**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

## VOLUME II

DEATH PENALTY CASE

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## APPENDIX G

Florida Supreme Court Opinion in *Wright v. State*, 213 So. 3d 881 (Fla. 2017).


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

213 So.3d 881
Supreme Court of Florida.

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

No. SC13–1213
|
March 16, 2017

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

**Holdings:** The Supreme Court held that:

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

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

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

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

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

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

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

Affirmed.

Canady and Polston, JJ., concurred in result.

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

**Attorneys and Law Firms**

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**REVISED OPINION**

PER CURIAM.

This case is before the Court on appeal from an order denying Tavares Jarrod Wright's initial motion to vacate his convictions and sentences under Florida Rule of Criminal Procedure 3.851, as well as Wright's renewed motion to determine intellectual disability filed pursuant to Florida Rule of Criminal Procedure 3.203. We have jurisdiction. See Art. V, § 3(b)(1), Fla. Const.

**FACTS AND BACKGROUND**

  

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

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

> With the aid of codefendant Samuel Pitts, Wright carjacked, kidnapped, robbed, and murdered David Green and James Felker while engaged in a three-day crime spree that spanned several areas in Central Florida. [FN2] During the crime spree, Wright was connected multiple times to a stolen pistol that matched the caliber of casings discovered at the scene of the murders. The trial court allowed the State to present evidence of these collateral acts to demonstrate the context in which the murders occurred and to explain Wright's possession of the murder weapon.
>
> [FN2] Wright and Pitts were tried separately for the murders. Pitts was convicted of two counts of first-degree murder and other offenses related to this incident. He received sentences of life imprisonment for the murders.
>
> The spree began when Wright stole a pistol and a shotgun from the Shank family's residence in Lakeland on Thursday, April 20, 2000. On the Friday morning following the burglary, Wright used the pistol to commit a drive-by shooting in a neighborhood near the Shank residence. [FN3] That evening, Wright and Samuel Pitts abducted Green and Felker in Lakeland, drove Green's vehicle approximately fifteen miles to Polk City, and murdered the victims in a remote orange grove. Wright shot one victim with a shotgun, which was never recovered, and the other victim with a pistol that used the same caliber bullets as the gun stolen from the Shank residence. Wright then abandoned the victim's vehicle in a different orange grove in Auburndale. In nearby Winter Haven, Wright used the Shank pistol in a carjacking that occurred during the morning hours on Saturday, April 21, 2000. That afternoon, law enforcement responded to a Lakeland apartment complex based on reports of a man matching Wright's description brandishing a firearm.
>
> ***887** [FN3] For the drive-by shooting, Wright was convicted of attempted second-degree murder and two counts of attempted felony murder.
>
> When an officer approached, Wright fled, but he was eventually arrested in the neighboring mobile home park. Ammunition matching the characteristics of the ammunition stolen from the Shank residence was found in his pocket. The stolen pistol was also recovered near the location where Wright was arrested. Almost a week later, the bodies of the victims were discovered. Thus, the following facts are presented in chronological order to demonstrate the geographical nexus of the offenses and to provide a complete picture of the interwoven events surrounding the double murders.
>
> **The Crime Spree**
>
> **The Shank Burglary: Thursday, April 20, 2000**
>
> On Thursday, April 20, 2000, Wright unlawfully entered a Lakeland home with two accomplices. Wright testified that they separated to search the house for items to steal. In one bedroom, Wright found and handled a plastic bank filled with money. One of his accomplices discovered a 12–gauge, bolt-action Mossberg shotgun and a loaded Bryco Arms .380 semi-automatic pistol with a nine-round clip in another bedroom.... The accomplice also found four shells for the shotgun in a dresser drawer. In exchange for marijuana, Wright obtained possession of the pistol from the accomplice.
>
> When Mark Shank returned home after work to discover his firearms missing, he notified the Polk County Sheriff's Office of the burglary. The Sheriff's Office lifted latent prints from the house, including several from the plastic bank. An identification technician with the Sheriff's Office matched the latent palm print lifted from the plastic bank to Wright's palm print, confirming that Wright was inside the house where the Shank firearms were stolen. The following day, Wright used the stolen pistol during a drive-by shooting in a nearby Lakeland neighborhood.
>
> **The Longfellow Boulevard Drive–By Shooting: Friday, April 21, 2000**
>
> At approximately 9 a.m. on Friday, April 21, 2000, Carlos Coney and Bennie Joiner observed a black Toyota Corolla approaching slowly on Longfellow Boulevard as they were standing outside a nearby house. Wright and Coney had

  

been embroiled in a continuing dispute since their high school days. Joiner made eye contact with Wright, who was sitting on the passenger side. The car made a U-turn and slowly approached the house again. Wright leaned out the passenger side window and fired multiple shots. One bullet struck Coney in his right leg. Coney's neighbor carried the wounded man to a car and drove Coney and Joiner to a Lakeland hospital where a .380 caliber projectile was removed from Coney's leg.

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

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

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

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

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

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

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

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

As this group left the apartments between 10 and 10:45 p.m., Wright ran a stop sign in the victim's car. A detective ***889** observed the traffic infraction and conducted a tag check as he followed the vehicle. The tag check reported that the license plate was registered to an unassigned

  

Virginia plate for a blue, 1988, two-door Mercury, which did not match the vehicle to which it was attached.

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

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

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

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

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

**The Winter Haven Carjacking: Saturday, April 22, 2000**

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

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

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

Hogan, whose house was within walking distance of the car dealership from which Wright was seen fleeing, testified that when he returned home at approximately 12:30 a.m. on Saturday, he found Wright seated there. Wright asked Hogan to drive him back to the Providence Reserve Apartments, and on the way there, Wright spontaneously said "they had shot these two boys," and that he had also "got into it with some Mexicans." Wright confessed to Hogan that they had transported two white men to an orange grove and shot both men with a pistol and a shotgun. Wright also confirmed that they engaged in a high-speed

  

chase with police in Lakeland. However, at that point, Wright did not disclose the identity of the other person who aided in the murders.

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

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

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

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

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

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

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

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

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

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

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

  

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

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

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

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

**The Trial**

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

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

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

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

  

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

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

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

> [FN16] The trial court found four aggravating circumstances: (1) Wright was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person (great weight); (2) Wright committed the felony for pecuniary gain (no weight); (3) Wright committed the homicide in a cold, calculated, and premeditated manner without any pretense of moral or legal justification [CCP] (great weight); and (4) Wright committed the felony for the purpose of avoiding or preventing lawful arrest (great weight).
>
> The trial court found three statutory mitigating factors and gave them some weight: (1) Wright committed the offense while under the influence of extreme mental or emotional disturbance; (2) Wright's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) Wright was 19 years old at the time of the crime. Wright offered approximately 34 nonstatutory mitigating factors, and the trial court found the following: (1) Wright suffered emotional deprivation during his upbringing (some weight); ***894** (2) Wright's low IQ affected his judgment and perceptions (some weight); (3) Wright suffered from neurological impairments, which affected his impulse control and reasoning ability (some weight); (4) Wright suffered from low self-esteem (little weight); (5) Wright lacked the capacity to maintain healthy, mature relationships (little weight); (6) Wright had frustration from his learning disability (little weight); (7) Wright lacked mature coping skills (some weight); (8) Wright displayed appropriate courtroom behavior (little weight); and (9) Wright suffered from substance abuse during his adolescent and adult life (little weight).

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

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

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

  

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

This review follows.

**ANALYSIS**

**Wright's Renewed Motion for Determination of Intellectual Disability**

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

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

> "Florida law includes a three-prong test for intellectual disability as a bar to imposition of the death penalty." Snelgrove v. State, 107 So.3d 242, 252 (Fla. 2012). A defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See Hurst v. State, 147 So.3d 435, 441 (Fla. 2014) rev'd, Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); § 921.137(1), Fla. Stat. The defendant has the burden to prove that he is intellectually disabled by clear and convincing evidence. Franqui v. State, 59 So.3d 82, 92 (Fla. 2011); § 921.137(4), Fla. Stat. If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled. Nixon v. State, 2 So.3d 137, 142 (Fla. 2009). In reviewing intellectual disability determinations, this Court has employed the standard of whether competent, substantial evidence supports the trial court's determination. See Cherry v. State, 959 So.2d 702, 712 (Fla. 2007); Brown v. State, 959 So.2d 146, 149 (Fla. 2007) ("This Court does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses."). "However, to the extent that the [trial] court decision concerns any questions of law, we apply a de novo standard of review." Dufour v. State, 69 So.3d 235, 246 (Fla. 2011).
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> In Hall v. Florida, —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court invalidated Florida's interpretation of its statute as establishing a strict IQ test score cutoff of 70. Hall explained that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning," and "[i]ntellectual disability ***896** is a condition, not a number." Id. at 2000, 2001. Accordingly, "[the Supreme Court] agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id. at 2001.

Following two evidentiary hearings, including one in which Wright was allowed to present evidence of adaptive functioning in accord with Hall, the postconviction court concluded that Wright had not proven that he is intellectually

  

disabled by clear and convincing evidence. As we will explain, not only do we conclude that the postconviction court's findings are supported by competent, substantial evidence, but we are also convinced that Wright has failed to establish intellectual disability even by a preponderance of the evidence.[3] Accordingly, we affirm the postconviction court's order determining that Wright is not intellectually disabled.

**Significantly Subaverage General Intellectual Functioning**

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

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. ... Each IQ test has a "standard error of measurement[”] often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. ... An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.
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> The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies.... A score of 71, for instance, is generally considered to reflect a range between 66 ***897** and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence.... Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor.... In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

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

In this case, the postconviction court considered expert testimony regarding Wright's IQ scores, how the SEM applies to those scores, how the practice effect applies to those scores, how the Flynn effect applies to those scores, and how Wright's effort may have affected the validity of those scores.[4] After considering that evidence, the postconviction court found that Wright had not established by clear and convincing evidence that he is of significantly subaverage intellectual functioning. We agree and further hold that Wright has failed to establish this prong by even a preponderance of the evidence.

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

Moreover, the expert testimony in this case makes clear that even when adjusting the IQ scores to account for the SEM, Wright cannot prove significantly subaverage general intellectual functioning by even a preponderance of the evidence. Even taking the most favorable testimony concerning the application of the SEM to Wright's scores, at its lowest point, the most favorable range derived from Wright's scores dips just one point beneath the threshold of 70 required for a finding of significantly subaverage general intellectual functioning. Wright's expert witness, Dr. Kasper, testified that she adjusted all seven of Wright's scores for the SEM and concluded that the most accurate range of scores for Wright was derived from his first IQ examination—a WISC–R yielding a score of 76 in February 1991—because it

  

would be free from practice effect concerns as it was Wright's first IQ test. Not only was the range yielded from Wright's first IQ test the most accurate, but it was also the lowest range. Upon applying the SEM to a 95% confidence interval, the range derived from that score was between 69 and 82. According to Dr. Kasper, given the 95% confidence interval, ***898** one could expect Wright to score within that range on nineteen out of twenty IQ test administrations, even taking the practice effect into account for subsequent administrations. Indeed, she testified that all of Wright's subsequent scores fell within that range. Most notably, however, Dr. Kasper agreed that Wright's score of 82 in 2005 was valid and free of any practice effect concerns, and she conceded that the score of 82 was within the 95% confidence interval she determined from applying the SEM to Wright's first IQ exam. Thus, we cannot conclude that Wright has satisfied this prong by even a preponderance of the evidence.

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

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

**Concurrent Deficits in Adaptive Functioning**

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

> As described in section 921.137(1) and rule 3.203(b), the term adaptive behavior "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." The definition in section 921.137 and Florida Rule of Criminal Procedure 3.203 states that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition, which this Court has interpreted to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there must be current adaptive deficits. See Jones v. State, 966 So.2d 319, 326 (Fla. 2007).

69 So.3d at 248.

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

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

  

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

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

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

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

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

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

  

the normal way the ABAS–II is administered, giving us great pause in considering its validity.

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

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

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

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

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

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

**Wright's Amended Motion for Postconviction Relief**

**Hurst v. Florida**

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

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

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

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

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

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

**Penalty–Phase Ineffective Assistance of Counsel**

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of Counsel for his

  

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

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

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

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

121 So.3d at 453–56.

**Failure to Adequately Investigate or Present Mitigation**

With regard to the penalty phase, Wright first contends that his trial counsel were ineffective in failing to adequately present evidence of mitigating circumstances. Although Wright may not be intellectually disabled for purposes of the categorical prohibition against execution under the Eighth Amendment, he can potentially demonstrate that his low IQ and mental health are mitigating circumstances sufficient to outweigh the aggravating circumstances. As a result, Wright contends that

his penalty phase counsel were ineffective because they failed to: (1) acquire documents; (2) present lay witnesses; and (3) present expert witnesses demonstrating his low IQ and mental health as mitigating circumstances. We conclude that these claims are without merit.

Failure to Acquire Documents

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

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

Presentation of Expert Witnesses

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

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

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

  

about Wright's Fetal Alcohol Syndrome, as well as Wright's low IQ.

***907** In addition, Wright has failed to demonstrate that any expert testimony would have changed the composition of the mitigating circumstances found. For instance, the trial court found the existence of two statutory mental health mitigating circumstances: (1) that Wright committed the offense while under the influence of extreme mental or emotional disturbance, and (2) that Wright's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. It assigned those two statutory factors some weight. The trial court also found one more statutory mitigating circumstance, that Wright was nineteen years old (some weight), as well as nine nonstatutory mitigating circumstances: that Wright (1) suffered emotional deprivation during his upbringing (some weight); (2) had a low IQ, which affected his judgment and perceptions (some weight); (3) suffered from neurological impairments, which affected his impulse control and reasoning ability (some weight); (4) suffered from low self-esteem (little weight); (5) lacked the capacity to maintain healthy, mature relationships (little weight); (6) was frustrated by his learning disability (little weight); (7) lacked mature coping skills (some weight); (8) displayed appropriate courtroom behavior (little weight); and (9) suffered from substance abuse during his adolescent and adult life (little weight).

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

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

Failure to Present Lay Witness Testimony

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

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

**Failure to Challenge Evidence of Aggravation**

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

First, Wright has failed to establish prejudice. None of the evidence presented during the postconviction evidentiary hearing negates the fact that Wright had previous convictions for battery. Furthermore, even if those prior convictions were omitted, the trial court still considered Wright's contemporaneous convictions for first-degree murder of the other victim, carjacking, kidnapping, and robbery with

  

a firearm in finding the prior violent felony conviction aggravating circumstance. As the postconviction court noted, the contemporaneous convictions were arguably more serious than the convictions Wright claims were not properly rebutted. As explained above, two of the three aggravating circumstances found below are among the weightiest aggravating circumstances. See Sireci, 825 So.2d at 887; Deparvine, 995 So.2d at 381–82. In addition, the previously undiscovered evidence concerning the attack on Cassada would have been merely cumulative to the concessions elicited from Cassada during penalty phase cross-examination and the evidence presented by Wright's trial counsel. Specifically, evidence was introduced that one other person was convicted in connection with the attack on Cassada, and Cassada conceded that perhaps five individuals attacked him and he did not know whether Wright actually struck him. Thus, because Wright has failed to establish prejudice, we affirm the postconviction court's denial of this claim. See Evans, 946 So.2d at 12.

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

**Guilt Phase Ineffective Assistance of Counsel Claims**

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

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

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

Failure to Present Impeachment Witnesses

Competent, substantial evidence supports the postconviction court's findings that Wright has not established deficiency with regard to the decision to not present witnesses to impeach the credibility of Durant or Robinson. Rather, the record reflects that the decision was the product of reasonable trial strategy. For instance, trial counsel testified that he felt

"Durant was such an easy target and so incredible" that he was not going to look for any witnesses to impeach him. The record further reflects that trial counsel extensively and successfully cross-examined Durant with the goal of discounting his credibility. In addition, trial counsel testified that they rejected the presentation of additional witnesses, with Wright's approval, to preserve opening and closing remarks. Moreover, trial counsel testified that he did not consider inmates to be strong witnesses and that he did not consider their testimony sufficient to justify ***910** sacrificing the retention of opening and closing remarks.

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

Failure to Object to Prosecutor's Closing Remarks

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

The comments at issue are the following:

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

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

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

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

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

**Cumulative Error**

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

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

**CONCLUSION**

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

It is so ordered.

NO MOTION FOR REHEARING WILL BE ALLOWED.

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

CANADY and POLSTON, JJ., concur in result.

LAWSON, J., did not participate.

**All Citations**

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

  

Footnotes

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

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

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

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

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

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

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

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

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

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

  

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

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

**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 H

Florida Supreme Court Opinion in *Wright v. State*, 256 So. 3d 766 (Fla. 2018).

256 So.3d 766
Supreme Court of Florida.

Tavares J. WRIGHT, Appellant,

v.

STATE of Florida, Appellee.

No. SC13-1213

|

September 27, 2018

**Synopsis**

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

**Holdings:** The Supreme Court held that:

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

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

Affirmed.

Canady, C.J. concurred specially.

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

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

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

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

**Attorneys and Law Firms**

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Maria Christine Perinetti, Raheela Ahmed, Lisa Marie Bort, and Margaret S. Russell, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

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

**Opinion**

PER CURIAM.

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

**FACTUAL AND PROCEDURAL BACKGROUND**

This Court detailed the underlying crimes in Wright's direct appeal. *Wright v. State* (*Wright I* ), 19 So.3d 277, 283-91 (Fla. 2009) (affirming convictions and sentences). For the purposes of this proceeding, it is only germane that Wright

  

was convicted of, and sentenced for, two counts of first-degree murder, two counts of armed kidnapping, two counts of robbery with a firearm, and one count of carjacking with a firearm. *Id.* at 283. Also, prior to sentencing, the trial court held a special hearing to determine if Wright had ID. *Id.* at 289-90. In 2010, Wright filed a postconviction motion, which the postconviction court denied. *Wright*, 213 So.3d at 894. While the appeal of that decision was pending before this Court, the Supreme Court issued its opinion in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). *Wright*, 213 So.3d at 894. Resultantly, this Court relinquished jurisdiction and remanded to the postconviction court, allowing Wright to file a renewed motion for determination of ID. *Id.*

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

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

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

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

This review follows.

## ANALYSIS

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

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

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

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

### The Remand Order

First, we must dispel Wright's impression that the Supreme Court's vacation and remand indicates that it either reversed on the merits or intends for us to do so. The remand was in the form of a Supreme Court summary reconsideration order, which is colloquially known as a "GVR" (granted, vacated, and remanded). A GVR is a "mode of summary disposition, *though not necessarily on the merits*, [by] an order that grants certiorari, vacates the judgment below, and remands the case to the lower court for reconsideration in light of an intervening Supreme Court ruling." Stephen M. Shapiro et al., *Supreme Court Practice* 346 (10th ed. 2013) (emphasis added) (collecting cases as examples of GVRs with nearly identical language as the GVR here, including *Siegelman v. United States*, 561 U.S. 1040, 130 S.Ct. 3542, 177 L.Ed.2d 1120 (2010) ); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711, 712 (2009). Although we have not explicitly addressed this subject, other courts have resoundingly determined that a GVR is neither a merits determination nor precedential case law:

> It is important to remember, however, that a GVR order is neither an outright reversal nor an invitation to reverse; it ***770** is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that

  

> decision and, if warranted, to revise or correct it. *See Pratt v. Philbrook*, 109 F.3d 18, 19-20 (1st Cir. 1997). The GVR order itself does not constitute a final determination on the merits; it does not even carry precedential weight. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001); *Henry v. City of Rock Hill*, 376 U.S. 776, 777, 84 S.Ct. 1042, 12 L.Ed.2d 79 (1964); *see also Lawrence*[ *v. Chater*, 516 U.S. 163, 178, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) ] (Scalia, J., dissenting) (suggesting that the GVR ought to be termed "no fault V & R" because it represents a "vacation of a judgment and remand *without* any determination of error in the judgment below"). Consequently, we do not treat the Court's GVR order as a thinly-veiled direction to alter our course ....

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

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

**Intelligence Prong**

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

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

With regard to the first prong, the statute defines the phrase "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." § 921.137(1). Currently, the mean IQ score of the general population is approximately 100; and each standard deviation represents about 15 points. *Hall*, 134 S.Ct. at 1994; DSM-5, at 37. Accordingly, the medical approximation of significant subaverage intellectual functioning is an IQ score of 70, plus or minus. *Hall*, 134 S.Ct. at 1994; DSM-5, at 37. There is a standard error of measurement (SEM) that affects each IQ score, which results in a range approximately 5 points above and below the raw IQ test score. *Hall*, 134 S.Ct. at 1995; DSM-5, at 37. Rather than interpreting IQ scores as a single, fixed number, medical professionals read IQ scores as a range to account for SEM. *Hall*, 134 S.Ct. at 1995; AAIDD-11, at 36. For this reason, the Supreme Court rejected the use of a strict 70-point ID cutoff in *Hall*, noting that courts must account for SEM because "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S.Ct. at 2000 (citation omitted) (quoting *Atkins*, 536 U.S. at 309 n.5, 122 S.Ct. 2242). This means that an "IQ test result of 75 [i]s squarely in the range of potential intellectual disability." *Brumfield v. Cain*, —— U.S. ——, 135 S.Ct. 2269, 2278, 192 L.Ed.2d 356 (2015).

As it pertains to the intelligence prong of the ID test, *Moore* generally embodies a simple affirmation of the principles announced in *Hall*. Following *Hall*, the Supreme Court again stated that when a defendant establishes an IQ score range—

  

adjusted for the SEM—"at or below 70," then a court must "move on to consider [the defendant's] adaptive functioning." *Moore*, 137 S.Ct. at 1049. The high court explained further:

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

*Moore*, 137 S.Ct. at 1050.

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

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

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

***773 Adaptive Functioning Prong**

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

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

The DSM-5 divides adaptive functioning into three broad categories or "domains": conceptual, social, and practical. DSM-5, at 37; *see also* AAIDD-11, at 43. The conceptual domain "involves competence in memory, language, reading,

  

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

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

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

The CCA had reversed a state habeas court that applied current medical standards—the DSM-5 and AAIDD-11—and found the defendant to have ID. *Id.* at 1045-46. The habeas court applied medical standards to the substantial evidence of the defendant's adaptive deficits before concluding that there were deficits in all three domains. *Id.* In fact, both the state and defense experts agreed that the defendant's adaptive functioning scores were more than two standard deviations below the mean. *Id.* at 1047. Despite this, the CCA reversed, making its own findings and rejecting the lower court's findings, in part, for the failure to rely on *Briseno*. *Id.* at 1046.[6] *Briseno* adopted an ID definition from the 1992 edition of the AAIDD-11 (two editions prior to the current edition) which included a relatedness requirement. *Id.* at 1046. The relatedness requirement, that adaptive deficits be "related" to intellectual functioning deficits, has been removed from the AAIDD-11. *Id.* Still, the CCA held that the lower court should have applied the *Briseno* factors to determine whether the defendant demonstrated relatedness. *Id.* Those factors had no medical or legal authority to support them, and they reflected a misinformed layperson's understanding of ID; for instance, the first *Briseno* factor follows:

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

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

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

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

upon superseded medical standards to conclude that the defendant was not intellectually disabled. *See generally Moore*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed.2d 416.

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

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

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

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

  

connected to the conceptual domain. *Id.* at 899. Although we discussed further evidence of Wright's abilities, the expert testimony, relevance of the evidence, and case posture all distinguish this case from *Moore*. *See id.* at 899-902.

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

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

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

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

**CONCLUSION**

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

It is so ordered.

  

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

CANADY, C.J., concurs specially.

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

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

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

LABARGA, J., concurring.

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

In the broader context, however, I agree with the general proposition that where a defendant has failed to establish any one of the three prongs of the intellectual disability determination by clear and convincing evidence, "the defendant will not be found to be intellectually disabled." *Williams v. State*, 226 So.3d 758, 768 (Fla. 2017) (quoting *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016) ), *cert. denied*, —— U.S. ——, 138 S. Ct. 2574, 201 L.Ed.2d 297 (2018). *Moore* does not alter this premise. Rather, *Moore* followed the holding of *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [the SEM (standard error of measurement) ], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. In *Moore*, the Supreme Court reiterated that courts are required to "continue the inquiry and consider other evidence of intellectual disability *where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.*" 137 S.Ct. at 1050 (emphasis added). There, because the defendant's IQ score, adjusted for the SEM, presented a range of 69 to 79, the Texas Court of Criminal Appeals was required to "move on" to consider adaptive functioning. *Id.* at 1049.

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

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

LAWSON, J., concurring specially.

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

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

  

measurement." *Id.* at 1049 (internal quotation marks omitted). In this case, by contrast, both the trial court and this Court did account for the standard error of measurement (SEM) when concluding that Wright failed to establish significantly subaverage intellectual functioning. *Wright*, 213 So.3d at 897-98.

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

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

CANADY, C.J., concurs.

PARIENTE, J., concurring in result.

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

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

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

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

> however, caution against reliance on adaptive strengths developed "in a controlled setting," as a prison surely is. DSM-5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should ***782** be obtained."); *see* AAIDD-11 User's Guide 20 (counseling against reliance on "behavior in jail or prison").

*Moore*, 137 S.Ct. at 1050.

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

> Specifically, the AAIDD and the DSM-IV stress that the focal point of adaptive behavior should be on the individual's limitations rather than demonstrated adaptive skills. An important reason for this policy is that "[t]he skills possessed by individuals with [intellectual disability] vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 21 n.29 (2003).
>
> The AAIDD, in its amicus brief to this Court, explains that the significant limitations in adaptive behavior must be based on objective measurements and not weighed against adaptive strengths. The purpose of the adaptive functioning prong is to ascertain whether the measured intellectual score reflects a real-world disability, as opposed to a testing anomaly. Thus for this prong, the diagnostician's focus must remain on the presence of confirming deficits. Accordingly, the AAIDD has specifically noted that "assessments must ... assume that limitations in individuals often coexist with strengths, and that a person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period." Am. Ass'n on Intellectual & Developmental Disabilities, *Definition of Intellectual Disability*, http://www.aaidd.org/content_100.cfm?navID=21 (last visited Jan. 14, 2011). Further, as the AAIDD correctly explains, much of the clinical definition of adaptive behavior is much less relevant in prisons, and in fact, a person with [intellectual disability] is likely to appear to have stronger adaptive behavior in a structured environment such as a prison than in society. The amicus brief of the AAIDD further points out that "[s]tereotypes and lay assumptions about people with [intellectual disability] can cloud or distort individual assessment."
>
> The failure to take an objective approach to deficits in adaptive behavior can result in the perpetuation of misunderstanding [intellectual disability].

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

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

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

**All Citations**

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

Footnotes

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

  

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

3 According to Justice Lawson's opinion, the fact that Wright failed to establish this first prong ends our inquiry. Concurring in result op. at 779–80 (Lawson, J.) (citing *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016) ). Whether the failure on one prong of the ID test is dispositive as a general matter may be a question in a different case. *Compare Salazar*, 188 So.3d at 812 (stating that the failure on one prong of the ID test is dispositive), *with Oats*, 181 So.3d at 467-68 (holding that the failure on one prong of the ID test is not necessarily dispositive). Yet that is not the issue in this case. Here —on remand from the Supreme Court's GVR order—we are simply reconsidering Wright's claim to determine if *Moore* changed the outcome. As we explained above, Wright's SEM-adjusted IQ range fell 1 point below 70. *Supra* pp. 771–72. Therefore, the postconviction court properly allowed him to introduce evidence of his adaptive functioning, which we addressed on appeal. *Wright*, 213 So.3d at 897-98; *see also Moore*, 137 S.Ct. at 1049 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning."); *Hall*, 134 S.Ct. at 2001. The Supreme Court vacated *Wright* because *Moore* may have impacted the outcome of Wright's ID claim; thus we must determine if *Moore* altered our decision by reviewing its effect on our earlier analysis. Therefore, any discussion of *Salazar* or its potential conflict with *Oats* is unnecessary here, particularly because Wright clearly failed to establish either prong at issue. *See In re Holder*, 945 So.2d 1130, 1133 (Fla. 2006) ("Of course, we have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds.").

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

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

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

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

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

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

  

to do so is a potential ground for reversal, *id.* at 1053. This catch-22 that we find ourselves in at times underscores our reliance on expert medical opinions provided below and a postconviction court's corresponding credibility determinations.

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

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

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

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

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

**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 I

Excerpt from the "Amended Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody," filed on December 17, 2019

**AMENDED PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

| **United States District Court** | **District: Middle District of Florida, Tampa Division** |
|---|---|
| **Name:** Tavares J. Wright | **Docket or Case No.: 8:17-cv-00974-WFJ-TGW** |
| **Place of Confinement:** Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 | **Prisoner No.:** DOC# H10118 |
| **Petitioner,** Tavares J. Wright **v.** **Respondents,** Mark S. Inch, Department of Corrections and Ashley Moody, Attorney General, State of Florida | |

**PETITION**

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

   Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida

   (b) Criminal docket or case number: CF00-02727A-XX

2. (a) Date of the judgment of conviction: November 13, 2004

   (b) Date of sentencing: October 12, 2005

3. Length of sentence: Sentenced to Death

4. In this case, were you convicted on more than one count or of more than one crime?
   ☒Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
   one count of carjacking, two counts of kidnapping, two counts of first-degree murder, and two counts of robbery with a firearm

6. (a) What was your plea?

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Not applicable.

(c) If you went to trial, what kind of trial did you have?

☒ Jury ☐ Judge only

Wright had a jury trial for guilt phase, but he waived a jury for penalty phase.

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐No

8. Did you appeal from the judgment of conviction?

☒Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: The Supreme Court of Florida.

(b) Docket or case number: No. SC05-2212

(c) Result: Wright's judgment and sentences were affirmed.

(d) Date of result: September 3, 2009.

(e) Citation to the case: *Wright v. State*, 19 So. 3d 277 (Fla. 2009).

(f) Grounds raised:

1. The trial court erred in admitting collateral-crime evidence as inextricably intertwined with the offense on trial which became a feature of the trial that rendered the probative value of the evidence to be substantially outweighed by the prejudicial effect.

2. Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).

3. The trial court erred in finding that the murders were committed in a cold, calculated, and premeditated manner.

4. The trial court erred in finding that the dominant purpose for committing the murders was witness elimination to avoid arrest.

(g) Did you seek further review by a higher state court? ☐ Yes ☒No

The Florida Supreme Court is the highest reviewing court.

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes ☒ No

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

☒Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida

(2) Docket or case number: CF00-02727A-XX

(3) Date of filing: November 5, 2010

(4) Nature of the proceeding: Motion for post-conviction relief

(5) Grounds raised:

1. Defense counsel's failure to object to the prosecutor's improper argument regarding Wright's propensity to commit violence constituted ineffective assistance of counsel.

2. Trial counsel provided prejudicial ineffective assistance during the guilt phase of Wright's capital trial by failing to object to evidence of other crimes or wrongful acts which exceeded its legitimate scope of admissibility.

3. Trial counsel provided prejudicial ineffective assistance during the guilt phase of Wright's capital trial by failing to challenge testimony of victim's family members that identified belongings of the victim.

4. The State violated Wright's due process rights under the *Brady* and *Giglio* decisions by not disclosing exculpatory or impeaching evidence, failing to correct

false and misleading testimony, and by presenting false evidence, testimony and argument to the jury.

5. Wright received prejudicial ineffective assistance of counsel for failure to impeach a jailhouse informant who indicated that he was going to commit perjury.

6. Wright was denied the effective assistance of counsel at his jury trial for failure of his trial attorney to impeach a jailhouse informant who testified to prior inconsistent statements in the two prior trials.

7. Failure to present experts who could testify to fetal alcohol syndrome during the guilt phase of Wright's trial constituted prejudicially ineffective assistance of counsel.

8. Trial counsel provided prejudicial ineffective assistance during the penalty phase of Wright's capital trial when they failed to challenge evidence offered in aggravation.

9. Wright received prejudicial ineffective assistance of counsel at penalty phase of his trial for failure to adequately investigate, prepare and present available mitigation.

10. *** The motion was unintentionally misnumbered and Claim 10 was missing.

11. Defense counsel was prejudicially ineffective for failing to challenge the juror for cause, or have the juror excused by exercising a peremptory challenge.

12. Wright was denied effective assistance of counsel for failure to investigate Wright's alibi witnesses in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

13. Newly discovered evidence that shows the State of Florida argued conflicting theories of prosecution was fundamentally unfair and violated Wright's due process rights.

14. Wright received prejudicially ineffective assistance of counsel because his defense attorney did not argue the codefendant's superior intelligence and reasoning in the proportionality of his death sentence.

15. Fla. Stat. 945.10 prohibits Wright from knowing the identity of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution.

16. Cumulative error deprived the defendant of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

17. Florida's lethal injection method of execution is cruel and unusual punishment and would deprive Wright of due process and equal protection of the law in violation of the Fourth, Fifth, Sixth, Eighth, an Fourteenth Amendments of the United States Constitution and corresponding portions of the Florida Constitution

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒Yes ☐ No

(7) Result: Denied.

(8) Date of result: May 22, 2013

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida

(2) Docket or case number: CF00-02727A-XX

(3) Date of filing: October 10, 2014

(4) Nature of the proceeding: Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203.

(5) Grounds raised: Wright is intellectually disabled and is not subject to execution.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒Yes ☐ No

(7) Result: Denied

(8) Date of result: March 27, 2015

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Florida Supreme Court

(2) Docket or case number: SC13-1213

(3) Date of filing (if you know):

(4) Nature of the proceeding: On January 29, 2016, the Florida Supreme Court directed the parties to file supplemental briefs addressing the applicability of *Hurst v. Florida*, 136 S.Ct. 616 (2016) to the instant case.

(5) Grounds raised:

1. Fla. Stat. **§** 775.082 mandates a life sentence following *Hurst.*

2. Where fact-finding is necessary, *Hurst* claims should first be brought in trial courts.

3. *Hurst* is retroactive under *Witt*.

4. *Hurst*'s rejection of reasoning based on *stare decisis* strongly favors its retroactive application.

5. A harmless error analysis is not necessary because the error can never be harmless under *Hurst.*

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐Yes ☒No

(7) Result: The Florida Supreme Court held that Wright is not entitled to relief under *Hurst v. Florida.*

(8) Date of result: November 23, 2016.

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☒Yes ☐ No
(2) Second petition: ☒Yes ☐ No
(3) Third petition: ☐Yes ☒No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: The *Hurst* issue in the third petition was argued in the supplemental briefing, which was directed by the Florida Supreme Court, the highest state court.

Additional Relevant Procedural History

(d) If you filed any fourth petition, application, or motion, give the same information:

(1) Name of court: United States Supreme Court

(2) Docket or case number: No. 17-5575

(3) Date of filing: August 14, 2017 (Docketed)

(4) Nature of the proceeding: Wright filed petition for writ of certiorari to the United States Supreme Court, seeking relief from the Florida Supreme Court's decision in *Wright v. State*, 213 So. 3d 881 (Fla. 2017) affirming the trial court's denial of Wright's intellectual disability claim.

(5) Grounds raised:

1. The FSC Erred in Finding that Wright's Intellectual Functioning (IQ) is Not Significantly Subaverage under the *Moore*, *Hall*, and *Atkins* Standards by Reinstating a Strict Numerical Threshold, Ignoring the SEM, and Relying on an Expert with Completely Unconventional Methods for Calculating IQ.

2. The FSC Failed to Apply the Standards Recently Announced in *Moore* and Previous Binding Supreme Court Precedent in Holding that Wright Lacks Deficits in Adaptive Functioning.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: Petition granted, judgment vacated, and case remanded for further consideration in light of *Moore v. Texas*, 137 S.Ct. 1039 (2017).

(8) Date of result: October 16, 2017

(d) If you filed any fifth petition, application, or motion, give the same information:

(1) Name of court: United States Supreme Court

(2) Docket or case number: No. 18-8653

(3) Date of filing: April 1, 2019 (Docketed)

(4) Nature of the proceeding: Upon petition for writ of certiorari, the United States Supreme Court vacated the Florida Supreme Court's decision in *Wright v. State*, 213 So. 3d 881 (Fla. 2017) and remanded to the FSC for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017). On remand, the FSC reaffirmed its denial of Wright's intellectual disability claim in *Wright v. State*, 256 So. 3d 766 (Fla. 2018). Wright filed a petition for writ of certiorari to the United States Supreme Court seeking relief from the Florida Supreme Court's decision.

(5) Grounds raised:

1. The FSC Erred in Finding that Wright's IQ is Not Significantly Subaverage Under the *Moore I*, *Hall*, and *Atkins* Standards by Reinstating a Strict Numerical Threshold and Relying on an Expert With Completely Unconventional Methods for Calculating IQ

2. The FSC's Requirement that Post-Conviction Defendants Prove Current Adaptive Deficits while Incarcerated Disregards *Atkins v. Virginia's* Reasoning for Excluding Intellectually Disabled Defendants from the Death Penalty, Misconstrues the Related Medical Diagnostic Framework, and is at Odds with the Trends of Other Jurisdictions

3. The FSC Continued its Trend of Misapplying the Standards of *Moore I*, *Hall*, and *Atkins* by Relying Too Heavily on Wright's Adaptive Improvements Made in Prison and Emphasizing his Perceived Adaptive Strengths Over his Adaptive Weaknesses

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: Petition denied.

(8) Date of result: June 3, 2019.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**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.**

(a) Supporting facts[1]:

**I. Introduction**

Tavares Wright's ("Wright") 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 Kremper and Joel Freid to evaluate Wright for mental retardation.[2] R5/745. Both experts testified at a special hearing regarding mental retardation on September 22, 2005. R5/749. Neither expert assessed Wright's adaptive behavior. Following that hearing, the trial court found that Wright's IQ scores did not establish a finding of mental retardation, and that Wright therefore was not mentally retarded for the purposes of capital sentencing. R5/825-29. On

[1] References to the record on appeal from Wright's direct appeal will be referred to as R (volume number) / (page number). References to the record on appeal containing the transcript of Wright's 2005 combined penalty phase/ *Spencer* hearing will be referred to as RS (volume number) / (page number). The postconviction record on appeal containing the transcript of Wright's 2012 evidentiary hearing on his Fla. R. Crim. P. 3.851 motion will be referred to as PC (volume number) / (page number). References to the supplemental record on appeal regarding Wright's Renewed Motion for Determination of Intellectual Disability and the 2015 hearing on that motion will be referred to as SR (volume number) / (page number).

[2] "Intellectual disability" has since replaced "mental retardation" as the appropriate term.

October 12, 2005, the trial court sentenced Wright to death on the two counts of first-degree murder and to life imprisonment on the remaining counts. R6/963-83.

On March 9, 2012, Wright filed an "Amended Motion to Vacate Judgment and Sentence," pursuant to Fla. R. Crim. P. 3.851. A hearing was held on the motion on October 16-17, 2012. The trial court denied the motion in an order rendered May 22, 2013. While the appeal of the trial court's denial was pending before the Florida Supreme Court ("FSC"), Wright filed a motion requesting that the FSC relinquish jurisdiction for the specific purpose of filing a renewed motion for determination of intellectual disability as a bar to execution under Fla. R. Crim. P. 3.203. On October 7, 2014, the FSC issued an order relinquishing jurisdiction to the circuit court. On October 10, 2014, Wright filed a "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203," in which he sought a renewed determination of intellectual disability as a bar to execution in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). SR1/1-7. The circuit court agreed to take judicial notice of the record on appeal from direct appeal, as well as the post-conviction record on appeal. The evidentiary hearing on the motion was held on January 5-6, 2015 and February 11, 2015.

Numerous experts have testified concerning Wright's intellectual disability. Dr. Mary Kasper testified for the defense at Wright's 2012 and 2015 evidentiary hearings and opined that Wright meets the criteria for intellectual disability. Dr. Michael Kindelan testified for the defense at Wright's 2015 evidentiary hearing and opined that Wright meets the criteria for intellectual disability. Dr. Joel Freid testified for the defense at Wright's 2005 mental retardation hearing and 2015 evidentiary hearing and opined that Wright

meets the criteria for intellectual disability. Dr. Michael Gamache testified for the State at the 2015 evidentiary hearing and opined that Wright did not meet the criteria for intellectual disability. Numerous lay witnesses testified throughout Wright's case as to evidence of Wright's adaptive functioning. The testimony of the above expert witnesses and lay witnesses is summarized below.[3]

**II. Intellectual Disability Definitions**

Both Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) define 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."[4] In addition to the statute and the rule, both the United States Supreme Court and the Florida Supreme Court look to the American Psychiatric Association, which publishes the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH ADDITION (American Psychiatric Association 2013) (hereinafter "DSM-V"), and the American Association on Intellectual

[3] Other expert witnesses have testified concerning Wright's intellectual disability. Dr. Alan Waldman opined for the defense at Wright's 2005 combined penalty phase and *Spencer* hearing that Wright is "retarded." SR3/414. Dr. Willam Kremper testified at Wright's 2005 special set mental retardation hearing that Wright was not mentally retarded. SR3/485. Dr. Joseph Sesta also testified at Wright's 2005 special set mental retardation hearing that Wright was not mentally retarded but was in the borderline range of intellectual functioning based on his full-scale IQ scores falling above the statutory cutoff of 70 that was in existence at the time. SR3/527-28.

[4] Wright will refer to the three requirements of Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) as Prong One (significantly subaverage general intellectual functioning), Prong Two (existing concurrently with deficits in adaptive behavior), and Prong Three (manifested during the period from conception to age 18).

and Developmental Disabilities, which publishes the AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) (hereinafter "AAIDD-11"), for guidance in intellectual disability cases. Both the DSM-V and AAIDD-11 definitions of intellectual disability are generally accepted in the psychological community. Although not identical, the definitions of intellectual disability in Fla. Stat. § 921.137 and Fla. R. Crim. P. 3.203 generally conform to these clinical definitions. The DSM-V defines intellectual disability as follows:

> Intellectual Disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and sociological standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more areas of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-V at 33. The AAIDD-11 defines intellectual disability as follows:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

AAIDD-11 at 5. Pursuant to Fla. Stat. § 921.137(4), Wright must show by clear and convincing evidence that he is intellectually disabled.

## III. Prong One - Significantly Subaverage General Intellectual Functioning ("IQ")

### A. Statutory and Clinical Definitions Related to Intellectual Functioning

Fla. Stat. § 921.137 defines "significantly subaverage general intellectual functioning," as "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."[5] Standardized IQ tests generally have a mean score of 100 with a standard deviation of fifteen points. The AAIDD-11 defines significant limitations in intellectual functioning as "an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific instruments used and the instruments' strengths and limitations." AAIDD- 11 at 31. The DSM-V explains that intellectually disabled individuals "have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5)." DSM-V at 37. Factors that may affect an individual's IQ score include both the practice effect and the Flynn effect. DSM-V at 37. The practice effect refers to "gains in IQ scores on tests of intelligence that result from a person being retested on the

[5] Fla. R. Crim. P. 3.203(b) defines "significantly subaverage general intellectual functioning," as "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4/011 of the Florida Administrative Code." The tests specified by rule 65G-4/011 are the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale.

same instrument." AAIDD-11 at 38. The Flynn effect refers to the statistical upward drift of IQ scores that occurs as an IQ test is taken further and further away from the year it is first normed. *See* AAIDD-11 at 37. "The Flynn-effect refers to the increase in IQ scores over time (i.e., about 0.30 points per year)." AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, USER'S GUIDE (11th ed. 2012) ("User's Guide") at pg. 23.

**B. Expert Testimony Regarding Prong One**

**1. Mary Elizabeth Kasper, Ph.D.**

Defense expert Dr. Kasper testified concerning Wright's intellectual disability at both the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence" and the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Dr. Kasper is a psychologist board certified in clinical psychology and neuropsychology. SR5/881-82. Her current practice mainly consists of assessment, testing, and consultation. SR5/882-883. She previously did evaluations for the Office of Disability Determinations for about twelve years. SR5/883. Dr. Kasper opined at both the 2012 and 2015 hearings that Wright suffers significantly subaverage intellectual functioning under clinical and statutory definitions. PC12/1984; SR5 897. Dr. Kasper explained the definitions and application of the standard error of measurement, Flynn effect, and practice effect during

the hearings and detailed Wright's individual scores. Wright's six full-scale scores are also detailed in the below chart:

| **Date of Test** | **Test Form** | **Administrator** | **Full Scale IQ Score** |
|---|---|---|---|
| 2/91<br>(10 years old) | WISC-R | Dr. Kindelan | 76 |
| 4/4/91<br>(10 years old) | WISC-R | Evelyn Pierce<br>(Polk County Public Schools, Bartow, FL) | 80 |
| 9/11/91<br>(10 years old) | WISC-R | Janet Cook<br>(Williamson Central Schools, Williamson, NY) | 81 |
| 8/25/97<br>(16 years 6 months old) | WAIS-R | Dr. Freid | 75 |
| 2001<br>(20 years old) | WASI | Dr. Dolente | N/A |
| 2/4/03<br>(a few days short of 23 years old) | WASI | Dr. Sesta | N/A |
| 7/15/05<br>(24 years old) | WAIS-III | Dr. Kremper | 82 |
| 7/25/05<br>(24 years old) | WAIS-III | Dr. Freid | 75 |

The following summary cites to Dr. Kasper's testimony from both the 2012 and 2015 hearings. Dr. Kasper testified that Wright was administered eight total IQ tests prior to 2014- six full-scale IQ tests and two abbreviated tests. SR5/907. All eight tests were in the Wechsler family of tests. SR5/907. Wright was given the exact same Weschler Intelligence Scale for Children- Revised ("WISC-R") three times in 1991 when Wright was ten years old. PC12/1942. Dr. Kindelan administered the first WISC-R to Wright in February of 1991. PC12/1959. Wright received a full-scale score of 76 on the first test, and that test was normed in 1972. PC12/1962-63. Accordingly, Wright's Flynn-corrected full-

scale IQ score from the first 1991 test was **70.**[6] PC12/1963. Wright was again given the exact same WISC-R on April 4, 1991 and September 11, 1991.[7] The second and third tests Wright took in 1991 were not valid indications of Wright's true score because they were taken so close together. PC12/1965. Dr. Kasper testified that she was specifically concerned about the validity of the second and third scores achieved in 1991 because they could be the result of the practice effect. SR5/913. Applicable manuals state that you need to wait a year between administrations of the same test to prevent the practice effect. SR5/913. There was no indication in the reports for the second and third scores that the test administrators were aware that Wright had previously been administered the WISC-R that year. SR5/916. Dr. Kasper was not concerned about the validity of the first 1991 score because it was the first test administered to Wright, and Dr. Kindelan's report made no mention of concern about the score's validity, which would be reported in the record. SR5/913-14.

Dr. Kasper testified that Wright was next tested with the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") in 1997 when he was sixteen years old. PC12/1966-67. Dr. Freid administered the test to Wright for a disability evaluation.

[6] Dr. Kasper testified extensively during the 2012 hearing about the definition of the Flynn effect and corresponding Flynn-correction. PC12/1947-51. Dr. Kasper also testified during the 2012 hearing that she didn't routinely apply the Flynn-correction in non-capital cases because she could rely on the DSM's measurement error of plus or minus five points when reaching a diagnosis, as intellectual disability is not clinically diagnosed with a bright-line number. PC12/1952. Dr. Kasper would later testify during the 2015 hearing that the DSM directed her to apply the Flynn effect to IQ scores. SR6/936.

[7] Wright received a full-scale IQ score of 80 on the WISC-R administered to him on April 4, 1991 and a full-scale score of 81 on the exact same WISC-R administered to him on September 11, 1991. The Flynn-corrected scores equal 74 and 75 respectively.

PC12/1966-67. Wright received a full-scale score of 75 on the 1997 test, and that test was normed in 1978. PC12/1969-70. Accordingly, Wright's Flynn-corrected full-scale IQ score from the 1997 test was **69.** PC12/1969-70. Dr. Kasper was not concerned about the validity of the 1997 score because it was the first time Wright was administered the WAIS-R and there were no reported concerns about the score's validity. SR5/914. Wright was then tested with two abbreviated IQ tests in 2001 and 2003. PC12/1975-78. The two abbreviated tests are not valid for the purposes of diagnosing intellectual disability[8], but they could contribute to the practice effect because they have four of the same main subtests as the full-scale tests. SR5/917. Finally, Wright was administered two Wechsler Adult Intelligence Scale- Third Edition ("WAIS-III") in July of 2005. PC12/ 1978-81. Wright received a full-scale score of 82 on the first test administered on July 15, 2005, and then received a full-scale score of 75 on the second test administered on July 25, 2015. PC12/1978-81. Dr. Kasper was concerned about the validity of the two 2005 scores because Wright had been tested so many times by that point. SR5/918. Dr. Kasper also noted that there was a sampling error of 2.3 points with the WAIS-III, so the 82 and 75 Wright scored on the WAIS-III in 2005 should be adjusted to 75 and 73. SR6/1072-73.

Dr. Kasper considered the first 1991 WISC-R score and the 1997 WAIS-R score to be the best measures of Wright's intelligence because they were given prior to any legal

[8] Screening tests such as the Wechsler Abbreviated Scale of Intelligence ("WASI") are abbreviated measures of IQ, which are specifically excluded by the rules established by the Agency for Persons with Disabilities. Additionally, the Wechsler manuals state that screening tests should not be given in any legal or quasi-legal setting, or when a determination based on an IQ score is important.

history, were taken in the most standardized conditions, and were the first times he'd been given the WISC-R and the WAIS-R. SR5/918. Dr. Kasper also testified that she spoke with the two doctors who administered both tests- Dr. Kindelan and Dr. Freid- and neither had concerns about the scores' validity. SR5/918-19.

Dr. Kasper explained that the standard error of measurement ("SEM") is a number calculated by the company making an IQ test and can be found in the test's manual. SR5/920; SR6/921-25. The SEM represents a range or band of IQ scores within which an individual's true score would fall. SR5/920; SR6/921-25. The SEM generally amounts to plus or minus five, but it is also a different number for different tests, ages, and IQ ranges. SR6/924. If one SEM is applied, the confidence interval would be 66 percent; in other words, there is a 66 percent chance that the individual's true score falls within that band. SR6/921. If two SEMs are applied, the confidence interval would be 95 percent, or a 95 percent chance that the individual's true score falls within that band. SR6/922-23. The 95 percent confidence interval was used in the *Hall v. Florida*[9] case. SR6/ 23.

Dr. Kasper calculated the SEM for the 1991 WISC-R administered by Dr. Kindelan and the 1997 WAIS-R administered by Dr. Freid. Wright obtained a full-scale IQ of 76 on the WISC-R administered by Dr. Kindelan in 1991. SR6/932. The SEM for this test is 3.14 or 3.24, depending on whether Wright was closer to 9 ½ or 10 ½ years old when he took the test. SR6/933. Since Dr. Kasper did not know the exact date the test was administered, she used the more conservative SEM of 3.14. SR6/933. Dr. Kasper applied the 3.14 SEM using a 95 percent confidence interval and calculated a range of scores from 70 to 82.

[9] *Hall v. Florida*, 572 U.S. 701 (2014).

SR6/934. The fact that all of Wright's subsequent full-scale scores fell within that range, even when accounting for the practice effect, gave Dr. Kasper additional confidence that Wright's true score falls within that range. SR6/934-35. Dr. Kasper saw no reason to doubt the validity of the first 1991 score, especially considering the subsequent scores Wright obtained. SR6/935. Dr. Kasper further testified that Wright obtained a full-scale IQ of 75 on the WAIS-R administered by Dr. Freid in 1997. SR6/937. The SEM for this test is 2.96. SR6/937. When the SEM is applied to this test using a 95 percent confidence interval, the range of scores is 69 to 81. SR6/937.

Dr. Kasper testified that no validity testing was done with Wright's IQ tests prior to 2014. SR6/1038. Validity tests are typically given with IQ tests in forensic setting to test the person's effort and motivation to determine if they may be malingering. SR6/1038-39. If a person is malingering on an IQ test, it is assumed they are "faking bad" or purposely scoring lower than their actual IQ. SR6/1052. Validity testing is not typically done in non-forensic settings. SR6/1039. Dr. Kasper was aware that State's expert Dr. Michael Gamache found that Wright was malingering after administering both a validity and IQ test to Wright in 2014. SR6/1047. Dr. Kasper did not disagree with Dr. Gamache's assertion that Wright malingered on the 2014 test and did not rely on the score from that test when determining if Wright met the criteria for Prong One. SR7/1111-12.

Dr. Kasper explained that the Validity Indicator Profile ("VIP") that Dr. Gamache administered was not an appropriate measure of malingering for individuals being considering for a diagnosis of intellectual disability because the VIP manual states that the test misclassifies intellectually disabled individuals 80 percent of the time. SR6/1107. Dr.

Kasper had previously administered the VIP to individuals who are suspected of intellectual disabilities, and none of those individuals had a valid score. SR6/1108. Dr. Kasper instead administers the Victoria Symptom Validity Test to intellectually disabled individuals because it does not have a high misclassification rate. SR6/1108-09. As a psychologist, Dr. Kasper is trained to look for malingering when administering IQ tests, and it is standard practice for psychologists to include any concerns about validity in their reports. SR7/1112-13. Dr. Kasper has experience doing evaluations for the Office of Disability Determinations, and the agency requires reporting any questions about a test's validity. SR7/1113. Dr. Kasper saw no indication in the reports for Wright's prior testing that there were concerns about validity. SR7/1113.

**2. Michael Gamache, Ph.D.**

State's expert Dr. Gamache testified concerning the issue of Wright's intellectual disability at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Dr. Gamache testified that he had been working as a psychologist for 30 years. SR8/1309-10. He does not hold any board certifications. SR8/1354. His practice currently consists of 80-85 percent forensic work. SR8/1311. Dr. Gamache first became involved in Wright's case when he was hired by the State in October of 2014. SR8/1315. Dr. Gamache administered the WAIS-IV to Wright, and Wright achieved a full-scale IQ of 65 on the test. SR8/1360. Dr. Gamache's report from the test was introduced as State's Exhibit Four. Dr. Gamache admitted that he altered

the standard administration of the WAIS-IV by engaging in "testing of limits", which he explained:

> Testing of limits is something that we do clinically when we have reason to suspect that a person may not be putting forth full effort on battery performance measures. The idea behind testing of limits is that for a number of the subtests the items get more difficult as you get further along in the test. They're discontinued rules on those subtests. Many of the discontinued rules take the form of if a person misses three consecutive items on this subtest, then you stop there and then calculate the score based on only the items that have been administered. You don't administer items beyond that. However, because of Mr. Wright's clinical presentation and the known potential for secondary gain and questions that I had about the validity of his performance, I engaged in some testing of limits. That is, when he would get to a point where he, for example, had missed three consecutive items and I would discontinue the scoring, I continued to administer some items that were harder in nature to see whether or not he got some of them right and indeed he did. That was not incorporated in the scoring, so it didn't alter the scoring whatsoever. It's an appropriate commonly recognized procedure when there is concern about validity.

SR8/1360-62. Dr. Gamache almost always administers a validity test in conjunction with intelligence testing where the issue is whether the individual is intellectually disabled. SR8/1332. Dr. Gamache tested Wright with the VIP to inform about Wright's "motivation, his effort, and the possibility that he may be feigning impairment on intellectual-type measures." SR8/1331. Dr. Gamache testified that an expert cannot accomplish the same thing using subjective judgment as he can with a validity test. SR8/1332. Dr. Gamache disagreed with Dr. Kasper's testimony that the VIP should not be used in situations where the issue is intellectual disability, and testified that the VIP "is the ideal instrument for measuring performance motivation effort and malingering when you're evaluating mental retardation unless you're dealing with somebody where there is clear evidence historically that they are severely impaired from an intellectual standpoint." SR8/1333-34. The results

of the VIP indicated to Dr. Gamache that Wright did not make a full or reasonable effort, "and, therefore, the results of any concurrent testing of intelligence would not be expected to be valid." SR8/1334. Dr. Gamache concluded "that Mr. Wright was motivated during [Dr. Gamache's] examination to not perform to the best of his abilities and to convince [Dr. Gamache] that he was impaired intellectually." SR8/1335. Dr. Gamache explained that a person cannot fake being smarter or more intelligent, but he can fake the reverse. SR8/1335.

Dr. Gamache had a large number of the results of Wright's prior IQ tests. SR8/1335-36. Based on the documents he reviewed, there was no evidence that any validity testing was done with any of the prior IQ tests. SR8/1336. Dr. Gamache testified that he could not rule out that Wright may have malingered on all his previous IQ tests. SR8/1368. However, he did agree that "there's some consistencies in these scores, some general consistency in the pattern of strengths and weaknesses and, therefore, [Dr. Gamache was] inclined to believe that these are a reasonable accurate reflection as a composite of what [Wright's] intellectual abilities are." SR8/1368. Despite his concerns about malingering, Dr. Gamache did not speak with any other mental health professional about any examination of Wright. SR8/1368.

Dr. Gamache prepared a chart labeled State's Exhibit 1 based on his review of seven of Wright's IQ tests. SR8/1336-37. Dr. Gamache explained that he averaged the scores for each tests' verbal IQ, performance IQ, and full-scale IQ scores. SR8/1337. Dr. Gamache then calculated a standard deviation for each averaged score and reported a range of scores based on the standard deviation. SR8/1337-38. Dr. Gamache's authority for evaluating IQ

scores in this way was an online course labeled "Online Statistics Education, a Multimedia Course of Study by David Lane." SR8/1358. Dr. Gamache admitted that neither the DSM-V nor the AAIDD-11 address evaluating IQ scores in this manner. SR8/1358-59.[10]

Dr. Gamache testified that the practice effect is a genuine concern when interpreting the validity of IQ scores. SR8/1338-39. However, Dr. Gamache does not believe that the practice effect occurred in Wright's case, in part, because Wright's performance on the verbal IQ subtest decreased from his first to second test. SR8/1340.[11] Dr. Gamache admitted that the practice effect was a concern for the three 1991 tests and the two 2005 tests because they were administered so close together but stated that the data didn't support the theory. SR8/1342-43. Dr. Gamache then testified that when a person is administered only one IQ test, it is important to apply the SEM and come up with a range

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[10] When Dr. Kasper was asked during her testimony if it was standard practice to average IQ scores together and calculate a standard deviation for the scores' average, she responded:

> No. I'm I guess you could average numbers together that you want to and you can always come up with a standard deviation. I don't see any justification. I don't know why you would do that … the standard error of measurement is different for every test, and it's different for every age and I don't understand any logical basis where you would average different scores together.

SR7/1117. Dr. Kasper then testified that she knew of no authority, including the DSM-V and AAIDD-11, that said to average scores together in this way. SR7/1118.

[11] Dr. Kasper testified that the overall scores on the second and third test in 1991 increased from the score on the first test, although they didn't go up as much as typical of the practice effect. SR5/915. Regardless, Dr. Kasper attributed the increase to the practice effect. SR5/915. Dr. Kasper later testified that the practice effect is more prominent on the performance test than the verbal, and that there was a "full-scale IQ practice effect of about eight points overall and it looks like [Wright] gained four" between the first and second tests. SR6/1064-65.

of scores, and it is his practice to do so both clinically and in a forensic setting. SR8/1345-46. When there is a second IQ test, Dr. Gamache testified that he "still might rely to some degree on this statistical extrapolation to inform the consumer for this information about the range of possible scores but it's giving us more individual information." SR8/1347-48. For the seven IQ tests Dr. Gamache considered in Wright's case, Dr. Gamache does not feel the need to "extrapolat[e] from this group statistical data" because he can tell from Wright's actual scores how he performs. SR8/1348.

Dr. Gamache opined that Wright's "true full-scale IQ" was 78. SR8/1350. Dr. Gamache reached this score by "calculating the mean and standard deviation for each of the index scores from the seven IQ administrations" he considered. SR8/1349. Dr. Gamache testified that the best measure of Wright's overall intellectual capacity would be the highest full-scale IQ score Wright ever achieved, which is 82. SR8/1366. Dr. Gamache also testified that for a score to be more than two standard deviations below the mean, it would have to be below 70, and Wright's scores are not. SR8/1351.

**3. Kevin Michael Kindelan, Ph.D.**

Defense expert Dr. Kindelan testified concerning the issue of Wright's intellectual disability at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Dr. Kindelan has worked as a psychologist in Polk County for 38 years. SR8/1371. Most of his practice involves counseling and assessment, and he has performed IQ tests throughout his career on both children and adults. SR8/1373. Dr. Kindelan testified that "any good psychologist has been

trained to administer tests in a standardized prescribed structured manner", and it is his practice to do so. SR8/1374. Dr. Kindelan explained that it is important to administer tests in a standardized manner so that test results from person to person and test to test can be compared; it keeps everything equal. SR8/1374. Dr. Kindelan heard Dr. Gamache's previous testimony concerning the testing the limits procedure he used on Wright. SR8/1374-75. Dr. Kindelan does not employ the testing the limits procedure in the way Dr. Gamache prescribed, and as he explained, the way that Dr. Gamache used testing the limits was non-standardized:

> Dr. Kindelan: In my opinion, the way [Dr. Gamache] performed the testing the limits as he – as I understand him, it was nonstandardized. It was atypical. What's typically done is that you do the whole test in a standardized manner and then you go back and do testing the limits. You don't do testing the limits as I understood that he did in the midst of the test.
>
> Ms. Perinetti: And why would you go back and do it later on as opposed to doing testing the limits in the midst of the test?
>
> Dr. Kindelan: Because if you do it in the midst of the test, then you're not doing the test in a standardized manner.
>
> Ms. Perinetti: And would this be contrary to the testing manual to do the test in this way that Dr. Gamache described?
>
> Dr. Kindelan: Absolutely, contradicted by any manual.

SR8/1375. Dr. Kindelan further testified that employing the testing the limits procedure in this way would probably frustrate the person being tested. SR8/1376. Dr. Kindelan was doing evaluations for the Office of Disability Determinations in 1991. SR8/1377. When the Office of Disability Determinations requested an IQ test, he administered a full-scale IQ test in a standardized manner. SR8/1377-78. A typical evaluation involving a minor would entail an interview with the applicant and his parent and the administration of the

WISC-R, which was the most current edition in 1991. SR8/ 1379. Dr. Kindelan would then write a letter to the Office of Disability Determinations with the results of the interview and testing. SR8/1379.

In a report dated August 25, 1997, Dr. Joel Freid referred to a previous evaluation that Dr. Kindelan conducted of Wright in 1991 to document Wright's intellectual level for the Office of Disability Determinations. SR8/1378-79. Dr. Freid was probably sent a copy of Dr. Kindelan's report with the packet he received from the Office of Disability Determinations. SR8/1390. Dr. Kindelan only keeps records for a certain number of years before shredding them, so he does not have a copy of the report regarding his evaluation of Wright. SR8/1378. Dr. Kindelan testified that it is his practice to always include a statement in his reports regarding the validity of test results. SR8/1381-82. He is absolutely sure that if he had any concerns about the validity of the IQ test he administered to Wright in 1991, he would have said so in his report. SR8/1382. Dr. Kindelan is also sure that Dr. Freid would have indicated in his own report that Dr. Kindelan said that the results were not valid. SR8/1382.

It was not Dr. Kindelan's practice to administer validity tests when performing evaluations for the Office of Disability Determinations, and the Office of Disability Determinations had never asked for a validity indicator in their request for testing. SR8/1380. Dr. Kindelan is confident in reporting that a test that he gives is valid without administering a validity test, and he disagrees with Dr. Gamache's testimony that one cannot tell if a person is giving a valid effort without a validity test. SR8/1380-81. Dr. Kindelan explained that it is not difficult to tell if a ten-year-old child is giving their best

performance on a test. SR8/1381. The signs that a child is not giving his best effort are usually not subtle, and most psychologists are able to rely on their subjective experience with the child to determine whether the child is putting forth his best effort. SR8/1381. Dr. Kindelan further testified that he is unaware of any validity test that is appropriate for a ten-year-old. SR8/1380.

Wright achieved a full-scale IQ of 76 on the WISC-R Dr. Kindelan administered in 1991. SR8/1385-86. The SEM at age 10.5 for this test is 3.21. SR8/1385-86. Applying the SEM to Wright's 76 score using a 95 percent confidence interval equals a range of scores from 69 to 82. SR8/1386. Dr. Kindelan opined that this places Wright in the range of someone who is intellectually disabled. SR8/1386. Dr. Kindelan considers Wright's test results over the years to be consistent, and all of Wright's full-scale IQ scores are within the 69 to 82 range of the 1991 WISC-R administered by Dr. Kindelan. SR8/1387-88. It would be nearly impossible for an individual to score as consistently as Wright by malingering. SR8/1387.

**4. Joel Freid, Ph.D.**

Dr. Freid testified concerning Wright's intellectual disability at both the September 22, 2005 special set mental retardation hearing and the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." The following summary cites to Dr. Freid's testimony from the 2015 hearing. Dr. Freid has worked as a psychologist for over 40 years. SR8/1399. During his years in private practice, about 70 to 75 percent of his practice was forensic. SR8/1400. He has also

performed evaluations for the Office of Disability Determinations and has been administering IQ tests throughout his entire career. SR8/1400-01. It is Dr. Freid's practice to administer IQ tests in a standardized manner according to the testing manuals. SR8/1401. Dr. Freid is familiar with the testing the limits procedure. SR8/1401. Dr. Freid does not believe that the testing the limits procedure that Dr. Gamache used on Wright is a standardized administration of the WAIS-IV. SR8/1401. A standard procedure would be to administer the entire test and then come back and perform the test the limits. SR8/1401. Dr. Kindelan testified that "[i]t can be rather fatiguing for an individual to go through a series of questions and then continue on asking questions within that one subtest and do the same thing over and over again." SR8/1402.

It is not Dr. Freid's standard practice to give validity tests with IQ tests. SR8/1412. He does not agree with Dr. Gamache's testimony that one cannot say that an IQ test is valid without also giving a validity test. SR8/1412. Psychologists are thoroughly trained to make observations and assess whether a person is malingering, and it is not impossible to make a determination regarding malingering without a validity test. SR8/1412. Dr. Freid would certainly indicate in his report if he thought Wright was malingering, and no such notation appears in his 1997 report. SR8/1412-13. Dr. Freid has reviewed Wright's prior IQ scores, and it would be very difficult and unlikely for an individual to score as consistently as Wright has throughout the years by malingering or faking. SR8/1418.

Dr. Freid evaluated Wright twice- in 1997 and 2005. He evaluated Wright in 1997 at the request of the Office of Disability Determinations. SR8/1405-06. Wright was referred to Dr. Freid for intellectual evaluation and a general clinical evaluation with

mental status examination. SR8/1406. Wright was 16 years old at the time of the evaluation. SR8/1406. The evaluation consisted of a clinical interview, a mental status examination, and a standardized IQ test. SR8/1406. Dr. Freid was not asked to perform an adaptive behavior assessment. SR8/1407. Wright's mother was present during the interview and mental status examination. SR8/1406. Dr. Freid administered the WAIS-R, and Wright achieved a full-scale IQ of 75. SR8/1410-11. Dr. Freid did not have any concerns about the validity of the 1997 test. SR8/1411. Although Wright needed encouragement during the formal testing, he was cooperative, and Dr. Freid felt that he was making his best effort. SR8/1411. The SEM for the 1997 test is 2.96. SR8/1413. When the SEM is applied to the results of the 1997 test using a 95 percent confidence interval, the range for Wright's full-scale IQ is 69.08 to 80.92. SR8/1414.

In his 1997 report, Dr. Freid also referenced a WISC-R administered to Wright by Dr. Kindelan in 1991. SR8/1407-08. Dr. Freid had the sense that the Office of Disability Determinations either sent him a copy of Dr. Kindelan's report or other records that indicated the results of Dr. Kindelan's evaluation. SR8/1408. Dr. Freid currently works in the same office as Dr. Kindelan and has known him for 25 to 30 years. SR8/1409. It is Dr. Kindelan's usual practice to indicate in a report if there are concerns with the validity of an IQ score. SR8/1409. If Dr. Kindelan noted any concerns about the validity of Wright's IQ scores from 1991, Dr. Freid is sure he would have indicated those concerns in his 1997 report. SR8/1410. Dr. Freid further testified that it would be "most unusual" for a ten-year-old to malinger on an IQ test. SR8/1410.

Dr. Freid evaluated Wright again on July 25, 2005 pursuant to a referral from defense counsel to determine Wright's level of intellectual functioning. SR8/1414. At the time, he was not aware that Dr. Kremper had administered the WAIS-III to Wright on July 15, 2005. SR8/1414-15. If. Dr. Freid had known that Dr. Kremper administered the WAIS-III only ten days prior to his evaluation, he would have spoken with defense counsel and possibly administered a different test to Wright, such as the Stanford-Binet. SR8/1415. Wright achieved a full-scale IQ of 75 on the WAIS-III Dr. Freid administered. SR8/1416. Dr. Freid did not have any concerns about the validity of the test, and he indicated in his report that he felt the test results were valid. SR8/1416. The SEM for the 2005 test is 2.37. SR8/1416. When the SEM is applied to Dr. Freid's 2005 test using a 95 percent confidence interval, the range is 70.24 to 79.74. SR8/1416.

Dr. Freid was present during Dr. Gamache's testimony explaining State's Exhibit 1. SR8/1418. Dr. Freid testified that he had never seen anyone average IQ scores and find the standard deviation, and he does not know of any authority for evaluating IQ scores in this way. SR8/1419. Even though Wright has taken multiple IQ tests, it is still appropriate to apply the SEM to each individual IQ score and come up with a range for each score using the 95 percent confidence interval. SR8/1425-26. Dr. Freid further testified that IQ should be considered not as a fixed score, but as a range. SR8/1425. Considering the 95 percent confidence interval and 2.37 standard error of measurement, Dr. Freid believes Wright's scores place him in the range of scores of someone who is intellectually disabled. SR8/1419. Dr. Freid did not evaluate whether Wright met the other prongs of intellectual disability but agrees that Wright meets the criteria for Prong One. SR8 1419-20.

## III. Prong Two – Deficits in Adaptive Behavior

### A. Statutory and Clinical Standards for Assessing Adaptive Behavior

The term "adaptive behavior" as defined in Fla Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) "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 AAIDD-11 defines adaptive behavior as follows:

> Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.
>
> For the diagnosis of intellectual disability, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills. The assessment instrument's standard error of measurement must be considered when interpreting the individual's obtained scores.

AAIDD-11 at 43. The assessment of adaptive behavior focuses on a person's typical performance, as opposed to their maximum performance. AAIDD-11 at 47. "Within an individual, limitations often coexist with strengths." AAIDD-11 at 7. Individuals with intellectual disabilities typically have both strengths and limitations in adaptive behavior, and significant limitations in one area are not outweighed by potential strengths in some adaptive skills. AAIDD-11 at 47. Intellectually disabled individuals "may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they

otherwise show an overall limitation)." AAIDD-11 at 7. Adaptive behavior includes the following categories and subcategories of adaptive functioning:

> *Conceptual skills*: language; reading and writing; and money, time, and number concepts
>
> *Social skills*: interpersonal skills, social responsibility, self-esteem, gullibility naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving
>
> *Practical skills*: activities of daily living (personal care), occupational skills, use of money, safety, travel/transportation, schedules/routines, and use of the telephone

AAIDD-11 at 44. The DSM-V definition also divides adaptive deficits into three "domains": conceptual, social, and practical, which are further broken down in the following manner:

> The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

DSM-V at 37. Adaptive deficits are shown 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-V at 38.

**B. Expert Testimony Regarding Prong Two**

**1. Mary Elizabeth Kasper, Ph.D.**

Dr. Kasper testified concerning Wright's adaptive functioning at both the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence" and the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." The following summary cites to Dr. Kasper's testimony from both the 2012 and 2015 hearings.

Dr. Kasper opined that Wright has deficits in adaptive behavior. PC12/1993; SR6/959-64. Dr. Kasper's assessment of Wright's adaptive behavior consisted of interviewing Wright and several people who knew him as a child, as an adult, or both. PC11/1894-95. Dr. Kasper also considered school records and psychological reports. Dr. Kasper also administered the Adaptive Behavior Assessment Scales-II ("ABAS"). PC12/1986. Dr. Kasper testified that when she interviewed Wright in prison, he had no idea who she was when she arrived, and he said that he had not been told anything about her visit beforehand. PC11/1896. Regardless, Wright spoke freely to Dr. Kasper, answered all her questions, and made incriminating statements about himself. PC11/1896-97. It was very easy for Dr. Kasper to convince Wright to talk to her, which was unusual. PC11/1897. Wright's willingness to talk to Dr. Kasper was consistent with many other things she found relevant to her ultimate diagnosis. PC11/1898.

When evaluating adaptive behavior, Dr. Kasper explained that "adaptive behavior is the way that [intellectually disabled people] actually adapt, the way that they actually

perform in everyday environment. It is their typical, not their optimal, behavior. It is not their best day. It is their average day." PC12/1985. Individuals are expected to have a pattern of strengths and weaknesses and having a strength in one area does not negate a disability or adaptive deficits in other areas. SR6/937-38. Intellectually disabled individuals are capable of learning and would be expected to learn and benefit from the supports that they are given. SR6/942. They are also capable of making improvements in their adaptive functioning. SR6/942.

Adaptive behavior is what a person can do on his own, as opposed to what he can do with assistance, which is considered coached behavior. SR9/1616. Intellectually disabled individuals are able to hold down jobs, have romantic relationships, have children, buy things at the store, take public transportation, and even have driver's licenses. SR6/940-42. With the help of assisted living coaches, some intellectually disabled individuals are able to live independently in their own apartments. SR6/939. There are government agencies that assist intellectually disabled individuals with job training, job placement, and even how to use the public bus system. SR6/939. Some individuals are able to work with the help of job coaches who provide the supports needed to continue working. SR6/952-54. Wright's cousin, Carlton Barnaby ("Carlton") provided support for Wright that was virtually identical to what a job coach would do. SR6/954-55. The supports that Carlton provided included helping Wright fill out the application, picking Wright up every day for work and making sure he was there on time, making sure Wright knew how to punch the time clock, making sure Wright knew where to stand, and making sure Wright was doing his job right. SR6/954.

Individuals with intellectual disabilities often do things to hide their disabilities from others. PC11/1908. This phenomenon is referred to as "the cloak of competency," "trying to pass," or "reverse malingering" (faking good). PC11/1908-09. This is an adaptive strategy that individuals use to be accepted and to avoid being picked on or singled out. PC11/1908. These individuals also parrot or mimic the behaviors of those around them, not necessarily understanding what is going on or the reason why they are doing something. PC11/1908. As to mimicking, Wright's cousin reported that when Wright came out of boot camp, he kept saying "yes m'am, no, m'am" to the point that it was strange. PC11/1915-16. Wright also mimics people who he trusts, or people in authority who he sees as kind figures. PC11/1916. As is common for intellectual disabled individuals, Wright sometimes acts as if he understands things when he actually does not. SR6/968-69. For example, when Dr. Kasper asked Wright about his reported Hebrew Israelite religion and the feast of unleavened bread, Wright was unable to explain it to her. SR6/968-69.

Dr. Kasper explained some examples of Wright "reverse malingering." She explained that low functioning individuals are often not the best reporters of their abilities, and they may overestimate their functioning or abilities. SR6/947-49. Dr. Kasper found that Wright was not a reliable source in this case. SR9/1606. Some of the things Wright told Dr. Kasper were not consistent with the stories from other sources and were contradicted by other people. SR6/948; SR9/1607. Dr. Kasper felt that Wright was either trying to inflate his level of abilities, or that he thinks that he can do more than he actually can. SR6/948. For example, Wright told her he has a high-school GED. PC11/1911. Wright did not obtain a GED, but a special diploma, which was given by the State of Florida and

is located in Wright's school records. PC11/1911. Dr. Kasper works with the school system and is very familiar with the four different types of diplomas offered by the State of Florida. PC11/1912. She described the special diploma that Wright obtained:

> The diploma means that the person met some kind of criteria that was independently set up for them for their disabilities, meaning that a team wrote out this person's disability is whatever, and as long as he comes and as long as he tries, there is no standard that he must meet, there is no benchmarks that he has to achieve, and there is not set hours that he has to have.
>
> It's – it's a recognition of the person's effort is what it is. It's a recognition that they have made some effort, and they have not been oppositional to the point that the school board does not want to give them a piece of paper, but it does not recognize that they have achieved anything according to any level, it does not recognize that they have attended a certain number of classes necessarily, and it does not recognize that they have met any type of goals besides that they have tried.

PC11/1913-14. Wright also told Dr. Kasper that he was a successful drug dealer and the leader of a gang. PC11/1914. However, the collateral sources Dr. Kasper spoke with did not agree with Wright's self-assessment. PC11/1914. They told her that they did not believe him to be a successful drug dealer, and that he was someone who would have been exploited and manipulated by the higher-ups because of his inability to count and suggestibility. PC11/1914. One person told her that Wright would have been given the drug-dealing tasks of an 11-year-old, who would be easily led and manipulated as to how much money he would be passing. PC11/1915. Every person Dr. Kasper interviewed told her that he was not the leader of a gang, except perhaps in his own mind. PC11/1915. Additionally, Dr. Kasper did not find any collateral evidence to back up what Wright told Dr. Gamache about living in an apartment by himself at the age of 13 or 14 that "mythical Mike drug dealer" set him up with, and she could not find a time period that was

unaccounted for when he was not living with family members. SR6/1092-94; SR9/1628-29.

Wright also demonstrates something called acquiescence bias, a phenomenon that is commonly seen with intellectually disabled individuals. SR9/1612. With acquiescence bias, people agree to things that they do not understand because it makes them look smarter. SR9/1612. Dr. Kasper explained:

> It doesn't make you look smart when you say, "Hey, I really have no idea what you're talking about and I don't know what's going on here."
>
> It actually makes you look smarter to smile, and to be calm, and to say, "Yes, that's what I meant, "Yes, that's what I did," "Yes, that's what I know," and "Yes, I understand you."

SR9/1612-13. Dr. Kasper has personally observed this with Wright. SR9/1613. During Wright's interview with Dr. Gamache, Wright tended to agree with Dr. Gamache. SR9/1614. Dr. Kasper thought Wright was trying to impress him. SR9/1614.

Dr. Kasper found that Wright suffers from deficits in adaptive behavior under Fla. R. Crim. P. 3.203 and Fla. Stat. § 921.137, as well as the DSM-V and AAIDD definitions of intellectual disability. SR6/949, 986. Dr. Kasper found that Wright had adaptive deficits across multiple environments. SR6/985-86. Adaptive deficits are grouped into three categories: conceptual, social, and practical. SR6/952. Dr. Kasper addressed each category with regard to Wright.

The conceptual skills category is made up of communication, functional academics, and self-direction. SR6/965. This area is the most problematic for Wright. SR6/966. Testing, school records, and witness testimony all show that Wright has had problems academically throughout his life. SR6/966. Multiple people reported that Wright has

problems reading. SR6/966. He has difficulty understanding complex directions and learning the rules of simple games like Uno. SR6/966. Wright lived with a relative named Melissa Porter for an extended period when he was a teenager. SR6/966. Porter reported that she had a lot of difficulty teaching Wright how to count. SR6/966; PC11/1921-22. Inmate Richard Shere confirmed that Wright's functional academic deficits still exist, as he has problems reading, writing, and filling out forms. SR6/968. Communication is also problematic for Wright. SR6/967. As a young child, Wright had speech therapy for his communication deficits. SR6/967. One of Wright's attorneys reported to Dr. Kasper that they had to explain things to Wright over and over in different ways, and Wright still did not understand. SR6/967. Finally, Wright has problems with self-direction, or the skills needed to handle oneself independently without the assistance of others. SR6/969-70. Wright's relative Melissa Porter reported that she had to be right on Wright to make sure he took his bath and brushed his teeth when he lived with her. PC11/1919-21. Wright is not able to decide on his own what he needs to do, such as get a job so that he does not violate his boot camp rules. SR6/971. On the other hand, he takes direction from whoever is around and does reasonably well when someone is in his face telling him what to do, such as his uncle telling him to cut his hair, having directions yelled at him in boot camp, his girlfriend Vontrese telling him where they were going on dates, or his cousin Carlton helping him with his job. SR6/970-71. The inmates Dr. Kasper interviewed called Wright a "push button" because you can tell him to do something and he just does it, even if he gets in trouble for it later on. SR6/971. Dr. Kasper testified that intellectually disabled individuals fare better in structured environments. SR6/972. Death row is a very structured

environment. SR6/972. Dr. Kasper compared death row's structure to that of the "ultimate group home." SR6/972.

Dr. Kasper further testified that Wright's school records reflect that he was classified as both emotionally handicapped and specific learning disabled. PC11/1924. He was exempt from taking standardized tests. PC11/1923. Both of his school psychological reports note that he has deficits in functional academic skills. PC12/2029. Wright's records reflect that he had Independent Education Plans ("IEPs") in school, which are used for students with disabilities to provide feedback and set specific goals. PC11/1924-25. Wright's IEPs indicate that he has problems interacting and communicating with others and controlling his behavior. PC11/1924-25.

The social skills category is made up of leisure and social subcategories. SR6/975. Wright has improved in this area to the extent that he had significant deficits when he was 16 years old, but not currently. SR6/975. Leisure encompasses the skills that one needs to engage in and plan recreation and leisure activities. SR6/975. This is different from physical athletic ability, which is not indicative of adaptive behavior. SR6/978-79. Dr. Kasper learned that although Wright was able play sports as a child because he met the height and weight requirements, he could not add up points or follow the rules of games even when others tried repeatedly to teach him. SR6/976. As far as leisure, Wright did not appear to have improved significantly as an adult. SR6/978. Social skills encompass the skills one needs to get along with others, such as having friends, showing and recognizing emotions, helping people, and having manners. SR6/979. Wright's social skills have improved throughout the years. SR6/969. Wright had deficits in the social subcategory

when he was 16 years old. SR6/980. He did not get along with people or have friends. SR6/980. He was bullied and called names. SR6/980. He got into fights, and he was constantly in trouble. SR6/980. Wright's only friend at the time was Carlton. SR6/980. Today, Wright is able to get along much better with others and modulate his behavior. SR6/980-81. He is well liked, and he is known on death row for being a nice guy. SR6/980-81. Accordingly, other inmates on death row help Wright to wright his grievances and medical things. SR6/980.The practical skills category consists of community use, home living, health and safety, self-care, and work. SR6/982-84. Dr. Kasper opined that although Wright had some difficulties with some of these things, his deficits in this area alone were not significant enough to qualify him for a diagnosis of intellectual disability. SR6/982-84.

In addition to testifying about Wright's individual deficits, Dr. Kasper also testified about the two Adaptive Behavior Assessment System- Second Edition ("ABAS-II") tests she administered to Wright. Dr. Kasper administered the ABAS-II, which is a standardized measure of adaptive behavior that provides a quantitative measure of adaptive functioning. PC12/1988. Although it is optimal to administer the ABAS-II with one caregiver for a person under 18, in this case Dr. Kasper used a large number of respondents when she administered the test because she was doing a retrospective analysis and therefore had to rely on more resources to get the information needed. PC12/1990; SR6/947, 1079. As with IQ tests, the mean score on the ABAS-II is 100, and two standard deviations below the mean is 70. PC12/1991-92. The ABAS-II also takes into account the SEM. SR6/ 958. The ABAS-II looks at the three categories of conceptual skills, social skills, and practical skills, as well as a general composite score that is a composite of all of the scores together.

PC12/1992-93. In order to be considered to have adaptive deficits for the purposes of diagnosing intellectual disability, a person must have deficits in one of the three areas or the composite. SR6/959.

Dr. Kasper used two separate ABAS-II's in this case: one for when Wright was 16.6 years old, the age he was when Dr. Freid administered the WAIS-R in 1997, and one for Wright's current functioning. SR6/957. Wright's ABAS-II scores are reflected in the charts below

**ABAS-II 16.6 YEARS OLD**

| | General Adaptive Composite | Conceptual | Social | Practical |
|---|---|---|---|---|
| Score | 65 | 67 | 75 | 76 |
| Confidence Interval (when SEM applied) | 62 to 68 | 63 to 71 | 69 to 81 | 72 to 80 |

**ABAS-II CURRENT FUNCTIONING**

| | General Adaptive Composite | Conceptual | Social | Practical |
|---|---|---|---|---|
| Score | 68 | 67 | 81 | 82 |
| Confidence Interval (when SEM applied) | 65 to 71 | 63 to 71 | 75 to 87 | 78 to 86 |

On the ABAS-II based on age 16.6, Wright scored significantly low on the general adaptive composite, as well as in the conceptual and social categories. SR6/959. Wright scored a 65 general composite score with a range from 62 to 68 when applying the SEM.

SR6/961. Wright scored a 67 in the conceptual category with a range from 63 to 71 when applying the SEM. SR6/961. Wright scored a 75 in the social category with a range from 69 to 81 when applying the SEM. SR6/961.Wright did not have deficits that were two or more standard deviations below the mean in the practical category. SR6/959. Wright's current adaptive functioning scores improved somewhat, but he still meets the criteria for intellectual disability in the conceptual category and general composite score. SR6/963. He scored a 67 in the conceptual category with a range from 63 to 71 when applying the SEM. SR6/963. He scored a 68 general composite score with a range of 68 to 71 when applying the SEM. SR6/964.

Regarding Dr. Gamache's critique of the ABAS-II, Dr. Kasper testified that she administered it because it is recommended that a standardized measure of adaptive behavior such as the ABAS-II or the Vineland Adaptive Behavior Scale be given. SR9/1635. She further testified that the ABAS-II is only one of the many sources of information concerning adaptive behavior, and she did not rely solely on her administration of the test when forming her opinions on adaptive behavior in this case. SR91635-36. Dr. Kasper acknowledged that the validity of this instrument is affected by the information that the informant is providing, which is why she used multiple sources and looked at the weight of the evidence. SR9/1635-36. She also acknowledged that it is not standard administration in the manual to use multiple informants as she did, but she performed the test that way because she was trying to get the most accurate information possible. SR9/1636. Further,

"Dr. Oakland"[12] has testified that he has administered the test this way in cases where it's very critical to get the most accurate information. SR9/1636.

**2. Michael Gamache, Ph.D.**

Dr. Gamache testified concerning Wright's adaptive functioning at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Dr. Gamache testified that he met with Wright once on November 17, 2014 for evaluation. SR9/1521-23. Dr. Gamache conducted a mental status exam and a "structured" clinical interview related to adaptive behavior. SR9/1523. Dr. Gamache used an outline he has developed based on the three categories of adaptive behavior that are defined in the DSM-V. SR9/1529-30. He asked Wright about his adaptive functioning during both the present and before Wright was 18, but his primary focus was on Wright's present functioning. SR9/1529-30. The clinical interview was broken up into two parts and lasted approximately three hours. SR9/1524. As far as records Dr. Gamache relied on, he testified that he considered the appendix to the Defendant's Renewed Motion for Determination of Intellectual Disability, which consisted of reports and testimony of mental health professionals and some lay witness testimony from the post-conviction evidentiary hearing. SR9/1593-94. He also considered the "Between the Bars Blog." SR9/1593-94.[13] Dr. Gamache did not independently receive any school records or Department of Corrections records to review. SR9/1594. Dr. Gamache did not speak with

[12] Dr. Thomas Oakland is one of the authors of the ABAS-II.
[13] The "Between the Bars Blog" is a website that allows people to post handwritten communications from inmates for pen pals to respond to.

any witnesses directly. SR9/1594. Dr. Gamache was provided with summaries of interviews conducted by the Office of the State Attorney of various lay witnesses, some of whom testified at the post-conviction evidentiary hearing, and some of whom did not testify. SR9/1596-97. Dr. Gamache considered both the summaries and the witness testimony in forming his opinions. SR9/1597. Dr. Gamache's interview with Wright was one of the main things he relied on when forming his opinions about Wright's adaptive functioning, and he considered Wright to be a generally reliable source about his functioning. SR9/1595.

In assessing Wright's adaptive behavior, Dr. Gamache considered Fla. Stat. § 921.137(1), as well as the AAIDD-11 and DSM-V definitions of adaptive behavior, which both identify three general areas of adaptive behavior: conceptual, social, and practical. SR9/1514-16. Dr. Gamache looked at each of these three areas with regard to Wright and concluded that he does not suffer from "significant or severe impairment of adaptive behavior consistent with that associated with a diagnosis of mental retardation or intellectual impairment." SR9/1577.

According to the DSM-V, the conceptual domain includes such things as memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations. SR9/1528. Dr. Gamache testified concerning several areas that were potentially important with regard to the conceptual subcategory of language, literacy, and communication. He found that Wright's only deficiency in this area is that "his reading level is low," … "but he's been able to adapt rather well to those inherent learning disabilities that he has and he's been able to communicate effectively

with others, express his own needs, and listen attentively and understand the needs and communication of others." SR9/1537-38. As support for his findings regarding this area, Dr. Gamache testified to the following:

1. "[Wright] appeared to be able to read to some degree, as evidenced by having him read out loud from a letter that he wrote and published on the Between Bars blog." SR9/1531. Wright explained to Dr. Gamache that he received assistance with writing letters in that he would dictate what he wanted to communicate to another inmate, and then copy that inmate's draft of the letter in his own handwriting. SR9/1532-33.

2. There is clear evidence that Wright's reading and writing are limited. SR9/ 1533. However, this is due to Wright's limited formal education and historical diagnosis of specific learning disability instead of his intelligence. SR9/1533. Despite Wright's limitations in this area, he was able to use other people to adapt and compensate for his deficiencies. SR9/1533.

3. "[Wright] has shown the initiative and the ability to take a draft and to rewrite it into his own words … his penmanship is excellent." SR9/1534.

4. "[Wright] described actively participating in communication with other inmates and with correctional staff at Florida State Prison." SR9/1534.

5. "[Wright] described good receptive language skills in the sense that he listened carefully and followed the advice or instruction of others." SR9/1534-35. One example of this is when Wright learned from informal communication with other inmates about the ability to get on the kosher diet, which is generally perceived by inmates to be better quality food than the normal diet, and he was able to follow the necessary steps to get on the kosher diet. SR9/1534.

6. "[Wright] showed the ability to communicate and express his needs and desires." SR9/1536. For example, during their interview Dr. Gamache observed Wright asking for bathroom breaks twice, asking about an echo from the recording in the adjoining room that was interfering with the examination, asking to speak with his attorneys during a break, and requesting a Mountain Dew when Dr. Gamache asked him if he wanted a drink. SR9/1536.

7. Wright indicated that he could use the telephone before and after he was incarcerated. SR9/1536-37.

The second conceptual subcategory relates to money, managing money, time, and number concepts. SR9/1538. Dr. Gamache found that Wright does not have any deficits related to this subsection. SR9/ 1542-43. In support of these findings, Dr. Gamache testified that:

1. "[Wright] appeared to be fundamentally able to understand numbers and time." SR9/1538. Wright's performance on a subtest of the IQ test Dr. Gamache administered that related to number skills was well within the normal range. SR9/1539.

2. Wright can remember how often he is given rec at the prison and how often he can shower and shave. SR9/1539.

3. Wright knows it has been about a year since people on the outside could order things for inmates, and that they are now able to do so again. SR9/1539.

4. "[Wright is] alert and aware when he does not receive things that he knows or expects to receive." SR9/1540.

5. "[Wright has] managed his own funds in the community to buy basic necessities such as food and clothes." SR9/1540. Wright told Dr. Gamache about his activities between the ages of 13 and 18, including how he was able to deal drugs, buy food, buy clothes, and take the bus. SR9/1542. Wright reported that he manages his own canteen account at the prison. SR9/1540. Wright receives monthly statements from the prison regarding his canteen account. SR9/1541.

6. "[Wright] was attentive to time and number issues during the examination." SR9/1540. He asked the deputy what time it was and recognized that there was still plenty of time before 5:00. SR9/1540.

Finally, Dr. Gamache looked at the conceptual subcategory of self-direction and the ability to formulate objectives or goals. SR9/1543. Dr. Gamache testified that when evaluating "an inmate or a defendant in a criminal matter, the most contemporaneous examples of self-direction, objectives, and goals typically relate to the case, and so I inquire about those kinds of activities." SR9/1543. Dr. Gamache found that Wright does not have any significant deficits in this area. SR9/1547. In support of these findings, Dr. Gamache testified that:

1. "Wright was able to identify his attorneys by name." SR9/1543.

2. Wright was able to tell Dr. Gamache how long his attorneys had been working with him on his case. SR9/1543.

3. Wright told Dr. Gamache about his communication with his attorneys- how he waits for them to come to see him or for them to call. SR9/1544. Wright thinks of things that might be important to share with his attorneys. SR9/1544.

4. Wright knows he can communicate with his attorneys through mail and told Dr. Gamache how legal mail is processed. SR9/1544.

5. When Dr. Gamache asked Wright about his motivation and objectives with regard to his communication with his attorneys, Wright recognized the limits of his legal knowledge and that he needed to consult with individuals with legal expertise. SR9/1544-45.

6. Wright indicated to Dr. Gamache that he's motivated because his attorneys listen to him. SR9/ 1545. Wright hopes his attorneys might help in proving his innocence. He does not want the death penalty, and he does not think it would be fair for him to be sentenced to death for something he did not do. SR9/1545.

7. Wright was able to effectively communicate to Dr. Gamache the sentence that has been imposed on him and what the allegations were. SR9/1545-46.

8. Wright wants his attorneys to help him prove he did not commit the crimes and that he was not there when the crimes took place. SR9/1546.

9. "[Wright] appeared to be receptive to information from his attorneys," and is open to their suggestions and strategies. SR9/1546.

10. Wright told Dr. Gamache that he wrote to a company to ask for help, but Dr. Gamache cannot recall the particulars. SR9/1546-47.

After looking at these subsets within the conceptual skills domain, Dr. Gamache concluded that Wright does not have sufficient adaptive deficits in this domain to qualify him for a diagnosis of intellectual disability. SR9/1548-50.Dr. Gamache next considered the social skills domain, which according to the DSM-V involves awareness of others' thoughts, feelings, and experiences, empathy, interpersonal communication skills, friendship abilities, and social judgment. SR9/1549. His findings regarding this domain were as follows:

1. Dr. Gamache did not have any difficulty understanding Wright, and Wright did not appear to have any difficulty understanding Dr. Gamache. SR9/1550-51.

2. Wright interacted effectively with both Dr. Gamache and his attorneys, and he expressed his needs. SR9/1551.

3. Wright described regularly speaking with and interacting with correctional officers and other inmates about a variety of issues. SR9/1551.

4. Wright "specifically engaged in counseling of others," including a pen pal with the pen name "Blue Lotus." SR9/1551-54. In his correspondence with Blue Lotus, Wright demonstrated empathy and engaged in good communication. SR9/1551-53.

5. Wright described how he has transitioned to becoming a more thoughtful and less impulsive person, which he attributed to his pursuit of new religious and spiritual beliefs. SR9/1554.

6. Wright described "an interest in … relationships with the opposite sex beginning when he was a teenager." SR9/1554. Wright reported that he pursued relationships and was regularly spending time with a girlfriend

at the age of 18 or 19. SR9/1554-55. Wright said that they did social things together such as go to the movies or the beach, and that he proposed or initiated some activities such as going out to eat. SR9/1555.

7. Wright displayed good social skills during the examination, such as being polite and thanking Dr. Gamache for the soda that Dr. Gamache bought him. SR9/1555.

8. Wright was able to follow rules during the examination, such as the testing rules. SR9/1555.

9. Wright appears to have adapted well to death row. SR9/1556. In contrast to when he was younger and was frequently written up, he is no longer having significant problems with the correctional staff. SR9/1556.

10. Wright is able to ask correctional staff for necessities or help. SR9/1557. For example, he is able to ask for toilet paper when he runs out. SR9/1557.

11. Wright has adapted effectively, is able to exercise self-control, and no longer acts out like he did in the past. SR9/1558-59. He reported that he no longer suffers from the same problem with anger as when he was younger. SR9/1559. He perceives that he is being provoked less, and he also perceives that he has made a philosophical and psychological change. SR9/1558-59.

12. Wright appears to be able to get along with his peers and other inmates. SR9/1559.

13. Wright denied that he has been exploited or taken advantage of. SR9/1560. Dr. Gamache could not find any examples either from things Wright related to him or in the record that suggested that Wright was being exploited by others. SR9/1560.

14. Wright engages in social conversation with other inmates about topics such as sports and personal or religious beliefs. SR9/1560-61.

15. Wright is engaged in "problem solving and empathic responses to others." SR9/1561. Dr. Gamache cited as examples Wright's correspondence with his pen pal Blue Lotus, as well as an incident when Wright counseled two inmates to avoid a physical fight between them. SR9/1561.

16. Wright recognizes personality concepts such as selfishness. SR9/1562.

17. Wright demonstrated "empathic social reasoning" in his correspondence with his pen pal Blue Lotus. SR9/1562-63.

18. "[Wright] was capable of communicating thoughts and emotions to others," such as with his pen pal Blue Lotus. SR9/ 1563. Dr. Gamache explained that intellectually disabled tend to struggle to make friends and communicate because they don't realize the importance of allowing others to share their own emotions. SR9/ 1563. However, "[Wright] exhibited repeated statements in his correspondence [with Blue Lotus] indicative of positive, healthy, psychologically healthy communication, sharing feelings, and requesting the sharing of feelings in return." SR9/1563.

19. "[Wright] recognizes and adapts to multiple levels of interpersonal interaction." SR9/1564. He can distinguish between friends and associates. SR9/1563-64.

Dr. Gamache testified that Wright's level of impairment in the above nineteen areas was not so impaired as to meet the criteria for intellectual disability. SR9/1564-65. Dr. Gamache also considered Wright's use of community resources and testified that he was focused on Wright's use of such resources "here and now." SR9/1565. Dr. Gamache found the following:

1. Wright "knows how to deal with perceived problems and injustices," and has filed requests and other paperwork to address problems while in prison. SR9/1565-66.

2. Wright knows how to use the prison law library and has used it previously. SR9/1567-68.

3. Wright can explain the process of filing a grievance and has used the process effectively. SR9/1568-69.

After looking at these subsets within the social skills domain, Dr. Gamache concluded that Wright does not have sufficient adaptive deficits in this domain to qualify him for a diagnosis of intellectual disability. SR9/1570. Dr. Gamache next considered the practical

skills domain, which according to the DSM-V involves learning and self-management across life settings, including personal care, responsibilities, money management, recreation, self-management of behavior, and work task organization. SR9/1571. Dr. Gamache made the following findings regarding this domain:

1. In his current setting, Wright engages in routine grooming activities, such as bathing, brushing his teeth, and brushing his hair. SR9/1572.

2. Wright looks out for his health. SR9/1572. He is able to follow the prison procedures for utilizing health care available to inmates. SR9/1572.

3. Wright is able to follow schedules, including bathing and recreational activities at the prison. SR9/1572.

4. Wright engages in self-care and health promotion activities, such as regular exercise. SR9/1572-73.

5. "[Wright is] able to get what he needs and satisfy basic living and practical requirements on a day-to-day basis in his current institutional setting." SR9/1573. He knows how to or inquires about how to make requests to suit his dietary or health-related needs, and he manages a canteen account. SR9/1573.

6. Wright told Dr. Gamache that, between the ages of 13 and 18, he lived independently in an apartment, got his own food and clothing, woke up and traveled around on his own, set his own daily agenda, used the bus, and used other public facilities such as parks. SR9/1573-74.

7. Wright indicated that he had driven a car a number of times but acknowledged that he never got a driver's license because he could not pass the written test. SR9/1574.

8. Wright was capable of using public transportation such as the bus or other means of transportation such as walking, paying other people to drive him around, or paying someone to borrow a car. SR9/1574.

Dr. Gamache concluded that Wright does not suffer from severe or significant impairment of adaptive functioning in the practical skills domain. SR9/1575.

Dr. Gamache did not use a standardized measure of adaptive behavior, such as the ABAS-II, in this case. SR9/1587. He testified that the ABAS-II was not necessary, and he does not think that it is a reliable or valid way to assess adaptive behavior in Wright's case. SR9/1587. Dr. Gamache finds the ABAS-II to be deficient from a validity standpoint. SR9/1588. Also, the ABAS-II was not administered according to the manual in Wright's case because the information came from multiple sources, as opposed to only the subject or one person who is familiar with the subject. SR9/1589-90. Therefore, there is no reason to believe that the results obtained for Wright are accurate or valid. SR9/1589.

**B. Lay Witness Testimony Regarding Prong Two**

The following twenty-one lay witnesses have testified concerning Wright's adaptive functioning. Their testimonies are summarized below.

**1. Cynthia Wright McClain**

Cynthia Wright McClain ("McClain") testified for the defense at Wright's May 11, 2005 combined penalty phase and *Spencer* hearing. McClain is Wright's maternal aunt. RS2/278. McClain has known Wright all his life. RS2/279. She observed Wright throughout his youth, until he was 13 or 14 years old. RS2/279. Wright did not have any kind of stable home life. RS2/279. Wright's mother (McClain's sister) would leave Wright with his grandmother for extended periods of time to go live with a new boyfriend. RS2/279-80. Wright's mother "basically abandoned" him a number of times. RS2/287. She also used alcohol while she was pregnant with Wright. RS2/287. McClain believes that Wright's mother had a drug and alcohol problem at a point in time. RS2/316. Wright's

father never played a role in his life and is currently in a mental hospital. RS2/281-82. McClain has helped care for Wright throughout his life. RS2/283.

McClain described Wright as a follower. RS2/285. He was "slow", and his mother received social security benefits for him because he was in "ESE" classes and had learning problems. RS2/285. McClain observed Wright have difficulty as a child concentrating on one task, which affected his schoolwork. RS2/289. This frustrated Wright. RS2/289-90. The other children picked on Wright because he was "slower" than them. RS2/286. Wright has sent McClain letters from jail expressing regret for his actions. RS2/293-94. Wright has shown improvement in his writing skills. RS2/294.

**2. Dennis Day, Jr.**

Dennis Day, Jr. ("Day") testified for the defense at the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence." Day met Wright in 2000 when they were both inmates at the Polk County Jail. PC10/1684. They were housed together for approximately one year. PC10/1684. Day described Wright as a loner and an outcast, who would go off by himself. PC10/1685. The other inmates did not treat Wright well, and they did not interact with him. PC10/1686. Day tried to get Wright to play cards with the other inmates so that he would fit in, but he did not always understand the rules, so he would mess up and anger his partner. PC10/1687-88. That, in turn, would make Wright angry, and a fight would break out or the game would stop. PC10/1688.

Wright did things in the jail that drew attention. PC10/1686-87. He was the loudest person in the dorm. PC10/1689. He sang and rapped constantly at abnormal times, often

early in the morning or when everyone was asleep. PC10/1689. He turned on all the showers and made a lot of noise at strange hours. PC10/1686. He carried on conversations with himself, which would cause everybody to look at him. PC10/1686. Day recalled an incident involving electrical wires in the shower facility:

> [T]hat was a situation where cigarette come in the dorm and we didn't have no light and he was trying to get a light, and he bust the light cover to get to the light and pull the wires out, and it was in the shower and the floor was wet. And I come in and turned the corner, and I'm like, "Hey, man," I said, "You want to die?" And – and he just seemed like he didn't – it didn't register. You know, you messing with live wire, hot wire on a wet floor with some – you know, I'm like "You going to die," you know.

PC10/1687.

**3. James Blake**

James Blake ("Blake") testified for the defense at the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence." Blake first met Wright in boot camp in 1997, when Blake was approximately sixteen years old. PC10/1734, 54. Wright did not fit in with the other boys in boot camp. PC10/1735. He adapted more slowly to boot camp than the rest of the boys, and he was not able to obey the drill instructors' orders because he did not understand them. PC10/1735. Wright acted differently than the other boys in boot camp. PC10/1735. While the other boys were trying to get through the program and follow orders, Wright did his own thing. PC10/1735-36. Wright would cause a commotion in an attempt to get attention from the other children. PC10/1736. Blake recalled that he and Wright were in a class together where they were required to write their autobiographies, and Wright did not participate in that activity. PC10/1737. Eventually, Wright was transferred to another program. PC10/1737.

After boot camp, Blake saw Wright again on the street in Lakeland around 1998. PC10/1738, 1741. Wright did not live in Blake's neighborhood, but Wright would come there from time to time. PC10/1738-39. Wright's clothing was awkward, and it did not match. PC10/1739-40. The other children made fun of Wright by calling him slow and telling him that he was born premature. PC10/1740-43. Wright did not engage in serious conversations. PC10/1745. Wright played football with Blake three or four times, but the other children did not want to pick Wright for their team because he did not understand the rules of the game. PC10/1743-44, 1753. Blake recalled several times when a team would decide that it was better to play with one less person than to pick Wright. PC10/1744-45.

**4. Jerry Hopkins**

Jerry Hopkins ("Hopkins") testified for the defense at the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence." Hopkins grew up in Polk County with Wright and knew Wright from the time they were both 13 to 18 years old. PC11/1758-61. They lived within walking distance of one another. PC11/1760. They played basketball together; attended middle school, high school, and boot camp together; and rode the same bus. PC11/1760. Hopkins believes that Wright was in "special classes," but isn't sure. PC11/1761. Hopkins and Wright were in the same grade. PC11/1772. Hopkins was in regular classes, and Wright was not in any of Hopkin's classes with him. PC11/1762, 1772.

The other children picked on Wright. PC11/1762. They teased him because he was a slow learner, and he could hardly read or spell. PC11/1762. Hopkins recalled that if you told Wright something one time, he would not remember it. PC11/1762. Wright also did

not comprehend a lot of things people told him. PC11/1763. Hopkins described Wright as a follower who was easily influenced by other people. PC11/1763. He did not fit in with the other children, but he would do things to try and fit in. PC11/1763-64. The other children referred to Wright as "push button." PC11/1763. Hopkins explained the meaning of the term: "It's like you push somebody up to do something. You just tell them something and they do it. It's like pushing a button. Just turn them on and turn them off." PC11/1763.

Hopkins saw Wright again in 2001-2005 when they were both at the Polk County Jail. PC11/1764-65. Wright did not seem to understand how serious the charges were that he was facing. PC11/1765. The other inmates did not want to be around Wright, and they treated him like he was different. PC11/1765. The other inmates manipulated Wright. PC11/1765. For example, they convinced him to steal a piece of pizza from a guard. PC11/1765-66. Wright asked the other inmates to write letters for him. PC11/1766. Hopkins would write poems for Wright, and Wright would copy them to send out. PC11/1766. Hopkins did not know of Wright ever writing anything on his own. PC11/1766. The guards at the jail treated Wright poorly. PC11/1766. They treated him differently than the other inmates. PC11/1767. The guards would shake down his cell for no reason, throw his stuff around, yell at him, and pick on him about his case. PC11/1767-68.

**5. Dahrol James**

Dahrol James ("James") testified for the defense at the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence." James was housed in Max Dorm at the Polk County Jail with Wright. PC11/1788. They

were roommates for six to eight weeks in 2002 to 2004. PC11/1789, 1808. Wright looked up to James, and they became friends. PC11/1790. James had a lot of conversations with Wright where he tried to get Wright to understand spiritual things, including concepts such as forgiveness and prayer, but Wright was not able to understand. PC11/1795-96. James led a Bible study group and a prayer circle in Max Dorm, which Wright participated in. PC11/1796-97. When the Bible study group got together, the participants would take turns reading out loud, but the other inmates always had to read to Wright. PC11/1796-97. In the prayer circle, each person in the circle would take turns praying about things such as their current situation or their families. PC11/1797. When it was Wright's turn, he talked instead of prayed, and he did not talk about anything that was relevant to the prayer circle. PC11/1797-98.

The other inmates saw Wright as different from them. PC11/1790-91. They picked on him and joked about him. PC11/1791. Wright was a follower and easily influenced by the other inmates. PC11/1791. Other inmates took advantage of Wright by putting razors (contraband) in his cell because he would allow them to. PC11/1792. Wright got nothing in exchange for keeping the razor blades, except the feeling that he was fitting in. PC11/1792-93. The inmates would also convince Wright to steal bread from the food cart and give it to them without taking anything for himself. PC11/1791-92. Wright was not street smart. PC11/1791. Wright tried to convince the other inmates that he was "more street," but he didn't seem to understand the price of street-related things, like rims and cars. PC11/1795. James explained why Wright is the kind of person a drug dealer would want to work for them:

> Because Mr. Wright's example of being a good drug dealer is what I call a sucker. Because if I gave him – if somebody gave him a hundred dollars worth of drugs and told him to bring back a hundred dollars, he's going to bring back exactly a hundred dollars. He's not going to – he's not going to try to like tell you that you have to pay him $30 of the -- $30 of the hundred. So I would have felt good having somebody like him on my team …
>
> Just having the hype of just being a drug dealer, I guess it was his thing. It wasn't about the money.

PC11/1794. Wright also had trouble following the rules in the jail. PC11/1799. If the officers did not take the inmates to rec at a certain time, Wright would go to the door and continue yelling for the officer to let them out to rec. PC11/1799. It never worked, but Wright did the same thing three times a week for the entire time he and James were incarcerated together. PC11/1799. Wright didn't learn not to do it the next time when it didn't work previously. PC11/1800. James recalled an incident when he became very angry with Wright:

> I know one situation where I kind of got real hot with Mr. Wright, because he used to come in my room and just like sit on the floor and just like stare me in the face and I can be asleep, or come wake me up. And he just never got it. I'll tell him you just can't do that, you can't just wake me up out my sleep and shake me and wake me up, and he was just like he feel comfortable. But if you feel comfortable, just don't wake me up 7:00 o'clock in the morning, but he'll go do the same thing two days later. And we almost – we had a problem about that.

PC11/1800. James agreed this kind of behavior could get a person hurt in jail. PC11/ 1800. Wright played basketball with the other inmates. PC11/1800. He was able to follow the rules, but he was easily distracted from the game when the inmates picked on the size of his head by calling him "Beetle Juice." PC11/1801-02. James explained that everyone "talk[ed] junk" to each other while playing basketball, but Wright was more easily distracted by it than the other inmates. PC11/1801-02.

**6. Shenard Dumas**

Shenard Dumas ("Dumas") testified for the defense at the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence." In 2004, Dumas and Wright were housed together for approximately eight months in the Max Dorm at the Polk County Jail. PC11/1846-47. Dumas described Wright as childish and ignorant. PC11/1838. He would turn on all the showers in the dorm, run around naked, and play. PC11/1840. The jail officers would tell him to come out of the showers. PC11/1840. None of the other inmates acted that way. PC11/1840. Dumas also described Wright as a follower. PC11/ 1839. He would do whatever the crowd did in order to fit in with the other inmates. PC11/1839. The other inmates picked on Wright, provoked him, and antagonized him for their own entertainment. PC11/1839.

**7. Carlton Barnaby**

Carlton Barnaby ("Carlton") testified for the defense at Wright's May 11, 2005 combined penalty phase and *Spencer* hearing and at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." The following summary cites to Carlton's testimony at both hearings. Carlton is Wright's maternal first cousin. RS2/329; SR4/655. Carlton is older than Wright by six months. SR4/ 655. Carlton has known Wright all his life. RS2/329. Carlton and Wright spent significant time together growing up, and they had a close relationship their entire lives. SR4/655, 659. Wright looked up to Carlton. SR4/659. Carlton felt like he had to look out for Wright, in part, because of the instability in Wright's home and his behavior and

educational issues. SR4/660. When Wright was first born, he lived with his mother. SR4/ 656. When Carlton and Wright were young, Wright moved in with his grandmother, but his mother was in and out of the picture throughout his life. SR4/ 657. Wright and Carlton sometimes stayed the night together at their grandmother's house. SR4/ 656. Carlton was not aware of Wright ever having his own apartment. SR4/ 656. At times, Wright and Carlton lived as close as 100 yards apart, but the farthest apart they ever lived was 12 miles. SR4/ 656.

Wright and Carlton attended the same elementary, middle, and high schools, but had no classes together. SR4/ 663. Wright was in SLD (slow learning disability) and/or ESE classes in school, and he struggled in school throughout. RS2/348; SR4/ 663. He was not very good with reading and writing in school, and Carlton would help him with spelling, grammar, and punctuation. SR4/663-64. Although Wright has improved in these areas through the years, it is something that he still struggles with. SR4/ 664. Wright got in trouble in school for fighting and skipping school. SR4/ 666. In his early teen years, he also started getting in trouble with the criminal justice system. SR4/ 687. Carlton described Wright as a follower, who is easily influenced by other people. RS2/335, 351. With the exception of one friend, Carlton did not know Wright to have friendships with other children when Wright was a teenager. RS2/340-41. Wright did not know how to handle peer pressure and had difficulty expressing his feelings. RS2/341-42. When the other children bullied him, he reacted by getting angry and fighting. RS2/341-42. Carlton tried to keep Wright from getting in trouble, but Carlton could not be with him at all times. SR4/ 666.

Wright did better when Carlton was helping him. SR4/ 666. Carlton helped Wright by bringing Wright to his house, giving him clothes, encouraging him, and helping him with his hygiene. SR4/ 660. From the time they were in third grade and throughout his life, Carlton provided Wright with toothpaste and deodorant, and coached him about proper hygiene. SR4/ 660-61. When they were in elementary school, Carlton sometimes went to Wright's house early in the morning before school to help him with his hygiene. SR4/ 699. Carlton recalled combing Wright's hair for him when Wright was between the ages of 10 and 12. SR4/ 661. A week or two before Wright was arrested, Carlton brought Wright to his house to take a shower. SR4/ 661-62. Carlton and others gave Wright rides because he did not have a driver's license, although Carlton did see Wright drive once. SR4/ 662, 700. Carlton knew Wright and his girlfriend "Vontrese" used the bus system together occasionally, but he never saw Wright use the bus by himself. SR4/ 691, 701. Carlton never saw Wright cook anything, and Carlton and others in the family would give him food. SR4/ 667. Carlton never saw Wright wash his own clothes, and Carlton believes his mother washed his clothes for him. SR4/ 667-68.

When Wright and Carlton were 16 or 17 years old, they worked together at the Albertsons warehouse in Plant City for less than six months. SR4/ 668. Carlton found out about the job, and he picked up Wright and took him to the temp agency. SR4/ 669. Carlton helped Wright fill out his application, and they were drug tested on the spot. SR4/ 669. They were hired together, and they always worked the same shift. SR4/ 670. Carlton picked Wright up in the morning at the same time each shift and drove him to work. SR4/ 670-71. Carlton also drove Wright home when their shift was over. SR4/ 671. Carlton

regularly helped Wright with the time clock until Wright was able to do it on his own. SR4/ 674-75. They stayed together and were within sight of one another during the entire shift. SR4/ 671. They went on breaks together, which they knew to take because an announcement was made, and everyone would leave at the same time. SR4/ 671-72. Carlton and Wright worked as selectors, which consisted of remaining stationary, putting stickers on boxes they grabbed from nearby, and placing them on a belt where the boxes would go to another section of the warehouse. SR4/ 672. Carlton and the other workers would look out for Wright and instruct him on how to do his job. SR4/ 673-74. Wright could not have done this job without someone helping him, at least at first. SR4/ 674.

Carlton and Wright were paid by check through the temp agency, and Carlton would drive Wright to the temp agency to pick up his paycheck. SR4/ 675. Wright did not have a bank account, so Carlton would drive Wright to a store to cash his check. SR4/ 675. Carlton helped Wright cash his checks, and he showed him where to sign his name on the checks. SR4/ 675-76. Aside from the job at the Albertsons warehouse, the only other job Wright ever had was seasonal work in the watermelon and orange groves. SR4/ 676. When Carlton and Wright were between the ages of 10 and 13, Wright's mother's fiancé, who did a lot of seasonal work, would drive Carlton and Wright to work with him. SR4/ 676-77. The job basically entailed passing fruit down a line, and Wright's mother's fiancé would guide Wright. SR4/ 677. They were paid under the table in cash. SR4/ 678. Carlton also recalled that Wright went to boot camp when he was 16 or 17 years old. RS3/352. When Wright came out of boot camp, he kept saying "Sir, yes; sir yes; ma'am yes" to Carlton and Carlton's mother. RS3/352. This behavior threw Carlton off. RS3/352.

Carlton was aware of Wright's relationship with his girlfriend Vontrese and that Wright was living with Vontrese on and off. SR4/ 690-91. Carlton visited Wright at Vontrese's house once or twice. SR4/ 691. Carlton did not see Wright as much when he was dating Vontrese because Wright had someone else who could care for him. SR4/ 701. Carlton sees Wright in prison about three times a year. SR4/ 692. Wright writes to Carlton and sends him birthday and holiday cards. SR4/ 692-94. When Wright was at the Polk County Jail recently, he tried to call Carlton, but Carlton cannot accept collect calls. SR4/ 695.

**8. Marian Barnaby**

Marian Barnaby ("Marian") testified for the defense at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Marian Barnaby is Wright's maternal aunt. SR4/ 633-34. There is a six-month age difference between Marian's son, Carlton Barnaby, and Wright. SR4/ 635. When Wright was a toddler, he lived 11 or 12 miles away with his mother, but he spent almost every weekend at Marian's house. SR4/ 635-36. Later, when Wright was 13 years old, he and his mother lived with Wright's grandmother in Auburndale. SR4/ 641-43. Marian has no knowledge of Wright ever living on his own. SR4/ 643. When they were children, Wright would spend most of his time with Carlton while at Marian's house. SR4/ 636. Wright and Carlton were best friends. SR4/ 636. As Wright and Carlton grew into their adolescent years, they saw each other about a couple of times a week. SR4/ 641.

Marian described Wright as a slow learner. SR4/ 637. As a young child, he had problems with his speech, and he was not able to learn as well as her own children. SR4/ 637. Wright had problems with pronouncing words and could not properly pronounce Carlton's nickname "Fedna." SR4/ 637-38. Wright instead pronounced the nickname as "Nuh." SR4/ 638. Aside from Wright's speech problem, Marian was able to communicate with Wright. SR4/ 647. Wright was in slow classes at school because of his learning problems. SR4/ 639. His slow learning problems continued throughout his years in school. SR4/ 640. Wright also started walking later than Marian's own children. SR4/ 638. Wright's mother received a disability check for his slow learning and disability. SR4/ 639. Marian described Wright's behavioral problems. SR4/ 643-44. He would not abide by either his grandmother or mother's rules. SR4/ 643-44. Marion was aware that Wright had behavioral problems in school. SR4/ 644.

Marian is aware that Wright and Carlton worked together as selectors at the Albertsons warehouse. SR4/ 645. Marian has not visited Wright since he's been in prison. SR4/ 648. Wright sends her cards on Mother's Day, Christmas, Thanksgiving, Easter, and sometimes her birthday. SR4/ 648-49. Marian has also received letters from Wright, but she is not sure who wrote them. SR4/ 652. Marian puts money in Wright's prison account, or she gives money to Carlton to put in the account. SR4/ 649.

**9. Byron Hileman**

Attorney Byron Hileman ("Hileman") testified at both the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence" and the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's

"Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." The following summary cites to Hileman's testimony from the 2015 hearing. Hileman has been an attorney for 38 years, and he has been involved with approximately 100 capital cases throughout his career. SR4/ 705-06. Hileman represented Wright in his capital case, as well as six other cases and the appeal of his capital case over the course of ten years. SR4/ 706-07. David Carmichael was Hileman's co-counsel on the capital case, and Rosalie Bolin was the investigator on the case. SR4/ 708-09. Hileman saw Wright extremely frequently, and he estimated that he spent upwards of 200 hours with Wright. SR4/ 708. Most of Hileman and Wright's communication was verbal and face-to-face, as opposed to in writing. SR4/ 709. Hileman got along well with Wright. SR4/ 708. Wright also got along well with Investigator Bolin. SR4/ 709. Investigator Bolin was very emotionally supportive of Wright, and he needed and appreciated that support. SR4/ 709.

Wright was very immature compared to the other capital defendants Hileman has represented who are Wright's age. SR4/ 709-10. When Hileman visited Wright at the jail, Hileman would speak with him about his cases. SR4/ 710. Wright was adamant throughout the course of Hileman's representation of him that he was not guilty of the murders. SR4/ 725. Wright always listened to Hileman, but the interactions were one-sided. SR4/ 710. Hileman did most of the talking and asked Wright if he understood or had any thoughts. SR4/ 710. Wright would always respond tersely and indicate that he understood, but Wright never engaged in a detailed discussion that led Hileman to believe that he actually comprehended what Hileman was talking about. SR4/ 710-11. During these discussions,

Wright would go off on irrelevant tangents, leading Hileman to believe that Wright did not understand what they were talking about. SR4/ 711. Hileman had to constantly refocus Wright to the points he was trying to address. SR4/ 711. Wright would ask Hileman questions indicating that he did not understand what Hileman was trying to explain to him. SR4/ 711. Hileman frequently had to repeat himself multiple times because Wright did not seem to understand. SR4/ 722.

Wright exhibited a lack of judgment in fully understanding his circumstances. SR4/ 714. Hileman recalled attempting to explain to Wright that it was in his best interest to take a "life and avoidance plea" because Wright already had more than one life sentence. SR4/ 712. Wright seemed unable to "process that information because his responses were non sequiturs [and] … didn't really address the issue that [Hileman] was trying to get [Wright] to consider." SR4/ 712. Hileman explained that he had an explicit discussion with the State about the possibility of a life offer, and Hileman felt that the State would be willing to make such an offer if Wright would have been willing to accept it. SR5/ 735-36. Hileman did not recall the offer ever being reduced to writing because Wright rejected it. SR5/ 736. Despite there being little or no downside to accepting a life in avoidance offer (given the fact that Wright already had more than one life sentence) and a very large upside (given the fact that Wright was facing the death penalty), Wright was not interested in the offer. SR4/ 713.

Hileman did everything he could to convince Wright to accept the life and avoidance plea once it became a realistic possibility. SR4/ 715. Hileman is not sure that Wright understood Hileman's explanation of the situation, because Wright did not give an explanation for rejecting the offer that made any sense. SR4/ 714. Instead, Wright focused

on the fact that there were two previous mistrials in the capital case, and he felt this proved that they could win the murder case and that this also discounted the need to consider the alternative. SR4/ 714. Additionally, Wright was convinced that his co-defendant, Samuel Pitts, was going to testify favorably for him at trial, even though Hileman knew otherwise and told Wright as much. SR4/ 715. Hileman described this as unrealistic and "magical thinking". SR4/ 714-15.

Wright had one of the most heavily mentally mitigated cases Hileman had ever seen. SR4/ 716. Wright was not able to make good judgments. SR4/ 716. He demonstrated an incapacity to relate facts to consequences. SR4/ 716. It was difficult to communicate with him rationally. SR4/ 716. Wright's judgments grew "out of some irrelevancy as opposed to the main facts that [Hileman] was trying to get him to focus on." SR4/ 716. He was easily manipulated by others, and his judgment was poor in terms of the kind of advice he was listening to. SR4/ 718-19. Wright did not always listen to Hileman's advice about not talking to other inmates about his case, and he spoke with "jailhouse lawyers" and other inmates about his case. SR4/ 719. Additionally, Wright experienced mood swings. SR4/ 716-17. Although he was always very courteous with Hileman, he was also very reactive, and he could go into a rage very quickly. SR4/ 717. During one of Wright's trials, Wright got into a physical altercation with a bailiff after the bailiff put his hands on Wright to make him move faster. SR4/ 717. Immediately after the altercation, Wright went from extreme rage to an emotional breakdown in the matter of a minute when he started sobbing in a holding cell. SR4/ 717.

Wright did not really actively assist Hileman with his case. SR4/ 718. He would discuss the issues with Hileman and appeared cooperative, but his active participation was very limited. SR4/ 718. Wright did not appear to be listening to the testimony during his trial. SR4/ 721. He would respond when Hileman asked him a question, but then he would go back to "doodling" on a notepad Hileman gave him. SR4/ 722. Wright doodled a lot during the trial. SR4/ 721. Although Wright understood on a superficial level what the State's witnesses would testify to, he was not able to assess the weight of the evidence and the consequences of the presentation of the evidence in a realistic way. SR4/ 715. Wright did not write Hileman any notes during trial and did not provide any suggestions about questions to ask the witnesses. SR4/ 722.

**10. David Carmichael**

Attorney David Carmichael ("Carmichael") testified at both the October 17-18, 2012 evidentiary hearing on Wright's "Amended Motion to Vacate Judgment and Sentence" and the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." The following summary cites to Carmichael's testimony from the 2015 hearing. Carmichael has been an attorney for 20 years and has been active in criminal defense work throughout his career. SR5/ 747. He was appointed as second chair on Wright's capital case, and he also represented Wright in one of his aggravator cases. SR5/ 747-48. In total, he represented Wright for approximately five years, during which time he visited Wright in person between 100 and 200 times. SR5/

748-50. Carmichael felt that he had a good relationship with Wright, despite communication difficulties with Wright and an initial lack of rapport. SR5/ 751.

Carmichael experienced "numerous types of difficulties" in communicating with Wright during his representation. SR5/ 751. Wright had developed a "social patina", which would make a person think he understood something when he really did not. SR5/ 752. For a long time, Carmichael thought Wright understood him because he would laugh, smile, and make appropriate comments or gestures. SR5/ 752. However, Carmichael later concluded that Wright did not really understand what his attorneys were talking about. SR5/ 753. For example, Carmichael would hear Hileman explain to Wright what was going to happen next during the trial, and Wright would nod and smile. SR5/ 753. Carmichael would then speak with Wright in the holding cell, and Wright would not really understand. SR5/ 753. Other times, Hileman or Investigator Bolin would tell Carmichael that they discussed certain things with Wright, but when Carmichael spoke with Wright about these things it was as if Wright was hearing them for the first time. SR5/ 754. Likewise, Wright did not understand why his attorneys could not call somebody to testify about his good character. SR5/ 789. He would ask Carmichael about it every time they spoke, and the fact that it appeared that Wright was getting an answer that was new to him every time Carmichael answered led Carmichael to believe that Wright didn't understand. SR5/ 789-90. Wright seemed to be able to understand things after he experienced them, but "it was very difficult for him to take verbal statements and make them concrete." SR5/ 754. As a result, Carmichael often had to repeat himself to Wright over and over, to the extent that

every time Carmichael spoke with Wright, he had to start at the beginning again and keep going over core issues. SR5/ 764.

Carmichael recalled that the defense had communications with the State after the first and second mistrial wherein the State indicated that they might be willing to offer a life sentence if Wright would accept the offer. SR5/ 756-57. Wright already had a life sentence in another case. SR5/ 756. Carmichael, Hileman, and another attorney named Larry Hardaway had several conversations with Wright about accepting the offer. SR5/ 757. They tried to convince Wright to accept a life offer because he was already under a life sentence. SR5/ 758. They also believed they had not persuaded the jury in the second trial that Wright was innocent and believed the State's case against Wright would be even stronger in the third trial. SR5/ 758. Wright seemed incapable of grasping what his attorneys were telling him and also incapable of understanding that he could resolve all of his cases by agreeing to a life sentence. SR5/ 758. Instead, Wright perceived every mistrial as a step closer to victory. SR5/ 758. Wright was never able to provide Carmichael with his reasoning for rejecting the life offer. SR5/ 761.

Carmichael explained that getting Wright to behave properly and groom himself for trial was akin to dealing with a six-year-old. SR5/ 768. Carmichael explained:

> I mean, we had to emphasize – it's like dealing with my six-year-old, you know, "Comb your hair before we go out." "Why?" You know, but eventually, you know, he would comply. And, like I said, you – once you got him on the task – and given these were six-week blocks, you know, he could do fairly well. But it was something where you constantly early on had to tell him why it was important …

SR5/ 768. Wright also got two teardrop tattoos and a dragon tattoo on his face while he was awaiting trial, despite his attorneys having conversations with him about his

appearance in front of the jury. SR5/ 768-70. They also had many conversations with Wright prior to trial about proper courtroom behavior. SR5/ 767. Wright was eventually able to adapt himself to acceptable courtroom behavior, in part, because his attorneys got him engaged in doing some activity during trial. SR5/ 767. For example, they gave him a coloring book and coloring pencils, and he drew pictures and colored. SR5/ 767. They were also allowed to have Investigator Bolin sit at counsel table with Wright during trial. SR5/ 772. Carmichael explained why:

> Well, she would – part of the problem for [Wright] was that he has seemed to have very little control over his reactions to things, and, again, I analogize it to my six-year-old or even younger, and we actually asked for and got leave from the court to have Ms. Bolin sit at the table simply because we were concerned about his ability to control himself.

SR5/ 772.

**11. Richard Shere**

Richard Shere ("Shere") testified for the defense at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Shere is an inmate on Florida's death row at Union Correctional Institution (UCI). SR5/ 841. Shere has known Wright for four years and has lived very close to him- either in the cell next to him or a couple of cells down from him. SR5/ 842. Shere described some aspects of life on death row. Shere explained that death row inmates are not able to see each other face to face when they are in their cells, but they are able to have conversations and pass notes. SR5/ 843. The inmates are able to communicate face-to-face during yard time, which usually happens for three hours two times per week. SR5/ 843-44. Inmates play a simplified version of basketball on the yard,

and Wright is a standout basketball player due to his athletic ability and height. SR5/ 865. Inmates are allowed to sleep whenever they want, except that they have to be up for count at nine o'clock. SR5/ 844. To send mail, an inmate fills out the envelope and places it on the bars unsealed so that it can be read for security reasons before it is sealed and sent out. SR5/ 845. Grievances and medical requests are also folded up and placed on the bars with regular mail to send out. SR5/ 845.

Shere does a lot of legal work for other inmates on his wing. SR5/ 848. He provides his legal services for free, and he does not ask for anything in return. SR5/ 855. Shere began drafting pleadings for Wright's non-capital cases when Wright asked him to look at his cases to see if he had any claims. SR5/ 848. Wright did not come up with anything on his own or present Shere with any claims he wanted to raise. SR5/ 848. Shere drafted Wright's pleadings for him and gave them to Wright to copy in his own handwriting. SR5/ 848-49. Wright copied what Shere wrote verbatim, even any errors Shere made in the original draft. SR5/ 849. Shere checked Wright's copy for errors and would have him make changes. SR5/ 849-50. Shere would then give Wright scrap paper with instructions on how to address the envelope and write the letter to the clerk for the pleadings, and Wright would copy what was on the scrap paper. SR5/ 850. Shere made all the decisions regarding which court to file the pleadings in. SR5/ 850-51. Shere spent hundreds of hours repeatedly trying to explain the legal issues to Wright, but Wright never understood. SR5/ 851-52. For example, despite Shere trying to explain the concept, Wright was not able to understand his *Miranda*[14] rights completely, or that there were constitutional issues that could be raised

[14] *Miranda v. Arizona*, 384 U.S. 436 (1966).

under *Miranda.* SR5/ 871. Shere likened his attempts to explain legal concepts to Wright to "beating [his] head against a wall." SR5/ 854-55. There is a law library at UCI, and inmates are allowed to get fifteen cases per week. SR5/ 852. Whenever Shere needed cases for Wright's case, he would write them down on a piece of paper so that Wright could copy them onto a request form in his own handwriting and order them in his own name. SR5/ 853. Shere would try to explain the cases to Wright, but Wright could not understand them. SR5/ 854.

Wright has also asked Shere to explain the meaning of letters from Wright's attorneys. SR5/ 856. Shere would explain to Wright what he needed to know from the letters and help him with drafting responses. SR5/ 856. Shere would draft questions for Wright to ask his attorneys, and Wright would copy the questions in his own handwriting. SR5/ 856. Shere also gave Wright advice on how to keep conversations going with his pen pals, and he drafted portions of letters to the pen pals for Wright to copy. SR5/ 857. Shere has also helped Wright manage his canteen requests. SR5/ 858. Shere has helped Wright add up the cost of items and add the tax. SR5/ 858. Wright could never figure out the tax, so Shere would try to explain it. SR5/ 858. Despite Shere's efforts to explain how to fill out the canteen forms, Wright would still make mistakes and get angry when he went over his limit and didn't receive everything he requested. SR5/ 858.

Shere has personally observed another inmate help Wright complete a medical request form by writing out the request for Wright and then passing it to Wright to copy into his own handwriting. SR5/ 859. Shere helped pass the form from the inmate's cell to Wright's. SR5/ 859. Wright was also able to request a special kosher tray by copying a

boiler plate request form that the other inmates were passing along the wing to request the tray. SR5/ 861. Wright decided he wanted the kosher tray after he heard other inmates on the wing discussing that the food was better. SR5/ 860.

**12. Carlos Coney**

Carlos Coney ("Coney") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Coney is 34 old and is employed with a nonprofit organization. SR7/1124-25. Coney went to high school with Wright but couldn't recall the exact high school. SR7/1125. Coney never met Wright in high school, but they had at least one mutual friend, Benie Joner. SR7/1125-26. Coney believes he and Wright were only in ninth grade together because Coney left school after that grade. SR7/1126. Coney knew Carlton Barnaby but was not aware Carlton was Wright's cousin until after the crimes took place. SR7/1126. Coney and Wright did not have any classes together in high school and did not belong to any of the same organizations. SR7/1127. Coney stated that Wright was in either "ESE or SLD classes." SR7/1128. Coney was also in special classes in high school but did not have any with Wright. SR7/1128. Coney "didn't know [Wright] well enough to know" how he interacted with other students. SR7/1128-29. Coney testified that "[he] honestly didn't know where [Wright] stayed or anything. [Coney] and [Wright] didn't know each other, really." SR7/1130.

Coney was with Benie Joner the morning that Wright shot him. SR7/1130. The shooting occurred about two years after Coney and Wright attended school together.

SR7/1131. During that two-year period, Coney recalled seeing Wright once at Wright's cousin's house and another time when he may have shared a car with Wright. SR7/1131. Coney never had any direct contact or personal conversations with Wright. SR7/1133-34. Coney could not recall if he ever saw Wright driving a car. SR7/1134-35.

**13. Aaron Silas**

Aaron Silas ("Silas") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Silas is 35 years old and currently unemployed. SR7/1137. Silas testified that he met Wright in 2000 when Silas became an accessory to a crime Wright committed. SR7/1138. Wright knocked on Silas' door early in the morning and asked for a ride. SR7/1139-40. Silas gave Wright a ride, and Wright gave him directions for where to go. SR7/1141-42. Silas stated that when Wright got in Silas's car, Wright put a gun on the floorboard. SR7/1144-45. Wright directed Silas to drive down Longfellow Boulevard. SR7/1143. While driving down Longfellow Boulevard, Wright said he saw some friends and asked Silas to turn around. SR7/1143-44. Silas stated that he was about to turn into the driveway where the individuals were when the shooting started. SR7/1146. After the shooting, Wright gave Silas directions to drive him home. SR7/1146-47. Silas stated that Wright gave him marijuana in exchange for giving him a ride. SR7/1148-49.

Wright had never been to Silas's house prior to this event. SR7/1139. Silas stated he is well known in his neighborhood and many people know where he lives. SR7/1139. Silas never attended school with Wright. SR7/1139. Silas only saw Wright twice in his life-

once at a friend's house and during this incident. SR7/1140. Silas never saw Wright again after the shooting incident. SR7/1148.

**14. Sandrea Allen**

Sandrea Allen ("Allen") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Allen is 33 years old and the middle sister to Vontrese Anderson ("Vontrese") and Darletha Jones. SR7/1150-51. Allen met Wright when she was about 17 years old through Brian Parker ("Parker"), the father of her child. SR7/1152. At the time, Allen lived in Lakeland with her mother. SR7/1152. Parker was also 17 years old and lived in Lakeland. SR7/1152. Allen believes Parker and Wright were cousins. SR7/1153. The first time Allen met Wright he was at Parker's house hanging out. SR7/1153. Allen was around Wright maybe five to ten times prior to his arrest. SR7/1153-54. Allen's brother, Samuel Pitts ("Pitts"), also met Wright through Parker. SR7/1154. Allen's sister, Vontrese, and Wright dated. SR7/1154. Allen and Wright "[n]ever had a relationship. [They] really couldn't stand each other." SR7/1155. Allen didn't like things Wright did, like "fighting, breaking in people houses." SR7/1156. Allen had knowledge that Wright sold cocaine and had been present when drug transactions were made. SR7/1156-57. Allen once observed Wright during a drug deal when he dealt to an undercover police officer. SR7/1157. Allen observed Wright have money with him, but she does not recall ever seeing him buy something from a store or make change. SR7/1157-58. She also never went to a restaurant with him. SR7/1158.

Wright would get around Lakeland by either walking or using the city bus. SR7/1158-59. When Wright and Vontrese were dating, Wright would stay at Vontrese's apartment "off and on." SR7/1159. Wright dressed "okay" and wore clean clothes. SR7/1159. He "kept himself together," and did not appear disheveled. SR7/1160. Allen was aware that Wright was a member of "South Side Thugs" but stated, "I don't know if it was a real gang, but it was a gang. I guess they called their selves a gang." SR7/1160. Wright would wear the gang colors of green and blue. Allen never had conversations with Wright herself but was present when he spoke with Pitts. SR7/1161. She never had problems understanding Wright and never observed him having difficulty understanding others. SR7/1161. Allen was "pretty sure" that Wright understood the consequences of his behavior. SR7/1162. Allen was present when Wright called from jail but is not sure if she answered the phone. SR7/1162. Wright had a group of friends he would hang out with, including Parker and Pitts. SR7/1164. Allen never observed Wright playing sports or video games. SR7/1164. Wright and his friends would go to the park to rap. SR7/1165.

**15. Darletha Jones**

Darletha Jones ("Jones") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Jones is 30 years old and the younger sister to Sandrea Allen and Vontrese Anderson. SR7/1167. Jones first met Wright when she was about 12-13 years old and living in Lakeland. SR7/1168. Wright hung out with a group of boys in the neighborhood. SR7/1169. Wright is several years older than Jones. SR7/ 1170. Jones's

sister Vontrese is six or seven years older than Jones. SR7/1174. Wright and Vontrese dated. SR7/1169. Jones only saw Wright in groups and never had individual or one on one conversations with him. SR7/1175. She never had problems understanding Wright, and never perceived Wright having difficulty understanding others. SR7/1170-71. Jones didn't go to the same school as Wright and didn't see him interact with kids at school. SR7/1175. She never went to Wright's house. SR7/1175.

Wright didn't wear brand new clothes, but he appeared clean. SR7/1171. He fit in with the other kids and never appeared dirty. SR7/1171-72. Jones observed Wright using the city bus frequently, but never saw him driving a car. SR7/1172-73. Jones saw Wright carrying a firearm "mostly all of the time" but was not sure whether he was a gang member. SR7/1173. She is unsure whether Wright carried a cell phone or pager or whether he was dealing drugs. SR7/1173-74. Jones never saw Wright being picked on while in the group of boys. SR7/1174.

**16. Vontrese Anderson**

Vontrese Anderson ("Vontrese") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Vontrese is 36 years old and is the eldest sister to Darletha Jones and Sandrea Allen. SR7/1177-78. Vontrese first met Wright through her brother, Sammy Pitts ("Pitts"), but does not recall the specific circumstances of their meeting. SR7/1179. Vontrese was in her early 20s at the time. SR7/1179. Wright was younger than her. SR7/1179. Vontrese lived in her own apartment in Providence Reserve with her

daughter. SR7/1181. Vontrese's brother Pitts and his girlfriend "Tasha" also came to live with her. SR7/1180. Wright only spent the night at Vontrese's apartment once during the time they knew each another. SR7/1181. Vontrese's relationship with Wright lasted two to three weeks. SR7/1182. Vontrese testified that she knew Wright for less than a year, and she "really didn't know him like that that well at all." SR7/1182. Vontrese observed Wright taking the city bus "one or two times." SR7/1183. Wright lived with his mom at the time, and Vontrese only visited Wright's home once. SR7/1183. Vontrese does not know if Wright has a driver's license and saw him driving a car "maybe once." SR7/1183-84. Wright appeared to understand Vontrese during their relationship, and she never had a problem understanding him. SR7/1187.

After their relationship ended, Vontrese told Wright she did not want him around, but Wright still kept coming around. SR7/1184-85. Vontrese believed that Wright knew he wasn't supposed to be around her because law enforcement told him not to come around her anymore. SR7/1184-85. Vontrese received one letter from Wright from the Polk County Jail. SR7/1187-88. Wright also called Vontrese after he was incarcerated, but she never spoke with him. SR7/1189. Wright had her phone number and memorized it. SR7/1193. Vontrese saw Wright with a firearm "only one time." SR7 1190. She has no knowledge of whether Wright sold drugs. SR7/1190. Wright did not have a job during the time they dated, and Vontrese never saw him have money. SR7/1191. Vontrese testified that Wright was clean, kept himself up, and fit in with the other men his age in the neighborhood. SR7/1191. Vontrese and Wright only went out to eat once, and Wright was

able to look at the menu and place an order without problems or assistance. SR7/1192. Vontrese did not remember if Wright had a pager during the time she knew him. SR7/1194.

**17. Toya Long Ford**

Toya Long Ford ("Ford") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Ford first met Wright when she was about seven years old and he was a couple years older. SR7/1197. Ford and Wright's mothers were friends. SR7/1197. Wright spent time at Ford's house when they were growing up. SR7/1197. Wright lived with his mom, step-dad, sister, and brother, and shared a small room with his brother. SR7/1198-1200. Ford would visit Wright's house once or twice a month. SR7/1198. Wright and Ford would talk and play around while their moms visited. SR7/1198. Wright would talk to Ford about problems at home and with his mom. SR7/1199. Ford stated that Wright was not an average kid. SR7/1200. She explained: "It was just like -- he was more so not -- wasn't really there. He was like sad a lot and couldn't really have . . . a normal conversation with him." SR7/1200. Wright was mainly sad about his problems at home and his mother's alcohol abuse. SR7/1200. Ford explained her difficulties communicating with Wright:

> We never really could have a conversation where he would give an elaborate answer back. It was, like, if you wanted to talk to him, basically, you just would want to ask yes-or-no questions because it's not like – he wasn't there enough to hold a full conversation like that … he would more so have trouble understanding me or what I'm trying to ask.

SR7/1202-03. Ford further explained that she and Wright never had a long conversation. SR7/1214. Wright "would just listen to me and stop me if he needed me to explain something." SR7/1214. Ford would often have to use simpler words and repeat herself when speaking to Wright. SR7/1215. Wright would sometimes act like he understood when he really didn't. SR7/1215. Ford believes Wright's lack of elaboration was because "he didn't understand the type of question that [she] was asking" and not because he was shy. SR7/1215.

Wright and Ford "pretty much grew up together" and had mutual friends. SR7/1201. Wright would often wear dirty clothing and shoes that he "could just slip on." SR7/1201. Ford does not believe Wright knew how to tie his shoes as "[h]e never tied them when he did have them on. He'd just stick the shoe string in the side" or "take them completely out." SR7/1209. Wright would often come to Ford's house to get food. SR7/1209. Ford's mother would make Wright food but did not allow Wright to cook because "[h]e had a very short attention span. We didn't want him to forget that he was cooking . . . my mom already knew from, like, way back that he wasn't, you know, he's not the type of person that we can put those type of responsibilities on." SR7/1214. Ford's mother also "had to remind [Wright], you know, to do simple things, you know, brush your teeth, wash your face, tie your shoes, things like that, which, you know, some of those things are hard but he did his best." SR7/1207. When Wright was at Ford's house, her mother would have to remind Wright to brush his teeth and shower. SR7/1211. This went on even when Wright was a teenager because he did not do these things on his own. SR7/1211. Ford's mother would buy him things like socks, shirts, school supplies, food,

and shoes. SR7/1218-19. Wright would give these items away to kids at school to make friends and so people would not beat him up. SR7/1213, 1219-20.

Wright and Ford went to the same middle school but did not have any mutual classes. SR7/1203. Ford believes Wright was in "special classes." SR7/1204. Ford would see Wright at school every day. SR7/1203. They sometimes walked to school together. SR7/1204. Wright would tell Ford that school "was hard for him to understand and try to keep up," and he didn't know how to do his homework. SR7/1204-05. Ford frequently helped Wright with his homework and would have to do his homework for him at times because "[i]t was not comprehensive to him." SR7/1205, 1212. Wright's school-work was significantly easier than Fords' because he was in special classes, but he still didn't seem to get it. SR7/1212. Ford never saw Wright read, and that was something he struggled with in school. SR7/1212. Ford observed other children in school taking advantage of Wright by "taking stuff from him, picking on him, just trying to manipulate him and get him to do things for them." SR7/1210. Children would pick on Wright because he was an easy target and wouldn't fight back. SR7/1210. Wright did not have many friends and would do "whatever they wanted him to do" to make friends with the other children. SR7/1210. For example, when Wright was in middle school, the kids would convince him to take an extra lunch tray or talk to a girl as "some kids know how to target and manipulate younger weaker-minded kids." SR7/1211.

Ford never saw Wright take the Lakeland bus, but she has been taking the bus herself since she was 12 or 13 years old. SR7/1215. Ford explained that to take the bus you "[j]ust get on, let them punch a card, and go sit down. You just pull a string when you get

to the area that you want them to stop." SR7/1215-16. When Wright was a teenager, the bus system was free for people under 18 years old; punch cards were mailed to minors for them to use. SR7/1216. When using the card, one did not need money or need to make any change. SR7/1216. To use the bus, one would need to know where the stop was and where the bus was going. SR7/1216-17. Ford noted that the buses "pass up and down the street all the time and they so, so it's easy to see, you know, exactly where they're going to stop at." SR7/1217. Ford further explained that in "the area that we used to go, it didn't cause for a transfer … I never went and had to transfer buses. SR7/1217. Ford and Wright lost touch once she started high school and was 13 or 14. SR7/1208. She last saw Wright almost one year prior to his going to jail. SR7/1212. Prior to that, she saw Wright off and on when he needed food or a place to sleep. Ford had no knowledge of Wright's involvement with drugs or gangs. SR7/1208.

**18. Benie Joner**

Benie Joner ("Joner") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Joner is 35 years old. SR7/1253. Joner attended Auburndale High School with Wright, but they had no classes together. SR7/1255. Joner does not know how Wright got to school. SR7/1255. Joner would see Wright in the morning before classes started. SR7/1255-54. Joner and Wright were friends and had mutual friends. SR7/1256. When Joner and Wright would talk in the morning, Wright did not appear to have difficulty communicating and seemed to understand Joner. SR7/1257. Joner would hang out with

Wright in a group of friends, and Wright got along with the group. SR7/1258. No one in the group tried to bully or intimidate Wright. SR7/1258. Joner never saw Wright get into any physical fights with any people on campus. SR7/1258. Joner thinks he "probably [saw Wright] after school a couple of times." SR7/1257. Joner does not know if Wright played any sports in high school. SR7/1259.

Joner recalled hanging out with Wright once outside of school but could not recall the exact place. SR7/1259-60. Wright never visited Joner's house. SR7/1260. Joner does not know how Wright got around and never observed him driving. SR7/1260-61. Wright and Joner had a disagreement about a girl when Joner was in ninth or tenth grade, and they eventually had a physical fight over the girl. SR7/1261-62. After the fight, Joner did not see Wright until the shooting on Longfellow Boulevard. SR7/1262-63. Wright was sitting in the passenger seat of a vehicle when the vehicle drove by, turned around, and shots were fired at Joner and Carlos Coney. SR7/1264-65. Joner has no knowledge of whether Wright was in a gang or sold drugs. SR7/1263.

**19. Michael Konhya**

Michael Konhya ("Konhya") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Konhya first met Wright while they were in a detention center and Konhya was 15 or 16 years old. SR7/1268-69. Konhya barely saw Wright at the detention center because Konhya was kept in lock down. SR7/1273. Between the time that Konhya met Wright and Wright went to prison, Konhya saw Wright "in passing . . . once

or twice in custody and maybe once on the street if [he] was just riding by." SR7 1269. Konhya stated that he "don't too much have conversation with Mr. Wright because [he] can't stand Mr. Wright." SR7/1270. Konhya and Wright had a problem in the detention center once. SR7/1270. Konhya has "no clue" if Wright was in the same gang as him and does not know if he is a gang member or not. SR7/1269-70. Konhya never saw Wright drive a vehicle. SR7/1270. Konhya was also in "adult jail" with Wright at some point. SR7/1272. Konhya never saw Wright having behavior problems in jail, but Konhya "wasn't in there very long with him." SR7/1272. Konhya has had no contact with Wright since 2000. SR7/1272.

**20. Detective Bradley Grice**

Detective Bradley Grice ("Detective Grice") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Detective Grice has been employed with the Lakeland Police Department for 27 years and currently serves in the violent crimes unit. SR7/1275. In 2000, Detective Grice was serving in the violent crimes unit, investigating homicides. SR7/1275-76. Detective Grice's only contact with Wright was in April of 2000 when he conducted a sworn interview. SR7/1276-77. On April 22, 2000, Detective Grice was investigating an aggravated assault with a firearm, and Wright was the lead suspect. SR7/1277-78. The alleged crime occurred at Providence Reserve apartments, and Wright was taken into custody hours after. SR7/1277-78.

Detective Grice conducted a custodial interrogation of Wright. SR7/1278-79. Following protocol, Detective Grice reviewed a *Miranda* rights form with Wright and had Wright initial after each individual right was read to him. SR7/1279-80. Wright indicated that he understood the rights, and initialed by each line. SR7/1280. Wright told Detective Grice he had graduated high school, and he appeared to have no problems signing his name or initialing the form. SR7/1280. Detective Grice explained that he read the *Miranda* form to Wright and then asked "Do you understand all that?" SR7/1292. Wright answered “yes, sir.” SR7/1293. Detective Grice explained the *Miranda* rights to Wright, but he did not have Wright explain the *Miranda* rights back to him. SR7/1293.

The interrogation lasted approximately twenty minutes. SR7/1285. Detective Grice had no problems understanding Wright during the interview, and Wright appeared to understand the questions asked of him. SR7/1281. Wright stayed on topic during the interrogation. SR7/ 1281. Detective Grice testified that if he had been dealing with someone with a physical or mental illness, he would have inquired about whether the suspect has ever been diagnosed with any mental illness or what his handicap was. SR7/1286. Detective Grice would do this “if it was something that was obvious, they’re speaking slowly or handicapped in some aspect.” SR7/1286. Detective Grice did not ask Wright about this. SR7/1287. Detective Grice did not ask Wright whether he receives a disability check. SR7/1292.

The alleged incident involved Wright’s former or current girlfriend, Vontrese Anderson (“Vontrese”). SR7/1282. During the interrogation, Wright was able to provide Vontrese’s address and phone number from memory. SR7/1282-83. Wright told Detective

Grice that he didn't have a firearm, but instead pointed a radio at two men. SR7/1284. Wright provided a detailed description of the radio and admitted to running away from the scene because "he had a blunt on him." SR7/1284. When Wright was arrested, he had a box with three bullets in it. SR7/1287. Wright said he was holding the bullets for a friend. SR7/ 1287. He identified them as .380 caliber bullets. SR7/1288. A .380 caliber handgun was found at the trailer park where Wright was apprehended. SR7/1289. Wright denied knowledge of the firearm. SR7/1289. In his experience, Detective Grice has previously arrested juveniles who had an extensive knowledge of drugs and guns but were not otherwise sophisticated. SR7/1294.

**21. Shakida Faison**

Shakida Faison ("Faison") testified for the State at the bifurcated January 5-6, 2015 and February 11, 2015 evidentiary hearing on Wright's "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203." Faison first met Wright through her friends Vontrese Anderson ("Vontrese") and Sammy Pitts ("Pitts"). SR7/1296-97. Faison was in her early twenties at the time. SR7/1296. She met Vontrese and Pitts through her boyfriend. SR7/1297. When Faison met Wright, he was dating Vontrese. SR7/1297. At the time, Faison lived in Lakeland with her boyfriend, and Vontrese and Pitts shared an apartment in Providence Reserve. SR7/1298. Faison believed Wright lived with Vontrese and Pitts at the time. SR7/1298. During the few months Faison knew Wright, she saw him several times but "not frequently . . . maybe once a week." SR7 1299. She does not know if Wright was working or attending school and never discussed this with him. SR7/1300.

Faison never really had any conversations with Wright during the time she knew him. SR7/1300. She was present when Wright spoke with others but she "wouldn't know what they were talking about" because she would be talking with her girlfriends. SR7/1300. Wright participated in conversations, but "[h]e had a few words, but not full-fledge conversation like everybody else was in." SR8/1301. Faison planned a barbecue where everyone was to bring something, and Faison drove Wright to Winn Dixie so he could purchase meat. SR8/1301-02. During the car trip they only engaged in "slight conversation", but Wright spoke about "some violence" but did not elaborate. SR8/1303-04. Faison observed Wright driving a car on the day of the barbeque with two other passengers she did not recognize. SR8/1304-05. She has no knowledge as to whether Wright used the bus system. SR8/1305. Faison was close with Vontrese and her sisters. SR8/1307. Faison made a statement to the police because Vontrese asked her to. SR8/1307.

**IV. Manifestation During the Period from Conception to Age 18**

The circuit court found "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." SR11/1865. Dr. Kasper opined that Wright meets the third prong for intellectual disability as his intellectual disability began prior to 18 years old. PC12/1994. Dr. Kasper explained the following circumstances concerning Wright's intellectual development. Wright has been diagnosed with fetal alcohol syndrome, which is known to cause defects in intellectual capacity. PC12/1995. Wright suffers from

microcephaly, as well as other physical characteristics of fetal alcohol syndrome.[15] PC12/1995. It is unclear whether Wright's mother received adequate nutrition while pregnant with Wright, as she only gained seven pounds during her pregnancy. PC12/1995-96. Maternal malnutrition is a risk factor for lower intellectual functioning. PC12/1996. Wright's mother also received benefits for Social Security benefits for Wright's disability when he was a child. PC12/1998-99. Wright was classified as emotionally handicapped and specific learning disabled in school, was exempt from taking standardized tests, and earned a special diploma. PC12/1911, 1923-25. Wright's school records indicate that he had deficits in functional academic skills, as well as problems interacting and communicating with others and controlling his environment. PC12/2029.

Dr. Kasper also testified concerning two IQ scores Wright achieved before he was 18 years old that indicate significantly subaverage general intellectual functioning: the full scale score of 76 with a 95% confidence interval of scores from 70 to 82 when Wright was ten years old and the full scale core of 75 with a 95% confidence interval of scores from 69 to 81 when Wright was 16 years 6 months old. PC11/1894; PC12/1959-70; SR5/897, 918; SR6/932-37.

[15] Dr. Alan Waldman testified for the defense concerning Wright's fetal alcohol syndrome and microcephaly at Wright's 2005 combined penalty phase and *Spencer* hearing. An MRI of Wright's brain showed that he suffers from microcephaly, which is a smaller than usual brain. SR3/379-80. Microcephaly is a symptom of fetal alcohol syndrome. SR3/379-80. Wright's brain is about two-thirds the size of a normal brain. SR3 379-80. The outward abnormalities of Wright's facial structures, including his small head, also indicate that he has fetal alcohol syndrome. SR3/395-97. Dr. Waldman opined that Wright's low intelligence is caused by his fetal alcohol syndrome. SR3/386.

As summarized above, lay witnesses Cynthia Wright McClain, Jerry Hopkins, Carlton Barnaby, Marian Barnaby, and Toya Long Ford testified that as a child: Wright was in special classes; Wright was picked on by other children because he was slower than them; Wright had difficulty communicating with others and understanding them; Wright struggled significantly with his school work; Wright couldn't care for all his daily living needs (such as grooming) without assistance or coaching. The State offered no testimony from Dr. Gamache or any other witness to that Wright's intellectual impairment did not manifest during the period from conception to age 18.

(b) If you did not exhaust your state remedies on Ground One, explain why: Not applicable.

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?
☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: This ground was developed during Wright's post-conviction proceedings.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203
Name and location of the court where the motion or petition was filed: Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida
Docket or case number: CF00-02727A-XX
Date of the court's decision: March 27, 2015
Result: Denied (Appendix C)

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399.
Docket or case number: SC13-1213
Date of the court's decision: November 23, 2016 (revised opinion March 16, 2017)
Result: Denied (Appendix A)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Not applicable.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: None.

**GROUND TWO: FLA. STAT. § 921.137(4) IS UNCONSTITUTIONAL AND VIOLATES WRIGHT'S DUE PROCESS RIGHTS AS PROTECTED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH 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.**

(a) Supporting facts:

Fla. Stat. § 921.137(4) requires Wright to prove by clear and convincing evidence that he is intellectually disabled. Wright argued below that requiring proof of intellectual disability by clear and convincing evidence violates his due process rights under the Florida and Federal Constitutions.

(b) If you did not exhaust your state remedies on Ground Two, explain why:
Not applicable.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: This ground was developed during Wright's post-conviction proceedings.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203
Name and location of the court where the motion or petition was filed: Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida
Docket or case number (if you know): CF00-02727A-XX
Date of the court's decision: March 27, 2015
Result (attach a copy of the court's opinion or order, if available): Denied. (Appendix C)

(3) Did you receive a hearing on your motion or petition? ☒ Yes☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of the court where the appeal was filed: Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399.
Docket or case number (if you know): SC13-1213
Date of the court's decision: November 23, 2016 (revised opinion March 16, 2017)
Result (attach a copy of the court's opinion or order, if available): Denied. (Appendix A)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Not applicable.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: None.

**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 FEDERAL 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.**

(a) Supporting facts:

**Penalty Phase Trial**

The Florida Supreme Court summarized the penalty phase portion of

Wright's trial as follows:

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