IN THE SUPREME COURT OF FLORIDA

TAVARES J. WRIGHT,

Appellant,

v. CASE NO. SC05-2212
Lower Tribunal No. CF00-2727A-XX

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. LANDRY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0134101
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Tavares Wright was charged in a seven-count indictment with carjacking, two counts of kidnapping, two counts of first degree premeditated murder of David Green and James Felker and two counts of robbery (R II, 341-347). Trial by jury resulted in guilty verdicts on all counts (R IV, 707-715; R XXXII, 4971-78). Thereafter, on November 16, 2004, Wright moved to waive jury recommendation and after full consideration the court granted the request and the jury was discharged (R XXXII, 5047-5123).

Subsequently, the court conducted a simultaneous penalty phase hearing and Spencer hearing (SR I-III). The court conducted a hearing for mental retardation on September 22, 2005, (R V, 748-833) and the court found Wright was not retarded (R V, 829). On October 12, 2005, the trial court entered its Sentencing Order and findings supporting the imposition of a death sentence (R VI, 963-83).

A. Guilt Phase

Polk County crime scene technician Lynda Raczynski responded to a potential crime scene on Bolender Road on April 23, 2000, at about 5:30 p.m. (R XX, 2672-76). A number of items

had been identified by family members (R 2679). Mary Bloomer identified a jacket as belonging to her child. The witness took photos and collected the items (R 2682). The next day she went to the crime scene office and processed the vehicle (R 2683). The vehicle was a white four-door Cirrus (R 2684). On Wednesday, April 26, when the bodies were discovered, she went to the scene on Barfield Road and processed the scene (R 2707-09). They photographed the area and collected evidence (R 2718). It was one big orange grove with a road cutting through it (R 2722). There were tire impressions by the body and spent bullet casings (R 2724, 2726-27). Victim number one was David Green and victim number two was James Felker. Green was face-up with a wallet in his hands; there was a bullet hole in his shirt and a bullet hole in his head (R 2741-42). Felker had two bullet holes and a large hole to the head (R 2743). All of the areas on the outside of the car that had blood were on the left rear portion of the car and all of the areas on the inside of the car having blood were on the left-hand side (R XXI, 2755-56).

Mark Shank, a resident of Lakeland, testified that when he returned home from work on April 20, 2000, he discovered that he had been burglarized (R XXI, 2810-12). Among the items taken

were a .380 automatic pistol with a nine-round clip and a 12-gauge bolt action Mossberg shotgun. One could fire the shotgun four times without reloading it (R 2815-17). The serial number on the gun was 1033297 (R 2821). He talked to a detective that evening. Shank did not know Wright or give him permission to be in the house (R 2823).

CST Anndee Kendrick first became involved in the Green-Felker homicides on April 27 when asked to respond to an apartment complex on Providence Road regarding some shoes found there and blood (R 2832). She looked at some blood on the steps of apartment #203 and collected a pair of tennis shoes (R 2834). She sent the shoes to FDLE to test for blood (R 2839). Her report indicates there was blood on the left side of the left shoe (R 2845).

CST Jean Gardner assisted CST Raczynski at the crime scene at Barfield Road on April 26. The bodies of Felker and Green were still there. She assisted with photos and measurements and attended the autopsies the following day (R 2849-50). Autopsy photographs were introduced into evidence (R 2856). Felker is the person who was shot with the shotgun and the skull was badly damaged (R 2859). A mid-caliber, jacketed hollow-point was

removed from the face of victim Green (R 2869). Another deformed bullet came from the pharynx (R 2871).

The previous testimony given by Deputy Sheriff Aaron Campbell was read to the jury (R 2888-2911). Campbell responded to the burglary at the Shank residence on April 20 (R 2888). It was determined that a rear bathroom had been the point of entry (R 2890). He took latent prints from various locations (R 2893). There were no prints from the point of entry (R 2898).

Bennie Joiner knew Appellant from school at Auburndale High (R 2917). He also knew Carlos Coney. Joiner went to a house in Lakeland on April 21 to help him clean up (R 2918-20). A car in which Appellant was a passenger drove by (R 2921). The car turned around and came back the other way (R 2925). The vehicle drove more slowly, Joiner saw a hand emerge from the window and heard a gunshot. Carlos was hit in the leg (R 2926-27). Carlos was taken to the hospital and Joiner told police he recognized Wright as the shooter (R 2928). The drive-by vehicle looked like a black Corolla (R XXII, 2938).

Carlos Coney testified that on the morning of April 21, 2000, he was at his brother Tony’s house on Longfellow Boulevard (R 2941). Coney looked out towards the road and a black car turned around and came back. He saw Tavares Wright (R 2944-45).

Wright, on the passenger side, pointed a gun outside the car and began shooting; only two people were in the car (R 2946-47). Coney was hit and fell (R 2947). Before that day, he had not had any problems with Wright (R 2949). Police visited him at the hospital but he wasn't talking since he was in shock (R 2951).

Ernesto Mendoza drove a 1995 white Jimmy on April of 2000 (R 2977). On April 21, he was at the Taco Bell in Winter Haven with Mr. Granados and Ms. Martinez (R 2978). The battery in his vehicle went dead and while attempting to start it, a black man walked up, pointed a gun at them and announced he was going to take the car (R 2980-81). The man got in Granados' car and drove off (R 2984). They jumped in Mendoza's truck and chased him (R 2986). During the chase the car became disabled (the radiator belt was hanging)(R 2988). Mendoza and his companion remained there until the police arrived (R 2990). The driver of the stolen car got out and started shooting at them and they took cover (R 2996). Days after making the police report, the witness saw Appellant's picture in the newspaper and he went to report that fact to the Winter Haven Police Department (R 2998-99). He identified Wright in court (R 2999).

Patrol officer Mary Cook wrote up a police report on the Taco Bell incident shortly after 1:00 a.m. on April 22 (R 3022). The victims later reported having seen the carjacker's photo in the paper (R 3024). They showed the picture of Wright (R 3026).

CST Laurie Ward, a supervisor in the crime scene unit, was called on the morning of April 21 to the area of Longfellow Boulevard in Polk County (R 3049). She understood there had been a shooting (R 3050). The scene had been cordoned off with barrier tape and Deputy Cruz showed her two bullet holes in the house and some casings found in front of the house (R 3052). Ward recovered a fired projectile in a table in the house. They chose not to dig a second one out of the wall (R 3056). The casing on the driveway was a .380 auto manufactured by Winchester (R 3060). There were three .380 auto Winchester caliber bullet casings and one .25 caliber bullet by CCI (R 3066). Ward went to the hospital, made contact with victim Carlos Coney and recovered a projectile removed from him (R 3067-68). She took photos of the Toyota Corolla on May 2 (the Longfellow Boulevard shooting) that belonged to Aaron Silas and there appeared to be scrape marks but no bullet holes to the vehicle (R 3070-71).

Sergeant Danny Monroe, police officer with the Lake Alfred City Police, arrived at the area near Miracle Toyota in Lake Alfred at about 2:30 a.m. on April 22 (R 3091-93). He took photos of Mendoza and Granados and the vehicle (R 3094). He also identified photos of casings from a .380 on the pavement to the left rear quarter of the Caprice (R 3095). The vehicle was towed to the police department for processing. One latent print was found on the interior portion of the driver's window and three latent prints were off the steering wheel (R 3099-3100). There was evidence of damage to the white SUV Jimmy where a projectile had struck it and ricocheted (R 3101).

Officer Johnnie Sikes became involved in Wright's arrest on April 22 (R 3116). Providence Reserve is on the north side of Lakeland and he was dispatched to go there at 6:00 or 6:30 p.m. concerning a disturbance that someone had pointed a weapon at another person (R 3117). Golden Wings Mobile Home Park was across the field from Providence Reserve (R 3122). The officers were given a description of a person wearing a bright yellow shirt with white stripes on the stairwell and the person was standing on the second floor (R XXIII, 3127-28). As Sikes walked up the stairs, Appellant started walking down the stairs, then vaulted over the stair rail (R 3131). Appellant began

running and his tennis shoes came off. Sikes was unable to grab Appellant by the shirt and tripped over Wright's shoes (R 3132). Sergeant Thomason pursued him across the courtyard in the direction of the Golden Wings Mobile Home Park. As Sikes was driving around, he heard a radio dispatch that Appellant was apprehended (R 3133-37). A citizen found a gun and Sikes recovered the gun in the driver's seat of a car (R 3137-39).

Officer Ryan Back, a K-9 officer with the Lakeland Police Department, assisted in the investigation with Sgt. Thomason and Officer Sikes at the apartment complex (R 3173). Wright had been apprehended and Back was to transport him (R 3175). Back was given the property removed from Wright's pockets, a box of ammunition and some live rounds (R 3176). In the box were two .380 caliber Federal rounds and one Winchester round (R 3178). Wright inquired about what charges he was facing and volunteered that he couldn't be charged with being in possession of a gun and later at the station, Back heard that a firearm had been collected at the scene (R 3178-79).

Lake Alfred police officer Michael Teague was dispatched to the area of Miracle Toyota, where Highways 17 and 92 converge, in the early morning hours of April 22 (R 3190). A dispatch advised there was a possible vehicle involved in a carjacking

with shots fired (R 3191). He spoke with Mendoza and Granados who informed him someone had stolen the car that was on the curb (R 3194). Teague observed shell casings toward the back of the vehicle and Sgt. Monroe collected the casings (R 3196-97). The Caprice was disabled (R 3204).

Sergeant Thomason met with Officer Sikes at building 885 to find a guy with a gun (R 3210). Appellant met the description given of the person they were looking for (R 3212-13). As he approached by climbing the steps, Thomason saw Wright seated on a step (R 3215). A black female was seated beside him. Wright appeared shocked when he and Thomason made eye contact (R 3216). Thomason called for him to stop and Wright sprung from the railing to the cement (R 3219-20). Officer Sikes tripped on tennis shoes and fell to the ground (R 3220). The tennis shoes came off the Appellant (R 3221). Thomason and Officer Gulledge chased Wright between the apartments (R 3226-27). While running, Appellant had his right hand to the right side pocket area and Thomason radioed the suspect possibly had a gun (R 3228). Thomason heard on the radio that Wright was in custody. He eventually talked to Monica Barnes who lived in the mobile home park who found the gun (R 3230-31). Thomason returned to

building 885 where the chase began but the tennis shoes were not there (R 3232).

CST Paula Maney of the Polk County Sheriff's Office responded to Bolender Road on April 22 when Deputy Dominguez advised her there was an abandoned vehicle in an orange grove (R 3257). She did not know anything about the whereabouts of the people in the vehicle or any possible homicide (R 3259). She identified photos taken at the scene (R 3260-61). There were areas on the back quarter panel which appeared to be blood and the vehicle was subsequently towed and processed by CST Raczynski (R 3264). Deputy Dominguez told her he found the key in the sand outside the vehicle door (R 3290).

Detective Derek Gulledge who was a Lakeland police officer on April 22, 2000, and was dispatched to the Providence Reserve Apartment complex and was in radio contact with Sikes and Thomason (R XXIV, 3337-39). A suspect matching the description they gave over the radio was running towards Gulledge. He had his hands down his pocket and his left hand was covering it. Wright, the suspect, ran past, ignoring his command to stop. Gulledge lost track of him at the hill but heard over the radio that other officers had him in custody (R 3340-44).

Former Lakeland city police officer Joseph Pillitteri also became involved in Wright's arrest. He went to the Golden Wings Mobile Home Park as a perimeter unit (R 3350-51). Pillitteri saw Appellant running with officers in pursuit. Wright kept on running when he ordered him to stop (R 3353). Appellant's right hand clenched his right pants pocket. Wright eventually stopped running and walked around in a circle with his hands in the air (R 3354-55). Pillitteri ordered him to the ground and Wright was handcuffed by Officer Sostre (R 3355). There was a box of bullets but no gun in his pocket. Pillitteri later returned to the park upon learning of the discovery of a gun and saw the car which had the window down and where Appellant had run to (R 3356-57).

Monica Barnes, owner of a 1988 Chevy Celebrity, sat on something on the driver's seat of her car, reached underneath her and pulled out the gun which was turned over to the police (R 3366-71). Auburndale Police Lieutenant Howard Lashley, Jr. was driving an unmarked vehicle on Bolender Road on April 22 and noticed a vehicle inside one of the rows in an orange grove (R 3377-78). He and Detective Peterson proceeded to the white vehicle to run the tags (R 3380). The vehicle was about two hundred yards from the road; the windows were up and the

driver's door was open six to eight inches. There was a key on a lanyard on the ground near the driver's door (R 3382). There was a single set of footprints from the area of the driver's door all the way to Bolender Road. He couldn't see the shoe impression because of the sugar sand in the grove; they looked more like divots (R 3383). He didn't think they could take a cast for tire impressions. The vehicle had not been reported stolen at that time but it looked ransacked with items strewn about (R 3384). They notified the Sheriff's Office because it was in their jurisdiction (R 3384-85).

Polk County Sheriff's Seargeant Alyn Marler was called to Bolender Road on April 22. Deputy Dominguez was recovering a car abandoned in the orange grove and learned there had been a missing persons report (R 3399-3400). He called out the crime scene unit to process the scene and was later advised there appeared to be blood spatter on the car. Then he called Detective Cavallaro (R 3401).

Joy Scriven, sister-in-law of victim David Green, testified that Green was visiting from Virginia for a week to attend a wedding (R 3416). That evening he and "Jimbo" (Felker) were going to go bowling or shoot pool after the wedding rehearsal dinner. She never saw them again (R 3417). Later, she became

aware the police had found the bodies and police requested items for DNA testing (R 3418). David had been driving a white Cirrus Chrysler. At some point she visited the scene where police had recovered the vehicle and she saw and picked up a jacket of David's thirteen-month-old son in the sand (R 3421).

Sheriff's Lieutenant Lawrence Cavallaro received a call from Marler about the suspicious vehicle recovered in the orange grove (R 3424). He was already aware the vehicle had been in a car chase with David Lay the previous night since he had monitored the channel (R 3424-25). He thought it best to have the vehicle towed for more crime scene processing and even assigned a homicide detective even though the bodies had not yet been discovered (R 3426). He asked family members about items from the vehicle that might help in locating the victims (R 3429-30). Cavallaro contacted pawn shops and learned someone had brought in Felker's black bag with computer components but the pawn shop had not bought it (R 3429-31). Value Pawn Shop on 98 North reported that the person had bought a Polaroid camera, there was a pawn ticket on the person and a sophisticated video system within the pawn shop (R 3432). Detective Williams pursued this line (R 3433). Phlebotomist Charlotte Speed recalled drawing Appellant's blood on June 1, 2001 (R 3452-55).

Detective John Joiner obtained court-ordered blood samples of Appellant and another defendant (Samuel Pitts) in June, 2001 and turned them over to the evidence custodian (R 3457-59).

Pawnbroker Donald Culpepper, owner and manager of 98 North Pawnbrokers in Lakeland, identified a set of computer repair tools manufactured by Jensen and he bought the item as a pawn item in his shop in April of 2000 for forty dollars (R 3467). He recognized the seller as one with whom he had previously done business (R 3467). A Sheriff's deputy inquired whether he had seen computer tools and Jensen. The Jensen tools are fairly uncommon items pawned (R 3468). Culpepper bought the item from Samuel Pitts who was accompanied by two other young black males (R 3470).

Francis Green, the mother of victim James Felker, last saw her son on April 21 at her house. His nickname was Jimbo and he was going bowling that evening with her nephew, David Lee Green, in David's car (R 3478). After the bodies were discovered, the police asked for his toothbrush for testing (R 3479). Felker had over one hundred dollars with him that night (R 3480).

Former FDLE crime lab analyst in serology DNA, Dr. Terri Hunter, was given Felker's and Green's toothbrushes, nail clippings and blood stain cards prepared from Wright's blood

tube, as well as one from Samuel Pitts (R 3493-94). She did STR DNA analysis on the samples and got profiles from Pitts, Wright, Felker and Green (R 3496-3501). She was given ten swabs of blood from the car. Four of the samples matched the DNA profile for Felker (R 3501-02). She was comfortable that the DNA profile obtained matched the DNA profile from Felker. She was also presented a pair of Nike shoes with suspected swabs of blood which were identified as coming from Wright (R XXV, 3512-13). She obtained a DNA profile on the left Nike shoe that matched the profile of Felker (R 3513).

Former Detective David Lay of the Polk County Sheriff's Office was driving in the Lakeland area on Friday evening, April 21 (R 3554). He noticed a vehicle come onto Providence Road without stopping at a high rate of speed (R 3555). Lay was driving in an unmarked vehicle (R 3557). The younger black male with nubs on top of his head was the driver (R 3578-79). Another black male was in the front seat (R 3557-58). The car ran a stop sign, Lay followed it getting tag numbers to run on his computer. It ran another stop sign and he continued following. The information he got back was that it was unassigned, meaning it did not belong to that car (R 3557-59). It came back to a 1988 blue vehicle but this was a newer model

Chrysler (R 3559). Lay turned on his emergency equipment, the other car started to flee and ran a red light (R 3560). They reached speeds of sixty miles an hour on a major road and the shift supervisor instructed him to cancel the pursuit (R 3561). The tag on the vehicle was a Virginia tag (YTA 8099). He followed procedure and put out the information on a BOLO (R 3562-63).

Detective Vickie Callahan testified that Detective Britt Williams assigned her the task of retrieving the tool kit from 98 North Pawnbrokers after Mr. Bloomer explained to her what the kit looked like and described a cell phone and serial number for the cell phone (R 3581-82). She recovered the tool kit on April 26 from Mr. Culpepper at the pawn shop (R 3582-83). The description matched that given by Mr. Bloomer, David Green's employer (R 3583). The name on the paperwork with Culpepper was Samuel Pitts and included his driver's license number. Bloomer also told Det. Callahan that Green had a Nextel cell phone in a black leather carrier case (with serial number provided) but she did not find a cell phone (R 3584-85).

Identification technician Susan Dampier received a pack of latent prints taken by Deputy Campbell at the Shank residence. Four latent lifts from a plastic bottle in the rear south

bedroom were examined (R 3594-95). One was of sufficient quality to use for a comparison (R 3597). She was asked to go to the jail and fingerprint Wright and was able to compare the palm prints (R 3598-99). She opined that it was the right palm print of Appellant and she was one hundred percent sure. (R 3601). Herman Moulden, Dampier's former supervisor, was asked to verify Dampier's identification and did so. He opined the latent print belonged to Wright (R 3624-27).

Tracy Grice, supervisor for the crime scene section for the Lakeland Police Department (and successor to Herman Moulden) was asked in April, 2000 to examine the gun, the box found in Wright's pocket and the bullets that were in the gun (R 3644-46). Grice used a super glue method but did not get any prints from the outside portion of the gun. He developed a print off the red sleeve of the box but it was not suitable for comparison. He removed the grips of the gun, found a print, but it did not match Wright, Silas, Ruffin or Pitts (R 3648-50).

Latent print examiner Patty Newton testified that she was asked to look at latent lifts that came off a Chrysler Cirrus (R 3664-65). Twenty-nine latent cards were submitted, eighteen contained latent prints of value and ten were of no value. She was provided known fingerprints for Wright, Pitts, Darryl

Stanton, and Rodnei Ruffin. Prints from the exterior left rear door frame and the left rear panel and the exterior left front door were identified as Wright's left palm, right palm, and left index finger, respectively (R 3666-67). Her work was verified by latent examiner Felicia Bowen and Herman Moulden. Newton was absolutely certain these prints were Wright's (R 3669). None of the latents belonged to the other people mentioned (R 3671). She knows Tavares Wright touched that car (R 3690).

FDLE Senior Crime Lab Analyst Charles Faville was asked to examine a black bag full of computer tools and found no prints there (R 3693-94). Three latent fingerprints were identified with the fingerprint card of Wright (R XXV, 3695). One of them was lifted from the steering wheel of the victim's car. Another was lifted from the inside of the driver's window. (R XXVI, 3696-98). These prints were lifted from the vehicle of victim Granados (R 3698).

Wesley Durant, an inmate in the Polk County Jail through the summer of 2000, was a trustee who performed as a barber and laundryman (R XXVI, 3720). Captain Watson asked him to cut Wright's hair in the maximum security area (R 3721-22). Durant told Appellant he had a lot of sand in his hair and Appellant responded that he was T. J. Wright and had been on the news.

Wright said he was in jail on a double murder in North Lakeland (R 3722-23). Wright was asking about the criminal justice process and Durant asked if he did it and noted he'd have to come up with an alibi or a good story for his lawyer (R 3724). Wright said they took these people out to a grove from Winn-Dixie, they didn't cooperate and they did what they had to do. Wright said they two were crackers, a slang term for whites (R 3725-26). Wright said he thought he put them on their knees and they were shot (R 3726-27). The victims had a car which the killers took. Wright's hair was braided down then like plats. Officer Faulkner overheard the conversation and suggested Durant talk to a detective (R 3728). Durant talked to Detective Davis and told him the truth about his conversation with Wright (R 3729). He asked what could be done for him but he received no benefits; he received almost a thirty-year sentence (R 3730).

In an interview with Detective Kneale, Durant said Wright mentioned that he and Sammy walked up to the boys and asked for a cigarette, that the boys had no money but only a camera and some computer stuff, that a lady at the pawn shop took the camera, and that he had been corresponding with Sammy in jail (R 3760-62).

Durant also told Kneale that Wright said when he shot them, both boys fell on their dicks (R 3763). Wright additionally stated he shot both guys in the back of the head because they didn't have any money, only computer stuff (R R 3764).

John Bloomer, owner of a computer service company in Virginia, is the father of Mary Bloomer. David Green was her fiancé and the father of Bloomer's grandson. He came to Lakeland to meet David because he found out David and Mary were going to have a child, about a year and a half prior to David's death (R 3795-96). Later, David and Mary moved to Virginia and worked for Bloomer. David had a computer tool kit and carried a Nextel cell phone (which was in the tool kit) (R 3797-98). After the wedding rehearsal, David had plans to go bowling with James and Mary went to the dinner (R 3800). David drove a white Chrysler Cirrus which was registered in Virginia (R 3801). The next morning he learned that David and James had not returned home and David's brother, Mike, reported them missing (R 3803). Subsequently, Bloomer was told their car had been found. He went to the sheriff's office to look at the car and identify which items might have been missing. He told the authorities the tool kit was one; Bloomer was not familiar with a camera David had brought down for the wedding and a jacket of the

infant grandson was found in the dirt among the orange trees where the car was found (R 3803-04). State Exhibit #70 looked like David's cell phone and Bloomer provided its serial number to the police to match it up (R 3811).

Mary Bloomer similarly described David's disappearance after the wedding rehearsal (R 3813-18) and added that David had about two hundred dollars in cash and a bank card (R 3819). She identified the Polaroid camera they purchased (R 3819-20). It was in the car the last time she saw it (R 3820). She also identified her son's jacket (R 3821) and identified David's wallet and driver's license which had been shown to her by a detective (R 3822-23).

Chief Medical Examiner Dr. Stephen John Nelson reviewed the autopsy files on David Lee Green and James Felker (R 3833). He did not perform the autopsies (R 3834). The witness observed the bodies at the crime scene before they were moved (R 3860). There were multiple wounds to the bodies and they were in moderate to advanced state of decomposition. Felker and Green had disappeared on April 21 and were found on April 26 (R 3861-62). The degree of decomposition was consistent with their having been dead since the 21st. For Felker, there was an entrance wound to the chest area (R 3862-64). There was a

bullet wound on the side of the face to Green and a wound to the chest (R 3864). There were three fatal wounds to Green: a wound to the head, a wound to the chest that produced trauma to the lungs, and a wound to the back of his neck that pierced a portion of his spinal cord (R 3866). The cause of death for Felker was a singular gunshot wound and shotgun wounds (plural) to the head (R 3867-69). The wounds were fatal and instantaneous (R 3870).

Brian Higgins who is currently forensic DNA examiner at the U.S. Army Criminal Investigations Lab (USCIL) and formerly a crime lab analyst at FDLE (R 3881-82), examined a pair of shoes in the instant case (R 3884). He tried to find the chemical indications for blood using the phenophthalein test (R 3885). For each shoe he found chemical indications for the presence of blood. He collected positive areas with a sterile swab and forwarded to the DNA section for analysis (R XXVII, 3886). His report was dated February 15, 2001, and the shoes were represented as being from Tavares Wright. Wright's green shorts gave chemical indication for the presence of blood but his yellow shirt did not (R 3887). On Pitts' white shorts there was one area giving chemical indication for the presence of blood but not on his shirt or shoes (R 3888). He also tested

swabbings from areas of an automobile and most of them were positive for blood which he forwarded to the DNA analyst, Dr. Hunter (R 3889-91).

Michael McDermott, manager of Value Pawn Jewelry, identified a standard pawn broker transaction form. The subject of transaction referred to in State's Exhibit #119 was a Polaroid camera purchased by them for ten dollars on April 25, 2000 (R 3906-09). The seller was Darryl Stanton. Another individual approached one of his employees and asked if there was any interest in purchasing another item, a satchel with very small hand tools. McDermott elected not to purchase them (R 3910-11).

The State and defense stipulated to the jury that the homicide victims were James Felker and David Green (R 3918).

Shakida Faison testified that a number of her friends lived at the Providence Reserve Apartment Complex, including Sandrea (Booby), Wright, Sammy, Tasha and Vontrese. Appellant was Vontrese's boyfriend (R 3923). She went over to the apartment on the afternoon of April 21 to plan for a barbecue the next day at her house (R 3926). Only Vontrese and Shakida had cars. Faison left at about 7:00-7:15 p.m. Vontrese had left by car and Wright had left on foot (R 3928). Faison gave Appellant a

ride to Winn-Dixie (R 3930). Wright volunteered the comment that he wasn't going to lie, that he shot the boy in the leg yesterday. He didn't say anything else (R 3931). The next day when she drove over to the apartment complex, she stopped in the driveway because she saw Appellant running towards the apartments. Suddenly, police were running behind him. Wright did not have any shoes on (R 3932-35). Inside the apartment everyone was talking about Appellant running from the police. She did not see a pair of shoes there (R 3956).

James Hogan testified that one Friday morning in April of 2000 Appellant came to his grandmother's house in a car with Sammy Pitts and another man (R 3969-70, 3975). The heavy-set man said he had a 12-gauge in the trunk and pulled it out. Appellant went to the passenger side of the front seat and got a gun from under the floor mat (R 3972). The three men had arrived in a dark green or dark blue Toyota. Hogan and the three men drove around in his Chevy Caprice for fifteen or twenty minutes (R 3973-74). Later that day, Hogan saw Appellant who was walking on the road that goes to Lake Alfred and who told him he needed a ride to Lakeland and Hogan complied (R 3977). Hogan went to Fat Daddy's club that night and when he returned that night at 12:30 or 1:00 am, Appellant Wright was

sitting on the couch on the phone at Hogan's grandmother's house (R 3981). Wright asked Hogan to take him back to the Providence Reserve Apartment complex. Hogan agreed to do so (R 3982). On the way over there, Wright mentioned they had shot these two boys and also said he got into it with some Mexicans. These were two different incidents (R 3984). Wright stated they took two white boys to a grove, shot one in the head, one in the chest (R 3985). When Hogan dropped Appellant at the apartments, he saw Sammy Pitts standing upstairs at a balcony. Wright also said they had gotten into a high speed chase in Lakeland. Wright explained they used a pistol and 12 gauge shotgun to shoot the boys (R 3987). A day or two later, Hogan learned there really were two dead boys (R 3989). The police visited his house and questioned him about Wright (R 3990-91).

Latasha Jackson was in a relationship with Sammy Pitts and Vontrese is Pitts' sister who had an on-again, off-again relationship with Wright (R 4054). Vontrese had a car at the time of this incident (R 4056). She got a phone call one night at about 10 p.m. from Sammy to go pick him up (R 4059). When she went to the apartment complex to pick up Sammy, Appellant was standing outside next to a white car she had not seen before. She thought he had just gotten through washing the car

off (R 4059-62). He left driving the car when she left with Sammy. She had not known him to own a car. Later that night, Wright knocked on the bedroom window at the Providence Reserve Apartments (R 4063). That day-the day Appellant was arrested-she and Wright were sitting outside on the steps; he had a small handgun and wore a pair of Nike tennis shoes (R 4066-67). Wright said he shot two white boys in the orange grove; he said he shot one in the head (R 4068). Wright ran to the front of the apartment complex. She found a pair of shoes he was wearing downstairs (R 4071). The police came back and got the shoes (R 4073). She went to the pawn shop with Sammy with a bag (R 4074-75). She saw a Polaroid camera at Rodnei's complex (R XXVIII, 4076).

Sandrea Allen, sister of Vontrese Anderson and Sammy Pitts, was visiting her sister at the apartment in Providence Reserve on April 21. (R 4132). No men other than Appellant and Sammy lived in the apartment (R 4133). She saw Appellant holding a handgun on Saturday morning (R 4134). Detective Scott Rench went to the jail annex in February, 2003 with the prosecutor and defense attorney (R 4148). They videotaped the attempt to have Wright and Pitts try on different pairs of shoes (R 4149).

Pitts is large, about six feet five inches tall (R 4156). The shoes fit Wright better than Pitts (R 4162).

During this investigation, Lieutenant Brian Rall came into contact with Darryl Stanton whom they learned had pawned a Polaroid camera. The homicide victims had a camera in their possession when reported missing (R 4169). Rall contacted Stanton on April 25, before the victims' bodies were found (R 4170). While at the apartment at the Stanton/Ruffin residence, Rall saw a Nextel cell phone. They told him where they got it and he seized it (R 4173). The serial number matched that given by family members (R 4174).

Byron Robinson met the Appellant in the county jail and even spent some time in the same cell with him (R 4187). The co-defendant told Robinson what they were in jail for one day in court and Robinson subsequently told Wright what Pitts had said. Wright indicated he couldn't believe Pitts would be talking about it (R 4190-91). Later, Wright said Pitts was lying, trying to put the whole thing on him. Wright said they were together and got in the victim's car at McDonald's. They were white guys from out of state (R 4193-94). They went to Sammy's house and got clothes and a shotgun; the victims were not there willingly (R 4194-95). Wright said he had the .380 gun and they

were going to steal something from them (R 4195). The victims said they didn't have something and they went to the grove (R 4195-98). When the victims resisted by insisting they had nothing, they got out of the car and Wright shot one of them with the .380. The other guy got out of the car and Wright also shot him with the .380 by the passenger side of the car (R 4198-99). When one of them was still breathing, Wright told Sammy to pop the trunk and get the shotgun. Wright got the shotgun and shot the victim. Pitts said sometimes he was there and other times not there (R 4200-01). When driving back, Wright said they got involved in a chase by police, but they got away and jumped out of the car (R 4202). Afterwards, Robinson talked to someone in Tallahassee about Wright's discussions after Robinson had received his jail sentence, and subsequently talked to a detective about what Wright and Pitts had said (R 4203-04).

Rodnei Ruffin was sixteen years old at the time of this incident in April of 2000 (R 4239). His stepfather was Darryl Stanton. Ruffin was a friend of Sammy Pitts (R 4240-41) and Appellant Wright (R 4242). He recalled going over to the Timberlane area of Lakeland to pick up Sammy at midnight (R 4244-45). Sammy needed a ride (R 4245). Sammy and Appellant were acting nervous and scared. Appellant drove off in a white

car (R 4247-48). Sammy had a Polaroid camera and a black bag (R 4248-49).

Appellant had a cell phone which he said he was going to sell or get rid of (R 4250-51). Ruffin asked him to give it to him and Appellant did so (R 4252). Within a few days, the police came to his house at night time and the police took the cell phone (R 4252-53). Ruffin told them he got it from Wright (R 4254). Appellant told him he got the cell phone from a "lick", meaning he had stolen it (R 4255). Appellant also told him that "Kida" had given him a ride to Winn-Dixie, that he saw two guys in a car. He asked for a light and when they refused, he stuck his hand in the back, opened the door and jumped in. Wright had a .380 gun (R 4258-59). Appellant said he was alone at the time and he had the two white guys go to Providence Reserve where he picked up Sammy. Appellant told him the car chase occurred with the white guys in the back seat (R 4260). Appellant was bragging. They went to an orange grove where he shot both victims (R 4261-62). Ruffin was present when his stepfather pawned the camera (R 4662). Ruffin took Sammy to pawn the black bag and Sammy told him the tools came from the same "lick". Sammy's story was pretty much the same as

Wright's. Pitts was arrested about four days after Wright (R 4264). Sammy did not say he shot the boys (R 4265).

The witness reiterated that Sammy basically confessed to him about his involvement in this matter. Ruffin denied that the shoes were his (Ruffin's) (R XXIX, 4301).

FDLE crime lab analyst John Romeo, an expert in firearms examination, identified a .380 caliber automatic that he examined (R 4334-36). The single action trigger pull was 7-1/4 to 7-1/2 pounds (R 4339). The bullets were the same caliber but different brands (R 4340). The cartridge case from the Coney shooting could have come from this gun (R 4345). The bullet in the living room table was fired by this gun as was the bullet removed from Coney (R 4349-50). The two bullet casings seized at the scene of the shooting at Highways 17 and 92 were fired from this gun (R 4353). He could neither identify nor eliminate the .380 bullets from Felker and Green as coming from the gun because of damage and other characteristics (R 4359-63).

Detective Malcolm Kneale became involved in the homicide investigation on April 24. Originally, they were investigating a missing person report but were looking into it as a homicide (R 4407). He was aware the car belonging to victim Green was found with blood on it in an orange grove between Lake Alfred

and Auburndale (R 4407). He and Detective Williams went to the victims' families home and collected evidence for DNA purposes. They went to a pawnshop and got a pawn ticket for the camera. As a result of that pawn they talked to Darryl Stanton and his stepson, Rodnei Ruffin, which led them to Sammy Pitts and Tavares Wright (R 4408-09). Kneale contacted Pitts at his residence at about 4:30 a.m. on April 26 (R 4409). After interviewing him, they went with Pitts to an orange grove in an area in Polk City but they were unable to recover the victims (R 4410). On a second visit to the grove at about 9:00 a.m., the bodies were discovered (R 4411). Wright had already been arrested. Wright's clothing at the time of his arrest was recovered (R 4412). The officer also recovered Pitts black sneakers (R 4414).

The distance from the Winn-Dixie where Ms. Faison dropped off Appellant to the location where the bodies were found was about ten miles (R 4417). Kneale was aware of the Taco Bell incident and the one in the Lake Alfred area on Highways 17 and 92 and discovered that was near the area of James Hogan (R 4418). The distance was a little over three miles (R 4420). Kneale never found a shotgun (R 4421). Appellant's shoes were picked up from Vontrese's apartment. Appellant was arrested on

April 27 at the jail for the murders (R 4423-24). Kneale got the serial number to the Nextel phone from Mr. Bloomer and checked to see that it matched. He did not charge Stanton or Ruffin with possession of stolen merchandise since there is no such crime (R XXX, 4479-80).

Appellant testified that he was present at the Shank burglary with Aaron Silas and one of his friends (R 4518). Wright bought the .380 gun from Aaron in exchange for marijuana (R 4520). He claimed he shot Coney because he thought the latter was reaching for a gun (R 4530). Wright was convicted of that and received two life sentences (R 4532).

Wright claimed that he told Pitts what had happened because if he did not do so he would be punished (a gang violation) R 4534-35). Wright claimed that Sammy was “our king” and took the .380 away from him (R 4535). Wright admitted that Faison gave him a ride to Winn-Dixie (R 4542). He eventually saw Sammy who pulled up in a white car that had blood on it. Wright asserted that Sammy explained that he and Ruffin had gotten into a fight with others (R 4547). Appellant started driving the car (R 4548). He washed the car because that’s what Sammy wanted (R 4550). Sammy removed things from the car (phone, camera, etc.) and put them in Vontrese’s car (R4551). He suggested Wright

burn the car and throw the gun in the lake, but Appellant did not do so and kept the gun (R 4552). Wright dumped the car and a friend gave him a ride (Appellant did not want to talk about the Taco Bell case because he wasn't charged with that.) (R 4555). He thought he got blood on his clothing when he jumped the fence while running from police (R 4559). Wright claimed he did not kill, nor was present, at the killing of Felker and Green (R 4561). He admitted driving the car when chased by Detective Lay (R 4564).

On cross-examination, Appellant admitted lying to the police on April 24 when he said he went to Tampa (before the police knew of the murders) (R 4568). The only truthful thing he told police was that he didn't do a murder, he claimed (R 4569). Wright could not answer why the police allegedly said they were there to talk about a double homicide when the police were not aware of the murders and Wright also claimed he didn't know about it (R 4571). Wright admitted he lied to police when he told them he got a ride from Ruffin. Wright claimed that Sammy Pitts ran a gang of seven hundred people in different counties but doesn't own a car (R 4572). Although Sammy imposes penalties for violations allegedly, Wright defied his command to throw the gun away (R 4575). Wright refused to answer whether

he was in possession of the murder gun at the Taco Bell or when he shot at Mr. Mendoza and his friend (R 4576-79). Wright refused to admit or deny questions about casings found on the road at Lake Alfred and refused to talk about whether Mendoza was mistaken in identifying his picture in the newspaper (R 4579). Wright admitted having the gun and throwing it away in the lady's car when he was arrested. He claimed Sammy got the gun after Wright shot Coney (R 4580). Wright claimed he was staying with Corey Hudson most nights (R4521, 4580), but Corey Hudson has never told anybody that was the truth (R 4581). Wright did not know why he did not call the police to explain the circumstance of his shooting Coney (R 4584). When asked to explain how the gun got back to Sammy, Wright repeated he was not going to talk about the Mendoza shooting (R 4587). Wright could not explain why his friend Mr. Hogan would say that Wright admitted shooting the two boys, but Hogan wasn't telling the truth (R 4588-89). Appellant admitted he did not try to contact people to corroborate his story (R4598). He claimed he has never before seen witness Durant (R 4616).

Rebuttal witness Detective Daniel Jonas is with the gang intelligence unit of the Lakeland Police Department since 1997 and the defense stipulated that he was an expert on gang

activity (R XXXI, 4670-71). He has never heard of anyone named Samuel Pitts or T. J. Wright as relating to gangs in the Lakeland-Polk County area (R 4671). He had never heard of any predominantly African-American gang with seven hundred members in it based in Polk County (R 4671). He would expect a gang of that size to come to his attention (R 4684-85).

Detective Kneale testified the last time to account for Felker and Green was around 7 or 8 p.m. in April 21, and that Wright was arrested about 6 p.m. on the 22nd. (R 4687). Kneale interviewed Wright about 6:30 p.m. on April 24 and the bodies of Felker and Green were found around 11:30 on the 26th. At the time of the jail interview with Wright he did not know Felker and Green were dead (R 4687-88). Neither he nor Detective Williams mentioned to Wright they were investigating a double murder. Wright spontaneously stated at the beginning of the interview, “I didn’t do no murder.” (R 4688).

Kneale questioned Appellant regarding his whereabouts in the Friday night of the boys’ disappearance and Appellant answered he went to Club Ecstacy in Tampa on Thursday and Friday night, that he was with Aaron Silas in the Holiday Inn. There was no record of them being registered at a Holiday Inn. Appellant claimed they moved to another hotel the next night but

the police never found that place. Silas did not corroborate Wright's story (R 4688-90). When he questioned Pitts about the murder, Pitts was emotional, crying and upset.

Defendant's Waiver of Jury Recommendation

Following the return of the guilty verdicts, Wright waived the right to have a jury recommend a sentence. His lawyer indicated that Wright was dissatisfied with the panel (R XXXIII, 5049). Wright informed the trial court that he had discussed the issue fully and that he was satisfied with the advice and representation provided by counsel. (R 5083-84). Wright understood that if a knowing, intelligent and voluntary waiver were found, that it would not be an issue on appeal (R 5084). Wright understood that he had the options of proceeding with the jury panel or waiving the jury and he decided not to proceed with the jury (R 5085). Wright was in agreement to proceeding with counsel's presenting mitigation evidence to the judge alone (R 5085-86). No one had threatened or forced him to make this decision; it was made freely and voluntarily on his part and he did not desire additional time to discuss the issue with counsel (R 5086). Wright understood that he had a right to receive the jury's recommendation (R 5086).

Wright understood that he was waiving the potential of a jury life recommendation which would be difficult for the court to override (R 5087-88). No one had told him the court was inclined to impose one sentence over another (R 5088). Wright understood the trial court could impose a death sentence if the court found there were sufficient aggravating factors to outweigh mitigating factors (R 5089). He still chose to waive the jury recommendation (R 5089-90). He understood the instructions that would be given to the jury (R 5090). Defense counsel Carmichael noted that for the last several days Wright was articulate, bright and aware of what's going on and Wright confirmed he understood everything in his discussion with attorneys (R 5092-93). He was not taking any medications to affect his thinking. Neither defense counsel Carmichael nor Hileman observed anything to indicate this was not a knowing, intelligent and voluntary waiver (R 5093). Investigator Bolin and the prosecutor similarly had made no observations which would call into question the waiver (R 5094).

Wright understood there would be no advisory opinion from the jury and he still intended to waive it (R 5095). It was freely and voluntarily made and not the product of any threat or promise (R 5096). The court found the waiver to have been

freely, voluntarily and knowingly made after full consultation with counsel (R 5096). The defendant's request was granted (R 5099). Appellant did not wish the court to reverse its ruling and proceed with the jury for an advisory verdict (R 5112). The court informed the jury that Appellant elected not to have a jury recommendation and discharged the jury (R 5114-23).

B. Penalty Phase

Penalty Phase - Spencer Hearing

(1) Walter Connelley, a corrections officer at the Polk County Jail, testified that he got into an altercation with Appellant Wright on September 29, 2001 (SR I, 142). Connelley elected to leave a co-worker and went up to feed the inmates in the isolation cells. Upon arrival at Appellant's cell, Wright sucker-punched him, rendering him unconscious. A trustee said that he was stomped and kicked in the head over fifty times (SR I, 143). Connelley was in the hospital for two or three days. The permanent lasting effects of the beating included his retirement from the sheriff's department-they carried him on light duty for over three years; he elected not to have the surgery recommended by his workmen's comp doctors and he now sees his own physician and psychiatrist (SR I, 145).

(2) Patty Newton, a latent print examiner with the Polk County Sheriff's Office, identified Wright's fingerprints on judgments and sentences for aggravated battery, for aggravated battery by a jail detainee, for battery on a law enforcement officer and for attempted second degree murder, and two counts of attempted felony murder (SR I, 149-157).[1]

(3) Inmate Preston Cassada testified that Appellant Wright and Brandon Gatlin were convicted of beating him in an incident on June 28, 2001. The witness was in a coma for thirty days thereafter (SR I, 159-160).

The prosecutor submitted a victim impact handwritten statement by Dennis Felker, the father of one of the victims (SR II, 164), as well as a statement by the stepmother, Kimberly Felker (SR II, 165).

Joy Scriven, sister-in-law of victim David Green and Ivy Scriven, Green's mother, both read victim impact letters (SR II, 166-176). The State rested.

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[1] The appellate record has now been supplemented and includes State penalty phase Exhibit P4, a judgment and sentence for aggravated battery; State Exhibit P8, the judgment and sentence for aggravated battery on a jail detainee; State Exhibit P9, a judgment and sentence for battery on a law enforcement officer; and State Exhibit P10, judgments and sentences for the offenses of attempted second degree murder with a weapon and two counts of attempted felony-murder (SR I, 149-156; SR VI, 562-568, 575-602).

Defense witness psychologist Joseph Sesta met with Appellant and prepared a report or summary of his findings (SR II, 203). Sesta conducted neuropsychological testing and testified that Appellant has a full scale IQ of 77; he is not mentally retarded (SR II, 206-107). Wright has a verbal IQ of 84 which is in the law average range and performance IQ of 74 (SR II, 208). Sesta opined that Wright had some microcephaly and had *in utero* exposure to substances like cocaine and alcohol and mild traumatic injury to the brain (SR II, 209-210).

Neuropsychology detected functional abnormalities in the brain (SR II, 211). Sesta opined that there was borderline intellectual functioning. Wright has impairments in frontal lobe functioning for things like reasoning and judgment and particularly abstract reasoning but not enough to meet the statutory mitigator exemplar (capacity to appreciate the criminal nature of his conduct and to conform his conduct to the requirements of the law) (SR II, 219) and opined that Wright would be vulnerable to the influences of others more capable than he is (SR II, 226-27). Sesta noted Wright's antisocial personality disorder (SR II, 228). Wright's father is at the state mental hospital in Chattahoochee (SR II, 227). Dr. Sesta noted that words like "extreme" or "substantial" regarding

impairments were legal and “are issues for the court”. (SR II, 242).

On cross-examination, Dr. Sesta admitted that he was not provided with such things as school records, medical reports and police reports (SR II, 248). The witness did not have any data about the co-defendant’s IQ (SR II, 251). Dr. Sesta was not aware of Appellant’s violence in jail after the murders (SR II, 252).

Cynthia Wright McClain next testified on behalf of her nephew, Mr. Wright (SR II, 278). Appellant did not have a stable parental home life; if his mother wanted to go somewhere she would leave Appellant with the witness for extended periods of time (SR II, 279-280). Appellant’s father is in a state mental hospital who has never played a role of any kind in his life (SR II, 282). He was real close with his cousin. The witness described Appellant as a follower and slow, he had learning problems (SR II, 285). His mother used alcohol while pregnant with him (SR II, 287). His mother was concerned about his motor skills but the doctor said it was normal (SR II, 289). Ms. McClain indicated that Appellant became frustrated and had difficulty concentrating on one task (SR II, 289). He has shown greater interest in religion while in jail (SR II, 293); his

vocabulary has improved (SR II, 294). He is sorry for things he's done (SR II, 298). He was sent to boot camp which did not help him (SR II, 299).

On cross-examination the witness stated that Appellant was seven years older than his nearest sibling, a sister (SR II, 302). The mother did not abandon Appellant on the street but rather left him in an environment with her mother that she felt was an appropriate, nurturing environment. His mother was a good person (SR II, 304). When the mother had her second child, Appellant stayed with his grandmother because the mother's new husband did not like him (SR II, 305). During the last twelve years Appellant stayed with the grandmother or other family members-he was left with people who care (SR II, 307). The witness didn't know who he was hanging around with as a teenager (SR II, 308). She thought he was hanging around a crowd that did drugs (SR II, 309). Appellant has not admitted the killings to her; he claims he was set up (SR II, 318). She agreed that Appellant made a lot of bad choices, quitting his job and running with people that stole and did drugs (SR III, 322-23).

Appellant's cousin, Carlton Barnaby, testified that the two of them were very close as children (SR III, 331). Appellant did not get the same attention and love as Barnaby because he

(Barnaby) had the support of two parents and friends (SR III, 331). He described Appellant as a follower (SR III, 335). Wright had low self-esteem (SR III, 337). Appellant had one close friend in Auburndale who apparently moved away (SR II, 340). Wright didn't know how to handle peer pressure; he reacted by fighting (SR III, 341). Appellant was in special education classes in school (SR III, 348). Wright was easily influenced (SR III, 351). He does not handle peer pressure very well (SR III, 353). The witness testified Appellant became involved with marijuana and a little bit of alcohol (SR III, 359). After he got out of boot camp he met his first love, Vontrese, then went to jail for beating her (SR III, 360). He went to trial and was found not guilty (SR III, 360).

On cross-examination, the witness testified they were in the same school in ninth grade. Wright got his GED while in boot camp (SR III, 367). Barnaby was in high school and wouldn't know with whom he was running (SR III, 367). When asked to explain his testimony that Appellant gets mad when pushed around, the witness answered that he didn't know if anyone pushed him when the two innocent victims were picked up, shot in the head and left in an orange grove (SR III, 370-71). Appellant told him that he was beaten in jail (SR III, 376).

When Barnaby talked to Appellant he didn't talk about this charge since "it's not his main priority"-even though he is facing the judge on a death penalty charge (SR III, 377). The witness has not had much contact with Appellant since the jury found him guilty on these murders (SR III, 378). Wright has not written to him to say he was sorry for what happened or confess to him (SR III, 378).

Dr. Alan Waldman, a psychiatrist, evaluated Appellant and determined that a specific type of EEG would be appropriate but he was unable to get it since Shands had stopped doing that type of EEG (SR III, 395). Shands now performs the test in a different way which yields a less angry patient. However, an EEG was conducted on Appellant, as was an MRI (SR III, 396). They found microcephaly, a brain size about two thirds normal size which is extremely frequent in fetal alcohol syndrome (SR III, 397). Fetal alcohol syndrome will cause microcephaly (SR III, 400). Appellant's intelligence and impairments affect his ability to perceive things and make judgments (SR III, 409). Waldman opined that Wright was profoundly impaired (SR III, 411). Appellant does not understand social strata, that people have different positions, jobs, responsibilities that translate into different privileges and lifestyles (SR III, 418). He

parrots, adopts the phrases used by whatever group he is with (SR III, 419). Such people would be highly susceptible to the influence of other individuals (SR III, 420).

Waldman disagreed with the antisocial personality disorder diagnosis applied to Appellant (SR III, 422). He explained that you don't have a personality disorder because of a brain injury; you have a personality change due to a general medical condition. In Appellant's case it would be fetal alcohol syndrome or possibly traumatic brain injury added onto that (SR III, 422-23). Waldman opined that the two statutory mental mitigators were present (SR III, 426-27). Waldman added that as part of the frontal lobe damage he would repeat mistakes, he lacks the ability to retain cause and effect so he is not frustrated very long by his inability to understand things (SR III, 430-31). He opined that Appellant was retarded (SR III, 432).

On cross-examination, Dr. Waldman testified that he was hired to make an evaluation in a homicide case with potential seeking of the death penalty and that he had fetal alcohol syndrome. Waldman was not provided with any police reports,

depositions or prior trial testimony (SR III, 436-37).[2] The prosecutor requested a Richardson hearing, asserting that he had not received a report relied on by Dr. Waldman. Court Exhibit #1 was a psychologist's evaluation on August 25, 1997. Court Exhibit #2 was an older MRI dated October 15, 2002. Court Exhibit #3 was a memorandum dated October 10, 2002. The defense did not assert a privilege and all three documents were furnished to the State. After a short recess, the prosecutor stated that he did not believe he received the records previously, but he had no problem now continuing his cross-examination of Dr. Waldman. The prosecutor withdrew his motion for Richardson inquiry and there was nothing remaining for the court to rule on (SR III, 439-454).

Although Dr. Waldman took a social history from Appellant, he did not attempt to corroborate the information of the social history by talking to relatives or others. In the two or three

[2] The prosecutor requested a Richardson hearing, asserting that he had not received a report relied on by Dr. Waldman. Court Exhibit #1 was a psychologist's evaluation on August 25, 1997. Court Exhibit #2 was an older MRI dated October 15, 2002. Court Exhibit #3 was a memorandum dated October 10, 2002. The defense did not assert a privilege and all three documents were furnished to the State. After a short recess, the prosecutor stated that he did not believe he received the records previously, but he had no problem now continuing his cross-examination of Dr. Waldman. The prosecutor withdrew his motion for Richardson inquiry and there was nothing remaining for the court to rule on (SR III, 439-454).

years prior to Wright's arrest for the instant charges, he had no reports or history that would tell about Appellant's ability to function on a day-to-day basis in society (SR III, 456). Waldman didn't test Wright's driving ability and did not see it as a particularly sophisticated endeavour (SR III, 457). Waldman couldn't argue that Appellant was not necessarily a follower if his companion had even less skill (SR III, 461). When asked why Wright ran from the police if he didn't know that his conduct was criminal, Waldman answered that he didn't know; he didn't think Wright understands the issue of violence that went on in the jail (although Appellant's cousin testified Appellant beat up a guard for calling him a name)(SR III, 467). Wright has the potential to repeat his mistakes and has limited impulse control (SR III, 468).

The Mental Retardation Proceedings

On July 5, 2005, Appellant filed a Notice of Intent to Rely upon §921.137, Florida Statutes, barring imposition of the death penalty due to mental retardation (R V, 743-44). The court entered a Stipulated Order for Appointment of Psychologists for Mental Retardation Only and therewith appointed Dr. Kremper and Dr. Fried (R 745). A hearing was conducted on mental retardation determination on September 22, 2005 (R 748-833).

Dr. Joel Fried opined that Wright currently has a full scale IQ of 75 (R 755). Borderline retardation is not mental retardation (R 760). Fried did not do an adaptive functioning assessment since he wasn't asked to do it (R 764-65). Dr. Kinderlan obtained a full-scale IQ score of 76 in 1991 (R 779). Dr. Kremper opined that on his testing Wright achieved a full-scale IQ of 82 and not in a range obtained by individuals who are considered mentally retarded (R 789). He added that an evaluation by Dr. Sesta found a full-scale IQ of 77 (R 791). Dr. Kremper testified that Wright would not meet the criteria for mental retardation (R 817).

The court took judicial notice of Dr. Waldman's testimony at the Spencer hearing (R 818-19). The State introduced State Composite Exhibit A which included a letter from Dr. Waldman, Dr. Fried's report of August 25, 1997, Dr. Fried's report dated July 26, 2005, that includes the opinion of Dr. Kinderlan from 1991, Dr. Kremper's report of July 15, 2005, and Dr. Sesta's report from February 4, 2003 and Dr. Waldman's report to Mr. Carmichael about his opinions dated October 9, 2002 (R 819-20); see also R V 858-878). The lower court found that Wright did not have mental retardation (R 829).

On October 12, 2005, the trial court entered its sentencing order and findings supporting the imposition of a sentence of death (R VI, 963-983). The court found and gave great weight to the CCP and avoiding arrest/witness elimination aggravating factors, F.S. 921.141(5)(i) and F.S. 921.141(5)(e) (R 967-969). The court also made these additional findings regarding aggravation (R 964-966):

> **1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Florida Statute Section 921.141(5)(b)**
>
> The Court needs to address a number of matters which constitute the finding regarding this aggravator. Each of these will be addressed in turn.
>
> The jury found the Defendant guilty of both counts of First Degree Murder as charged in the Indictment. The State can first establish this aggravating factor merely by reliance upon this contemporaneous Verdict of guilty of First Degree Murder as to each of the two homicide victims, David Green and James Felker. Indeed, as the Defense has conceded in it's [sic]Supplemental Amended Memorandum Of Law In Support Of Imposition Of A Life Sentence, case law is clear that the State can use contemporaneous/simultaneous offenses in meeting it's [sic] burden of proving this aggravating factor beyond a reasonable doubt. Thus, based upon this jury's guilty Verdict as to each of the two counts of First Degree Murder, the Court finds, on that basis alone, that this aggravating factor has been proven beyond a reasonable doubt.
>
> The Court finds that this same jury, in the case at bar, found the Defendant guilty of the crimes of Carjacking, two counts of Kidnapping, and two counts of Robbery With A Firearm, all of which were charged

in the same Indictment alleging the two counts of First Degree Murder. Although each of these other five counts are felonies involving the use or threat of violence to the person and the Court finds that these have been proven beyond a reasonable doubt, these charges need be merged with the two counts of First Degree Murder arrived at in the same rendition of verdict. The Court so merges them and gives them no separate consideration.

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

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

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

was left permanently impaired as a result of this aggravated battery.

The Defendant's violence in jail extended beyond a fellow inmate. The Defendant was also previously convicted of Aggravated Battery On a Corrections Officer for another brutal attack, this time perpetrated on Corrections Officer Walter Connelly. Mr. Connelly, who was the first witness called by the State in the Spencer/Sentencing Hearing held before the Court, testified that he had gone alone into that section of the jail to feed the inmates then being held in isolation. Mr. Connelly testified that the Defendant "sucker punched" him and thereafter "stomped" and "kicked him in the head over 50 times". Mr. Connelly testified that this beating was so severe that even after he was released following several days of hospitalization, he could only return to light duty, and eventually elected to retire as a result of the injuries sustained in this attack. Additionally, Mr. Connelly testified that the aftermath of this attack has required continuing medical and mental health treatment. Finally, the Defendant was also previously convicted of Battery on a Law Enforcement Officer, a case involving the separate and unrelated attack perpetrated upon Corrections Officer Dan Cooley.

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

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

The evidence presented in the case at bar established that not only was the vehicle that Mr. Green and Mr. Felker were driving in taken (the carjacking charge),

> but numerous items of the decedents' personal property were also taken, some of which were subsequently pawned, albeit that all pawning of such items was by persons other than the Defendant.
>
> The Court finds that while the State has established beyond a reasonable doubt that pecuniary gain was intrinsically intertwined with the committing of each capital felony, the Court, considering the merger previously addressed, in the light of all testimony and evidence in the case, gives this aggravating factor no additional weight beyond that which the other aggravating factors as herein found are independently accorded.
>
> The Court feels that it would be disingenuous to find that the capital felony was not committed for pecuniary gain when it finds that both of the victims were killed during the course of the ongoing carjacking and armed robberies. However, given the Court's findings as to the other aggravating factors which the Court finds to be proven by the State beyond a reasonable doubt, the Court is nonetheless unwilling to give this aggravating factor any independent weight, particularly given the Court's subsequent findings as to the cold, calculated, and premeditated aggravator hereinafter discussed.

As to mitigation, the court found and gave some weight to the statutory mitigator that the capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance, F.S. 921.141(6)(b); found and gave some weight to mitigator F.S. 921.141(6)(f) that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and gave some weight to Appellant's age

of nineteen. The court rejected the statutory mitigators that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor, F.S. 921.141 (6)(d) and that the defendant acted under extreme duress or under the substantial domination of another person, F.S. 921.141(6)(e) (R 970-71). The trial court also considered some thirty-one non-statutory mitigating circumstances (R 972-79).

The court reiterated that Appellant is not mentally retarded (R 963, 979). The court imposed a sentence of death (R 981-83). Wright now appeals.[3]

[3] In his Statement of Facts, Appellant impermissibly editorializes on matters *dehors* the record, e.g., his speculation regarding the subsequent trial results of co-defendant Pitts, and characterized a number of State witnesses as Pitts' "phalanx", presumably as a strategy inviting this Court into the unfamiliar role of weighing the credibility of unseen witnesses. This Court is poorly equipped to subsume such a role from the printed page of a transcript. Trotter v. State, 932 So. 2d 1045, 1050 (Fla. 2006). In any event, this "phalanx" should be distinguished from "King" Sammy Pitts' army of seven hundred members that Wright asserted Pitts commanded (R 4535, 4572). Sammy was the superior, "Our King" (R 4535).

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not abuse its discretion in allowing the admission of evidence of other crimes that were inextricably intertwined with and relevant to the offenses charged, which made the entire homicidal episode and Appellant's involvement therein understandable to the jury, and was not unduly prejudicial to the defendant.

Issue II: Appellant's request for appellate relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002) must fail since Wright abandoned his Ring claim by opting to have the judge alone consider the appropriate penalty to be imposed, without the benefit of the jury's participation in making a recommendation. Consequently, this claim is procedurally barred. Alternatively, the claim is meritless.

Issue III: Appellant has failed to demonstrate error in the lower court's finding of the presence of the cold, calculated and premeditated aggravating factor. There is competent, substantial evidence to support the finding. Additionally, even if there were error, it is harmless beyond a reasonable doubt.

Issue IV: Appellant has failed to demonstrate error in the lower court's finding the aggravating factor that the crimes were committed to avoid or prevent a lawful arrest. There is competent, substantial evidence to support the finding. Any error would be harmless error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE ADMISSION OF EVIDENCE OF OTHER CRIMES THAT WERE INEXTRICABLY INTERTWINED WITH AND RELEVANT TO THE CRIMES CHARGED.

The State filed a Notice of Intent to Use Evidence of Other Crimes on September 13, 2002 (R III, 486-490) and filed a Supplemental Notice on February 20, 2003 (R IV, 608).[4] The defense filed a Motion in Limine on March 10, 2003 and an Amended Motion in Limine on August 12, 2003 (R IV, 613-616; 628-631). At a hearing on February 24, 2003, after hearing the argument of counsel (Supp. Vol. I, 81-116), the lower court ruled that the incidents in question were inextricably intertwined or inseparable crime evidence and were relevant, or otherwise constituted ordinary direct evidence (Supp. Vol. I, 116-122). Prior to trial, on October 15, 2004, the prosecutor announced that he and defense counsel had had discussions about stipulating to some of the other crimes but nothing was finalized (R IV, 666-667). After jury selection, defense counsel informed the court that after discussing the matter,

[44] The State also filed an Amended Memorandum in support of the Motion to Use Other Crime Evidence in the related prosecution of Wright in the incident involving victims Coney, Joiner and Carter on or about September 28, 2001 (Supp. Vol. V, 539-549).

Appellant did not want them to stipulate to any of the facts regarding the ancillary intertwined criminal acts (R XX, 2559-60, 2571-72). The defense nevertheless argued that since Appellant had made admissions to some of these matters in prior trials, the prejudicial effect now would be much greater. The prosecutor responded that the defense had declined his attempt to arrive at a stipulation and announced Wright's opposition to such a stipulation and argued that Wright's taking the stand to admit to some of it did not alter the character of the evidence. The trial court adhered to its earlier ruling (R XX, 2572-78).

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799, 806 (Fla. 2002); Brooks v. State, 918 So. 2d 181 (Fla. 2005); Randolph v. State, 853 So. 2d 1051 (Fla. 2003). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000); White, supra, at 806; Green v. State, 907

So. 2d 489 (Fla. 2005); Perez v. State, 919 So. 2d 347 (Fla. 2005).

Appellant contends that the lower court erred in its determination that Appellant's conduct from Thursday through Saturday, which included a number of criminal acts, was admissible as inextricably intertwined or otherwise relevant evidence pursuant to F.S. 90.402 and that such evidence became a feature of the trial.[5] Appellee submits the claim is meritless.

The incidents in question include the following:

(1) The burglary on Thursday, April 20 of the Shank residence in Lakeland during which the two murder weapons, the .380 automatic and the Mossberg shotgun, were stolen. Appellant's fingerprint was left at the scene;

(2) The drive-by shooting in the morning on Friday, April 21 when automobile passenger Wright fired the stolen handgun at Coney, Joiner and Carter;

[5] While the term "feature of the trial" is employed when analyzing "similar fact evidence" issues pursuant to Williams v. State, 110 So. 2d 654 (Fla. 1959)-See Williams v. State, 117 So. 2d 473 (Fla. 1960)-it is nonetheless true that even relevant evidence may be inadmissible and excluded due to prejudice or confusion under F.S. 90.403. Additionally, it should be noted that when relevant evidence is introduced that is inextricably intertwined-in contrast to similar fact Williams rule evidence-it is not necessary to give a cautionary or limiting instruction to the jury. See Damren v. State, 696 So. 2d 709, 711 (Fla. 1997).

(3) The car chase at about 10:30 p.m. on Friday, April 21, when Detective Lay pursued the speeding vehicle (owned by one of the homicide victims it was subsequently learned);

(4) The car theft and shooting incident with Granados and Mendoza at about 1:00 a.m. on Saturday morning, April 22 (the Taco Bell incident):

(5) Appellant's attempt to flee arresting officers on Friday evening and his throwing the .380 automatic handgun on the front seat of Monica Barnes' automobile on April 22;

(6) Evidence that Wright possessed the firearm on April 21 and 22 from other witnesses.

Appellant wildly charges that more than half the witnesses testified on collateral matters (Brief, pp. 74, 79)("The State used at least 32 witnesses whose testimony in whole or in part related to the collateral offenses."). Appellee disagrees.

Of the more than fifty witnesses to testify, most pertained to the Felker-Green homicides: Raczynski, Kendrick, Gardner, Maney, Lashley, Marler, Scriven, Cavallaro, Speed, Joiner, Culpepper, Green, Dr. Hunter, Callahan, Favile, Grice, Durant, John and Mary Bloomer, Dr. Nelson, McDermott, Faison, Hogan, Higgins, Jackson, Rench, Rall, Robinson, Ruffin, Romeo and Kneale. Additionally, a number of witnesses testified to the

circumstances of Wright's Friday arrest and his attempt to discard the murder weapon: Sikes, Back, Thomason, Gulledge, Pillitteri, Barnes. Further, Appellee regards the testimony of Detective Lay regarding his chase of Wright driving the victim's car after the murders as part of the *res gestae* of that crime. A distinct minority of witnesses testified on the remainder of Wright's crime spree-the Shank burglary (Mark Shank, Campbell, Dampier, Moulden); the Taco Bell carjacking and shooting (Mendoza, Cook, Monroe, Teague) and the drive-by shooting (Joiner, Coney, Favile, Ward). While there may have been some overlapping of witnesses who participated in the entire investigation and related their work on different aspects, it is clear that the jury was told what they needed to be told on the relevant issue of Appellant's possession and use of the murder weapon before, during and after the episode until his arrest.

The State sought to use evidence of Appellant's possession and use of the firearm in his Thursday through Saturday crime spree since it was important to establish that the murder weapons he stole in the Shank burglary he had and used during the drive-by incident, double homicide, Taco Bell incident and up to his arrest when he disposed of it in Monica Barnes' vehicle throughout the entire period, repudiating the notion

that someone else must be responsible. See Lawrence v. State, 614 So. 2d 1092, 1095 (Fla. 1993)(Defendant's access to weapons was sufficiently relevant on murder prosecution to permit witness' testimony that defendant had stolen two handguns from car); Smith v. State, 641 So. 2d 1319, 1322 (Fla. 1994)(evidence of defendant's commission of an armed robbery about twelve hours after the homicide was relevant to proving Smith's motive to obtain money "and to proving that he possessed the same gun in both offenses.").

Appellant disingenuously argued below and repeats here that Wright's sworn testimony in a prior trial admitting some of the collateral crimes could be used to prove these facts and therefore reduced the probative value of the collateral crimes evidence. See R XX, 2572-73. It is not clear to Appellee what counsel was and is proposing. Certainly, the State could not as part of its case in chief call the defendant to the stand and ask him which offenses he was admitting to. Nor does it make sense to draw the conclusion that Wright obtain a windfall benefit of keeping this jury in the dark about the other incidents because he admitted some of them to a different jury. If defense counsel was suggesting the State should simply await the defendant's taking the stand, a prosecutor would be ill-

advised to forego explaining how this double homicide came to pass and hope the defendant was not bluffing on the representation he would testify. If counsel was suggesting the State simply read Wright's prior testimony in a prior homicide trial or the trial for the attempted murders of Coney and Joiner, the prejudicial result of the jury learning of those trials would be greater and it is difficult to accept there would be no defense objection when Wright adamantly informed his counsel he would not stipulate to the admission of any collateral crime evidence (R XX, 2559). Thus, the only rational resolution for the disputing parties-mutual stipulation-was foreclosed by Appellant Wright and he should not be heard to complain at this late hour.

This Court has repeatedly acknowledged that "all evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." Ashley v. State, 265 So. 2d 685, 694 (Fla. 1972); Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988); Smith v. State, 866 So. 2d 51, 61 (Fla. 2004).

This Court has repeatedly described the related concepts of "similar fact" evidence of collateral crime evidence admissible pursuant to the seminal case of Williams v. State, 110 So. 2d 654 (Fla. 1959) and F.S. 90.404 and evidence of other crimes

which may be "dissimilar" but nonetheless relevant to the prosecution of the offense charged, pursuant to F.S. 90.402. See e.g. Bryan v. State, 533 So. 2d 744 (Fla. 1988); Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Zack v. State, 753 So. 2d 9, 16-17 (Fla. 2000).

Inextricably intertwined or inseparable crime evidence is a form of dissimilar relevant evidence which is admitted under F.S. 90.402 and does not constitute Williams rule evidence. See e.g. Conde v. State, 860 So. 2d 930, 948 (Fla. 2003)("Here…the G.M. incident was relevant to explain the context in which evidence connecting Conde to the murders was discovered."); Consalvo v. State, 697 So. 2d 805, 813 (Fla. 1996); Smith v. State, 866 So. 2d 51, 62-63 (Fla. 2004); Pagan v. State, 830 So. 2d 792, 805 (Fla. 2002)("Many times acts closely tied to the charged crime help establish the entire context out of which a criminal act arose."); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995)("Among the purposes for which a collateral crime may be admitted is establishment of the entire context out of which the criminal action occurred…Inseparable crime evidence is admitted not under 90.404(2)(a) as similar fact evidence but under section 90.402 because it is relevant."); Griffin v. State, 639 So. 2d 966, 969 (Fla. 1994)("Mr. Pasco's testimony

was necessary to identify the gun and to show that the gun was stolen from the possession of its rightful owner. Nicholas Tarallo's testimony identified the individual who stole the gun as Griffin, thereby establishing possession. This evidence was essential to show Griffin possessed the murder weapon. Therefore, it is relevant."); Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996)("Here we find that evidence of the robbery was properly admitted to complete the story of the crime on trial and to explain Ferrell's motivation in seeking to prevent retaliation by the victim."); Bryan v. State, 533 So. 2d 744, 747-748 (Fla. 1998).

Appellant's contention that the evidence of other crimes became a feature of the trial or was otherwise unduly prejudicial is meritless. In Conde v. State, 860 So. 2d 930 (Fla. 2003), this Court explained that it is not solely the quantity but also the quality and nature of collateral crimes evidence in relation to the issues to be proven that determines whether its admission has "transcended the bounds of relevancy to the charge being tried". Id. at 946. The Court reiterated there that Stevenson v. State, 695 So. 2d 687 (Fla. 1997) resulted in reversal because evidence was inadmissible because it lacked relevance rather than because it was extensive. The

Court approvingly cited Snowden v. State, 537 So. 2d 1383, 1385 (Fla. 3d DCA 1989) and Townsend v. State, 420 So. 2d 615, 617 (Fla. 4th DCA 1982)-that more is required for reversal than a showing that the evidence is voluminous and that the number of transcript pages and exhibits is not the sole test when such quantity is the result of there being numerous crimes. Conde at 947. See also Zack v. State, 753 So. 2d 9, 17 (Fla. 2000).

The Test is Relevancy

No serious contention can be made that the evidence of Wright's crime spree from Thursday through Saturday was not relevant to the prosecution of this double homicide. Appellant did not plead guilty or confess to the police and thus did not relieve the State of its burden to prove defendant's guilt beyond a reasonable doubt. Consequently, it was important to establish Wright's participation and responsibility. The State's theory was that Appellant shot both victims with the .380 automatic (and that either he or Pitts followed up with the shotgun blast to the head of Felker). Wright did not previously know the victims. Establishing a connection of Wright to the .380 murder weapon significantly aided in the prosecutor's satisfying his burden. Testimony about the chronologically first collateral crime-the burglary of the Shank residence on

Thursday-which included both the identification of the firearms taken and the presence of Wright's fingerprint at the scene-was an important first step.

We know that Appellant kept the .380 automatic taken in the Shank burglary because of the second collateral incident-the drive-by shooting on Longfellow early Friday morning when Wright fired the weapon at Coney and Joiner. Testimony and evidence from witnesses that Wright was the shooter and technicians and experts that the bullets came from this weapon was appropriate to show Wright's continued possession of this gun. Later, Friday evening, Wright carjacked, robbed and executed Felker and Green with the .380 automatic. While Appellant apparently chooses to characterize the Friday night car chase with Detective Lay as an unrelated criminal incident, in reality it is part of the *res gestae* of the double homicide shortly beforehand. Obviously, Wright did not want to be stopped to explain his presence in the white Cirrus even before the victims were reported missing. Next, in the late Friday evening and early Saturday morning hours, after disposing of the victim's car, now pedestrian Wright seized at gunpoint a vehicle from Mendoza and Granados at the Taco Bell restaurant and abandoned it a short distance from James Hogan.

Surprisingly, they pursued him in another vehicle and when Wright was forced to abandon that vehicle he shot at his pursuers with the same firearm stolen from Shank. Testimony and evidence from the witnesses and technicians is important to establish that fact. This is corroborated by witness Hogan who testified that while giving Wright a ride the latter admitted to his confrontation with the Mexicans and to killing the two boys in the grove. Finally, Appellant complains about the testimony of numerous officers who participated in Appellant's arrest at the apartment complex. Wright would have the Court believe this is an unrelated example of resisting arrest. It is not. Appellant's flight and discarding the weapon in Monica Barnes' vehicle is not merely out of concern for possessing a weapon, but for possessing a weapon used in a double homicide as well as the Coney-Joiner drive-by shooting. Furthermore, if the State had not introduced any evidence of the earlier non-homicidal shootings, the jury would not be able to understand why he was being arrested and how he was connected to the Felker-Green homicides.

Additionally, the testimony and evidence pertaining to Wright's arrest for non-homicidal offenses and the concomitant recovery of the Shank firearm in the Monica Barnes' vehicle

which was used throughout the episodes on Friday and Saturday, significantly aids in the understanding of Wright's connection to the Felker-Green homicides with Detective Kneale's testimony that during an interview Wright volunteered that he wasn't responsible for the murders before the police even knew there had been murders (R XXI, 4687-88).

Finally, any claim of undue prejudice is belied by the fact that Appellant Wright himself acknowledged in his testimony that he was present and had participated in the burglary of the Shank residence when the .380 automatic and Mossberg shotgun were stolen and that he indeed did shoot Coney in a drive-by incident for which he received a lengthy prison sentence (R XXX, 4518-20, 4530-32). Wright further admitted driving the car when chased by Detective Lay (R 4564) and he acknowledged having the handgun and throwing it away in Monica Barnes' vehicle when arrested at the apartment complex (R 4580). The only point which Wright seemed reluctant to discuss was the Taco Bell incident involving the car theft and chase by Mendoza and Granados, offering as his rationale that he had not been charged with that offense (R 4555, 4587). As explained, *supra*, that evidence was relevant to show Appellant's possession of the weapon shortly after the double homicides, and it was not unduly prejudicial; even

defense counsel suggested in closing argument Wright's testimony indicated he might be implicated (R XXXI, 4769, 4793).

Sufficiency of the Evidence

Although Appellant does not contest the sufficiency of evidence at trial, this Court has an independent obligation to review the record for sufficiency of the evidence. See Fla. R. App. P. 9.142(a)(6); Rodgers v. State, 948 So. 2d 655, 673-74 (Fla. 2006); Blake v. State, 972 So. 2d 839 (Fla. 2007).

The evidence established that the victims were taken to an isolated orange grove and shot execution-style. Wright's admission to numerous witnesses of his participation as one of the gunmen (inmate Durant, R XXVI, 3725-27, 3763-64; James Hogan, R XXVII, 3984-85; Latasha Jackson, R XXVII, 4067-68; inmate Byron Robinson, R XXVIII, 4195-4200; Rodnei Ruffin, RXXIX, 4261-62) along with the corroborative evidence of Appellant's fingerprints in the car and the DNA blood sample of victim Felker on Appellant's Nike shoe (Dr. Hunter, R XXV, 3512-13) adequately support a premeditated killing. Since the jury also found Appellant guilty of carjacking and two counts each of kidnapping and robbery (R IV, 708-14), it is a safe inference the jury also found these were felony murders.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS THAT THE FLORIDA DEATH SENTENCING STATUTES ARE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS PURSUANT TO RING V. ARIZONA, 536 U.S. 584 (2002).

Wright next contends that the lower court erred in denying his motions below challenging the death penalty statute as unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). Specifically, he complains that the statute requires the trial judge rather than the jury to make the findings to impose a death sentence but acknowledges this Court has rejected the claim in cases like Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Duest v. State, 855 So. 2d 33 (Fla. 2003); and Jones v. State, 855 So. 2d 611 (Fla. 2003) (Appellant's Brief, pp. 86-87). Secondly, Wright argues that the aggravating circumstances are elements of the offense and must be charged in the indictment and found unanimously by the jury (Appellant's Brief, pp. 88-93).

Standard of Review

Whether challenged statutes are constitutional is a question of law which the appellate court reviews *de novo*. Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Commission, 838 So. 2d 492 (Fla. 2003). But since

by his actions Appellant has abandoned and waived the claim, there is nothing to review. Wright mentions that he filed a number of motions and arguments below making Ring-related arguments. See e.g. R III, 427-460; R III, 533-535; R III, 522-528; R IV, 677-702. He further notes that the trial court denied his motions. See e.g. R III, 516, 517, 521; R IV, 703-704. Thus, he reasons, the matter has been adequately preserved for appellate review. This reporting, however, remains incomplete. While the foregoing alone might have been sufficient for initial appellate preservation purposes, Appellant's subsequent action in voluntarily waiving the right to present evidence to, and receive a recommendation from, the jury and to rely exclusively on the court, is fatal to the presentation of his claim now. He abandoned any Ring-type contention by choosing to have the circuit court alone consider and decide his fate and thus is procedurally barred now from attempting to resurrect the claim (R. 33, 5047-5123). See generally McDonald v. State, 952 So. 2d 484, 489 (Fla. 2006) (noting several claims were procedurally barred in the appeal from denial of the postconviction motion because they had not been raised in the trial court); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); Shere v. State, 742 So. 2d 215, 218 n6

(Fla. 1999); Marshall v. State, 854 So. 2d 1235, 1252 (Fla. 2003)(issues raised in appellate brief that contain no argument are deemed abandoned); accord Simmons v. State, 934 So. 2d 1100, 1111 n12 (Fla. 2006); Whitfield v. State, 923 So. 2d 375 (Fla. 2005); Griffin v. State, 866 So. 2d 1 n7 (Fla. 2003); Atkins v. Singletary, 965 F.2d 952, 955 n1 (11th Cir. 1992)(appealing only a portion of the multiple issues and subissues raised below results in abandonment on appeal); Doyle v. Dugger, 922 F.2d 646, 649-650 n1 (11th Cir. 1991)(same).

Appellant Wright is absolutely correct that the State would insist he may not present a claim attacking the constitutionality of Florida's death penalty scheme under the Supreme Court's holding in Ring v. Arizona, 536 U.S. 584 (2002) because he requested and was granted a penalty phase conducted without a jury. See Lynch v. State, 841 So. 2d 362, 366 n1 (Fla. 2003); Guzman v. State, 868 So. 2d 498, 511 (Fla. 2003) ("Guzman asserts that he did not knowingly waive his jury rights, because at the time of his waiver in 1996, neither the trial court nor defense counsel knew the rights that would be granted by Ring and Apprendi, so they did not explain these rights to Guzman. This claim lacks merit because Ring and Apprendi did not invalidate any aspect of Florida's death

sentencing scheme [citation omitted]. Thus, Ring did not expand Guzman's jury rights beyond what he knew when he waived these rights."). Bryant v. State, 901 So. 2d 810, 822 (Fla. 2005) (holding as to Ring claim, "The trial court ruled that Bryant's claim is legally insufficient because he waived his penalty phase jury. We agree."); see also, Blakely v. Washington, 542 U.S. 296 (2004) (holding that Apprendi rights can be waived).

Alternatively, even if the claim had been adequately preserved, it is meritless.[6] In Winkles v. State, 894 So. 2d 842, 845-847 (Fla. 2005), this Court disposed of the claims as follows:

> Winkles argues that Florida's death penalty statute is unconstitutional on two grounds: (1) contrary to the statute, the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed. 2d 435, 120 S.Ct. 2348 (2000), and *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed. 2d 556, 122 S.Ct. 2428 (2002), require that a jury must find the aggravating circumstances necessary to impose the death penalty; and (2) the statute does not require that aggravating circumstances be charged in the indictment. We address each claim in turn.
>
> First, Winkles contends that under *Apprendi* and *Ring,* a jury must find the aggravating circumstances required to impose the death penalty. [fn3] In

[6] In a decision in May of 2005, this Court observed that it had rejected Ring claims in over fifty cases. Marshall v. Crosby, 911 So. 2d 1129, 1134 and n5 (Fla. 2005). Obviously, since that time, the Court has had the occasion to add numerous cases to that list. Appellee does not deem it necessary to further itemize them.

Apprendi the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Ring*, the Court applied this rule to death penalty cases, holding that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589, 122 S.Ct. 2428.

> [fn3] Winkles based his argument before the trial court on *Apprendi* and *Ring*, even though the latter case had not been decided when Winkles raised his claim. Certiorari, however, had been granted. See *Ring v. Arizona*, 534 U.S. 1103, 1103, 151 L.Ed. 2d 738, 122 S.Ct. 865 (2002).

As appellant admits, at least in cases, such as this one, that include a prior violent felony conviction as an aggravating circumstance, this Court has repeatedly rejected the argument that *Apprendi* and *Ring* require the jury, rather than the judge, to find the remaining aggravators. *See, e.g., Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003) ("We have previously rejected claims under *Apprendi* and *Ring* in cases involving the aggravating factor of a previous conviction of a felony involving violence."), *cert. denied*, 541 U.S. 993, 158 L. Ed. 2d 500, 124 S. Ct. 2023 (2004); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla.) ("*Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), *cert. denied*, 540 U.S. 950, 157 L. Ed. 2d 283 (2003). Accordingly, we affirm the trial court's denial of relief on this issue.

Second, Winkles contends that Florida's death penalty statute is unconstitutional because it does not require that aggravating circumstances be charged in the indictment. Again, this Court has regularly rejected such claims where, as here, one of the

aggravators is a prior violent felony conviction. For example, in *Doorbal v. State*, 837 So. 2d 940, 963 (Fla.), *cert. denied*, 539 U.S. 962, 156 L. Ed. 2d 663 (2003), we rejected this same claim, concluding that

> one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnapping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone satisfies the mandates of the United States and Florida Constitutions, and therefore, imposition of the death penalty was constitutional.

Accord Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003) (rejecting claim that aggravating circumstances must be alleged in indictment); *see also Lynch v. State*, 841 So. 2d 362, 378 (Fla.) (rejecting a claim that Florida's death penalty statute is unconstitutional because it does not require notice of aggravating circumstances), *cert. denied*, 540 U.S. 867, 157 L. Ed. 2d 123 (2003). As we have said before, "[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in [the statute]. Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove." *Vining v. State*, 637 So. 2d 921, 927 (Fla. 1994). The trial court in this case found, and we agree, that each murder charged in the indictment to which Winkles pled guilty constituted a prior violent felony conviction as to the other murder conviction. *See Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990) ("We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes."). The prior violent felony aggravator also was supported by appellant's 1982 convictions for kidnapping, armed

> robbery, and aggravated assault and his 1963 convictions for assault and attempted robbery. Accordingly, we affirm the court's denial of Winkles's motion on this issue as well.

Accord, Hernandez-Alberto v. State, 889 So. 2d 721, 733-34 (Fla. 2004).

Appellant Wright adds at footnote 3 on page 86 of his brief that he is incorporating "in part" the arguments set forth in the Public Defender's initial brief in Douglas v. State, SC02-1666. Appellee submits that such "incorporation" is improper. Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995) ("In any event, it clearly is not proper for counsel to attempt to cross-reference issues from a brief in a distinct case pending in the same court. . . Moreover, we do not believe it wise to put an appellate court or opposing counsel in the position of guessing which arguments counsel deems relevant to which of the separate cases, nor do we support a rule that might encourage counsel to brief the Court through a simple incorporation by reference."); Johnson v. State, 660 So. 2d 648, 652 (Fla. 1995) ("The attempt to cross-reference a brief from a separate case is impermissible under any circumstances because it may confuse factually inapposite cases, it leaves appellate courts the task of determining which issues are relevant (which is counsel's role, and it circumvents the page-limit requirements.").

Additionally, and alternatively his claim is meritless. In Douglas v. State, 878 So. 2d 1246, 1263-64 (Fla. 2004) this Court yet again rejected the Ring claim, despite the Public Defender's brief.

Wright attempts to explain away his waiver-abandonment by arguing that he merely elected to forego the jury's participation in sentencing because Appellant was upset about the trial court's allowing collateral crime evidence to be introduced. Wright's argument is reminiscent of the defense contention rejected years ago by the Supreme Court when a petitioner claimed that cause existed to excuse his procedural default in that objection would have been "futile" in state court. Engle v. Isaac, 456 U.S. 107, 130 (1982) ("We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.").

Although not given the opportunity to submit a sentence recommendation, the jury in the instant case did unanimously find (1) that Wright was guilty of carjacking and possessed a

firearm and during the crime, carried, displayed, used, threatened to use or attempted to use a firearm; (2) that Wright was guilty of two counts of kidnapping and carried a firearm, and during the crime carried, displayed, used, threatened to use or attempted to use a firearm; (3) that Wright was guilty of two counts of first degree murder, that he carried or displayed a firearm, possessed a firearm, discharged a firearm which resulted in death or great bodily harm to another; (4) that Wright was guilty of robbery with a firearm and that he possessed a firearm and during the crime, carried, displayed, used, threatened to use a firearm. (R IV, 708-714).

This Court has continued to deny Ring claims on a consistent basis. See Frances v. State, 970 So. 2d 806 (Fla. 2007).

> Frances' claim is without merit. *Ring* did not alter the express exemption in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the cases. *Id.* at 490. [n5] This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying Ring claims. *See, e.g., Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on Ring claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); *Davis v. State*, 875 So. 2d 359, 374 (Fla. 2003) ("We have denied relief in direct appeals where there has been a prior violent felony aggravator."); *Johnston v. State*,

> 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"); *Henry v. State*, 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction"). (footnote omitted)
>
> Additionally, this Court has rejected claims that *Ring* requires the aggravating circumstances to be individually found by a unanimous jury verdict. *See Hodges v. State*, 885 So. 2d 338, 359 nn.9-10 (Fla. 2004); *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). The Court has also repeatedly rejected challenges to Florida's standard jury instructions based on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). *See Mansfield v. State*, 911 So. 2d 1160, 1180 (Fla. 2005); *Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993); *Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992).

Accord Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Parker v. State, 904 So. 2d 370, 383 (Fla. 2005); Johnson v. State, 969 So. 2d 938 (Fla. 2007).

Since Wright has multiple previous violent convictions, some contemporaneous with the instant homicides, he would not be eligible for Ring relief-even if he had not abandoned and waived the claim. This meritless and procedurally barred claim must be rejected and relief denied.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING IT PROVEN BEYOND A REASONABLE DOUBT THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED MURDER.

Appellant next challenges the trial court's finding that the CCP aggravator was established. Appellee submits that his contention is meritless.

Standard of Review

The standard of review on whether the lower court correctly found aggravating factors is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. It is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); Alston v. State, 723 So. 2d 148, 160 (Fla. 1998); Evans v. State, 800 So. 2d 182, 195 (Fla. 2001).

The trial court entered its findings at R VI, 967-968:

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

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

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

This Court is well aware of the heightened standard necessary in determining that the First Degree Murder involved was committed in a cold, calculated, and premeditated manner without any pretense of any moral or legal justification. As the Florida Supreme Court has stated in **Connor v. State**, 803 So.2d 598 (Fla. 2001) and **Jackson v. State**, 748 So.2d 85, 89 (Fla. 994), “In order to establish ccp, the State must establish that the killing was the product of cool and calm reflection and was not an act prompted by emotional frenzy, panic, or a fit of rage (cold); that the Defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the Defendant exhibited heightened premeditation (premeditated); and the Defendant had no pretense of moral or legal justification.”

The victims in this case were carjacked and kidnapped from an area adjacent to a major thoroughfare and taken from a crowded, well populated, well traveled

area of the city and then driven miles away to a secluded area, where they were then taken to an even more secluded spot off the paved road, deep into a large orange grove, where they were killed execution style from gunshots fired from behind at exceptionally close range. The elapsed time and distance between the city site where the carjacking and kidnappings originated and the remote rural distant site where the murders occurred gave the Defendant a significant period of time to contemplate and consider his alternatives. There is no evidence that the murders were performed in a rage or a panic. The Defendant chose the specific execution style manner, means, and site of death, choosing so isolated a rural location that the gunshots were unlikely to even be heard by anyone.

No mental health issue involving this Defendant (low IQ, learning disability, neurological impairment, or other mental defect, even when considered in the aggregate) reached such severity that it interfered with Tavares Wright's ability to perceive events, or to coldly p1an and by prearranged calculated design carry out the heightened premeditated murders of David Green and James Felker. Indeed, the Court finds that the manner and means of death at this remote rural location, so well chosen and concealed that despite an extraordinary and extensive law enforcement search effort, day after day, from ground and air, the bodies yet remained undiscovered until a co-defendant led law enforcement to them, evinces how effective this premeditation, plan, and calculation were in evading detection.

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

Appellant contends that the evidence contradicts the trial court's finding that the double homicide was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or fit of rage, or that Wright had a careful plan or pre-arranged design to commit murder, or that Appellant exhibited heightened premeditation. Appellant apparently acknowledges that there is no evidence that Wright had no pretense of moral or legal justification in this double execution-style murder (Brief, p. 95).

This Court has noted that with regard to the CCP aggravator, four factors must be established: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) the defendant had a careful plan or pre-arranged design to commit murder before the fatal incident; (3) exhibited heightened premeditation; and (4) had no pretense of moral or legal justification. Chamberlain v. State, 881 So. 2d 1087 (Fla. 2004). The instant case is similar to the facts presented in Pearce v. State, 880 So. 2d 561, 575-577 (Fla. 2004) where this Court explained:

> This Court has held that execution-style killing is by its very nature a "cold" crime. *See Lynch v. State*, 841 So. 2d 362, 372 (Fla.), *cert. denied*, 540 U.S. 867, 157 L. Ed. 2d 123, 124 S. Ct. 189 (2003); *Walls*

v. State, 641 So. 2d 381, 388 (Fla. 1994). As to the "calculated" element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of calculated is supported. *See Hertz v. State*, 803 So. 2d 629, 650 (Fla. 2001); *Knight v. State*, 746 So. 2d 423, 436 (Fla. 1998) (holding "even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"). This Court has "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." *Alston v. State*, 723 So. 2d at 162; *see also Lynch*, 841 So. 2d at 372 (noting that defendant had five- to seven-minute opportunity to withdraw from the scene or seek help for victim, but instead calculated to shoot her again, execution-style).

(Id. at 576).

* * * *

The sentencing order in this case discusses in great detail the facts that support this aggravating circumstance: Pearce confined the victims, called for assistance from his friends, and requested they come to the location armed, thereby revealing a plan that required the use of firearms. The circumstances also showed that the "business" for which Pearce summoned the armed assistance "was intended to harm Crawford and Tuttle in some fashion." Pearce and Smith engaged in a private conversation when Smith arrived at the location. While the content of this conversation is not known, the conversation shows they had an opportunity to discuss a plan. Pearce drove the car and stopped on his own initiative along the deserted rural road where the shootings occurred. Pearce exchanged firearms with Smith when informed that Smith's gun was jammed. Even though Pearce did not

> actually pull the trigger, he voiced neither objection nor surprise when Smith shot Tuttle in the head. Instead, Pearce requested assurance that Tuttle was dead. Pearce drove the vehicle a short distance down the road and again stopped on his own initiative. He asked no questions after Smith shot Crawford twice. Pearce and Smith then drove to a restaurant where they ate breakfast and then threw the murder weapon into Tampa Bay. There was no evidence that Pearce acted in an emotional frenzy, panic or rage. There was no evidence of victim resistance or struggle that could have provoked the shootings. Further, Pearce had the means and opportunity to either "rough up" or shoot the victims at the business location. Instead, he called his associates, took the victims for a ride at night to a remote, unlighted location, and sat by while Smith shot them in the head execution style. There is competent, substantial evidence in the record to support these findings. Thus, we conclude that the CCP aggravating circumstance was properly found in this case.
>
> (Id. at 577).

Unlike the defendant in that case, Appellant here admitted to several people that he was a shooter in the double execution-style homicide. See also Parker v. State, 873 So. 2d 270, 288 (Fla. 2004)(CCP can be indicated by facts such as advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course); Anderson v. State, 863 So. 2d 169, 177 (Fla. 2003); Davis v. State, 859 So. 2d 465, 479 (Fla. 2003); McCoy v. State, 853 So. 2d 396, 408 (Fla. 2003). This Court has also indicated that while the factor applies when the facts showed a particularly

lengthy period of thought and reflection by the perpetrator before the murder, it does not require a methodic or involved series of atrocious events or a substantial period of thought and reflection by the perpetrator. Asay v. Moore, 828 So. 2d 985, 993 (Fla. 2002); Philmore v. State, 820 So. 2d 919 (Fla. 2002)(CCP upheld for killing of car owner execution-style where defendant procured the murder weapon after robbing a pawn shop on the day before the murder and the defendant drove the owner to a remote location).

In this case, Wright armed himself with the .380 automatic and shotgun obtained in his burglary of the Shank residence on April 20, approached victims Green and Felker in their vehicle at the Winn-Dixie and with the assistance of his colleague, Sammy Pitts, transported the hapless victims to a remote area in the orange groves and executed them with the stolen weapons. Wright continued driving the vehicle before abandoning it and some of the victims' property was subsequently pawned. As the trial court noted, "the elapsed time and distance between the city site where the carjackings and kidnappings originated and the remote rural distant site where the murders occurred gave the Defendant a significant period of time to contemplate and consider his alternatives. There is no evidence that the

murders were performed in a rage or a panic. The Defendant chose the specific execution-style manner, means, and site of death, choosing so isolated a rural location that the gunshots were unlikely to even be heard by anyone." (R VI, 967-68).

The evidence and record supports the court's finding and Appellant's claim is meritless.

But even if the lower court erred in this regard, any such error would be harmless beyond a reasonable doubt. In its conclusion, the trial court acknowledged that it must look at the nature and quality of the aggravators and mitigators and:

> The Court finds that the aggravating factors in this case far outweigh the statutory and non-statutory mitigating factors. The aggravating factors in this case are appalling. Indeed, the Court finds that even in the absence of any individual aggravator as found herein, that the Court would still find that the remaining aggravators; particularly the conviction of another capital felony in the case at bar and the six (6) prior violent felony convictions (independent of the non-capital violent felonies involved in the case at bar) would, as an aggregate of remaining aggravating factors, heavily outweigh all existing statutory and non-statutory mitigators. Thus, in weighing the aggravating factors against the mitigating factors, the scales of life and death tilt unquestionably to the side of death.
>
> (R VI, 980)(emphasis supplied).

Thus, Appellant's conviction of some thirteen felonies alone would outweigh all the mitigation presented and render the imposition of a sentence of death the appropriate penalty.

In addition to his contention that the evidence is insufficient for CCP, Appellant claims that his mental mitigation negates CCP. He cites Maulden v. State, 617 So. 2d 298, 302 (Fla. 1993) which found the homicide to be the result of Maulden's emotional stress following the separation from his wife, his chronic schizophrenia, and a psychiatrist testified as to his "dissociated or depersonalized state". Similarly, in Spencer v. State, 645 So. 2d 377, 384 (Fla. 1994), this Court rejected CCP where the defendant thought his wife-victim was trying to steal his painting business and his personality structure and chronic alcoholism impaired him to an abnormally intense degree.[7] Appellant cites Evans v. State, 800 So. 2d 182 (Fla. 2003), a decision supporting the factor here, where the CCP finding was approved and this Court acknowledged one can be emotionally and mentally disturbed but still have the ability to qualify for CCP.

In the instant case, in contrast to Maulden and Spencer, Wright cannot justify the execution of two victims who were strangers as an emotional "family dispute", and as the trial court explained in its findings, Wright's emotional disturbance was "either created or exacerbated by Defendant's election to

[7] A death sentence for Spencer was subsequently affirmed in Spencer v. State, 691 So. 2d 1062 (Fla. 1996).

participate in these preceding crimes." (R VI, 970)(emphasis supplied) and Appellant's non-statutory mitigation is not compelling (see, e.g., the court's order regarding Appellant's "oppositional nature" (R VI, 974).[8] Appellant is not schizophrenic nor does he have chronic alcoholism and his actions throughout demonstrate the ability for coldness, calculation and heightened premeditation.

[8] Defense expert Dr. Sesta noted that words like "extreme" or "substantial" on the statutory mitigation list were legal terms for the court and he tried to avoid such "legal weasel words" (SR II, 242). Defense expert Dr. Waldman could not answer when asked on cross-examination regarding the capacity to understand criminality of his conduct why Appellant ran from police after hiding the victims' bodies and why he had the gun (SR III, 467).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR THAT THE CRIMES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

Appellant's final argument is that the lower court erred in finding the avoid arrest aggravator, F.S. 921.141(5)(e). Appellee submits that this contention is meritless.

Standard of Review

The standard of review on whether the lower court correctly found aggravating factors is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its findings. It is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); Alston v. State, 723 So. 2d 148, 160 (Fla. 1998); Evans v. State, 800 So. 2d 182, 195 (Fla. 2001); Buzia v. State, 926 So. 2d 1203, 1209 (Fla. 2006).

The trial court articulated its finding at R IV, 968-69:

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

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

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

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

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

This Court is well aware of the Florida Supreme Court's admonition that where the victim is not a law enforcement officer, the support evidence must be very

> strong to show that "the sole or dominant motive for the murder was the elimination of the witness." **Preston v. State**, 607 So.2d 404 (Fla. 1992). However, the Supreme Court has upheld this aggravator when the circumstances surrounding the crime clearly show it to be the dominant motive.
>
> The Court finds, as the State has argued and the Defense has conceded, that the elimination of the witnesses in order for the perpetrator to avoid being caught in the case at bar was the dominant motive for the murders. The Court finds that each of these capital felonies were committed for the purpose of avoiding or preventing lawful arrest.
>
> The Court finds that the State has proved this aggravating factor beyond a reasonable doubt. The Court gives this aggravating factor great weight.

See also the defense concession in the Supplemental Amended Memorandum of Law in Support of Imposition of a Life Sentence (R V, 889):

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

> b. The State has proven beyond a reasonable doubt that the victims were killed to eliminate witnesses but the court should grant only some weight to this factor.
>
> In conclusion, the defense believes that the State has proven beyond a reasonable doubt only Aggravators number one, three and five. They have not proven Aggravators two and four. The defense believes that the court should grant little weight to the Prior Capital Felony Convictions and moderate weight to the factors of Prior Violent Felonies, with some weight granted for Witness Elimination. (emphasis supplied)

Earlier at the penalty phase/Spencer hearing, trial defense counsel stated "we can presume they were eliminating witnesses." (Supp. Vol. IV, 518).

Appellant's concession below should result in an abandonment and a procedural bar precluding Wright from now challenging this aggravator. The law does not require Appellant personally approve the concession. See Florida v. Nixon, 543 U.S. 175 (2004)(explaining that a defendant has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his own behalf, or take an appeal, but counsel's obligation to his client does not require him to obtain consent to every tactical decision and holding that counsel's concession of guilt did not rank as a 'failure to function in any meaningful sense as the Government's adversary.'). Consequently, it is not mandated that Wright personally assert

or acknowledge that the avoid arrest aggravator has been established.

Alternatively, the claim is meritless. Appellant argues that the evidence does not support a finding of the avoid arrest aggravator (based on the testimony of Robinson and Durant), that the defense did not concede this aggravator in the court below, and that the lower court engaged in mere speculation. This Court has held repeatedly that where the victim is not a police officer, the evidence supporting the avoid arrest aggravator must prove that the sole or dominant motive for the killing was to eliminate a witness, and that this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred without direct evidence of the offender's thought processes. See Hoskins v. State, 965 So. 2d 1, 19 (Fla. 2007); Schoenwetter v. State, 931 So. 2d 857, 874 (Fla. 2006); Farina v. State, 801 So. 2d 44, 54 (Fla. 2001); Buzia v. State, 926 So. 2d 1203, 1209-10 (Fla. 2006); Parker v. State, 873 So. 2d 270, 289 (Fla. 2004).[9] This Court has, again repeatedly, upheld the

[9] Appellant is mistaken in asserting that the avoid arrest aggravator is available only where the evidence includes the defendant's admission to police that his motive was to avoid arrest or eliminate witnesses. The fact that this Court has repeatedly asserted that this factor may be proved by circumstantial evidence, *ipso facto*, proves that there need be no accompanying admission by the defendant to this motive since

finding of this aggravator where the victim has been transported to an isolated location and killed. Hoskins, supra; Nelson v. State, 850 So. 2d 514, 526 (Fla. 2003); Hall v. State, 614 So. 2d 473, 477 (Fla. 1993); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992); Jones v. State, 748 So. 2d 1012, 1027 (Fla. 1999)("McRae's body was found in a wooded area of a neighboring county, and the evidence tended to prove that she died as a result of ligature strangulation. As recognized by the trial court, based on the evidence in this case, there was no reason to kill the victim except to prevent detection and arrest."); Parker v. State, 873 So. 2d 270 (Fla. 2004)(evidence established avoid arrest aggravator where victim store clerk was driven to remote location thirteen miles away and killed with single gunshot to back of head); Philmore v. State, 820 So. 2d 919 (Fla. 2002)(avoid arrest aggravator approved where defendant kidnapped owner in a carjacking, drove her in her car for approximately a half hour to a remote location and did not wear

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an admission or confession constitutes direct evidence, not circumstantial evidence. See Walker v. State, 957 So. 2d 560, 577 (Fla. 2007)("In his statement to law enforcement officers, Walker confessed to killing Hamman. This confession provides direct evidence that he unlawfully killed Hamman, the *actus reus*."); Conde v. State, 860 So. 2d 930, 943 (Fla. 2003)("Because the State presented direct evidence in the form of Conde's confession, this Court need not apply the special standard of review applicable to circumstantial evidence cases."); Pagan v. State, 830 So. 2d 792, 803-04 (Fla. 2002).

either a mask or gloves in order to conceal his identity); White v. State, 817 So. 2d 799 (Fla. 2002)(victim placed in middle of front seat of car that prevented escape and drove her to a location where she was passed over a barbed wire fence and fatally stabbed); Card v. State, 803 So. 2d 613 (Fla. 2001)(witness elimination aggravator shown where witness to crimes was driven to a secluded area eight miles away where he slashed her throat); Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994).

In the instant case, the evidence at trial supports the lower court's findings. Wesley Durant testified that Appellant admitted they took the victims to a grove from Winn-Dixie and they "did what they had to do" (R XXVI, 3725). Wright told him he shot both guys in the back of the head (R 3764). Appellant also told James Hogan that they took two boys to a grove, shot one in the head, one in the chest (R XXVII, 3985). Wright told Latasha Jackson he shot two white boys in the orange grove (R XXVII, 4068). The distance from the Winn-Dixie to the location where the bodies were found was about ten miles (R XXIX, 4417), confirming the difficulty of discovery in this isolated area; when Pitts took the officers to the orange grove, they were

unable to locate the victims until a second visit to the site utilizing helicopters to find them (R 4410-4411).

We know that Appellant's contention to a witness that he killed because the victims had no money is false because Francis Green, the mother of victim James Felker, testified that he had over one hundred dollars with him that night (R XXIV, 3480) and Mary Bloomer, who was engaged to victim David Green, testified that the latter had about two hundred dollars in cash with him (R XXVI, 3819).

Moreover, as stated in Issue III, *supra*, even if the lower court erred in finding the presence of this aggravator, the trial court's order is abundantly clear that such error would be harmless under the circumstances as the prior violent felony convictions-which remain uncontested-would "as an aggregate…heavily outweigh all existing statutory and non-statutory mitigators". The court observed:

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

> statutory and non-statutory mitigators. Thus, in weighing the aggravating factors against the mitigating factors, the scales of life and death tilt unquestionably to the side of death.
>
> (R VI, 980)(emphasis supplied).

Proportionality

Although not raised by Appellant, this Court is required to do a proportionality analysis. The instant case is similar to others involving a double homicide within the same episode. See e.g. Lynch v. State, 841 So. 2d 362 (Fla. 2003); Francis v. State, 808 So. 2d 110 (Fla. 2001); Looney v. State, 803 So. 2d 656 (Fla. 2001); Overton v. State, 801 So. 2d 877 (Fla. 2001); Farina v. State, 801 So. 2d 44 (Fla. 2001); Morton v. State, 789 So. 2d 324 (Fla. 2001); Green v. State, 907 So. 2d 489 (Fla. 2005); Way v. State, 760 So. 2d 903 (Fla. 2000).

The instant case is also proportional to the sentence imposed in the double shooting (which resulted in a single homicide in Pearce v. State, 880 So. 2d 561 (Fla. 2004)) where, as here, the two victims were kidnapped, taken by car at night to a remote unlighted location and shot. The Court has also found the death penalty a proportionate sentence in cases where the victims have been carjacked and subsequently executed. See e.g. Spann v. State, 857 So. 2d 845 (Fla. 2003)(aggravators here similarly included prior violent felony, avoid arrest, pecuniary

gain, and CCP); Philmore v. State, 820 So. 2d 919 (Fla. 2002)(same).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the Appellant's convictions and death sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, Byron P. Hileman, Esq., 443 East Central Avenue, Post Office Drawer 9479, Winter Haven, Florida 33883-9479 and to John K. Aguero, Assistant State Attorney, P.O. Box 9000, Drawer SA, Bartow, Florida 33831-9000, this 27th day of March, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____

ROBERT J. LANDRY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0134101
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
COUNSEL FOR APPELLEE