should not be taken into account because even without these tests Mr. Wright’s contention fails.

A third test score, administered in 2014 while Mr. Wright was incarcerated, was unusually low. This was due (depending on which version of the facts one believes) to either Mr. Wright’s malingering or the state expert’s use of a non-standardized test procedure which fatigues the test taker. Again, we assume for the sake of argument that this third test also should not be considered.

Accounting for the SEM in a manner most favorable to Mr. Wright (in other words, assuming every test score was improperly inflated by five points), he still scored above 70 on all but two of the tests. *See* D.E. 36 at 15, 89, 102–03. This led the postconviction trial court, after remand due to *Hall*, to find that these IQ scores did not demonstrate by clear and convincing evidence that Mr. Wright had significant subaverage general intellectual functioning. *See* D.E. 37 at 122. As we explained earlier, the Florida Supreme Court ruled in *Wright III* that this finding was supported by substantial evidence. *See* 256 So.3d at 772.

Mr. Wright now asserts that the Florida Supreme Court in *Wright III* disregarded *Hall* and instead misconstrued IQ as a single number (rather than a range) when it focused on his highest score of 82 and failed to explicitly mention any of his other scores. This is an incorrect reading of *Hall*—and of *Wright III*—for a couple of reasons.

First, even when Florida courts used the strict-cutoff rule for determining intellectual disability (the approach struck down in *Hall*), they still considered multiple scores. *See Hall*, 572 U.S. at 734 (Alito, J., dissenting) (noting that Florida accounted for risk of error by analyzing multiple test results). *Hall* did not establish any rule regarding how to weigh IQ tests when a person takes several of them; it instead held that “[e]ven when a person has taken multiple tests, each separate score must be assessed using the SEM” *Id.* at 714. And that is precisely what the Florida Supreme Court in *Wright III* did with respect to Mr. Wright’s highest score of 82—it noted this score reflected “a range of 79-86, which is well above the

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approximation for [intellectual disability].” *Wright III*, 256 So.3d at 772.

Second, the Florida Supreme Court did not limit its analysis to Mr. Wright’s highest score of 82. It noted in *Wright III* that the most favorable evidence of Mr. Wright’s IQ range, adjusted for the SEM, “dipped 1 point beneath 70” at “the lowest end of the range.” *Id.* It also referenced “numerous IQ test scores above 70,” and considered testimony from two competing experts. *Id.*

On this record we cannot conclude that *Wright III* was an unreasonable application of *Hall*. This is particularly so because the postconviction trial court found that though Mr. Wright failed to establish subaverage intellectual functioning, his scores did “fall within the test’s acknowledged and inherent margin of error,” and he therefore was entitled to present evidence of adaptive deficits. *See* D.E. 37 at 122. And this is consistent with *Hall*. The Florida courts’ approach here did not “fail[] to take into account the standard error of measurement,” nor did it “bar[] an essential part of a sentencing court’s inquiry into adaptive functioning.” *Hall*, 572 U.S. at 724 (Alito, J., dissenting). Instead, the record reflects that Mr. Wright “ha[d] the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.” *Id.*

C

Before we turn to the arguments regarding the adaptive-deficits prong, we will consider one final claim Mr. Wright raises with respect to the subaverage-intellectual-functioning prong. Mr.

Wright asserts that the Florida courts unreasonably applied the *Hall* command that the legal determination of intellectual disability be “informed by the medical community’s diagnostic framework” by failing to account for the so-called Flynn effect. *See* 572 U.S. at 721. The Flynn effect describes an upward drift in IQ scores over time. Under this theory, a person’s score can be artificially higher if he takes an IQ test several years after the test was normed on the population. *See Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019). *See also* AAIDD-11, at 37 (“Because Flynn reported that mean IQ increases about 0.33 points per year, some investigators have suggested that any obtained IQ score should be adjusted 0.33 points for each year the test was administered after the standardization was completed.”) (cleaned up).

Mr. Wright first took an IQ test at age 10, in 1991, and he received a score of 76. Dr. Mary Kasper, an expert witness for the defense, testified that the IQ test he took that year was normed on the population in 1972, 19 years before the test. With a Flynn adjustment, Mr. Wright’s first score would therefore be 70. And his score of 75, which he received at age 16 in 1997, would drop down to a 69. Mr. Wright says that these scores are the most accurate and reliable indicators of his true IQ.

We have, as Mr. Wright recognizes, previously held that courts need not “accept and apply the Flynn effect.” *Ledford v. Warden, Ga. Diagnostic and Classification Prison*, 818 F.3d 600, 636 (11th Cir. 2016). *See also id.* at 637 (“[O]ur Circuit . . . leaves it to the fact-finder court to hear and consider the Flynn effect

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evidence and to make its own fact-findings about the credibility and weight of the expert evidence regarding the Flynn effect.”). And we have observed that “there is no consensus about the Flynn effect among experts or among the courts.” *Raulerson*, 928 F.3d at 1008. Mr. Wright contends that there is now a general consensus in the clinical manuals that Flynn adjustments are the best practice—but he also acknowledges that not every expert in the field of intellectual disability holds the same opinion. Compare Leigh D. Hagan et al., *IQ Scores Should Not Be Adjusted for the Flynn Effect in Capital Punishment Cases*, 28 Journal of Psychoeducational Assessment 474 (2010), with Jack M. Fletcher, et al., *IQ Scores Should Be Corrected for the Flynn Effect in High-Stakes Decisions*, 28 Journal of Psychoeducational Assessment 469 (2010).

Only five years have elapsed since we rejected the same argument from the defendant in *Ledford*, see 818 F.3d at 637–39, and we are not persuaded that the medical consensus has changed since then. Indeed, one of the clinical manuals that Mr. Wright cites to buttress his Flynn-effect argument is the same edition of the same clinical manual cited by the defendant in *Ledford*—the DSM-5. See *Ledford*, 818 F.3d at 637.

Mr. Wright also cites to the AAIDD-11, which does not appear to have been part of the evidentiary record in *Ledford*. But that alone does not convince us that the general medical consensus has changed. Just two years ago, in *Raulerson*, we again rejected a Flynn-effect argument, explaining that “[n]o adjustment for the Flynn effect is required in this Circuit.” *Raulerson*, 928 F.3d at 1008

(noting that two psychologists who had administered the defendant's IQ tests "testified that they would not apply the Flynn effect to the scores"). Mr. Wright acknowledges the holdings in *Ledford* and *Raulerson*, and then asks us to reach a different conclusion. But he does not in his brief attempt to explain how the medical consensus has changed since those cases. And if nothing has changed, *Ledford* and *Raulerson* constitute binding precedent for us as a later panel.

Having concluded that the Florida Supreme Court in *Wright III* did not unreasonably apply clearly established federal law in analyzing the intellectual-functioning prong, we now turn to Mr. Wright's arguments concerning the adaptive-deficits prong.

D

Mr. Wright contends that the district court erred in its analysis of adaptive deficits—the second prong of both the Florida statute and the widely accepted diagnostic framework. As *Moore* recognized, "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*," rather than adaptive strengths. 137 S. Ct. at 1050. Adaptive deficits are defined as "the inability to learn basic skills and adjust behavior to changing circumstances." *Hall*, 572 U.S. at 710. *Moore* cautioned courts, pursuant to clinical recommendations, to not focus too heavily "on adaptive strengths developed 'in a controlled setting,'" such as a prison. 137 S. Ct. at 1050 (citations omitted).

The DSM-5 and the AAIDD-11 divide adaptive functioning into three categories: conceptual, social, and practical. *See* AAIDD-11, at 43; DSM-5, at 37. Adaptive deficits exist when at least one of the three domains “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.” DSM-5, at 38.

According to Mr. Wright, the Florida Supreme Court in *Wright III* unreasonably applied *Moore* by overemphasizing expert- and lay-witness testimony of his perceived adaptive strengths while disregarding evidence of his deficits in all three categories of adaptive behavior. The Florida Supreme Court compounded this error, Mr. Wright argues, by relying too heavily on his prison behavior in its analysis.

The Florida Supreme Court noted that *Moore* was unclear in instructing courts as to what degree of emphasis on adaptive strengths constitutes overemphasis. It described “the difficult position that the States are placed in due to the Supreme Court’s lack of clear guidance on this analysis” and due to its directive that states should “interpret and follow two clinical manuals that caution people like us from making untrained ID diagnoses.” *Wright III*, 256 So.3d at 776 n.9. While acknowledging that *Wright II* had indeed discussed some of Mr. Wright’s adaptive strengths and behavior in prison, the Florida Supreme Court nonetheless concluded in *Wright III* that the decision in *Wright II* boiled down to “the competing expert medical testimony of [state expert] Dr. Gamache and

[defense expert] Dr. Kasper,” whose testimony was based on “current medical standards.” *Id.* at 775, 777. Notably, the Florida Supreme Court in *Wright III* found that *Wright II* did not “independently weigh[] strengths and deficits,” like the Texas appellate court had done in *Moore*, nor did it base its decision on outdated standards and nonclinical factors. *Id.*

The Florida Supreme Court did not unreasonably apply *Moore*. Though *Wright III* certainly criticized *Moore*, it also spent several pages distinguishing its decision in *Wright II* from the Texas appellate court’s decision in *Moore*. And the distinctions it made were plausible. For example, with respect to the overemphasis-on-adaptive-strengths issue, the Florida Supreme Court pointed out that even though it considered some expert testimony that detailed strengths in certain areas, “much of the evidence that the [*Wright II*] opinion detailed was directly relevant to the conceptual domain,” whereas the Texas appellate court in *Moore* had “used completely unrelated adaptive strengths . . . to outweigh the extensive evidence of adaptive deficits in all three domains.” *Id.* at 777 (citing *Moore*, 137 S. Ct. at 1045–47). The key difference, as the Florida Supreme Court saw it, was that in *Wright II* it did not “arbitrarily offset deficits with unconnected strengths” but instead “relied on expert testimony with regard to connected adaptive deficits and the postconviction court’s credibility determinations.” *Id.*

This is not an unreasonable application of *Moore*. The record does not reflect that there was overwhelming evidence of

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adaptive deficits that the Florida Supreme Court disregarded in favor of lay perceptions about adaptive strengths.

With respect to the prison-behavior issue, the Florida Supreme Court in *Wright III* again criticized *Moore*, noting that it is likewise difficult to know where the Supreme Court drew the line for reliance on prison conduct. *See* 256 So.3d at 777–78. It then pointed out that the only portion of its decision in *Wright II* where it discussed prison conduct was when it recited the findings of the state expert, Dr. Gamache. *Id.* at 777. Mr. Wright asserts that Dr. Gamache primarily based his opinion on a single interview with him while he was imprisoned, and that therefore the Florida Supreme Court’s reliance on this opinion contradicts *Moore*.

We do not agree. In addition to what we’ve summarized, the Florida Supreme Court relied heavily on evidence from outside of the prison context—and, to the extent that it relied on some behavior within the prison, it did not stress “improved behavior in prison” the way that the Texas appellate court did in *Moore*. 137 S. Ct. at 1050. Indeed, it was this “improved behavior in prison” that the Texas appellate court in *Moore* used to justify disregarding evidence of adaptive deficits from earlier in the defendant’s life. *Id.* The Florida Supreme Court, on the other hand, “merely listed connected facts that Dr. Gamache relied upon to render his medical conclusion that [Mr.] Wright does not have adaptive deficits.” *Wright III*, 256 So.3d at 777.

It is also worth pointing out that the Supreme Court decided *Moore* on direct review, rather than on federal collateral review,

where AEDPA requires substantial deference. *See Clemons v. Commissioner, Al. Department of Corrections*, 967 F.3d 1231, 1250 (11th Cir. 2020). Here we must find not only that the Florida Supreme Court erred, but that its application of *Moore* was “objectively unreasonable,” *White*, 572 U.S. at 419 (internal quotation marks omitted), and we are confident that it was not.

V

On the factual side, Mr. Wright argues that the state court record proves by clear and convincing evidence that he is intellectually disabled and thus ineligible for execution under *Atkins*, 536 U.S. 304. We conclude that the Florida Supreme Court’s finding to the contrary was not an unreasonable determination of fact in light of the evidence presented in the state court proceedings and that Mr. Wright has not rebutted by clear and convincing evidence the presumption of correctness given to that factual finding.

Mr. Wright acknowledges that he has a mild level of disability but argues that it nonetheless precludes his execution. As discussed earlier, he asserts that the postconviction trial court improperly interpreted his IQ scores, and that the scores he received should not be given equal evidentiary weight. In fact, he says, the postconviction trial court should have discounted four of them as unreliable indicators of his IQ because they were either artificially inflated by the practice effect or because he achieved them after the developmental stage.

In analyzing the subaverage intellectual functioning prong, the postconviction court considered competing expert testimony from Dr. Kasper and Dr. Gamache, as well as numerous IQ scores above 70 (after SEM adjustments) to determine that there was competent and substantial evidence for it to find that Mr. Wright “failed to prove significant subaverage intellectual functioning.” *See Wright III*, 256 So.3d at 772. For several reasons, this was not an unreasonable determination of fact.

First, as we said above, the medical approximation of significant subaverage intellectual functioning is an IQ score of 70, give or take. Mr. Wright’s scores ranged from 75 to 82. Even accounting for the SEM adjustment, it was not unreasonable for the postconviction court and the Florida Supreme Court to find, based on Mr. Wright’s scores, that he did not meet the significant subaverage intellectual functioning prong. *Cf. Clemons*, 967 F.3d at 1248–49 (state court’s finding that defendant failed to show significantly subaverage intellectual functioning when his scores ranged from 51 to 84 was not an unreasonable determination of fact).

Second, the state’s expert, Dr. Gamache—who administered one of Mr. Wright’s IQ tests—had expressed concerns in his testimony that Mr. Wright malingered on both that test and his previous tests. He also opined that “one can malingering and fake a low IQ” but one “cannot fake a higher IQ.” *Wright II*, 213 So.3d at 898. This testimony could reasonably be viewed by the postconviction trial court as more credible and persuasive than that of Mr. Wright’s expert, Dr. Kasper, who testified about the practice effect. *Cf.*

Clemons, 967 F.3d at 1249 (allowing state courts to take into account expert opinions that the defendant was malingering).

The postconviction trial court also considered Dr. Kasper’s testimony regarding the practice effect. Dr. Kasper testified that the most accurate range of scores for Mr. Wright was derived from his first IQ examination in 1991, which yielded a score of 76 (between a 69 and 82, she testified, if one applies the SEM to a 95 percent confidence interval). *See Wright II*, 213 So.3d at 897–98. And even Dr. Kasper conceded that the score of 82 was within the 95 percent confidence interval she determined from applying the SEM to Mr. Wright’s first exam. *See id.* at 898. Based on this testimony, and the scores themselves, we cannot conclude that the postconviction trial court made an unreasonable determination of fact with respect to the subaverage-intellectual-functioning prong, or that the Florida Supreme Court erred in affirming that finding.

The same is true of the postconviction trial court’s factual findings regarding the adaptive-deficits prong. Here, again, the postconviction trial court was faced with “the competing expert medical testimony of Dr. Gamache and Dr. Kasper,” *Wright III*, 256 So.3d at 777, and it chose to credit Dr. Gamache’s testimony over Dr. Kasper’s. Dr. Gamache testified that Mr. Wright has some deficits in reading and writing skills but attributed them to a lack of education and a learning disability rather than to an intellectual disability. *See Wright II*, 213 So.3d at 899. Dr. Gamache did point to some adaptive strengths in explaining why these deficits do not rise to the level required for a determination of intellectual disability.

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See id. at 899–900. But, as explained above, we think it is reasonable to read *Moore* as stopping short of precluding courts from considering *any* evidence of adaptive strengths, especially when those adaptive strengths are directly relevant—in an expert’s view—to disproving adaptive deficits.

The postconviction trial court also explained at length why it disregarded the testimony of Mr. Wright’s expert, Dr. Kasper, who had conceded that she had not administered the standardized test for adaptive functioning in “the normal way.” *Id.* at 900. This gave the court “great pause in considering its validity,” and we do not view that as an unreasonable determination of fact. *Id.* As a result, the denial of Mr. Wright’s intellectual disability claim by the postconviction trial court and the Florida Supreme Court in *Wright III* was not based on an unreasonable determination of the facts.

VI

We affirm the district court’s denial of Mr. Wright’s petition for a writ of habeas corpus.

AFFIRMED.

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX B

United States District Court for the Middle District of Florida
August 19, 2020 “Order Denying Amended Petition”

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

TAVARES J. WRIGHT,

Petitioner,

v.

Case. No: 8:17-cv-974-T-02TGW

SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

_____ /

ORDER DENYING AMENDED PETITION

Tavares Wright received two death sentences for two murders during a crime spree in Polk County in 2000. He files this petition for relief from those sentences under 28 U.S.C. § 2254. The Court has before it Wright's amended petition and memorandum in support, Docs. 36, 37, and 38, the State's response, Doc. 42, and Wright's reply, Doc. 46. With the benefit of full briefing on both sides, the Court finds that a hearing is unnecessary and denies the amended petition.

FACTUAL BACKGROUND

The underlying events took place over a period of several days. The Florida Supreme Court¹ provided the factual details accurately here based upon the undersigned's reading of the trial transcript:

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.

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.

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

¹ *Wright v. State*, 19 So. 3d 277, 283–91 (Fla. 2009) (*Wright I*).

complex based on reports of a man matching Wright's description brandishing a firearm.

³ 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.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.

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

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.

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.

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 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 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

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.

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.

⁷ Wright refused to testify about the details of the 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 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.⁸

⁸ 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 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.⁹

⁹ 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 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.

¹⁰ 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 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 underlying case history is as follows: Petitioner was charged on May 11, 2000 with carjacking, two counts of kidnapping, two counts of robbery, and two counts of first degree murder. A2 at 341–47.² The case was mis-tried twice, once for an evidentiary mishap during trial, and the second one due to a jury deadlock. On the third trial in late 2004, the jury convicted Petitioner of all counts. A4 at 707–15. Petitioner waived jury at the penalty phase. A33 at 5047–123. On October 12, 2005 the trial court entered its sentencing order, imposing the death sentence for the two murders. The trial court found four aggravating circumstances, three statutory mitigating circumstances, and several nonstatutory mitigating circumstances.³

The Florida Supreme Court affirmed on direct appeal, with the factual recitation set forth above. *Wright I*, 19 So. 3d at 283. Petitioner underwent a full

² The physical record, in five boxes in good order, is indexed at Doc. 43. The trial record on appeal bears prefix “A.” The postconviction record has prefix “B.” The U.S. Supreme Court certiorari record has a “C” prefix.

³ The four statutory aggravating circumstances were 1) previous conviction of another capital felony or felony involving violence to the person (great weight); 2) felony for pecuniary gain (no weight); 3) homicide committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight); and 4) felony committed for purpose of avoiding or preventing lawful arrest (great weight). The trial court found three statutory mitigating circumstances, and gave them some weight: 1) offense committed under the influence of extreme mental or emotional disturbance; 2) Petitioner’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and 3) Petitioner was 19 years old at the time of the homicides. Petitioner offered approximately 34 non-statutory mitigating circumstances and the Court found several including those related to Petitioner’s low IQ, low self-esteem, emotional deprivation during his upbringing, substance abuse, neurological impairments, which affected his impulse control and reasoning ability, lack of mature coping skills, and lack of capacity to develop mature, health relationships. *Wright I*, 19 So. 3d at 290 n.16.

round of state collateral review with no success, some of which is discussed below when it is pertinent to one or more grounds for relief. Petitioner now brings this amended petition for federal habeas relief under 28 U.S.C. § 2254, Doc. 36, and memorandum in support. Doc. 38. The State has filed a response, Doc. 42, to which Petitioner replied. Doc. 46.

The standards by which this petition is adjudged are set forth as follows: Because it was filed after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (“AEDPA”). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003).

Under the AEDPA, a writ of habeas corpus cannot be granted unless the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). To exhaust state remedies, the petitioner must “fairly present” his claims to the state’s highest court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). A claim is “fairly presented” if the petitioner has described the operative facts and the federal legal theory on which his claim is based so that the state courts have a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 275–

78 (1971). Unless the petitioner clearly alerts the state court that he is alleging a specific federal constitutional violation, he has not fairly presented the claim. A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or federal case law, or by citing state cases that explicitly analyze the same federal constitutional claim. *Howell v. Mississippi*, 543 U.S. 440, 443–44 (2005).

A habeas petitioner’s claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729–30. Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and “the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.” *Id.* at 735 n.1.

The AEDPA established a “substantially higher threshold for habeas relief” with the “acknowledged purpose of ‘reducing delays in the execution of state and federal criminal sentences.’” *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA’s “‘highly deferential standard for evaluating state-court rulings,’ demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S.

19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim “adjudicated on the merits” by the state court unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision regarding a claim. *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1605–06 (2016) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991)).

“The threshold question under the AEDPA is whether [a petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final.” *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the “clearly established Federal law,” if any, that governs the sufficiency of the claims on habeas review. “Clearly established” federal law consists of the holdings of the Supreme Court at the time the petitioner’s state court conviction became final. *Williams*, 529 U.S. at 412; see *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is “contrary to” the Supreme Court’s clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405–06; see *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the “contrary to” prong, the Court has observed that “a run-of-the-mill state-court decision applying the correct legal rule from [the Supreme Court’s] cases to the facts of the prisoner’s case would not fit comfortably within § 2254(d)(1)’s ‘contrary to’ clause.” *Williams*, 529 U.S. at 406.

Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas court may grant relief where a state court “identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . . case” or “unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to find a state court’s

application of Supreme Court precedent “unreasonable” under § 2254(d)(1), the petitioner must show that the state court’s decision was not merely incorrect or erroneous, but “objectively unreasonable.” *Id.* at 409; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller–El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller–El II*). A state court decision “based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]” *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller–El I*). In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the “burden of rebutting this presumption by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *Miller–El II*, 545 U.S. at 240. However, only the state court’s factual findings, not its ultimate decision, are subject to 2254(e)(1)’s presumption of correctness. *Miller–El I*, 537 U.S. at 341–42 (“The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.”).

PETITIONER’S GROUNDS ONE, TWO, AND THREE

These three grounds comprise the bulk of the petition. They address Petitioner’s mental status and claimed intellectual disability. They are related, and

the Court combines them here for discussion. Ground I, which spans 82 pages of the 160-page petition, seeks relief because Petitioner is intellectually disabled and thus may be not be put to death under the eighth amendment to the U.S.

Constitution.⁴ Ground II seeks relief because Florida Statutes § 921.137(4),⁵ which requires a defendant in the death phase to establish intellectual disability by clear and convincing evidence, imposes a standard of proof upon a defendant that violates the defendant's due process rights under the fifth, sixth, eighth and fourteen amendments.⁶

⁴ To quote the petition: "Ground One: Wright is intellectually disabled, and his execution is barred by the eighth amendment of the United States Constitution. The state court's resolution of Wright's claim was an unreasonable application of clearly established federal law, including *Atkins v. Florida*, 536 U.S. 304, *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). Further, the state court made an unreasonable determination of the facts in light of the state court record." Doc. 36 at 9.

⁵ This statute, entitled "Imposition of the death sentence upon an intellectually disabled defendant prohibited" states in pertinent part: "After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony . . . the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability . . . the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination."

⁶ To quote the petition: "Ground Two: Fla. Stat. § 921.137(4) is unconstitutional and violates Wright's due process rights as protected by the fifth, sixth, eighth, and fourteen amendments to the United States Constitution. The state court's resolution of Wright's claim was an unreasonable application of clearly established federal law. Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record." Doc. 36 at 91.

Ground III also addresses mental disability. It alleges that trial counsel provided ineffective assistance of counsel by failing adequately to present mitigation evidence (related to mental disability) at the penalty phase.⁷

Procedural Background of these Claims: After conviction below, Petitioner waived the jury recommendation in the penalty phase, and the jury was discharged. During the penalty hearing, Petitioner filed a motion to bar the death penalty due to intellectual disability (“ID”), then known under the term “mental retardation.” A5 at 743–44. The trial court conducted a lengthy penalty phase hearing, receiving several mental health expert witnesses, including two retained by Petitioner and two that the Court appointed. The Court found Petitioner was not intellectually disabled, primarily due to his tested IQ of 75, 77, and 82.⁸ The Court did not consider adaptive functioning specifically at this penalty phase. A5 at 829. Petitioner did not bring this point on direct appeal. *Wright I.*

In his postconviction proceedings, Petitioner received a first hearing, in October 2012 lasting several days, on his collateral ID claims and other trial-

⁷ To quote the petition: “Ground Three: Wright received prejudicial ineffective assistance of counsel at the penalty phase of his trial when trial counsel failed to adequately investigate, prepare and present available mitigation. The state court’s resolution of Wright’s claim was an unreasonable application of clearly established law, including *Strickland v. Washington*, 366 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), *Porter v. McCollum*, 558 U.S. 30 (2009), *Sears v. Upton*, 130 S. Ct. 3259 (2010), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 93.

⁸ A5 at 755, 789, 791.

related claims. He called multiple witnesses. The state circuit court ruled against Petitioner after this hearing, in a lengthy order. Doc. 37 at 26–116. But during the pendency of Petitioner’s appeal from this ruling, the U.S. Supreme Court issued its opinion in *Hall v. Florida*, in which it held Florida’s intellectual disability scheme unconstitutional insofar as it equated adaptive functioning to a strict IQ score requirement. 572 U.S. 701, 704–05 (2014). Thereafter, the Florida Supreme Court relinquished jurisdiction of Petitioner’s appeal and allowed him to file a renewed motion for determination of ID with the postconviction court.

After Petitioner refiled his postconviction ID motion post-*Hall*, the postconviction court granted a renewed evidentiary hearing on ID, where the court heard from additional witnesses, including more mental health experts. Doc. 37 at 118–29. The state circuit court denied Petitioner’s renewed motion in 2015, *id.*, and Petitioner appealed.

The result of the appeal was a detailed opinion, *Wright II*, in which the Florida Supreme Court undertook a very detailed examination of the record on Petitioner’s ID claims, and stated: “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.” *Wright v. State*, 213 So. 3d 881, 902 (Fla. 2017) (*Wright II*), cert. granted, vacated and remanded, 138 S. Ct. 360 (2017).

Two weeks after the Florida Supreme Court issued *Wright II*, the U.S. Supreme Court issued an opinion out of Texas on capital punishment intellectual disability issues, *Moore v. Texas*, 137 S. Ct. 1039 (2017). *Moore* was issued in spring 2017. Petitioner filed a certiorari petition from *Wright II* that the Supreme Court first addressed upon returning from their 2017 summer recess. That Court granted, vacated, and remanded (“GVR”) *Wright II* in light of *Moore*. *Wright II* thus came back on remand to the Florida Supreme Court in late 2017 without opinion for reconsideration in light of *Moore*. *Wright v. Florida*, 138 S. Ct. 360 (2017). The Florida Supreme Court then issued *Wright III*. *Wright v. State*, 256 So. 3d 766 (Fla. 2018) (*Wright III*).

In *Wright III* the Florida Supreme Court first discussed, correctly, that the “GVR” remand after *Moore* was not a merits determination nor precedential. 256 So. 3d at 769. The *Wright III* court set forth to “reconsider this case in light of *Moore* to determine if a different outcome is warranted.” *Id.* at 770. It again reviewed the two main elements of ID, quantitative intelligence (basically, IQ) and adaptive functioning, to determine if the *Moore* opinion changed matters. Upon its detailed review of the evidence and consideration of *Moore*, the Florida Supreme Court held:

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, [in *Wright II*], we can again conclude that Wright failed to prove adaptive deficits by clear and convincing evidence—a conclusion that *Moore* did not alter.

Wright III, 256 So. 3d 778.

The Florida Supreme Court in *Wright III* thus reaffirmed denial of Petitioner's ID petition. Petitioner's certiorari petition on *Wright III* was denied in June 2019, *Wright v. Florida*, 139 S. Ct. 2671 (2019), and he filed the instant amended federal habeas petition shortly thereafter. The petition is timely.

The summary of events is as follows:

April 20–22, 2000: 3-day crime spree and murders
 October 18, 2004: the instant (third) trial starts
 November 13, 2004: jury guilty verdicts
 May 10–11, 2005: penalty phase bench trial
 September 22, 2005: penalty phase ID bench hearing
 October 12, 2005: sentencing order, death sentence entered
 September 3, 2009: direct appeal (*Wright I*) aff'd by Fla. Sup. Ct.
 November 5, 2010: state postconviction petition filed
 March 9, 2012: amended state postconviction petition filed
 October 16–18, 2012: trial court hearing on postconviction claims
 May 22, 2013: trial court denies postconviction claims, appealed
 May 27, 2014: U.S. Sup. Ct. issues *Florida v. Hall*
 October 7, 2014: Fla. Sup. Ct. relinquishes pending appeal to trial court for reconsideration in light of *Florida v. Hall*
 January 5–6 & February 11, 2015: 3 days of hearings on post-*Hall* ID motion
 March 26, 2015: trial court denies post-*Hall* ID motion, appealed
 March 16, 2017: postconviction appeal aff'd by Fla. Sup. Ct., revising an earlier 2016 affirmance (*Wright II*)
 October 16, 2017: on cert. petition, U.S Sup. Ct. grants GVR of *Wright II* in light of new case *Moore v. Texas*

Sept. 27, 2018: Fla. Sup. Ct. affirms postconviction denial (*Wright III*)
June 3, 2019: U.S. Sup. Ct. denies cert. on *Wright III*

The Legal Test for The Intellectual Disability Defense: In *Atkins v.*

Virginia, the Supreme Court held that the eighth amendment to the U.S. Constitution “restrict[s] . . . the State’s power to take the life of” an intellectually disabled individual. 536 U.S. 304, 321 (2002). Adjudications of intellectual disability should be ‘informed by the views of medical experts.’ *Hall v. Florida*, 572 U.S. at 721. The “generally accepted” approach, according to the *Moore* Court, is to consider 1) intellectual functioning deficits, indicated by an IQ score roughly two standard deviations below the mean, 2) adaptive deficits, which are the inability to learn basic skills and adjust behavior to changing circumstances, and 3) require onsets of these deficits while still a minor. *Moore*, 137 S. Ct. at 1045; *see also Atkins*, 536 U.S. at 308 n.3.

The Florida Courts Reasonably Held Petitioner is Not Mentally Disabled:

Trial Evidence Shows No Mental Disability

Before delving into what the Florida courts did to adjudicate Petitioner’s intellectual disability claim in the penalty and postconviction phases, it is worthwhile to simply state, in lay terms, what the trial record shows about Petitioner’s mind. The record shows this: Tavares Wright is not intellectually disabled. Tavares Wright is not, in the former term, mentally retarded.

The one portion of this record in which Petitioner could neither mangle about nor script, and had to show his full wits, was in his trial direct examination and more importantly in his cross examination. The trial record shows that Petitioner ably and clearly testified in his defense. A30 at 4517–626. He was coherent. He was clear. On both direct and cross he understood the questions and his answers were responsive, concise, and lucid. He underwent a thorough cross examination. He responded politely and firmly, and held up well. He portrayed an entire and complete version of facts, chronologically, that exculpated him on the murders and placed blame on the separately-tried codefendant Mr. Pitts. A30 at 4567–622. Petitioner did not stray or deviate from the defense theme and clear factual version that mapped the path to acquittal.

Petitioner was firm and rational in refusing to testify about the second, uncharged Mendoza/Winter Haven carjacking for which he could have faced future criminal exposure. He identified every question that touched on this uncharged criminal exposure, and he declined to answer them, correctly noting why. A30 at 4576–79. He effectively parried the prosecutor's questions. *See, e.g.*, A30 at 4576, 4606. His trial testimony addressed unimpeachable points of the State's case. For example, he noted that he leaned against the victim's car when Pitts drove it up, which addressed any fingerprints thereon. A30 at 4547. He had a plausible and firmly stated reason why bullets that matched the murder weapon

were in his pocket at his arrest. A30 at 4611 (Pitts bought them and later asked Petitioner to discard along with the gun). He ably and consistently set up a factual scenario, without logical holes or gaps, whereby Mr. Pitts disappeared alone, and returned somewhat later driving the victims' blood-marked car. No one can read Petitioner's direct and cross examination and rightly say this man is so bereft of mind that the eighth amendment bars this punishment.⁹

In addition to his capable trial testimony other concrete facts in this record show Petitioner's mental ability. He earned his GED while in juvenile boot camp. A39 at 367.¹⁰ He did not have a driver's license because he could not pass the written test, but he was a capable driver, at one point outrunning the police after a chase, and later driving the dead victims' car away to abandon it. A30 at 4547, 4554, 4556, 4563–64; B24 at 1304. He managed his marijuana sales business, receiving pages from regular customers, and traveling to call on customers and doling out bags of marijuana and collecting money. A30 at 4521, 4539–41, 4544. He exchanged marijuana for the pistol used in the murders. *Id.* at 4520.

⁹ The Florida Supreme Court stated that “Wright gave extensive testimony during trial, where he told a coherent narrative of his version of events. He testified at length and was not generally aided by leading questions. Furthermore, he endured a strong cross-examination by the State...” *Wright II*, 213 So. 3d at 900. The state circuit judge who issued the postconviction order found Petitioner's trial testimony was “very telling and compelling in gauging the Defendant's intellectual functioning and adaptive behavior.” Doc. 37 at 123.

¹⁰ A defense expert testified this was not a real high school graduate equivalency degree, but was a certificate which evidenced something much less. Doc. 36 at 106–07.

He not infrequently criticized his lawyer's work and strategy, questioning and suggesting alternate steps. B21 at 733; *accord Wright II*, 213 So. 3d at 900–01 (“Wright assessed the performance of his 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.”). He argued to the state trial court that his defense lawyers should have prior transcripts on hand to impeach witnesses. A22 at 2969. He lucidly addressed the court about his worry concerning trial fairness and engaged in other lucid colloquy with the judge. A4 at 669–75; A20 at 2581–88. He articulately waived a jury finding on the record, in the penalty phase, A33 at 5083–92. At that time his lawyer said Petitioner is “articulate, bright, aware of what’s going on in his reasoning.” He said, “I understood everything.” A33 at 5092–93.

Family relatives testified that Petitioner reads the Bible often in prison, writes letters and cards, and asked for a college-level dictionary. A38 at 293–94. They 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. *Wright III*, 256 So. 3d at 778. In police interviews he recalled addresses and phone numbers of others. B25 at 1475. The Florida Supreme Court noted “[t]he interview is inconsistent with an intellectually disabled defendant.” *Wright II*, 213 So. 3d at 901.

Florida Court Used Appropriate Procedures and Made Reasonable Findings

Florida statute § 921.137(2) states that “[a] sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.” Section 921.137(1) further states:

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 conclusions of the Florida courts that Petitioner did not meet the definition of intellectually disabled under this definition are sound, and reasonable. The state circuit court and Florida Supreme Court followed *Atkins*, *Hall*, and *Moore*, *supra*.

Concerning the element of “general intellectual functioning,” a rough, general inquiry is whether the Petitioner exhibited IQ scores below 70, which is two standard deviations below the mean. One must take into account the standard error of measurement (“SEM”) with these tests. Taking the SEM into account, ranges in the 70 to 75 level still require consideration of adaptive functioning, and

a Petitioner even with a 75 IQ could prove intellectual disability by showing substantial adaptive deficits. *Hall*, 572 U.S. at 722 (quoting *Atkins*, 536 U.S. at 309 n.5).

The IQ scores present in this record are generally higher than those recently reviewed by the Eleventh Circuit in a capital case affirming denial of relief. See *Clemons v. Comm'r, Ala. Dept. Corr.*, __ F.3d __, 2020 WL 4370963, at *13 (11th Cir. July 30, 2020) (Clemons' IQ scores were 51, 58 adjusted to 66, 67 adjusted to 60, 73, 77, 84).

Both the state circuit court¹¹ and Florida Supreme Court noted that Petitioner has taken a total of nine IQ tests, all of them reported full-scale scores of 75 or above. His highest was a full-scale score of 82. As to this 82, Petitioner's own expert testified it was "valid and free of any practice effect concerns." *Wright II*, 213 So. 3d at 897. These tests started at age ten. On the IQ testing element alone, Petitioner clearly is not disabled.¹² Even if one factored in the SEM, and hypothetically said every test taken was too high by the maximum SEM rate, Petitioner is still over 70 on each of them save two, as he scored 75 on two of

¹¹ The postconviction trial court's detailed 2013 order can be found at Doc. 37 at 26. The same court's order, after remand due to *Hall* can be found at Doc. 37 at 118. Both orders show a very detailed, fact-based postconviction inquiry with several dozen witnesses. The postconviction court heard testimony, all told, from at least seven mental health experts.

¹² Petitioner scored a 76, 80, and 81 on his first three IQ tests at age 10 or 11. Doc. 36 at 89, 102. He scored 75 on his next test at age 16. *Id.* He took two abbreviated tests in 2001 and 2004. He took two full tests in 2005, scoring 82 and 75, respectively. Doc. 36 at 15, 103.

them. The data simply shows, no matter how it is viewed, tests almost universally over 70 and some over 80. Summarizing all the IQ test evidence accurately, the *Wright II* court held: “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.” 213 So. 3d at 896–98. These various IQ tests, by various practitioners spanning over a decade, are in the record; all of them augur against Petitioner on the first “general intellectual functioning” element of mental disability. *Id.* The Florida Supreme Court reaffirmed this proper finding after the *Moore* remand, in *Wright III*. 256 So. 3d at 771–72. The *Wright III* court held: “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.” 256 So. 3d at 771–72.

The record that Petitioner suffers no qualifying ID is strengthened by the indication in this record that Petitioner may have been malingering in some tests. The State expert expressed these concerns and the Florida Supreme Court was reasonable in considering the likelihood of malingering when reviewing this record. *Wright II*, 213 So. 3d at 898. In *Clemons, supra*, the Court noted that “it is abundantly clear that a state court may discount IQ scores where there is evidence

of malingering.” 2020 WL 4370963, at *13 (citing *Carroll v. Sec’y DOC*, 574 F.3d 1354, 1359, 1367–68 (11th Cir. 2009)).

Additionally, the Florida courts properly considered the second ID element of “adaptive functioning,” consistent with prevailing U.S. Supreme Court pronouncements. The Florida Supreme Court consulted and followed modern medical advice, citing to the authoritative AAIDD-11 and DSM-5 definitions of adaptive functioning and discussing how those authorities impacted Petitioner’s case.¹³ *Wright III*, 256 So. 3d at 773. The state courts properly found Petitioner had not proven adaptive functioning deficits. Considering the multiple mental health experts who examined Petitioner at length and testified on this topic at length in the hearings on mental disability, the lay witnesses, the crimes at bar and the trial testimony, the *Wright II* court found “all of these types of evidence refute that Wright has concurrent deficits in adaptive functioning.” 213 So. 3d at 898–99. The Florida Supreme Court provided a detailed, multi-page summary in this regard, *id.* at 898–902, which is well based in the evidentiary record. The Florida Supreme Court then readdressed the findings at length, including a full discussion of the AAIDD-11 and DSM-5 standards in *Wright III*. 256 So. 3d at 773–78. This

¹³ These sources are DSM-5, i.e. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) and AAIDD-11, American Association of Intellectual Development Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 5 (11th ed. 2010). See *Wright III*, 256 So. 3d at 771–76.

discussion closely followed *Hall* and *Moore*. It is noteworthy that even Petitioner's expert agreed that Petitioner did not have current deficits in the social and practical skills domains. *Wright III*, 256 So. 3d at 777; *Wright II*, 213 So. 3d at 900. The only adaptive deficit that Petitioner's expert Dr. Kasper could point to is in the subcategory of conceptual skills.

In crediting the State's expert, both the trial court and the Florida Supreme Court exercised reasonable judgment based upon the extensive record, consistent with federal constitutional principles. As noted above, the only adaptive function in dispute was in regard to conceptual skills. And:

To a large extent, [the State expert'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. [citation omitted] 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 domains).

Wright III, 256 So. 3d at 777 (citing *Moore*, 137 S. Ct. at 1045–47).

Under the standard set forth in §2254(d)(2), habeas relief is available only if the state decision was based upon an unreasonable determination of the facts.

Miller-El II, 545 U.S. at 240. This determination that Petitioner was not suffering from ID is well founded. Thus Ground One is denied.

In Ground Two, Petitioner asserts that the Florida statute is unconstitutional and violates his right to due process because it places upon him the burden to prove intellectual disability by clear and convincing evidence. This ground is due to be dismissed and denied for three reasons.

First, as the Respondent notes, this is ground is unexhausted, and therefore procedurally barred, subject to dismissal. This ground was not squarely presented to the Florida courts in a manner to get a proper merits ruling. Petitioner raised this point for the first time in his written closing arguments to the state circuit court, submitted after his final intellectual disability hearing. At the outset of the hearing Petitioner's counsel had acknowledged that this was the applicable standard. B20 at 628–29. The claim that this standard and burden of proof was unconstitutional did not arise until written closing arguments, where Petitioner argued in favor of a preponderance standard. B26 at 1715–17. Raising the issue for first time in a written closing argument does not preserve it under Florida well-established pleading requirements, as the *Wright II* court noted. 213 So. 3d at 896 n.3. The federal issue was thus not squarely presented for state court review, and the point was denied on an adequate and independent state law ground as unpreserved under Florida procedural rules. “It is a ‘fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters.’” *Herring v. Sec’y, Dep’t of Corr.*, 397 F.3d

1338, 1355 (11th Cir. 2005) (quoting *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997)). It is thus not reviewable here and should be dismissed. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 78 (1977).

Second, this ground is almost certainly foreclosed by the Eleventh Circuit's holding in *Raulerson v. Warden*, 928 F.3d 987, 1001–04 (11th Cir. 2019). The *Raulerson* court held that the Georgia capital sentencing statute did not violate due process by requiring the capital defendant to prove beyond a reasonable doubt his intellectual disability. The Georgia beyond a reasonable doubt standard of proof is greater than Florida's clear and convincing standard. Petitioner's claim cannot survive *Raulerson* and is without merit until the Eleventh Circuit or Supreme Court changes that ruling. Just as in *Raulerson*, Petitioner here does not cite controlling federal precedent that bars this part of the Florida sentencing procedure. Thus the Florida court's decision, even if this Court could presume it was presented to them squarely, was not "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

Third, Ground Two is to be denied because of this detailed factual record. Petitioner did not establish mental disability by clear and convincing evidence, nor could he establish it by a preponderance. The record, especially the trial evidence, shows clearly as a matter of fact that he is not intellectually disabled. On his

record, he could meet no standard of proof whatsoever, as the Florida Supreme Court has noted correctly. *Wright II*, 213 So. 3d at 898, 902.

Petitioner's third ground is also related to intellectual disability and the Court turns to it now. Petitioner asserts that his two defense lawyers provided constitutionally ineffective assistance of counsel in the penalty phase by improperly marshaling and presenting mitigating evidence, which mostly related to intellectual disability. As the petition states, Petitioner claimed that trial counsel failed to acquire documents, failed to present mitigation witnesses, and failed to present expert testimony about the "Flynn effect" and the practice effect on IQ scores. Doc. 38 at 42. The state circuit court held an evidentiary hearing on this claim, which it denied. The Florida Supreme Court affirmed on this point. *Wright II*, 213 So. 3d at 905–08. Thus, Ground Three is exhausted.

This ground requires consideration of the familiar precepts of *Strickland v. Washington*, 466 U.S. 668, (1984). This is a very familiar standard and the Court will not repeat the boilerplate case law here. Suffice it to say, Petitioner must establish both that his penalty phase lawyers were deficient, and that the deficient performance prejudiced him so as to deprive him of a reliable proceeding. *Id.* at 687. Both Florida courts reviewing this matter hewed closely to the constitutional doctrines set forth in *Strickland* and federal law. *See, e.g.*, Doc. 37 at 101–09; *Wright II*, 213 So. 3d at 903–09.

The test is “whether the state habeas court was objectively reasonable in its *Strickland* inquiry,” not an independent assessment of whether counsel’s actions were reasonable. *Putnam v. Head*, 268 F.3d 1223, 1244 n.17 (11th Cir. 2001). Even so, when one reads the trial record and the penalty phase record, one is impressed by the thorough and effective lawyers who defended Petitioner with vigor and dedication.

The Florida Supreme Court reviewed in detail the efforts of Petitioner’s lawyers in the sentencing phase, and we need not detail all that action here. In summary, as to the alleged failure to acquire documents, during the postconviction evidentiary hearing Petitioner’s counsel presented his complete school records, from two states, which indicated Petitioner had several independent “special” education plans and was both emotionally handicapped and specific learning disabled. Two of these school reports contained psychological reports that contained early IQ. One of Petitioner’s mental health experts testified he reviewed these records, and Petitioner’s family members testified, corroborating these points as well. It was also established Petitioner’s mother was receiving social security benefits due to his mental state. The Florida Supreme Court found that documents complained-of as missing were simply cumulative to this type of evidence. *Wright II*, 213 So. 3d at 905–08. The record bears this out. For example, school records that his present lawyers offer, *see* amended petition at Doc. 36 at 95, are

cumulative. It was abundantly clear that this man suffers from mental deficits, severe learning disabilities, and was in special education classes. His precise mental state was quite apparent and presented by the time the penalty phase concluded.

Concerning the alleged failure to properly present penalty-phase witnesses, the Florida Supreme Court noted that:

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. 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 trial testimony.

Wright II, 213 So. 3d at 906.

These findings are record-based, and sound. As to the claimed failure to present mitigation witnesses, Petitioner's lawyers presented additional mitigating evidence at the penalty phase, beyond that presented at the guilt phase.

The Eleventh Circuit recently addressed this type of claim in a capital case where, unlike here, additional witnesses were not presented in the penalty phase:

No absolute duty exists to introduce mitigating or character evidence. [citation omitted] And we have held, in a capital case, that counsel's performance was not deficient when he chose to rely on the mitigating evidence presented in the guilt phase instead of presenting additional evidence during the penalty phase. [citation omitted] We explained that "[w]hich witnesses, if any, to call, and when to call them, is the epitome

of a strategic decision, and it is one that we will seldom, if ever, second guess.”

Raulerson, 928 F.3d at 998 (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc)).

Concerning failure to present penalty phase evidence about various mental deficits, at the initial penalty phase the defense presented mitigation evidence of Petitioner’s unfortunate, traumatic childhood which included abandonment and neglect. One of Petitioner’s experts testified about Petitioner’s in utero exposure to alcohol and cocaine, which caused microencephaly, a smaller brain and cranium. He also suffered mild traumatic injuries as a child which the trial court heard about. *Wright I*, 19 So. 3d at 289. The sentencing judge received the defense’s expert testimonial evidence concerning fetal alcohol syndrome and microencephaly during the penalty phase. *Wright II*, 213 So. 3d at 906; Doc. 36 at 89 n.15; Doc. 37 at 107.

Likewise, Petitioner’s present argument that counsel were *Strickland*-ineffective due to failure to argue the “Flynn effect” is unavailing. This effect describes an apparently upward drift in IQ scores in this country over the years. See Doc. 36 at 100. Petitioner contends that means his IQ scores are actually lower on the older standard than what he registered. A key problem with this argument is that he took IQ tests quite a long time ago, starting at age 9. They have remained fairly consistent, and almost always they land him in the area *above* 70. For this

same reason, Petitioner’s arguments about the “practice effect,”—that scores go up when you take more tests—fails. *Id.* As the petition notes, “Wright received a full-scale 76 on this first test [in 1991].” *Id.* at 102.

As to the “Flynn effect,” there is no medical/legal consensus. *See Raulerson*, 928 F.3d at 1008 (“No adjustment for the Flynn effect is required in this Circuit.”); *Thomas v. Allen*, 607 F.3d 749, 757–58 (11th Cir. 2010). Here, the facts do not fit well to establish such an effect anyway. The courts below were all quite aware that Petitioner was profoundly impaired, had fetal alcohol syndrome, and a low IQ. *Wright II*, 213 So. 3d at 906–07. Under no fair reading of this record can Petitioner’s trial counsel be described as incompetent to the point of “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687, 690. And no matter how the Flynn effect might be deemed in the future, there is voluminous evidence in this case concerning Petitioner’s mind, and the Florida courts reviewed it in a not unreasonable manner, consistent with controlling federal law.

The postconviction court took testimony about the Flynn and practice effects and found no prejudice. The postconviction trial court held:

This Court does not find that [trial] counsel was deficient in not presenting experts to argue the Flynn Effect and Practice Effect. As mentioned above, the Defendant scored above 70 on all the IQ tests he took, and when the scores were adjusted by [defense expert] Dr. Kasper, the Defendant only scored below 70 on one of the adjusted test scores. The Court does not find that the Trial Court would have come

to any different conclusion with regard to weighing the mitigation and aggravation of it had been presented with information about the Flynn Effect and Practice Effect.”

Doc. 37 at 106–07.

The finding was affirmed by the *Wright II* court, which held that:

[T]he 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.

Wright II, 213 So. 3d at 906.

To sum up the discussion of Petitioner’s mental state which is set forth in various arguments in Grounds One, Two and Three, about the best that can be said for his case was found in 2009 by the *Wright I* court. There the Florida Supreme Court noted: “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.” *Wright I*, 19 So. 3d at 277.

This record contains the testimony of at least seven mental health experts who opined on Petitioner's mental state.¹⁴ The Florida courts quite properly found, and reasonably relied upon, the extensive evidence showing no ID, and the courts did so in a manner true to the controlling U.S. Supreme Court standards.

PETITIONER'S GROUND FOUR

Ground Four states that trial counsel rendered ineffective assistance in the penalty phase by failing adequately to challenge evidence offered in aggravation.¹⁵ While incarcerated pending the instant trial, Petitioner was involved in two very violent jailhouse aggravated batteries, for which he was convicted separately. The State presented these in aggravation at the penalty phase. The first battery involved inmate Cassada who testified that Petitioner and others beat him nearly to death, which placed him in a coma for 30 days. A37–A38 at 159–162. Petitioner and one other inmate were convicted of the Cassada aggravated battery. The second involved a very violent battery upon jail deputy Connelly committed by Petitioner alone, for which he was convicted. Evidence was that Petitioner struck

¹⁴ Dr. Mary Kasper testified in both the 2012 and 2015 ID hearings. Drs. Michael Kindeln and Michael Gamache testified at the 2015 hearing. Drs. Joel Fried, Alan Waldman, William Kremper, and Joseph Sesta testified in the 2005 penalty phase hearings. See Doc. 36 at 10–11.

¹⁵ To quote the petition: "Ground Four: Trial counsel provided prejudicial ineffective assistance during the penalty phase of Wright's capital trial when they failed to challenge evidence argued in aggravation. The state court's resolution of Wright's claim was an unreasonable application of clearly established federal law, including *Strickland v. Washington*, 366 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record." Doc. 36 at 123.

Connelly, knocking him unconscious, and then struck him repeatedly thereafter. Connelly was hospitalized, and went on light duty work and then retired, still receiving mental health counseling in his retirement due to the incident. A37 at 141–48.

At the postconviction phase, Petitioner argued that his lawyers were ineffective in not mitigating this evidence, primary by calling two inmates as witnesses. These inmates would have testified that Petitioner was only one of many in the Cassada attack, and that officer Connelly taunted and provoked Petitioner prior to the attack. The state circuit court granted Petitioner a hearing on these arguments, and found no *Strickland* violation. B16 at 2760–63.

At this postconviction hearing, two inmates testified that Connelly verbally harassed Petitioner. One inmate testified Connelly started the assault by throwing the first punch. B10 at 1692–96; B11 at 1813–28.

Petitioner’s trial counsel (handling both the jail battery cases and the instant case) testified he was aware of the information concerning Connelly allegedly provoking the assault, but that Connelly’s alleged provocation did not “justify a guard being beat half to death,” and the two inmates were poor witnesses in the jail battery trials. According to the lawyer, their “minimal mitigation” did not amount “to a hill of beans.” B13 at 2147–48, 2171. The trial lawyer had cross-examined Connelly intently during the aggravated battery trial, and “that had already been

explored” and it was not successful in front of a jury. Doc. 37 at 64–65; B13 at 2144. Before the court at the murder penalty phase, in contrast, the trial counsel said that “I see very little profit in doing so unless the provocation were very extreme. And, as I recall, it was not and certainly not—it wasn’t physical provocation It was more taunting and, you know, playing games with people.” Doc. 37 at 65; B13 at 2145. In the penalty phase, these facts were “not of the degree that I think is mitigating.” B13 at 2147.

The Florida Supreme Court affirmed this ruling. *Wright II*, 213 So. 3d at 908–09, finding in part:

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. . . . [T]wo of the three aggravating circumstances found below are among the weightiest aggravating circumstances. [cite omitted] 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. . . .

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 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.

Wright II, 213 So. 3d at 908–09. This sound finding is not an unreasonable application of clearly established federal law. “A petitioner cannot establish that the outcome of the proceeding would have been different when ‘[t]he new evidence largely duplicated the mitigation evidence at trial.’” *Raulerson*, 928 F.3d at 999 (citing *Cullen v. Pinholster*, 563 U.S. 170, 200 (2011)).

PETITIONER'S GROUNDS FIVE AND SIX

Grounds Five and Six contend that Petitioner suffered ineffective assistance of trial counsel by his lawyers' failure to impeach two jailhouse informant-witnesses during trial, Wesley Durant and Byron Robinson.¹⁶

Concerning Ground Five, witness Durant was an inmate barber at the jail. He testified Petitioner confessed to the murders during a haircut. A26 at 3721–25. Durant testified that jail guard Faulkner overheard this confession, told Durant he needed to contact detectives, and Faulkner “got the ball rolling” with the homicide detective. A26 at 3728–29. On cross examination, Petitioner's trial counsel elicited that Durant had ten felonies including two *crimen falsi*, had two pending serious charges, was seeking “help” on his charges; refused to give a taped statement until he got a deal, and denied seeing news reports about the case. Trial counsel then elicited that Durant earlier admitted to seeing news reports, and

¹⁶ To quote the petition: “Ground Five: Wright received prejudicially ineffective assistance of counsel when trial counsel failed to impeach state witness Wesley Durant. The state court's resolution of Wright's claim was an unreasonable application of clearly established federal law, including *Strickland v. Washington*, 366 U.S. 668 (1984). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 130.

Ground Six states: “Wright received prejudicial ineffective assistance of counsel when trial counsel failed to impeach a jailhouse informant who indicated that he was going to commit perjury. The state court's resolution of Wright's claim was an unreasonable application of clearly established federal law, including *Strickland v. Washington*, 366 U.S. 668 (1984). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 136.

further that Durant was mistaken about Petitioner's hair style and his knowledge of the codefendants. A26 at 3735–59.

At the postconviction hearing, jail guard Faulkner testified he had overheard no haircut confession or other confession by Petitioner. B10 at 1717–19.

Petitioner's trial counsel testified at the hearing and understood at the time "that the officer was present and apparently the conversation was reported to him, but he did not actually hear any admissions made by . . . the defendant. That was my understanding. Where that came from, I'm not sure." B13 at 2155. Trial counsel testified that in calling any other witness beyond the defendant, he always weighed "losing the sandwich." That means in Florida parlance losing both opening and rebuttal closings (i.e. closing both first and last) which former Florida procedure entitled a defendant to do if he called no witnesses beyond himself in his case. B13 at 2175.

Also at the postconviction hearing Durant's nephew, an inmate, testified. He stated that Durant is untrustworthy and a known "snitch." B10 at 1747–48. The nephew spoke with defense lawyers prior to trial but was never called. B10 at 1749–50.

Similarly, Ground Six asserts ineffective assistance due to failure to properly impeach witness Robinson. Robinson testified that he was a cell mate of

Petitioner, and Petitioner confessed to the murders. A28 at 4201. Towards the end of the trial, defense counsel informed the court they had recently spoken to several jail inmates, who claimed to have information about Robinson and another state witness. A30 at 4502–03. After Petitioner testified in his defense, defense counsel asked for a court colloquy in which it was discussed with Petitioner whether to call these impeachment witnesses, and it was noted on the record “that he does not wish to present any further witnesses, thus, preserving first and last closing[.]” A30 at 4640–43.

At the postconviction hearing four inmates testified. Doc. 36 at 137. One testified that Robinson stated an intent to “jump into somebody’s case” to help himself. *Id.* at 138. Another testified Robinson was a known “snitch” and he heard Robinson say he was going to jump into Petitioner’s case and lie. This witness informed Petitioner about the Robinson statements prior to trial. Two others testified similarly. B11 at 1802–06. Trial counsel at the postconviction hearing testified he had no recollection of his tactical reasons for not calling these inmate witnesses, but did recall some of the inmates were facing very serious charges and would not talk to the defense, and their testimony was of limited value. B13 at 2148–51.

The postconviction court found Petitioner failed to establish either deficiency or prejudice under *Strickland* concerning these witnesses. Doc. 37 at 92–97. The Florida Supreme Court affirmed, stating:

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, 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 the he did not consider their testimony sufficient to justify 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. [citation omitted] 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.

Wright II, 213 So. 3d at 909–10. This conclusion is based in controlling federal law, is based in a fair review of the entire record, and is reasonable given the deference due to trial counsel.

Review of these trial lawyers’ strategic decisions is done in a “highly deferential” manner, applying “a strong presumption . . . of reasonable professional assistance.” *Johnson v. Sec’y, Dep’t of Corr.*, 643 F.3d 907, 928 (11th Cir. 2011), (quoting *Strickland*, 466 U.S. at 689). Experienced trial lawyers know that “considering the realities of the courtroom, more is not always better.” *Raulerson*, 928 F.3d at 998, (quoting *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000) (en banc)). Accordingly, Petitioner is not entitled to relief on Grounds Five and Six.

PETITIONER’S GROUND SEVEN

Petitioner’s Seventh Ground claims that trial counsel was constitutionally ineffective in failing to object to the prosecutor’s closing argument regarding Petitioner’s character or propensity to commit violence.¹⁷ The reader will recall the factual setting of the instant case: A weekend crime spree where Petitioner burgled a house and did a drive-by shooting of local rival Carlos Coney with the

¹⁷ Ground Seven states: “Defense counsel’s failure to object to the improper argument regarding Wright’s propensity to commit violence constituted ineffective assistance of counsel. The state court’s resolution of Wright’s claim was an unreasonable application of clearly established federal law, including *Strickland v. Washington*, 366 U.S. 668 (1984). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 141.

stolen pistol, then kidnapped and shot the victims with the pistol, ditching their car and needing a ride which caused him to engage in a third shooting to carjack a ride home. Thus the admitted *res gestae* involved three disparate shootings in a short period of time, all which tied Petitioner to the main murder weapon.

Petitioner contends that the prosecutor's closing argument, which was not objected to due to *Strickland*-level ineffectiveness, crossed the line from evidence summation to an argument that Petitioner had a propensity or character for violence. The prosecutor referred to Petitioner as a 'hoodlum,' 'murderer,' 'cold-blooded,' and a 'criminal.' A31 at 4819, 4820, 4823, 4835; A32 at 4839, 4851. Concerning Petitioner's testimony about self defense in the drive-by shooting of the rival, the prosecutor argued, "Well, that's crap. It doesn't make any sense. He stole the gun on Thursday. He used the gun on Friday. He shot a man with it. He certainly doesn't have any problems shooting people. He shot Carlos Coney." A31 at 4822–23. The Petitioner also complains about other "propensity arguments" which are set forth below.¹⁸

¹⁸ The prosecutor argued concerning Petitioner's self-defense testimony: "When you have a carjacking and 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 [the two murder victims]. It's—it's an irrational thing to do." A31 at 3824. "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.' Okay, It wasn't a mystery. So how's he going to refute that? Say he didn't shoot him? So he does the next best thing. Well, I thought maybe [Coney] was going for something. 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

The prosecutor's closing was not objected to. Petitioner raised this objection first in his direct appeal. The Florida Supreme Court addressed the matter in the broader context of extrinsic evidence/collateral crimes. *Wright I*, 19 So. 3d at 295. Concerning the prosecutor's closing, the *Wright I* court addressed Florida state law evidentiary standards. It stated, "Multiple statements that Wright 'certain[ly] doesn't have any problems shooting people' lean toward an impermissible propensity-toward-violence argument." *Id.* "[W]hen [the State] cast Wright as a violent character who acts upon his desire to shoot people, the State abused [favorable rulings] by inappropriately taking it beyond the edge of propriety in contradiction of the evidence doctrine of Florida." *Id.* The Florida Supreme Court concluded that the comments were harmless error because no contemporaneous objection was lodged, and the similarities between the related crimes did not become a feature of the trial. *Id.* It concluded the unpreserved comments did not rise to fundamental error. *Id.*

Petitioner asserted in his state postconviction motion that failure to object to these prosecutorial statements in the guilt phase closing arguments was ineffective

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] turn around. That's exactly what he did. He shot him." A31 at 4827–28.

Later, when summing evidence related to the Winter Haven/Mendoza carjacking, the prosecutor stated: "But the second time, when you look at this map, after he dumped [the victims'] car on Bolender Road and went and carjacked the Mexicans, he comes up to right there, and that's when 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." A31 at 4829.

assistance of counsel under *Strickland*. Petitioner received a hearing on the merits of this argument. Trial counsel testified that, as a general rule, he was reluctant to object to the prosecutor's closing argument lest the same objections be visited upon him. He also did not tactically think it was wise to let the jury think that he is being obstructive, and "trying to pull the wool over their eyes." B13 at 2166. After reviewing the transcripts, trial counsel stated in hindsight, he should have objected to the comments. B13 at 2166–67. In denying the claim, the postconviction court noted the state's evidence included Petitioner's admissions describing his involvement, evidence that clearly tied the Petitioner to the murder weapon, his fingerprints were on the victim's car, and the victim's blood was on his shoes: "The Court finds no reasonable probability that, but for counsel's deficiency with regard to the un-objected to comments of the prosecutor that the result of the proceeding would have been different." B16 at 2748. After reviewing the record on this point, the Florida Supreme Court found no prejudice. *Wright II*, 213 So. 3d at 911.

This state court holding is not contrary to or an unreasonable application of clearly established federal law. Given the crime spree that was proven here (and no claim is now made that collateral evidence or extrinsic evidence is grounds for relief), the closing argument comments were factual, accurate, and a fair summary of what the jury had heard. There is no basis for relief in this seventh ground.

PETITIONER'S EIGHTH AND NINTH GROUNDS

In Ground Eight, Petitioner contends his death sentence is unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016)¹⁹ and in his ninth ground,²⁰ Petitioner claims the Florida death penalty is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). In a nutshell, *Hurst* and *Ring* require every fact supporting a death penalty, i.e. aggravators, etc., to be determined and found by a jury as fact-finder, not a jury sitting as an advisory jury. In other words, all predicates and facts to support the death penalty require a jury finding. See *Hurst*, 136 S. Ct. at 621–22. *Hurst*, which came after *Ring* and after Petitioner's sentencing, invalidated part of the Florida death penalty statute and required a full jury finding on every contested factual element of the death penalty.

But *Hurst* is entirely inapt here because Petitioner elected a strategy to forego the jury finding at the penalty phase, believing his best chances were with the bench. Here Petitioner clearly and at length, waived his right to proceed with a

¹⁹ This ground states: “Ground Eight: Wright’s death sentence is unconstitutional under *Hurst v. Florida*. The state court’s resolution of Wright’s claim was an unreasonable application of clearly established federal law, including *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 144.

²⁰ “Ground Nine: The trial court erred in denying Wright’s motions that the Florida’s death sentencing statutes are unconstitutional under the fifth, sixth, and fourteenth amendments of the United States constitution as shown in *Ring v. Arizona*. The state court’s resolution of Wright’s claim was an unreasonable application of clearly established federal law, including *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 152.

jury at penalty phase. He gave up his right to jury findings at the penalty stage. Instead, he opted for strategic reasons to have the judge make findings in the penalty phase. In effect he opted for a bench trial on that subject. The Florida Supreme Court quite properly found “Wright knowingly, intelligently, and voluntarily waived his right to a penalty-phase jury Wright concedes that he waived his right to a penalty-phase jury, thus barring this claim.” *Wright I*, 19 So. 3d at 297. Thus *Hurst* and *Ring* afford Petitioner nothing.

One cannot fault Petitioner for opting against jury consideration at the penalty phase. He testified at length and the jury by its verdict chose to disbelieve every material thing he said. Further, the jury had already found the existence of two death phase aggravators. By its verdicts of armed kidnapping with a firearm and robbery with a firearm the jury had already established two aggravating circumstances: 1) a previous conviction of another capital felony or one involving the use or threat of violence to a person, and 2) commission of the murder for pecuniary gain.

Petitioner’s main argument appears to suggest his jury trial waiver at the penalty phase was improper and not knowing, due to ID that became apparent only after the penalty phase was well underway. See Doc. 36 at 146–50. Although contrary to the record as a whole, this argument cites mostly the postconviction testimony of Petitioner’s defense lawyers. But during this extensive factual waiver

at the time of the penalty phase the defense lawyer stated that Petitioner was lucid, and did understand, and did give a knowing waiver of the jury at penalty phase. *See* A33 at 5092 (“[Petitioner] appears and has appeared for the last several days to be articulate, bright, [and] aware of what’s going on in his reasoning.”). Both defense lawyers and the defense investigator stated to the court that they had seen nothing “which would indicate this to be other than a knowing, intelligent, and voluntary waiver at this point[.]” *Id.* at 5093–94. And Petitioner’s reasons for asking the jury to be discharged before the penalty phase were rational: Petitioner told his lawyer “[h]e felt they didn’t like him, that they were going to recommend a death penalty, that they had already made up their minds, they weren’t going to be fair, and he wanted to waive his right to a jury recommendation.” Doc. 37 at 63.

Because Petitioner waived his right to a jury during the penalty phase, *Hurst* and *Ring* do not provide Petitioner grounds for relief. The state courts’ holdings on this matter are not contrary to or an unreasonable application of clearly established federal law. There is no basis for relief on Grounds Eight and Nine.

PETITIONER’S TENTH GROUND

In his final ground Petitioner asserts cumulative error deprived him of a fair trial, especially in light of the ineffective assistance of counsel he received.²¹

²¹ “Ground Ten: Cumulative error deprived Wright of the fundamentally fair trial guaranteed under the sixth, eighth, and fourteenth amendments. The state court’s resolution of Wright’s claim was an unreasonable application of clearly established federal law, including *Strickland v.*

Although this ground does appear to be exhausted, it contains no content in the amended petition, nor substantive content in the memorandum, beyond matters already considered and found to be wanting. Doc. 36 at 154–56; Doc. 38 at 73–75. In his memorandum, Petitioner argues that the Florida Supreme Court, in reviewing this ground, adopted a “nonsensical standard of proof for cumulative error claims” Doc. 38 at 73. The amended petition fails entirely to state which errors, insufficient in themselves but cumulatively sufficient, exist or fall under this ground. In the undersigned’s view, this non-list is not surprising. Petitioner received an energetic, detailed, and vigorous defense, handled with thoughtfulness and fairness by the Florida state courts. There were no errors presented that could cumulate or conglomerate to create a grounds for relief under ground number ten.

The amended petition is without merit and denied. No issue or ground presented would give reasonable jurists cause to conclude there is any basis for relief or any portion with merit. Title 28 U.S.C. § 2253(c)(2) permits the Court to issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” That showing has not been made here. *See generally Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v.*

Washington, 366 U.S. 668 (1984). Further, in many respects, the state court made an unreasonable determination of facts in light of the state court record.” Doc. 36 at 154.

Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Therefore, the undersigned denies a certificate of appealability, and denies a request to proceed on appeal *in forma pauperis*. Petitioner must obtain permission from the court of appeals to proceed *in forma pauperis*.

DONE AND ORDERED at Tampa, Florida, on August 19, 2020.

/s/ William F. Jung
WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX C

United States Court of Appeals for the Eleventh Circuit
February 15, 2022 Order Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13966-P

TAVARES J WRIGHT,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, JORDAN, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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February 15, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13966-P

Case Style: Tavares Wright v. Secretary, Department of Corr.

District Court Docket No: 8:17-cv-00974-WFJ-TGW

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas

Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX D

Florida Supreme Court Opinion in *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 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. 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 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 mitigation¹⁴ 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 pursuant 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 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 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.

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 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 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 pursuant 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 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 (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.

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 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 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 codefendants 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 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 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:

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.

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX E

“Defendant's Renewed Motion For Determination Of Intellectual
Disability As A Bar To Execution Under Florida Rule Of Criminal
Procedure 3.203,” filed October 10, 2014

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

STATE OF FLORIDA,

Plaintiff,

CASE NO. CF00-02727A-XX

v.

TAVARES J. WRIGHT ,

Capital Postconviction Death Penalty Case

Defendant.

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

The Defendant, Tavares J. Wright, 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.¹ In support of this Motion, Mr. Wright states:

1. Mr. Wright's trial counsel filed a Notice of Intent to Rely Upon § 921.137 Florida Statutes, Barring Imposition of the Death Penalty Due to Mental Retardation on June 30, 2005. R5/743-44. The trial court appointed Drs. William G. Kremper and Joel B. Freid to evaluate Mr. Wright for mental retardation, R5/745, and both experts testified at a special hearing regarding mental retardation on September 22, 2005. R5/748-832. Neither expert assessed Mr. Wright's adaptive functioning. R5/764; R5/783-817. Following that hearing, the trial court found that the six IQ scores which were before the court (76, 75, 77, 82, and

¹ In previous litigation, the term "mental retardation" was used in place of the term "intellectual disability".

75)² did not establish a finding of mental retardation, and that he therefore was not mentally retarded for the purposes of capital sentencing. R5/827-29.

2. On October 12, 2005, the trial court sentenced Mr. Wright to death as to the two counts of first-degree murder and to life imprisonment on the remaining counts. R6/963-83. Mr. Wright remains on Florida's death row.
3. Mr. Wright's case is currently pending before the Florida Supreme Court on an appeal of this Court's denial of his motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851. On June 11, 2014, Mr. Wright filed a Motion to Relinquish Jurisdiction to this Court for the specific purpose of filing a renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203. On October 7, 2014, the Florida Supreme Court issued an order relinquishing jurisdiction to this Court for a period of sixty days for the purpose of filing a renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203.
4. Mr. Wright is intellectually disabled and is not subject to execution. In 2005, the trial court found that Mr. Wright did not meet the criteria for mental retardation because none of his IQ scores were 70 or below. R5/825-830. The trial court did not take into account the standard error of measurement, the Flynn Effect, the practice effect, or adaptive functioning. On May 27, 2014, the United States Supreme Court decided *Hall v. Florida*, 134 S.Ct. 1986, 188 L.Ed. 2d 1007 (2014). The Court in *Hall* acknowledged that IQ scores are "best understood as a range." *Hall*, 134 S.Ct. at 1988. The Court rejected the strict IQ

² Mary Elizabeth Kasper, Ph.D. testified at Mr. Wright's postconviction evidentiary hearing that Mr. Wright was actually administered some version of the Wechsler test a total of eight times. PC12/1942.

score cutoff of 70 required by *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) and held that “when a defendant’s IQ 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.” *Hall*, 134 S.Ct. at 2001. *Hall* requires courts to examine and rely on what “experts in the field would consider” when diagnosing intellectual disability; something that has never been done in this case. *Hall*, 134 S.Ct. 1995. Mr. Wright’s IQ scores fall within the margin of error. Thus, Mr. Wright seeks a renewed determination of intellectual disability as a bar to execution under Florida Rule of Criminal Procedure 3.203 in light of *Hall v. Florida*, 134 S.Ct. 1986.

5. Mr. Wright relies on the opinion of the following expert:

Mary Elizabeth Kasper, Ph.D., ABPP, ABN
2650 Bahia Vista Street, Suite 209
Sarasota, Florida 34239

Dr. Kasper was hired by CCRC-Middle in 2012. Although she did not conduct any IQ testing on Mr. Wright, she reviewed all prior IQ testing of Mr. Wright, and she assessed his adaptive functioning. She testified at Mr. Wright’s postconviction evidentiary hearing that Mr. Wright meets the criteria for mental retardation as defined in Florida Statute § 921.137 (1). PC12/1994. Dr. Kasper has not generated a written report, but she testified at the evidentiary hearing regarding Mr. Wright’s 3.851. A transcript of her testimony is included as Appendix A.³ Dr. Kasper also reviewed Mr. Wright’s previous IQ scores and compiled them in a chart, which was introduced as Defense Exhibit Two at the evidentiary hearing, and is included as Appendix B. The testimony of five lay witnesses who testified

³ The transcripts from the postconviction evidentiary hearing are part of the postconviction record on appeal.

at Mr. Wright's postconviction evidentiary hearing about Mr. Wright's adaptive functioning is included as Appendix C.

6. In addition to Dr. Kasper, the following individuals previously tested and/or evaluated Mr. Wright.

- a. Kevin Kindelin, Ph.D.
391 Central Avenue
Winter Haven, Florida 33880

Dr. Kindelin evaluated Mr. Wright in 1991, at which time he administered a WISC-R. Undersigned counsel has not been able to obtain Dr. Kindelin's report, if one exists.

- b. Janet Cook
Williamson Central School
Williamson, New York 14589

Ms. Cook evaluated Mr. Wright on September 11, 1991. Her report is included as Appendix D.

- c. Evelyn Pierce
Polk County Public Schools
Psychological Services
Bartow, Florida 33830

Ms. Pierce evaluated Mr. Wright on April 9, 1991. Her report is included as Appendix E.

- d. Joel B. Freid, Ph.D. P.A.
460 Florida National Drive
Lakeland, Florida 33813

Dr. Freid evaluated Mr. Wright in 1997 and 2005. His report dated August 25, 1997 is included as Appendix F. His report dated July 26, 2005 is included as Appendix G. The transcript of Dr. Freid's testimony at the special hearing regarding mental retardation held on September 22, 2005 is included as Appendix H.

- e. Alan J. Waldman, M.D.
602 South Main Street, Suite G
Gainseville, Florida 32601

Dr. Waldman's report dated October 9, 2002 is included as Appendix I. The transcript of Dr. Waldman's testimony from Mr. Wright's combined penalty phase/*Spencer* hearing is included as Appendix J.

f. William G. Kremper, Ph.D.
158 Summerlin Street
Bartow, Florida 33830-4641

Dr. Kremper's report dated July 15, 2005 is included as Appendix K. The transcript of Dr. Kremper's testimony at the special hearing regarding mental retardation held on September 22, 2005 is included as Appendix L.

g. Joseph J. Sesta, Ph.D., ABPN
409 Apollo Beach Blvd.
Apollo Beach, Florida 33572

Dr. Sesta's report dated February 4, 2003 is included as Appendix M. Dr. Sesta's testimony at Mr. Wright's combined penalty phase/*Spencer* hearing is included as Appendix N.

7. Counsel certifies the motion is made in good faith and on reasonable grounds to believe that the prisoner is intellectually disabled.

WHEREFORE the Defendant respectfully requests an evidentiary hearing pursuant to Florida Rule of Criminal Procedure 3.203(e) and a renewed determination of intellectual disability in light of *Hall v. Florida*, 134 S.Ct. 1986.

Respectfully Submitted,

/s/ Maria Christine Perinetti

Maria Christine Perinetti

Florida Bar Number 0013837

Raheela Ahmed

Florida Bar Number 0713457

Law Office of the Capital Collateral

Regional Counsel- Middle Region

3801 Corporex Park Drive, Suite 210

Tampa, FL 33169-1136

Telephone (813) 740-3544 ext. 110 & 109

Fax No. (813) 740-3554

Email: perinetti@ccmr.state.fl.us;

ahmed@ccmr.state.fl.us

Secondary Email: support@ccmr.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 10th day of October, 2014.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing has been furnished by the mail to The Honorable Donald G. Jacobson, Circuit Court Judge, P.O. Box 9000, Room C Blue Side, Bartow, Florida 33831-9-9000 and to Tavares J. Wright, DOC # H10118, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 10th day of October, 2014.

I HEREBY FURTHER CERTIFY that a PDF copy of the foregoing was served via electronic mail to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7910 at stephen.ake@myfloridalegal.com and CapApp@myfloridalegal.com and John Aguero, Assistant State Attorney, Office of the State Attorney, 255 Broadway Avenue, Bartow, Florida 33830 at jaguero@sao10.com on this 10th day of October, 2014.

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar No. 0013837
Raheela Ahmed
Florida Bar No. 0713457
Capital Collateral Regional Counsel-
Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619-1136
(813) 740-3544
Fax No. (813) 740-3554
Email: perinetti@ccmr.state.fl.us;
ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX F

Circuit Court for the Tenth Judicial Circuit in and for Polk County Florida
March 26, 2022 “Order Denying Defendant's Renewed Motion For Determination Of
Intellectual Disability As A Bar To Execution Under Florida Rule Of Criminal
Procedure 3.203”

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

STATE OF FLORIDA,

Plaintiff,

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

v.

TAVARES J. WRIGHT, RECEIVED AND FILED

Defendant.

MAR 26 2015

STACY M. BUTTERFIELD, CLERK

**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, 134 S.Ct. 1986. 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

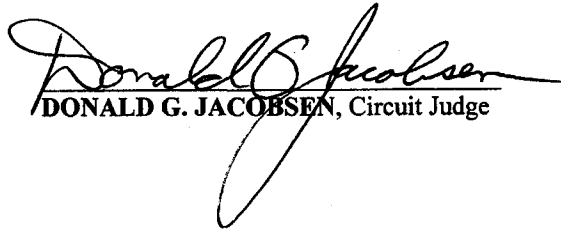
the most serious offenses” (at page 552); but there is an “evolving standard of decency that marks the progress of a maturing society” (at page 557); that proportionality must be “viewed less though a historical prism than according to the evolving standards of decency that mark the progress of a maturing 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 legally 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 26th day of March, 2015.


DONALD G. JACOBSEN, Circuit Judge

cc:

Tavares Wright #H10118
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026-4000

Hope Pattey, Esq.
Office of the State Attorney
P.O. Box 9000
Bartow, FL 33831-9000

Maria Christine Perinetti, Esq.
Raheela Ahmed, Esq.
Law Office of Capital Collateral
Regional Counsel – Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, FL 33169-1136

Stephen D. Ake, Esq.
Assistant Attorney General
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, FL 33607-7013

John A. Tomasino, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

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

RECEIVED AND FILED

MAR 26 2015

STACY M. BUTTERFIELD, CLERK