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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-1213

TAVARES J. WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT FOR POLK COUNTY, STATE OF FLORIDA
Lower Tribunal No. CF00-2727A-XX

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Tavares Jerrod Wright's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851. The record on direct appeal in this case was prepared in three separately paginated parts. The first part, comprising 33 volumes, is cited in the form *e.g.* R[volume number]/[page no]. The second part, comprising three volumes of photos admitted in evidence, evidence lists and the like, is cited where necessary in the form *e.g.* RE[volume number]/[page number]. The third part comprises six volumes and primarily contains sentencing proceedings. It is cited in the form *e.g.* RS[volume number]/[page number]. Citations to the record on appeal will be cited in the form PC[volume number]/page number].

REQUEST FOR ORAL ARGUMENT

Given the gravity of the case and the complexity of the issues raised herein, Mr. Wright, through counsel, respectfully requests this Court grant oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

Tavares Jerrod Wright was charged by indictment with one count of carjacking, two counts of kidnapping, two counts of first-degree murder and two counts of robbery on May 11, 2000. R2/341-51. This Court on direct appeal described the crimes as follows:

> With the aid of codefendant Samuel Pitts[1], Wright carjacked, kidnapped, robbed, and murdered David Green and James Felker while engaged in a three-day crime spree that spanned several areas in Central Florida. During the crime spree, Wright was connected multiple times to a stolen pistol that matched the caliber of casings discovered at the scene of the murders. The trial court allowed the State to present evidence of these collateral acts to demonstrate the context in which the murders occurred and to explain Wright's possession of the murder weapon.
>
> The spree began when Wright stole a pistol and a shotgun from the Shank family's residence in Lakeland on Thursday, April 20, 2000. On the Friday morning following the burglary, Wright used the pistol to commit a drive-by shooting in a neighborhood near the Shank residence. That evening, Wright and Samuel Pitts abducted Green and Felker in Lakeland, drove Green's vehicle approximately fifteen miles to Polk City, and murdered the victims in a remote orange grove. Wright shot one victim with a shotgun, which was never recovered, and the other victim with a pistol that used the same caliber bullets as the gun stolen from the Shank residence. Wright then abandoned the victim's vehicle in a different orange grove in Auburndale. In nearby Winter Haven, Wright used the Shank pistol in a carjacking that occurred during the morning hours on Saturday, April 21, 2000. That afternoon, law enforcement responded to a Lakeland apartment complex based on reports of a man matching Wright"s description brandishing a firearm.
>
> When an officer approached, Wright fled, but he was eventually arrested in the neighboring mobile home park. Ammunition matching the characteristics of the ammunition stolen from the Shank residence was found in his pocket. The stolen pistol was also recovered near the location where Wright was arrested. Almost a week later, the bodies of the victims were discovered.

Wright v. State, 19 So. 3d 277, 283 (Fla. 2009)

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[1] Mr. Pitts was tried separately for the murders and other offenses related to this case. He was convicted of two counts of first-degree murder and sentenced to life in prison. *Wright*, 19 So. 2d at n. 2.

Mr. Wright was found indigent and the Public Defender was appointed, but then withdrew. R2/340, 355-57. The court appointed Byron P. Hileman on July 17, 2000 and David Carmichael on November 20, 2001. R2/357; R3/478. Mr. Hileman had been trying capital cases since 1977, and he served as the lead attorney in Mr. Wright's capital case. PC12/2096, 2102. At the time, he had a thriving private practice where he carried a caseload of approximately one hundred felony cases, in addition to handling three or four capital cases per year. PC12/2107, 2110. Mr. Carmichael was trying to become certified to do death penalty cases, and Mr. Wright's case was his first death penalty case. PC13/2213-14. Mr. Hileman was primarily responsible for guilt phase, and Mr. Carmichael was primarily responsible for penalty phase. PC12/2121. Rosalie Bolin was the investigator on the case, and she worked on both the guilt phase and the penalty phase. PC12/2109, 2121-22.

Mr. Hileman's representation of Mr. Wright spanned nearly a decade, from his initial appointment in 2000 through the conclusion of the direct appeal, and he described it as a "very complex process," the likes of which neither he nor anyone else he has heard about has experienced before. PC12/2112. In addition to the capital case, Mr. Hileman and Mr. Carmichael represented Mr. Wright on a number of non-capital cases, including the Shank burglary, the Longfellow drive-

by shooting, the Taco Bell case, the Cassada case, the Connelley case, and the Cooley case. PC12/2109-11. Mr. Hileman recalled participating in a total of six trials with Mr. Wright. PC12/2096. The non-capital cases were tried first. PC12/2096, 2125. The murder case was tried three separate times. PC12/2096. Mr. Wright's first murder trial, which began in March 2003 and lasted six weeks, resulted in a mistrial after the State's last rebuttal witness, one of the lead detectives in the case, testified that Mr. Wright "looks about the same as he looked [when he was arrested] except for the two teardrop tattoos under his eye which stand for the two people he killed." *Wright*, 19 So. 2d at n. 3; PC3/400-401.[2] The second trial, which began in September 2003 and also lasted six weeks, resulted in a mistrial due to a hung jury. *Wright*, 19 So. 2d at n. 3; PC13/2126. The third and final trial began on October 18, 2003. *Wright*, 19 So. 2d at 289. John Aguero took over for Paul Wallace as the assistant state attorney on the case, and although the core evidence remained the same, Mr. Aguero adopted a more streamlined approach. PC13/2127. Mr. Wright was convicted as charged of one count of

[2] According to Mr. Carmichael: "We reached, after six weeks, a mistrial on the last witness of that case. It was disheartening. It was an intentional statement by law enforcement officers that caused a mistrial. It was the last witness, 131st or something like that. His comment was unsolicited, and it resulted in a mistrial. We had to recover, deal with the frustrations associated with that kind of comment, deal with the public scrutiny about how much the trial had cost. There was a tremendous amount of newspaper reaction to it because it had cost us so much money and should the officer be responsible, etcetera, etcetera." PC13/2271.

carjacking, two counts of kidnapping, two counts of first-degree murder, and two counts of robbery with a firearm on November 13, 2004. R4/707-15. By the time they got to a penalty phase, Mr. Hileman was worn out and relying on Mr. Carmichael. PC13/2130-31, 2140.

Mr. Wright waived his right to a penalty phase jury, and the jury was discharged. *Wright*, 19 So. 2d at 289. A combined penalty phase and *Spencer*[3] hearing was held on May 10 and May 11, 2005. RS1/128-160; RS2/161-321; RS3/322-482; RS4/483-532. A special hearing was held on September 22, 2005 to determine whether Mr. Wright met the statutory criteria for mental retardation. R5/750-832. Following that hearing, the trial court found that Mr. Wright was not mentally retarded for the purposes of capital sentencing. R5/829. The Court sentenced the defendant to death as to the two counts of first-degree murder and to life imprisonment on the remaining counts on October 12, 2005. R6/963-83. The judgment and sentence is located at R6/988-98.

An appeal was filed in the case on November 4, 2005. R6/1001. Mr. Hileman was appointed to represent the defendant on appeal. R6/1011. The judgment and sentence were affirmed at *Wright v. State*, 19 So. 2d 3d 277 (2009) in an opinion dated September 3, 2009. Neither a motion for rehearing nor a

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

petition for writ of certiorari was filed.

Mr. Wright filed a Motion to Vacate Judgment and Sentence on November 5, 2010. PC4/612-700; PC5/701-848. The State filed its Answer on January 5, 2011. PC6/876-1000. A case management conference was held on September 6, 2011. PC7/1026-91. On September 8, 2011, this Court issued an order granting an evidentiary hearing on Claim IV, Claim V, Claim VI, Claim VII, Claim VIII (to the extent it concerns a failure to present available mitigation), and subclaims 1-4 of Claim IX. PC7/1093-94. An Amended Motion to Vacate Judgment and Sentence was filed on March 9, 2012, and a Motion to Accept Amended Motion to Vacate Judgment and Sentence was subsequently granted by the court. PC8/1245-1395; PC9/1396-1485.

An evidentiary hearing was held on October 16-18, 2012. PC10/1671-1755; PC11/1756-1940; PC12/1941-2125; PC13/2126-2313. The parties submitted written closing arguments. PC15/2535-2595; PC13/2607-64. The circuit court filed an order denying Mr. Wright's Amended Motion to Vacate Judgment and Sentence on May 23, 2013. PC16/2688-2778. A notice of appeal was timely filed on June 19, 2013.

JURISDICTION

This Court has jurisdiction. Art. V, ' 3(b)(1) Fla. Const.

STANDARD OF REVIEW

Under *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The circuit court erred when it denied Mr. Wright's claim that trial counsel provided ineffective assistance under *Strickland* by failing to adequately investigate and present evidence of mental retardation at the penalty phase of Mr. Wright's capital trial, despite clear indications that their client suffered from significant intellectual impairments. As clinical psychologist and neuropsychologist Mary Elizabeth Kasper, Ph.D. testified to at the postconviction evidentiary hearing, when Mr. Wright's previous IQ scores are corrected for the Flynn Effect, Mr. Wright meets the criteria for mental retardation under Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203. But for the deficient performance of trial counsel, Mr. Wright would have been found to be mentally retarded and ineligible for execution, or in the alternative the additional evidence of mental retardation

would have provided additional mitigation that would have tipped the balance of mitigating and aggravating factors in favor of a life sentence.

ARGUMENT II: The circuit court erred when it denied Mr. Wright's claim that trial counsel provided ineffective assistance under *Strickland* when they failed to present two inmate witnesses, Dennis Day and Reginald Henry, who could have offered testimony to mitigate evidence offered by the State in aggravation. The testimony of these witnesses would have placed Mr. Wright's prior battery convictions against Preston Cassada and Corrections Officer Walter Connelley in context, and would have mitigated this serious aggravating factor that was given "great weight" by the trial court.

ARGUMENT III: The circuit court erred when it denied Mr. Wright's claim that trial counsel provided prejudicial ineffective assistance under *Strickland* by failing to impeach State witness Wesley Durant, a fellow inmate who testified that Mr. Wright confessed to him while he was cutting Mr. Wright's hair at the jail, with the testimony of Corrections Office Norman Faulkner, and Mr. Durant's nephew, James Blake.

ARGUMET IV: The circuit court erred when it denied Mr. Wright's claim that counsel provided prejudicial ineffective assistance under *Strickland* by failing to impeach State witness Byron Robinson, a jailhouse informant who testified that

Mr. Wright confessed to him in jail, with the testimony of three inmate witnesses who heard Mr. Robinson say that he was going to become involved in another inmate's case in order to help himself out in his own case.

ARGUMENT V: The circuit court erred when it summarily denied Mr. Wright's claim that trial counsel provided prejudicial ineffective assistance under *Strickland* by failing to object to the prosecutor's improper closing arguments, which crossed the line from comment on what the trial court had earlier decided was permissible inextricably intertwined evidence of other bad acts into assertions about Mr. Wright's propensity for violence and bad character.

ARGUMENT VI: The circuit court erred in denying Mr. Wright's claim that cumulative error deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments and rendered his convictions and sentence of death unreliable.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT HE RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT AVAILABLE MITIGATION.

Introduction

The United States Supreme Court has held that counsel has a duty to bring to

bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690.

There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show prejudice, it is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In *Wiggins v. Smith*, the United States Supreme Court held "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision

with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2538, 156 L.Ed. 2d 471 (2003).

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Id. at 2535.

Counsel's duty to investigate and prepare applies to the penalty phase, as well as the guilt phase, of a capital trial. *See, e.g., Id.*; *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000); *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed. 2d 398 (2009); *Sears v. Upton*, 130 S.Ct. 3259, 177 L.Ed. 1025 (2010). In *Rompilla v. Beard*, the United States Supreme Court held that counsel rendered deficient performance which fell below prevailing norms as set out in the ABA Guidelines, citing counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarceration, and failure to gather evidence of a history of substance abuse. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2463, 162 L.Ed. 2d 360 (2005). The *Rompilla* Court found that "this is not a case in which defense counsel simply

ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts . . .” *Id.* at 2462. However, despite the scope of this mitigation investigation, including speaking to family members and consulting with mental health experts, the Court still found that counsel rendered deficient performance by failing to look at a court file, which contained a report that detailed mitigation and suggested numerous areas of mitigation to investigate.

In the case at hand, trial counsel provided prejudicial ineffective assistance of counsel under *Strickland* by failing to adequately investigate and present mitigation at the penalty phase of Mr. Wright’s trial. Claim Nine of Mr. Wright’s motion for postconviction relief was framed broadly, and it contains four more specific subclaims, which identify areas in which trial counsel provided ineffective assistance: 1) Ineffective assistance for failure to acquire documents; 2) Ineffective assistance for failure to present mitigation witnesses; 3) Ineffective assistance for failure to present experts to argue the Flynn Effect or practice effect on IQ scores; and 4) Ineffective assistance for failure to present and prepare experts to correlate fetal alcohol syndrome with IQ scores. PC8/1284-99. The text of Subclaim Three specifically alleges that Mr. Wright meets the criteria for mental retardation as a bar to execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and

Fla. Stat. § 921.137 (1); Fla. R. Crim. P. 3.203. The circuit court held an evidentiary hearing on this claim, which it denied, stating that it did not find that "counsel for the defense was ineffective in investigating, preparing, and presenting mitigation." PC16/2763-71. Mr. Wright seeks review of these findings.

Penalty Phase Trial

This Court summarized the penalty phase portion of Mr. Wright's trial as follows:

> On October 18, 2004, Wright began his third trial on these charges. The jury returned a guilty verdict on all seven counts and made specific findings that Wright used, possessed, and discharged a firearm, which resulted in death to another. Wright waived his right to have a penalty-phase jury. The jury was discharged after the trial court conducted a thorough colloquy and determined that the waiver was made knowingly, intelligently, and voluntarily.
>
> During the combined penalty-phase and *Spencer* hearing, the State presented impact statements from the victims' families. The State introduced the certified judgments and sentences from the Longfellow Boulevard drive-by shooting and from two incidents that occurred while Wright was imprisoned prior to the capital trial. The State also presented the testimony of the victims of the jail-related felonies. Defense counsel stipulated that the contemporaneous capital convictions supported the aggravating circumstance of a prior violent felony.
>
> The defense presented mitigation evidence of Wright's traumatic childhood through the testimony of his family, which included virtual abandonment and neglect by his parents. Two defense expert witnesses testified that Wright's exposure to cocaine and alcohol in utero caused some microcephaly, which is a condition that affects the

size of the brain, and mild traumatic injury to Wright's brain. Though one defense expert determined that Wright has borderline intellectual functioning, including impairments in his frontal lobe functioning for reasoning and judgment, the expert testified that Wright did not satisfy the requirements for statutory mitigation or qualify as mentally retarded under section 921.137, Florida Statutes (2000).

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

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

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

Wright, 19 So. 3d at 289-91.

As this Court further summarized, the aggravating circumstances and

mitigating circumstances found by the trial court were as follows:

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

Wright, 19 So. 3d at n. 16.

Mitigation Presented in Postconviction

I. School Records

In 2010, CCRC-Middle obtained Mr. Wright's school records from the Polk

County School Board. A certified copy of these records was introduced at the evidentiary hearing as Defense Exhibit One. PC14/2336-2500; PC15/2501-32 Included in this exhibit were records from Florida and New York, elementary school, middle school, and high school. The records indicate that Mr. Wright was classified as both emotionally handicapped and specific learning disabled (SLD). There are several Independent Education Plans (IEPs) and two school psychological reports that contain IQ scores. An "Authorization for Source to Release Information to the Social Security Administration" is signed by Mr. Wright's mother and dated February 7, 1991. There is a special education diploma dated May 18, 1999. Dr. Kasper reviewed these records and testified about them during the evidentiary hearing.

II. Mary Elizabeth Kasper, Ph.D.

Mary Elizabeth Kasper, Ph.D. is a clinical psychologist and neuropsychologist. PC11/1886. In her current practice in Sarasota, Florida, she performs assessments for different sources, including the Office of Disability Determination, the Department of Vocational Rehabilitation, and the court system. PC11/1888. She has been a Social Security disability evaluator since 1999. PC11/1888. Many of the people she sees are evaluated for suspected learning disabilities, developmental disorders, or mental retardation. PC11/1889-90.

Dr. Kasper was contacted by CCRC-Middle in April of 2012 and asked to look into Mr. Wright's records, IQ testing, developmental history, and the link between fetal alcohol syndrome and low intellectual functioning. PC11/1891-92. She reviewed various records regarding Mr. Wright, interviewed Mr. Wright and seven collateral witnesses, and consulted with Dr. Sesta. PC11/1894-98. She reviewed Mr. Wright's IQ scores and made some adjustments to them. PC11/1899. She completed a test called the Adaptive Behavior Assessment Scales-II (ABAS-II). PC11/1899.

A. Mental Retardation

Dr. Kasper described mental retardation as a "condition of intellectual disability, meaning you're cognitively behind individuals of your comparable age." PC11/1899. Most all definitions of mental retardation require that a person meet three criteria: (1) a cognitive slowing or cognitive deficiency defined as two standard deviations below an average IQ, (2) deficits in adaptive functioning, and (3) onset prior to age eighteen. PC11/1900-01.

Under Fla. Stat. § 921.137 (2), "[a] sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation." Fla. Stat. § 921.137. The statute defines mental retardation as follows:

> (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

Fla. Stat. § 921.137.

The definition of mental retardation under Fla. Stat. § 921.137 (1) differs from the definition of mental retardation in the DSM-IV-TR in two major ways. Unlike the DSM-IV-TR, which specifies what it means by deficits in adaptive functioning and requires that an individual have deficits in two areas of adaptive functioning, the statute does not specify what the adaptive deficits have to be. PC11/1901-02. Additionally, although the DSM-IV-TR requires an individual's IQ to be two standard deviations below the mean, the DSM-IV-TR accounts for the standard error of measurement and the Flynn Effect in that it says the IQ can go up to 74 or 75. PC11/1902.

Dr. Kasper ultimately concluded that Mr. Wright meets the criteria for

mental retardation as defined in Fla. Statute § 921.137 (1). PC12/1994. Her analysis regarding IQ testing and adaptive functioning will be discussed below.

1. IQ Testing

Fla. Stat. § 921.137 defines "significantly subaverage general intellectual functioning," as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." The full-scale Wechsler tests and the full-scale Stanford-Binet tests, as well as six other tests, are listed by the Agency for Persons with Disabilities as acceptable tests. PC11/1932-35. In order for a test to be acceptable to the Agency for Persons with Disabilities, it has to be a full-scale measure, not an abbreviated measure. PC11/1933. A "mean score" is an average score, or the typical score that someone in the community should make. PC11/1936. All standardized tests are supposed to have a mean score of 100. PC11/1936. Due to a known sampling error with the WISC-III, which can be corrected for and considered, the mean on that test is actually 102.35. PC11/1936-37. A standard deviation is fifteen points. PC11/1937. Assuming that the mean score is 100, two standard deviations below the mean would be an IQ of 70. PC11/1937-38.

IQ tests are normed based on the most recent United States census data.

PC11/1938-39. Factors such as age, gender, race, and geographic location are taken into account so that the sample mirrors the population. PC11/1939. The norming process, which is both critical and expensive, establishes what constitutes a score of 100 at that moment in time. PC12/2015.

a. The Flynn Effect

The Flynn Effect is a phenomenon that has been known for many years and is generally accepted in the scientific community. PC12/1948. It is an upward drift of IQ scores, which is equal to three points per decade. PC12/1948, 1950-51. According to the Flynn Effect, if a person took an IQ test that was normed ten years ago in the year it was normed and took the same test again today, he would be expected to score higher today because of this upward drift. PC12/1948. The Flynn Correction is a mathematical formula whereby you look at the date the test was normed when it was assigned 100 as the absolute mean and correct for the amount of time that has passed from the date the test was normed to the date the person actual took the test. PC12/1948. In order to adjust for the Flynn Effect, you multiply the number of years since the test has been normed by .3 and subtract that number from the score. PC12/1949-50. The WAIS-R manual from 1991 notes the Flynn Effect. PC12/1947. The "green book," which is put out by the American Association for Intellectual Disabilities, mentions the Flynn Effect and

adjusting for the Flynn Effect. PC11/1903.

Although the Flynn Effect is a known phenomenon, it is not standard practice to adjust IQ scores for the Flynn Effect in non-capital cases. PC12/1951, 2046-47. In non-capital cases, mental retardation is not diagnosed using a bright-line specific number. PC12/2052. The DSM-IV-TR definition of mental retardation allows psychologists to use the measurement error of approximately five points. PC12/2052. Therefore, it is a generally accepted practice in the psychological community to diagnose people with mental retardation when they have IQ scores over 70. PC12/2053. As Dr. Kasper explained:

> [T]he way we diagnose people gives us a range of scores that we're allowed to interpret. When we report a score of 75, we can call someone mentally retarded. We don't need to adjust the scores . . . [I]f the score is 75 and the person has concomitant deficits in adaptive functioning . . . and they're achieved prior to 18, I'm going to say he's retarded. The school psychologist doesn't need to adjust the score. I don't think it's standard practice.

PC12/2046-47.

Dr. Kasper does not apply the Flynn Effect except in capital cases. PC12/2048. Capital cases require a precise score, and she has to justify the exact points. PC12/2052. The Flynn Effect removes the arbitrary nature of the score by adjusting for the upward drift in IQ scores over time. PC12/2047. An IQ score of 70 as a bright line cut-off for mental retardation in capital cases is based on the

assumption that the mean score is 100, and therefore two standard deviations below the mean is equal to 70. PC12/2055. However, because of the Flynn Effect, the mean is drifting upward. PC12/2059. Depending on when the test was normed and when it was actually taken, two standard deviations below the mean does not always equal 70, as the mean does not always equal 100. PC12/1953. In order to determine whether, under the statute, a person's IQ score is two or more standard deviations below the mean, one has to "consider when the test was normed because the mean will change and two standard deviations will be a different number depending on how long after the test was normed the test was given." PC12/2060.

b. Standard Error of Measurement

The standard error of measurement is "an estimate of how repeated measures of a person on the same instrument tend to be distributed around his or her true score." PC12/1954. There are different standard errors of measurement for different age ranges and scores, and there is a wider range of variability in lower IQ scores. PC12/1956. The different confidence intervals are included in the test manuals. PC12/2011. The Florida Department of Education recommends that the confidence interval be included in any report having to do with intellectual testing. PC12/1957, 2011. Abbreviated intelligence tests, such as the WASI, however, are not given confidence intervals because they are only general estimates of IQ.

PC12/2013. It is appropriate to apply the Flynn Effect or the standard error of measurement, but not both. PC12/1955.

c. The Practice Effect

The practice effect is a well-known effect that is reasonably accepted in the scientific community by which you take a test multiple times and get a better score. PC11/1940; PC12/1947. If a person takes an IQ test and then takes it again, they would be expected to get a noticeably higher score, sometimes by as much as ten points. PC11/1940; PC12/1941. The shorter the interval between tests, the more likelihood of a practice effect. PC11/1940. The Wechsler manuals suggest a one to two year interval to minimize the practice effect. PC11/1940. The Sarasota school system will not accept the same test within one year, so parents have their children tested every year and a day so that they get a better score. PC12/1941. After taking the same IQ test four or five times, these children are able to achieve high enough scores to qualify for the gifted program, not because they became smarter, but because of the practice effect. PC12/1941-42. The practice test can be avoided by giving the person a different IQ test. PC11/1940. IQ tests are not normed on individuals who have taken the same test multiple times, and it is not typical for somebody to have taken the same test over and over again. PC12/1942.

Although there are different versions of the Wechsler test, they are all

remarkably similar. PC12/1943-46. While the actual questions might be different, the way they are administered, timed, and scored is the same. PC12/1946. In the block design test, different pictures are used in different tests, but the same exact blocks are used for every version of the Wechsler test. PC12/1945. People do better at the block design test by doing it multiple times. PC12/1946. There is also an advantage to knowing which of the tests are timed and which of the tests you do not need to rush on. PC12/1946.

Mr. Wright was administered some version of a Wechsler test a total of eight times. PC12/1942-43. In 1991, he took the WISC-R three times. PC12/1942. In 1997, he took the WAIS-R. PC12/1943. He took an abbreviated form of the WAIS in 2001, and the WASI in 2003. PC12/1943. He took the WAIS-III twice in 2005. PC12/1943. Altogether, he has taken the exact version of the subtests down to the exact same blocks, the same format of coding, and the same order of the test eight times. PC12/1943.

d. Previous IQ Testing of Tavares Wright

Dr. Kasper reviewed Mr. Wright's previous IQ scores and compiled them in a chart, which was introduced as Defense Exhibit Two. PC15/2534. Of particular interest to her were the IQ tests Mr. Wright took during the developmental period because they are evidence of onset prior to age eighteen. PC12/1971. She did not

find any indication that Mr. Wright was purposely performing poorly on any of the IQ tests and concluded that Mr. Wright meets the criteria for a person who is of significantly subaverage general intellectual functioning under Fla. Stat. § 921.137. PC12/1984.

Mr. Wright was given the WISC-R three times in 1991, when he was approximately ten years old. The WISC-R was normed in 1972, so by 1991 it was already 19 years old. PC12/1962. It appears that the first IQ test was administered by Dr. Kindelin for a disability determination in Florida around February of 1991. PC12/1959. Mr. Wright received a full-scale IQ of 76 on this first test. PC12/1963. When this score is adjusted for the Flynn Effect, it becomes a 70, which equals two standard deviations below the mean. PC12/1963. On April 4, 1991, Mr. Wright took the WISC-R again in a Bartow, Florida school and obtained a full-scale IQ of 80. PC12/1961; PC15/2534. On September 11, 1991, when he was in school in Williamson, New York, he took the same test for a third time and obtained a full-scale IQ of 81. PC12/1961-62; PC15/2534. It does not appear that Mr. Wright's schools in Florida or New York were aware of the previous tests. PC12/1962. In order to avoid the practice effect, Mr. Wright should have been given a different IQ test. PC12/1965. Given that he took the same exact test three times in less than one year, it is not surprising that his score went up. PC12/1965.

Therefore, the higher scores on the second and third IQ tests in 1991 are not valid indications of Mr. Wright's IQ. PC12/1965.

The next IQ test Mr. Wright took was on August 25, 1997 when he was sixteen years and six months old. PC12/1970. Dr. Fried administered the WAIS-R as part of a disability evaluation. PC12/1967. Mr. Wright achieved a full-scale IQ of 75. PC12/1970. The test was normed in 1978, which was nineteen years before it was given to Mr. Wright. PC12/1969-70. When the Flynn correction is applied, this score is 69, which equals more than two standard deviations below the mean. PC12/1970-71.

In addition to the four IQ tests Mr. Wright was given prior to age eighteen, he was also given four IQ tests as an adult. In 2001, Dr. Dolente, a defense expert hired to assist in Mr. Wright's capital case, administered a Wechsler screening test, which was probably the WASI. PC12/1972-73. On February 4, 2004, Dr. Sesta also administered the WASI. PC12/1976-77. Dr. Sesta is a neuropsychologist who was hired by the defense to determine whether Mr. Wright had a closed head injury and does not have experience working with mentally retarded individuals. PC11/1899, 1907. Screening tests such as the WASI are abbreviated measures of IQ, which are specifically excluded by the rules established by the Agency for Persons with Disabilities. PC12/1973. Additionally, the Wechsler manuals say

that screening tests should not be given in any legal or quasi-legal setting, or when a determination based on an IQ score is important. PC12/1975. Therefore, Dr. Kasper was not able to rely on these two tests in determining whether Mr. Wright is mentally retarded. PC12/1978. It is important to note, however, that while these tests cannot be considered in determining whether Mr. Wright meets the definition of mental retardation under Fla. Stat. § 921.137 (1), they would contribute to the practice effect because they have several of the same exact subtests as the full-scale IQ tests. PC12/1973.

Finally, Mr. Wright took the WAIS-III twice in July of 2005. The WAIS-III was normed ten years earlier, in 1995. PC12/2004. On July 15, 2005 Dr. Kremper administered the WAIS-III, and Mr. Wright obtained a full-scale IQ of 82. PC12/1978. When one applies the 2.34 correction for the sampling error with the WAIS-III and the Flynn correction, Mr. Wright's corrected score is 77. PC12/1978-80. On July 25, 2005, Dr. Freid administered the WAIS-III again, and Mr. Wright achieved a full-scale score of 75. PC12/1981. When one applies the 2.34 correction for the sampling error with the WAIS-III and the Flynn correction, Mr. Wright's corrected score is 70. PC12/1981. Dr. Kasper noted a problem with administering the same exact test twice within ten days, and described it as a "completely inappropriate", "strange" "unusual" practice. PC12/1981-82, 2037.

In Dr. Kasper's opinion, Dr. Freid's test is invalid and should not be considered. PC12/2036-37. Additionally, by 2005, Mr. Wright had already been given a Wechsler test six times, and she would not have given him another Wechsler test. PC12/1983. The practice effect could have been avoided by both Drs. Kremper and Freid by giving him a number of other acceptable IQ tests. PC12/1983.

2. Adaptive Behaviors

Adaptive behavior is a person's ability to take care of himself and relate to others. PC12/1984. It is a "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." PC12/1984-85. Adaptive behavior is a person's typical, as opposed to optimal, behavior. PC12/1985. In addition to looking at Mr. Wright's IQ scores, Dr. Kasper considered school records, psychological reports, family members who knew Mr. Wright during his developmental period, and some of the inmates who knew him prior to age eighteen in evaluating Mr. Wright's adaptive behavior. PC12/1985. She concluded that Mr. Wright has deficits in adaptive behavior. PC12/1998.

Dr. Kasper found evidence of adaptive deficits in Mr. Wright's school records from New York and Florida. PC11/1923-27; PC12/2029. Mr. Wright was classified as both emotionally handicapped and specific learning disabled (SLD).

PC111924. He was exempt from taking standardized tests. PC11/1923. Both of his school psychological reports note that he has deficits in functional academic skills. PC11/1929. There are several Independent Education Plans (IEPs) in Mr. Wright's school records, which are used for students with disabilities to provide feedback and set specific goals. PC11/1924-25. Mr. Wright's IEPs indicate that he has problems interacting and communicating with others and controlling his behavior. PC11/1929. The IEPs were designed to help him with these adaptive deficits. PC11/1929.

Dr. Kasper also learned that Mr. Wright's mother received social security benefits for him when he was a child. PC12/1998-99. A child cannot receive social security benefits for simply having a learning disability because the school system has a mechanism for accommodating such a disability. PC12/1998. In order to receive disability benefits a child must have deficits in multiple domains. PC12/1998.

There is a common misperception that people who are mentally retarded cannot function, drive, read, or live independently. PC11/1904. In fact, there is a wide range of people who are mentally retarded, and about fifteen percent of individuals who are mentally retarded can drive, read, and work at a job. PC11/1904-05. People who are mentally retarded have strengths and weaknesses,

and they can be very good at some things. PC11/1905. These strengths do not limit a person from being retarded; in fact it is a person's weaknesses that make them mentally retarded. PC11/1906.

Like most individuals with mental retardation, Mr. Wright has both strengths and weaknesses. One of his strengths is that he has a good rote memory. PC11/1927. Unfortunately, he is not able to give the information enough meaning so that he is able to act on it or benefit from it. PC11/1927. Similarly, he is often able to recognize when he makes a mistake, but he is not able to do anything with that information to avoid making the same mistake over and over again. PC11/1928. He is also very loyal, and he seeks out people are bigger, smarter, or stronger than him who can protect him. PC11/1927-28. One of his weaknesses is that he has a problem adapting to just about any environment. PC11/1928. When he was in the jail awaiting trial, he had difficulty adapting to the structured environment and following jail rules. PC12/1993.

Individuals with mental retardation often do things to hide their disabilities from others. PC11/1908. This phenomenon is commonly referred to as "cloak of competency," "trying to pass," or "reverse malingering" (faking good). PC11/1908-09. It is an adaptive strategy that people use to be accepted, and to avoid being picked on or singled out. PC11/1908. They parrot or mimic the

behaviors of those around them, not necessarily understanding what is going on or the reason why they are doing something. PC11/1908. Mr. Wright's cousin reported that when Mr. Wright came out of boot camp, he kept saying "yes m'am, no, m'am" to the point that it was strange. PC11/1926. He also mimics people who he trusts, or people in authority who he sees as kind figures. PC11/1926. When Dr. Kasper met with Mr. Wright at the prison, he did not know that she was coming. PC11/1895. Dr. Kasper explained to him who he was, and he spoke freely to her, answered all of her questions, and made incriminating statements about himself. PC11/1896-97. Dr. Kasper explained how Mr. Wright's behavior on that day was consistent with her findings, and showed how easily he is swayed. PC11/1898.

Dr. Kasper identified several other examples of the above-described "reverse malingering" in Mr. Wright's case. PC11/1911. He told her he has a GED. PC11/1911. In reality, Mr. Wright did not obtain a GED, but a special diploma, which was given by the State of Florida and is located in his school records. PC11/1911. Dr. Kasper, who works with the school system and is very familiar with the four different types of diplomas offered by the State of Florida, described the special diploma that Mr. Wright obtained:

The diploma means that the person met some kind of criteria that was

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

PC11/1913-14.

Mr. Wright also told Dr. Kasper that he was a highly skilled drug dealer and the leader of a gang. PC11/1911. However, the collateral sources she spoke with did not agree with Mr. Wright's self-assessment. They told her that they did not believe him to be a successful drug dealer, and that he was someone who would have been exploited and manipulated by the higher-ups because of his inability to count and easy suggestibility. PC11/1914. One person told her that he would have been given the drug-dealing task of an eleven-year-old, who would be easily led and manipulated as to how much money he would be passing. PC11/1915. Every person she interviewed, including people who knew him since he was a child, told her that he was not the leader of the gang, except perhaps in his own mind. PC11/1915.

There are instruments, such as the Adaptive Behavior Assessment Scales-II (ABAS-II), that quantitatively measure adaptive functioning. PC12/1985-86. The ABAS-II considers information from collateral sources, which is important because individuals who are low functioning are often not good self-reporters. PC12/1989. Dr. Kasper does not use these instruments in every case and she would have been able to assess Mr. Wright without using such an instrument. PC12/1986. She used the ABAS-II in this case at the request of postconviction counsel, and although it did not tell her anything she did not already think, she was able to rely on the numerical results in forming her opinions. PC12/1986. She asked various witnesses about Mr. Wright's adaptive functioning from age sixteen and a half to adulthood. PC12/1991. A mean score on the ABAS-II is 100. PC12/1991. The results of the ABAS-II that Dr. Kasper administered regarding Mr. Wright were a general composite of 63, a conceptual composite of 67, a social composite of 75, and a practical composite of 77. PC12/1993. Two standard deviations below the mean would be a 70. PC12/1992. Therefore, the scores on the ABAS-II indicate that Mr. Wright has adaptive deficits in general ability and conceptual skills. PC12/1993.

B. Risk Factors

Mr. Wright has multiple risk factors for developing low cognitive ability.

PC12/1995.

- **Fetal Alcohol Syndrome-** The Department of Disabilities notes that fetal alcohol syndrome is a developmental disability that affects a person's "ability to learn, profit from environmental stimuli, and develop at a normal rate." PC12/1995. Fetal alcohol syndrome often leads to mental retardation or borderline mental retardation. PC12/1995. Mr. Wright has been diagnosed with fetal alcohol syndrome, which is an organic brain syndrome. PC12/1995. He was also exposed to cocaine during the developmental period. PC12/1995.

- **Maternal Nutrition-** Maternal nutrition is a risk factor for lower intellectual functioning because it affects neural development. PC12/1996. This may have been a factor during the fetal developmental period, as Mr. Wright's mother only gained seven pounds while she was pregnant with him. PC12/1996.

- **Inadequate Nutrition-** Inadequate nutrition is documented as affecting one's ability to reach one's highest level of potential. PC12/1997. There are reports that there was only beer in Mr. Wright's mother's house, and no food, and that he often did not get enough to eat. PC12/1997.

- **Regularity and Structure-** Mr. Wright was bounced around from place to place. PC12/1997. His mother was not fully aware of what was going on in the school system, and she did not get him as much help as she could have gotten. PC12/1998.

- **Lack of Surgical Intervention-** A number of surgical interventions could have helped Mr. Wright. PC12/1996. There are surgeries that would have allowed his brain to grow, thereby preventing microcephaly from being as much of a problem. PC12/1996-97. Additionally, his facial deformities could have been corrected to give him a more normal appearance. PC12/1997. Mr. Wright did not receive this intervention, and as a child he was ostracized for his appearance, which is not helpful to a child.

> PC12/1997. He was called names such as "peanut head", little alien, Beetlejuice, and "Jerry Lewis kid." PC12/1997.

C. Antisocial Personality Disorder

Dr. Kasper explained why she does not agree with Dr. Sesta's testimony that Mr. Wright suffers from antisocial personality disorder:

> I do agree that Mr. Wright has behavioral characteristics of antisocial personality disorder, and if you do not apply the diagnostic criteria correctly, you absolutely would come up with a diagnosis of antisocial personality disorder.
>
> What I think the problem is, is that it wasn't considered that Mr. Wright has organic brain syndrome. And Mr. Wright has problems with rules, problems with behavioral regulation, problems with attention, problems with understanding that are biologically based in nature, and that would be a ruleout criteria for giving him a personality disorder diagnosis even though he has behaviors that in the absence of that organic brain syndrome would definitely qualify him for a diagnosis of antisocial personality disorder.

PC12/1999-2000.

III. Lay Witnesses

The following witnesses who testified at the evidentiary hearing offered additional information regarding Mr. Wright's adaptive behavior. They all would have been willing to testify at Mr. Wright's trial. PC10/1696, 1750; PC11/1771, 1806-07, 1844.

A. Dennis Day, Jr.

Dennis Day, Jr. met Mr. Wright in 2000 when they were both inmates at the

Polk County Jail. PC10/1684. They were housed together for approximately one year. PC10/1684.

Mr. Day described Mr. Wright as a loner and an outcast, who would go off by himself. PC10/1685. The other inmates did not treat Mr. Wright well, and they did not interact with him. PC10/1686. Mr. Day tried to get Mr. Wright to play cards with the other inmates so that he would fit in, but he did not always understand the rules, so he would mess up and anger his partner. PC10/1686, 1687-88. That, in turn, would make Mr. Wright angry, and a fight would break out or the game would stop. PC10/1688.

Mr. Wright did things in the jail that drew attention. PC10/1686. He was the loudest person in the dorm. PC10/1689. He sang and rapped all the time, often early in the morning or when everyone was asleep. PC10/1689. He turned on all of the showers and made a lot of noise at strange hours. PC10/1686. He carried on conversations with himself, which would cause everybody to look at him. PC10/1686. Mr. Day recalled a particular incident involving electrical wires in the shower facility:

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

> seemed like he didn't – it didn't register. You know, you messing with live wire, hot wire on a wet floor with some – you know, I'm like "You going to die," you know.

PC10/1687.

B. James Blake

James Blake first met Mr. Wright in boot camp in 1997 when they were both approximately sixteen years old[4]. PC10/1734, 1754. Mr. Wright did not fit in with the other boys in boot camp. PC10/1735. He adapted more slowly to boot camp than the rest of the boys, and he was not able to obey the drill instructors' orders because he did not understand them. PC10/1735. While the other boys were trying to get through the program and follow orders, Mr. Wright did his own thing, often causing a commotion in an attempt to get attention from the other children. PC10/1735-36. They were in a class together where they were required to write their autobiographies, and Mr. Wright did not participate in that activity. PC10/1737, 1755. Eventually, Mr. Wright was transferred to another program. PC10/1737.

After boot camp, Mr. Blake saw Mr. Wright again on the street in Lakeland around 1998. PC10/1737-38, 1741. Mr. Wright did not live in Mr. Blake's neighborhood, but Mr. Wright would come there from time to time. PC10/1739.

[4] Mr. Wright was born on February 7, 1981. In 1997, he would have been approximately sixteen years old.

His clothing was awkward, and it did not match. PC10/1739-40. The other children made fun of him by calling him slow and telling him that he was born premature. PC10/1740, 1742-43. He did not engage in serious conversations. PC10/1745. They played football together three or four times, but the other children did not want to pick Mr. Wright for their team because he did not understand the rules of the game. PC10/1743-44, 1753. Mr. Blake recalled several times when a team would decide that it was better to play with one less person than to pick Mr. Wright. PC10/1744-45.

C. Jerry Hopkins

Jerry Hopkins knew Mr. Wright from the time they were both thirteen to eighteen years old and growing up in Polk County. PC11/1759-61. They lived within walking distance of one another. PC11/1760. They played basketball together, attended middle school, high school and boot camp together, and rode the same bus. PC11/1760. He thinks Mr. Wright was in special classes at school. PC11/1761.

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

him. PC11/1763.

Mr. Hopkins agreed that Mr. Wright was a follower, who was easily influenced by other people. PC11/1763. He did not fit in with the other children, but he would do things to try and fit in. PC11/1763-64. The other children referred to him as "push button", which he explained, "It's like you push somebody up to do something. You just tell them something and they do it. It's like pushing a button. Just turn them on and turn them off." PC11/1763. The other children would make up a lie about someone saying something about his mother, and he would react to it without knowing whether it was true or not. PC11/1763.

Mr. Hopkins saw Mr. Wright again in 2001-2005 when they were both at the Polk County Jail. PC11/1764-65. Mr. Wright did not seem to understand how serious the charges were that he was facing. PC11/1765.

The other inmates did not want to be around Mr. Wright, and they treated him like he was different. PC11/1765. They did things to manipulate him, such as one time when they got him to steal a piece of pizza from a guard. PC11/1765-66. Mr. Wright asked the other inmates to write letters for him. PC11/1766. Mr. Hopkins once gave Mr. Wright a poem to copy. PC11/1766. He did not know of Mr. Wright ever writing anything on his own. PC11/1766.

The majority of the guards at the jail also treated Mr. Wright poorly, and not how they treated the other inmates. PC11/1766-67, 1776. They shook down his cell for no reason, threw his stuff around, yelled at him, and picked on him about his case. PC11/1767. This occurred both before and after the incident with Officer Connelly. PC11/1776.

D. Dahrol James

Dahrol James was housed in Max Dorm at the Polk County Jail with Mr. Wright. PC11/1789. They were roommates for six to eight weeks in 2001 or 2002. PC11/1789. Mr. Wright looked up to Mr. James, and they became friends. PC11/1790.

Mr. James led a Bible study group and a prayer circle in Max Dorm, which Mr. Wright was also a part of. PC11/1796-97. He had a lot of conversations with Mr. Wright where he tried to get Mr. Wright to understand spiritual things, including concepts such as forgiveness and prayer, but Mr. Wright was not able to understand. PC11/1795-96. When the Bible study group got together, the participants would take turns reading out loud, but the other inmates always had to read to Mr. Wright. PC11/1796-96. In the prayer circle, each person in the circle would take turns praying about things such as their current situation or their

families. PC11/1797. When it got to be Mr. Wright's turn, he just talked, as opposed to praying like the other men. PC11/1798.

The other inmates saw Mr. Wright as different from them. PC11/1791. They picked on him and played jokes on him. PC11/1791. Mr. Wright was a follower. PC11/1791. He was not street smart. PC11/1791. He did not seem to understand the prices of things. PC11/1795.

Mr. Wright was easily manipulated. When the inmates played basketball, they would pick on Mr. Wright by talking about his head and calling him "Beetlejuice," which would distract him and get him off his game. PC11/1801. The other inmates would get him to do things, such as steal bread from the food cart and give it to them without taking anything for himself. PC11/1791-92. They also hid razors in Mr. Wright's cell because they were contraband, and Mr. Wright would get nothing in return except for feeling like he was fitting in. PC11/1792-93. Mr. James explained why Mr. Wright is the kind of person a drug dealer would want to work for them:

> A. Because Mr. Wright's example of being a good drug dealer is what I call a sucker. Because if I gave him – if somebody gave him a hundred dollars worth of drugs and told him to bring back a hundred dollars, he's going to bring back exactly a hundred dollars. He's not going to – he's not going to try to like tell you that you have to pay him $30 of the -- $30 of the hundred. So I would have felt good having somebody like him on my team.

Q. So basically he would have volunteered?

A. Yeah. Just having the hype of just being a drug dealer, I guess it was his thing. It wasn't about the money.

PC11/1794.

Mr. Wright also had trouble following the rules in the jail. PC11/1799-1800. If the officers did not come around to take the inmates to rec at a certain time, Mr. Wright would go to the door and continue yelling for the officer to let them out to rec. PC11/1799. It never worked, but he did the same thing over and over again, three times a week for the entire time they were incarcerated together. PC11/1799.

Mr. James recalled an incident when he became very angry with Mr. Wright:

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

PC11/1800. Mr. James agreed this kind of behavior can get a person hurt in jail. PC11/1800.

E. Shenard Dumas

In 2004 Shenard Dumas and Mr. Wright were housed together for

approximately eight months in the Max Dorm at the Polk County Jail. PC11/1846-47.

Mr. Dumas described Mr. Wright as childish and ignorant. PC11/1838. He would turn on all of the showers in the dorm, run around naked, and play. PC11/1839-40. The officers would tell him to come out of the showers. PC11/1840. None of the other inmates acted that way. PC11/1840.

Mr. Dumas also described Mr. Wright as a follower. PC11/1838-39. He would do whatever the crowd did in order to fit in with the other inmates. PC11/1839. The other inmates picked on Mr. Wright, provoked him, and antagonized him for their own entertainment. PC11/1839.

Ineffective Assistance of Counsel

Both of the trial attorneys were skilled and experienced, a circumstance that admittedly weighs against an ineffective assistance claim. On the other hand, there are features of this case that are at least highly unusual, if not unique. Mr. Hileman, the lead attorney, has an impressive resume. He was an associate professor for a short while before he entered law school and became a lawyer around 1976. PC12/2098-99. Since then the main focus of his practice has been criminal defense of major cases, including death penalty cases. PC12/2099-2105. One consequence of that extensive experience over a long period of time in a

rapidly growing Florida county was that he was much in demand and had a busy practice. PC12/2107. At the time he agreed to take on Mr. Wright's case he had a case load of three or four capital cases a year plus around a hundred other felony cases. PC12/2110. Still, he understood the magnitude of the job as it existed at the time of his original appointment, which meant representation on a double homicide and on three noncapital cases which the State intended to use both as aggravators and as inextricably intertwined evidence of guilt. What he could not know was that Mr. Wright would pick up three new serious felony cases based on altercations in the jail while awaiting trial on this case, two of which would result in convictions at trial and be used as aggravators. Nor could he have known that this case would result in three full guilt phase trials because mistrials were declared in the first two, both of which lasted around six weeks. As Mr. Hileman said:

> I've never had a case quite like this one before or since, and it -- it was much larger than I perceived initially simply because it turned out to be one of -- I spent 10 years of my life with this man's case. I mean, literally. And it was a very complex process. And you're right, I about did not fully anticipate it because I'd never experienced anything like that before. Neither, I think, has anybody else that I ever heard about.

PC12/2112. One of the recurring themes in the evidentiary hearing was that by the time of the penalty phase proceedings, including the mental retardation hearing, Mr. Hileman was simply worn out.

Mr. Carmichael was brought in as second chair counsel with primary responsibility for the penalty phase because it would involve mental health issues and he had some useful background in such matters from being the prosecutor in Baker Act and Jimmy Rice proceedings. PC12/2113. This was his first death case, and he took it on to help him obtain certification for appointment in death penalty cases. PC12/2114. Mr. Hileman described the division of responsibilities between the two attorneys this way:

> I would not say that I delegated more responsibility to Mr. Carmichael because I was tired or worn out or burned out. I pretty much from the get-go intended for him to be the primary [attorney] in developing what I viewed as the primary mitigation, which was the mental health mitigation, and I relied on him for that.
>
> Now, as the trials proceeded, he helped me some with the guilt phase, and I probably was sitting there in by the time of the third trial during penalty phase with my eyes crossed because, yes, I was worn out. So to that extent, yes, maybe I was relying more on him in that respect, but the delegation had been going on since the beginning.
>
> As I think I've been telling you throughout my testimony, from the very beginning, I delegated most of that — the mental health aspects of the case to Mr. Carmichael. When we got into the mental retardation stuff, the same thing was true. He certainly kept me informed, I was aware of it, but I relied heavily on him.

PC13/2130-31; and:

> And what you asked me earlier about fatigue, you're probably right. At that point, I wouldn't have had the energy to kind of reinvent the wheel and start questioning these witnesses myself and get myself up

to speed simply because of I'd been already expended.

PC13/2134. When questioned about any of the specifics of the penalty phase, Mr. Hileman's testimony was consistent with these statements. For example, Dr. Dolente, the mental health expert he originally retained, was replaced with mental health experts selected by Mr. Carmichael. PC12/2117-18. With regard to institutional records such as school or disability records, he said that they may have come to him but he would have passed them on to the investigator or to Mr. Carmichael. PC12/2122. Mr. Hileman did not know if he had heard of the Flynn Effect at the time of trial, although he had learned about it by the time of these postconviction proceedings. PC13/2137. Any "critiquing" of the IQ scores that were presented during the trial proceedings would have been done by Mr. Carmichael. PC13/2137-38. Although both attorneys signed the *Spencer* memorandum, Mr. Carmichael was the one who wrote it. PC13/2135. The same was true about drafting, preparation, argument, and pretty much anything else regarding mental retardation. Mr. Hileman vaguely remembered a discussion about the practice effect and its possible impact on additional IQ test results, but also said "I was sitting there basically worn out and relying on David. . . . In general terms I remember that, but any further details, I do not recall." PC13/2140.

Mr. Carmichael succinctly summarized the mitigation strategy this way:

> [T]here existed a very real belief on my part that our client suffered from two different things: One, we believed some congenital defects which made him actually retarded by statute and, therefore, precluded from having the death penalty imposed upon him; and I believed in his early childhood, because of the way his environment and his existence occurred, he grew up something as a feral child, which I believe further impaired him from understanding the circumstances around his case, and I believed, again, it could preclude him from having the death penalty applied to him.

PC13/2217-18.

In its order denying relief, the circuit court found that "counsel made every attempt to look into the issue of mental retardation and find an expert to testify regarding the Defendant's deficiencies." PC16/2766. That is not the case. Trial counsel provided deficient performance under *Strickland* when they failed to thoroughly investigate and present evidence of mental retardation despite clear indications that their client suffered from significant intellectual impairments. *See Porter*, 558 U.S. at 40 (holding that trial counsel provided deficient performance when he ignored pertinent avenues for investigation of which he should have been aware). Mr. Carmichael was the one who selected the two experts who testified for the defense at the combined penalty phase/*Spencer* hearing, Drs. Waldman and Sesta. PC13/2222-23. Following Dr. Waldman's testimony at the combined penalty phase/*Spencer* hearing that was held on May 10-11, 2005 that Mr. Wright is mentally retarded, trial counsel filed a Notice of Intent to Reply Upon § 921.137

Florida Statutes, Barring Imposition of the Death Penalty Due to Mental Retardation on June 30, 2005. R5/743-44. The court appointed Drs. Kremper and Freid to evaluate Mr. Wright for mental retardation, R5/745, and both experts testified at a special hearing regarding mental retardation on September 22, 2005. R5/748-832. Neither expert assessed Mr. Wright's adaptive functioning. R5/764; R5/783-817. Following that hearing, the trial court found that Mr. Wright was not mentally retarded for the purposes of capital sentencing. R5/829.

Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *Mason v. State*, 489 So. 2d 734 (Fla. 1986); *Sireci v. State*, 536 So. 2d 231 (Fla. 1988); *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985). Trial counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *Ponticelli v. State*, 941 So. 2d 1073, 1095 (Fla. 2006); *Sochor*, 883 So. 2d 766. None of the experts presented at the trial level conducted a complete and constitutionally adequate mental retardation evaluation. Although Drs. Walman and Sesta expressed conflicting opinions regarding mental retardation, the defense did not hire any experts prior to trial with the express purpose of evaluating Mr. Wright for mental retardation. None of the experts considered the practice effect, and as Dr. Kasper explained, Dr. Freid administered

the WAIS-III on Mr. Wright only ten days after Dr. Kremper administered the exact same test, rendering Dr. Freid's test results invalid. None of the experts was asked to consider the impact of the Flynn Effect on Mr. Wright's IQ scores. None of the experts reviewed complete school records, because, as Mr. Carmichael testified, the defense obtained only incomplete elementary school records from a family member of Mr. Wright. PC13/2229-30. *See Porter*, 558 U.S. at 406 (trial counsel found ineffective where he did not obtain any of the defendant's school, medical, or military service records); *Rompilla*, 545 U.S. at 382 (trial counsel rendered deficient performance, in part, by failing to obtain school records and records of the defendant's prior incarcerations); *Walker v. State*, 88 So. 2d 128, 138 (Fla. 2012) (trial counsel found ineffective where he failed to seek medical, educational, criminal, drug treatment, or social service records). The circuit court acknowledged in its order denying relief that more documents and records might have been obtained during postconviction than by trial counsel. PC16/2764.

Dr. Waldman, a medical doctor, was hired by the defense to perform a medical evaluation of Mr. Wright. RS2/394. He did not perform intellectual testing of Mr. Wright. RS2/417. He performed an EEG and an MRI on Mr. Wright and determined that Mr. Wright suffers from fetal alcohol syndrome and microcephaly, which means that his brain is approximately two-thirds the size of a

normal brain. RS2/396-97. Dr. Waldman testified at the penalty phase trial that Mr. Wright "has low intelligence which approaches that of mental retardation and may very well be within the range of mental retardation because of fetal alcohol syndrome." RS2/404. Although Dr. Waldman acknowledged that all of Mr. Wright's IQ scores of which he was aware were above 70, he testified that it is important never to make a diagnosis based only on a number, and reiterated that it is his opinion that Mr. Wright has mental retardation. RS3481/482.

Dr. Sesta was originally hired "to delineate any residual sequelae of closed head injury incurred during childhood vis-a-vis mitigation in the matter of his current charges," in his own words. R5/867. Mr. Carmichael gave him no direction at all. PC13/2256; RS1/254 ("Doctor, just to be perfectly clear, you weren't provided with anything other than basically a request to go and do your testing; is that correct?"). He was not provided with Mr. Wright's school records. RS1/248. Mr. Carmichael did not follow the standard defense practice of having Dr. Sesta first appointed as a confidential advisor before making the decision to disclose him because he did not understand the practice at the time:

> I don't believe I made the distinction at that point to make him a confidential advisor as opposed to just a consultant or a testifying witness at that date . . . . I might not even have made the distinction when I wrote the motion. I would say it would be my typical practice today to have doctors appointed initially as confidential advisors so

> that I can gain the tactical advantage of understanding what they would say before listing them as a testifying witness.

PC13/2221. This was deficient performance on its face.

Dr. Sesta did the defense no good at all. Dr. Sesta wound up testifying that in his professional opinion Mr. Wright has antisocial personality disorder (ASPD), RS1/242, an opinion that has no conceivable connection to the reason why he was appointed in the first place, and an opinion that Dr. Waldman "strongly disagreed" with. RS2/422. Relying on the WASI, a screening test that is specifically excluded by the rules established by the Agency for Persons with Disabilities, he flatly contradicted Dr. Waldman on whether Mr. Wright is mentally retarded, undermining the defense case for mental retardation. RS1/214. (*See* Dr. Kasper's critique above.)

When cross-examined, Sesta said in so many words that because Mr. Wright is an African-American the "normal" IQ was lower for him than would be the case for Caucasians. RS1/249-51. The implication the Court was left with was that Wright could not be eligible for relief under *Atkins*, or for the mitigating effect of intellectual disability that falls just short of the *Atkins* threshold, unless his IQ scores were down around 55 or so (i.e. two standard deviations below whatever is "normal" for that particular group). Mr. Carmichael did not see anything

objectionable in that line of testimony. PC13/2250-51.

In fact there are two rather glaring problems with it. The first should have been a red flag to defense attorney Carmichael in particular, namely that it was a blatant violation of equal protection. That line of thinking means that a member of one favored racial group can avail himself of *Atkins* protection while others cannot. The second is that it is science so bad that it verges on incompetence. As Dr. Kasper explained at the postconviction evidentiary hearing, standardized IQ tests are normed against the U.S. population and the appropriate documentation about that norming process is an integral part of the test itself. If Dr. Sesta did not know that he should not have been testifying about the subject at all.

With regard to Dr. Sesta's testimony about ASPD: ASPD is a recurring thorn in the side of any death penalty defense lawyer. This Court has repeatedly recognized that "antisocial personality disorder is a trait most jurors tend to look disfavorably upon." *Freeman v. State*, 858 So. 2d 319, 327 (Fla. 2003) quoted in *Jones v. State*, 998 So. 2d 573, 585 (Fla. 2008). Usually the defense is stuck with ASPD as a component of a mental health profile which contains other mitigation, thereby setting up a typical double edged sword dilemma. Mr. Carmichael's response to a question along these lines indicates that he was confused by or unfamiliar with this common situation:

> Q. Now, antisocial personality disorder is not terribly helpful in mitigation. Would you agree with that statement?
>
> A. I -- let me think about it. I think if you have an Axis I or Axis II diagnosis . . . as some sort of — you know, if you're looking at the Diagnostic Statistical Manual, if you're looking at the text revised edition and you're sitting there saying you've got an Axis I or Axis II, I think that's something that's relevant. I don't think it's necessarily helpful based on the fact pattern that we were dealing with, yes.

PC13/2257.

Dr. Sesta had nothing to offer the defense and should not have been called as a witness in the first place. At a minimum, he should have been appointed as a confidential advisor so he could have been "buried" if defense counsel decided not to use him. Dr. Sesta did not conduct any personality testing, but offered an unfavorable personality disorder diagnosis anyway. He was asked to evaluate Mr. Wright for closed head injury and found no evidence of it. In fact, he reported "no pathognomonic signs of cerebral signs of cerebral disease or injury,"[5] R5/849, and his testimony at the penalty phase suggested that he learned about the microcephaly only after his own examination:

> Q. A medical diagnosis which you later came to learn after your examination was done -- and pronounce it again for me. Micro?

---

[5] pathognomonic/pa·thog·no·mon·ic/ (path″ug-no-mon´ik) specifically distinctive or characteristic of a disease or pathologic condition; denoting a sign or symptom on which a diagnosis can be made.
Mr. Wright's microcephaly was pathognomonic.

A. It's microcephaly.

Q. Microcephaly can affect an ability and the capacity of an individual to think and reason?

A. Oh, absolutely.[6]

RS1/211. Dr. Sesta's testimony, presented first, prospectively undermined rather than supplemented that of Dr. Waldman. In this case there was only one edge to the double edged sword, and it was bad for the defendant.

Mr. Carmichael was asked why he called Dr. Sesta to testify at all:

Q. Dr. Sesta's testimony was that Mr. Wright was not retarded and that he had antisocial personality disorder, that he did not meet the statutory criteria for the mental mitigators, and that he disagreed with Dr. Waldman on many things. Why did you call Dr. Sesta at all?

A. I believe that there was value in the court hearing different disciplines coming up with different conclusions rather than having somebody testify solely to the same thing which was contrary to all of the prior findings that we'd had in the case. I thought it was appropriate for Dr. Sesta to tell us the truth about what his findings were, just like I thought it was appropriate for Dr. Waldman to say, I believe that truth, but these are my findings.

PC13/2263-64. That is not the strategy of an advocate.

The trial court rejected the defense claim of mental retardation as a bar to execution because the court concluded that the IQ scores reported during the

[6] Given Dr. Waldman's rather graphic presentation in court, where he stepped down and pointed out Wright's relevant facial and cranial features, not to mention what would be obvious to anyone, this testimony is surprising.

penalty phase and special mental retardation proceedings did not meet the relevant statutory criteria, namely an IQ score of 70 or below. The defense offered only a short (rather dispirited) argument at the mental retardation hearing. In its *Spencer* memorandum the defense argument was:

> Wright is borderline mentally retarded under the WAIS-IV and retarded by medical definition. The defense modifies its position regarding the statutory barring of the death penalty for those individual defined by § 921.137(2) as being retarded. The defense maintains its contention that the strict numeric definition (a score of under 70 on the WAIS-III) found in § 921.137 is not a sufficiently accurate indicia of retardation and it fails to take into account medical observations, medical testing and medical findings. Herein, the defendant scored consistently in the borderline retarded range when tested by psychologists, however, when medically tested he was found to suffer from fetal alcohol syndrome and a congenital brain defect called microcephaly. Testimony adduced by the only medical doctor to testify, Dr. Alan Waldman, clearly and strongly indicated that when viewed in conjunction with his borderline test scores that he did meet criteria medically to be labeled as retarded.
>
> The defense has adduced evidence which reasonably established that Wright is retarded, though not within the narrow definition promulgated by the Florida legislature. Therefore the court should view this in the light most favorable to the defendant and grant this matter tremendous mitigating weight.

R5/897. As nonstatutory mitigating circumstances the trial court found that Mr. Wright's low IQ affected his judgment and perceptions, and that he suffered from neurological impairments, which affected his impulse control and reasoning ability, but accorded these circumstances only "some weight." In reaching this

conclusion the Court reasoned in the sentencing order that that:

> The Court has heard extensive testimony regarding the Defendant's IQ, as measured by the standardized Wechsler Intelligence Scale Tests, Juvenile, Adult, Revised and Third Edition, administered a total of five times to the Defendant between 1991 and 2005, taken when the Defendant was age 9 or 10; age 16 years 6 months; age 22; and age 24. Per these tests, the Defendant's full scale IQ was 76 in 1991; 75 in 1997; 77 in 2003; 82 and 75 in separate tests conducted in 2005. From the testimony and evidence presented, each and every one of these scores reflects a lower IQ than average, albeit that none of these scores establishes mental retardation, as the Court has heard at a previous hearing.
>
> The Court is reasonably convinced of the existence of this non-statutory mitigating factor and gives it some weight.

R6/973. Mental retardation as a bar to execution was not raised on appeal.

In considering the various issues presented by this claim it is helpful to review the rationale of *Atkins* itself. Prior to *Atkins*, mental retardation, or intellectual disability as it is now termed, was considered a mitigating circumstance like other mitigating circumstances. The Respondents in *Atkins* argued that it should stay that way. The Supreme Court rejected that view and instead held that execution of the mentally retarded was constitutionally barred in all circumstances.

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe

> penalty," *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* [*Penry v. Lynaugh*, 492 U.S. 302 (1989)] demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S., at 323–325, 109 S. Ct. 2934. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Atkins, 536 U.S. at 320-21 (footnote omitted).

Analogously, in barring the death penalty for juvenile offenders, the Court reasoned:

> Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. Indeed, this possibility is the linchpin of one contention pressed by petitioner and his *amici.* They assert that even assuming the truth of the observations we have made about juveniles' diminished culpability in general, jurors nonetheless should be allowed to consider mitigating arguments related to youth on a case-by-case basis, and in some cases to impose the death penalty if justified. A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring

> imposition of the death penalty on any offender under 18 years of age.
>
> We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.

Roper v. Simmons, 543 U.S. 551, 572-73 (2005).

An ineffective assistance claim overlaps an *Atkins* claim in the sense that even if the evidence presented in postconviction does not quite convince the Court that a defendant's IQ is low enough to meet the statutory criteria for mental retardation as a bar to execution, it may nonetheless have sufficient mitigating impact that it warrants a finding of deficiency for failure to develop and present it. Moreover, the mitigating effect of evidence showing that Mr. Wright's IQ scores were closer to the *Atkins* threshold than the trial court found should have an exponentially greater effect on the Court's assessment of prejudice (as well as deficiency). This makes intuitive sense. The difference in culpability for a heinous crime committed by someone with an IQ of 103 versus someone with an IQ of 93 is negligible, whereas the difference between 70 and 72 may be life or death. The excerpts quoted above show that, in the Supreme Court's view, mitigating effect, that is, lowered culpability due to diminished intellectual

capacity, should increase exponentially as a defendant's low IQ is shown to approach the *Atkins* and *Roper v. Simmons* absolute bar threshold, where leaving the decision to a case by case approach is no longer sufficient to pass constitutional muster. It follows that counsel's obligations also increase exponentially, and that too only makes sense. If it is clear that a defendant may have at best marginally diminished capacity any deficiency in investigating and presenting evidence of a low IQ is unlikely to be prejudicial. If, as here, there is conflicting expert evidence about whether he is in fact legally retarded so as to preclude execution then the urgency of getting it right is obviously increased.

Another point to consider is that the legal implications of applying the Flynn Effect are, for now at least, different from application of the standard error of measurement (SEM). Fla. Stat. § 921.137(1) defines "significantly subaverage general intellectual functioning" as "performance that is **two or more** standard deviations **from the mean**." (emphasis added). The statute does not indicate what the actual number is that represents the mean score, nor does it provide an actual numerical cut-off. Neither does Fla. R. Crim. P. 3.203. Assuming that the mean score is 100, this Court in *Cherry* determined that the cut-off score for mental retardation is 70 or below. *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007). The mean score on every test, however, is not always 100. The Flynn Effect aside, the

mean score for the WISC-III is actually 102.35 due to a known sampling error. PC2/243-44. Adjusting IQ scores to account for the three point per decade upward drift of IQ scores known as the Flynn Effect provides a more accurate indication of an individual's IQ score compared to the mean, in keeping with the plain meaning of Fla. Stat. § 921.137(1).

In the recently decided *Hall v. State,* 109 So. 3d 704 (Fla. 2012), a 5-2 decision that reaffirmed the use of a strict cutoff of 70 or below rather than adopt a "range of scores" reporting method because of the SEM, this Court recited its language in *Cherry*:

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. . . . [T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes. . . .

Cherry, 959 So. 2d at 712-13.

Mr. Wright adopts the dissenting views in *Hall* with regard to the application of the SEM. Simply put, *Cherry* and *Hall* are bad science and bad math. The *Cherry* decision is in conflict with the definition of mental retardation as stated by the AAMR and DSM-IV; discounting the confidence interval and standard error of

measure is outside the standard of care in the psychology profession. On October 21, 2013, the United States Supreme Court granted certiorari in *Hall v. Florida* on the question of "[w]hether the Florida scheme for identifying mentally retarded defendants in capital cases violates *Atkins v. Virginia*." *Hall v. Florida*, 2013 U.S. LEXIS 7645; 2013 WL 3153535 (2013). That case is still pending before the United States Supreme Court, and may have important implications in the case at hand.

Application of the Flynn Effect does not implicate concerns about deference to the statutory text. It adjusts "the mean score on a standardized intelligence test." Only after the Flynn Effect correction is made to determine the mean based on when the test was normed and when it was administered to a subject in accordance with the appropriate instructions for administration of the test by its publisher is the standard deviation applied and the resulting number reported. Thus application of the Flynn Effect precisely follows the statute and the rule.

The latest comment from this Court on the Flynn Effect is *State v. Herring*, 76 So. 3d 891 (Fla. 2011). The comment came in a footnote which said only that "We make no judgment as to the efficacy of adjusting for the Flynn Effect because it is not relevant in this case." *Herring,* 76 So. 3d at n.4 (Fla. 2011), reh'g denied (Dec. 20, 2011), *cert. denied*, 133 S. Ct. 28 (2012). It is Mr. Wright's position that

in the interest of fairness and consistency, the Flynn Effect should be applied in *Atkins* proceedings in Florida, as it has been in other jurisdictions. *See Sasser v. Hobbs*, No. 02-3103 (8th Cir. Nov. 15, 2013) (vacating the district court's finding that the defendant is not mentally retarded under *Atkins* where his IQ scores were 79 and 83, but when adjusted for the Flynn Effect one of his scores was reduced to 75); *Brumfield v. Cain*, No. 04-787- JJB-CN, 2012 WL 602163, at 18 (M.D. La. Feb. 23, 2012) (finding the Flynn Effect to be "widely accepted as a fact in the scientific community); *United States v. Hardy*, 762 F. Supp. 2d, 849, 857 (E.D. La. 2010) ("[T]here is in fact published, peer-reviewed research supporting the existence of the Flynn Effect for the test Hardy took and the IQ range in which his score fell" and "correcting for the Flynn Effect is a 'best practice' in the field and therefore should be done."); *United States v. Lewis*, No. 1:08 CR 404, 2010 U.S. Dist. LEXIS 138375, at 29-32 (N.D. Ohio Dec. 23, 2010) (recognizing the adjustment for the Flynn Effect as "a best practice for an intellectual disability determination" and adjusting the defendant's IQ scores to account for the Flynn Effect during a pretrial determination of the defendant's *Atkins* claim); *United States v. Davis*, 611 F. Supp. 2d 472, 486 (D. Md. 2009) ("Corrections for the Flynn Effect . . . allows for fair comparisons between scores obtained at different times . . . In conclusion, the Court finds the defendant's Flynn Effect evidence both

relevant and persuasive, and will, as it should, consider the Flynn-adjusted scores in its evaluation of the defendant's intellectual functioning."); *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1280-81 (N.D. Ala. 2009), aff'd, 607 F.3d 749 (11th Cir. 2010) ("An evaluator may also consider the 'Flynn Effect,' a method that recognizes the fact that IQ test scores have been increasing over time. . . . Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field."); *Green v. Johnson*, No. CIVA 2:05 CV340, 2006 WL 3746138, at 45 (E.D. Va. Dec. 15, 2006) ("Considering all of the case law and evidence, this Court concludes that the Flynn Effect should be considered when determining whether Green's scores fall at least two standard deviations below the mean. There is sufficient evidence in the record to show the Flynn Effect is recognized throughout the profession."); *Hill v. Humphrey*, 662 F.3d 1335, 1373 n.15 (11th Cir. 2011) ("This circuit has recognized that the statistical phenomenon known as the Flynn Effect … can be applied by a test administrator to an individual's raw IQ test score when arriving at a final IQ score."); *Holladay v. Allen*, 555 F.3d 1346, 1350 n.4, 1358 (11th Cir. 2009) (crediting the psychologist that concluded the IQ scores needed to be adjusted for the Flynn Effect); *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (remanding for an evidentiary hearing in part because the district court "refused to consider relevant evidence, namely the Flynn Effect

evidence"); *Howell v. State*, No. W2009-02426-CCA-R3-PD, 2011 Tenn. Crim. App. LEXIS 447, at 36-39 (Tenn. Crim. App. June 14, 2011); *State v. Burke*, No. 04 AP-1234, 2005 WL 3557641, at 13 (Ohio App. Dec. 30, 2005) (holding that trial courts must consider accounting for the Flynn Effect but are not required to actually adjust for it); *People v. Superior Court*, 155 P.3d 259, 262, 263 n.4, 266 (Cal. 2007) (holding that the trial court did not err in its interpretation of the defendant's IQ scores, which included the trial court's acceptance of the Flynn Effect).

The Flynn Effect is mentioned nowhere in Mr. Wright's penalty phase/*Spencer* hearing or mental retardation hearing. In Mr. Wright's case, the application of the Flynn Effect is crucial: As Dr. Kasper testified during the postconviction evidentiary hearing, when Mr. Wright's IQ scores are corrected for the Flynn Effect, he has not one but three scores that are 70 or below, two of which were attained before the age of eighteen.[7] The additional lay witness testimony and Dr. Kasper's adaptive functioning assessment establish that Mr. Wright suffers from deficits in adaptive behavior. But for trial counsel's deficient performance at the penalty phase of his capital trial, that information would have been provided to the

[7] Although the circuit court mentions in its order that when adjusted for the Flynn Effect, only one of Mr. Wright's scores is **below** 70, RS16/2768-69, it is important to note that the cutoff is 70 or below, and not below 70, such that that a score of 70 would qualify for mental retardation under Fla. Stat. § 921.137 or *Cherry*.

court, and there is a reasonable probability that either the trial court would have found that Mr. Wright is mentally retarded and thus barred from execution under *Atkins*, 536 U.S. 304, Fla. Stat. § 921.137(1), Fla. Stat. (2008), and Fla. R. Crim. P. 3.203, or Mr. Wright would have received a life sentence based on the additional mitigation.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE OF MR. WRIGHT'S CAPITAL TRIAL WHEN THEY FAILED TO CHALLENGE EVIDENCE OFFERED IN AGGRAVATION.

Mr. Wright alleged in Claim VII of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance during the penalty phase of Mr. Wright's capital trial when they failed to challenge evidence offered in aggravation. PC8/1282-84. The circuit court held an evidentiary hearing on this claim, and found that Mr. Wright failed to establish either prong of *Strickland*. PC16, 2760-63. Mr. Wright seeks review of these findings.

Testimony Presented During the Penalty Phase

During the penalty phase trial, the State presented testimony from Walter Connelly and Preston Cassada for the purpose of proving the aggravating circumstance that Mr. Wright was previously convicted of a felony involving the

use or threat of violence to a person. Fla. Stat. § 921.141(5)(b). Walter Connelly, a corrections officer, was the victim of an aggravated battery while he was employed at Frostproof jail. RS1/141-48. Preston Cassada, a jail inmate, was the victim of an aggravated battery while he was incarcerated at the South County jail. RS1/159-62. The testimony that was offered went beyond showing prior convictions, and demonstrated violent propensity. The trial attorneys should have presented mitigating evidence to counter the damaging impact of this testimony, but they failed to do so.

Preston Cassada testified that he suffered a battery in Polk County jail on June 28, 2001 for which Mr. Wright and Brandon Gatlin were convicted. RS1/159-62. As a result of the battery, Mr. Cassada was knocked unconscious, hospitalized, and in a coma for thirty days. RS1/160. Mr. Cassada stated that he believed there were approximately five inmates involved in the battery. RS1/162. He further testified that he had no personal knowledge or actual memory of which individual battered him. RS1/162.

Officer Connelly testified to an altercation that he had with Mr. Wright on September 29, 2001. RS1/141-48. At the time, he was a jail deputy at the Polk County Jail in Frostproof. RS1/142. Officer Connelly elected to leave a co-worker and went to feed the inmates in the isolation cells. RS1/143. After arriving to Mr.

Wright's cell, Officer Connelly was "sucker punch[ed]" and knocked unconscious. RS1/143. A trustee later relayed to Officer Connelly that Mr. Wright repeatedly kicked Officer Connelly in the head after he fell to the floor. RS1/143. Officer Connelly was hospitalized for two or three days. RS1/145. As a result of his injuries, Officer Connelly retired from the Sheriff's Department. RS1/145.

Mitigation Presented in Postconviction

During the evidentiary hearing in postconviction proceedings, Mr. Wright presented two witnesses who provided the court with mitigating evidence regarding both the Connelly and Cassada incidents. Both witnesses, Dennis Day and Reginald Henry, were known to Mr. Wright's trial attorneys and would have been available to testify during the penalty phase proceedings.

Dennis Day met Mr. Wright while they were both in custody around 2000. PC10/1684. Mr. Day was incarcerated with Mr. Wright in both the South County and Annex jail facilities for approximately one year. PC10/1684. Mr. Day indicated that he was present during the incident where Preston Cassada was battered, although he did not personally observe the battery. PC10/1690-91. Mr. Day testified that he did not believe Mr. Wright had any involvement with Cassada's battery:

Mr. Cassada's room was right up above my room, and when I – when

> I heard the moaning and I jumped on the table and look, T – when I come out of my room, I can already see TJ standing, you know, in the day room area where we play cards at . . . And when I jumped up on the table and looked on the floor where [Mr. Cassada] was laying at, you know, people was standing around by the door, but I – didn't see [Mr. Wright] around Mr. Cassada room.

PC10/1691-92. As a result of the battery on Mr. Cassada, five prison inmates (including Mr. Wright, Mr. Day, Kevin Mitchell, Brandan Gatlin, and Michael Davis) were implicated and subsequently moved to a confinement facility at the South County jail. PC10/1691, 1705.

While he was placed in confinement for between 100 and 120 days, Mr. Day could not see into Mr. Wright's jail cell, but he could overhear Mr. Wright's interactions with Officer Connelly. PC10/1692. Officer Connelly treated Mr. Wright more harshly than he did the other inmates, and he would harass Mr. Wright every time he worked a shift in their confinement area. PC10/1693-94. "It will basically be arguments and, you know, just a lot of like bar – bar talking. Just one on the other side of the door, one can't get to the other, any kicking on the door and cursing and carrying on." PC10/1693. The harassment was continuous:

> Basically every time he came in and he worked, he would . . . always stop by the door and do something or start something to bring TJ to the door, bring him up on the door . . . and he would say something to him, knowing that he was easily, you know, to get mad, and then he'll bring him up on the door and then they'll – that's when they go to cursing and talking.

PC10/1694. Specifically, Officer Connelly would "mess" with Mr. Wright's food tray by taking his main course or his dessert off of the tray. PC10/1694. Further, Mr. Day testified that on the date of Officer Connelly's battery, the harassment also occurred as Officer Connelly "was talking about TJ's mom." PC10/1696.

Reginald Henry, an inmate housed with Mr. Wright during his solitary confinement in South County Jail, also testified about the constant harassment and verbal abuse that occurred between Officer Connelly and Mr. Wright. Unlike Dennis Day, Mr. Henry had a clear view of Mr. Wright's cell from his own jail cell. PC11/1816. Mr. Henry's cell was in front of Mr. Wright's cell for approximately 2.5 to 3 months. PC11/1826. Mr. Henry also noted that Officer Connelly treated Mr. Wright more harshly than the other inmates. PC11/1824. The harassment was constant, "[a]lmost every time, they were – it was something, because he always felt like Tavares was, you know, pulling some type of game or some stuff, playing or something . . . So the times that I did see them encounter each other, it was always a problem." PC11/1825. The harassment was mostly verbal as Officer Connelly attempted to get a rise out of Mr. Wright. Mr. Henry recalls "Officer Connelly specifically telling Tavares that his mother should have closed her legs at birth, he should never have been born." PC11/1818-19. While

Mr. Wright was already placed on suicide watch, Officer Connelly would say, "Go on kill yourself. Why you playing and wasting our time like this here?" PC11/1819. Further, Officer Connelly used racial slurs, referring to Mr. Wright as a "nigger." PC11/1819.

On the day of Officer Connelly's battery, Mr. Henry testified that Officer Connelly did not follow jail protocol when handing out the dinner trays and opened each inmate's door to hand the food tray over, rather than unlocking the flap on the door to place the tray through. PC11/1820. Further, Officer Connelly's behavior on that day consisted of not only verbal abuse, but also of physical abuse. PC11/1822. Mr. Henry stated, "[Officer] Connelly had an ink pen in his hand and was poking it in Tavares' face. When Tavares went to try to move the pen out his way, [Connelly] punched him." PC11/1822.

Both Mr. Day and Mr. Henry had contact with Mr. Wright's trial attorneys prior to trial. Mr. Day testified that he spoke with Mr. Wright's attorney, Byron Hileman, regarding his observations while being housed with Mr. Wright. PC11/1701. Further, Mr. Day and Mr. Henry both testified in the trial regarding the battery of Officer Connelly. PC10/1699; PC11/1818.

Deficient Performance

The United States Supreme Court has held that investigations into mitigating

evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524. The trial attorneys provided deficient performance under *Strickland* because they failed in their duty to present evidence during the penalty phase trial to mitigate the testimony provided by Walter Connelly and Preston Cassada. Trial counsel's performance in this case "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Mr. Hileman testified during the evidentiary hearing that he was aware of the harassment that was continuing between Officer Connelly and Mr. Wright before the battery to Officer Connelly ever occurred. Specifically, Mr. Hileman stated, "I do remember [Wright] describing at some point, and I'm not sure when it was but probably before the trial, that [Officer Connelly] had – how he had been provoked by this particular guard over a period of time and finally just blew up and – and the incident occurred." PC13/2141. Mr. Hileman was also the defense attorney for Mr. Wright during the Officer Connelly battery trial. When asked about presenting evidence regarding the continuous provocation and harassment during the battery trial, he noted, "Well, certainly I think provocation as a mitigating factor. It certainly wouldn't have been a defense, I don't think . . . I don't know that we really had a defense other than a reasonable doubt defense and

attacking the State's evidence." PC13/2142. Further, Mr. Hileman described cross-examining Officer Connelly "lightly" and being limited in his ability to cross him at all due to the sympathetic nature of Officer Connelly's situation in front of a jury. PC13/2142-43.

While Mr. Hileman was not responsible for cross-examining Officer Connelly during the penalty phase of Mr. Wright's murder trial, he stated that the strategy regarding Officer Connelly during penalty phase differed from the strategy during the battery trial itself. Attorney Hileman stated he did not want Officer Connelly cross-examined as intently as he was during the battery trial "because that had already been explored", and it was not successful in front of a jury. PC13/2144. However, when questioned about the strategy of presenting the mitigating evidence of Officer Connelly's harassment of Mr. Wright during the penalty phase, where no jury was present, he stated: "I'm not suggesting that there's any harm [in presenting the evidence]. I see very little profit in doing so unless the provocation were very extreme. And as I recall, it was not and certainly not – it wasn't physical provocation . . . It was more taunting and, you know, playing games with people." PC13/2145. Specifically, Mr. Hileman stated:

> I think those questions, or some of them at least, were asked of Officer Connelly in cross-examination to try to give the jury a flavor of the fact that this was not an unprovoked attack, that there was some

> reason to understand why it may have occurred, not a defense, but, you know, it's ameliorating to some degree. I don't recall whether any decision was made to do or not do that again in the penalty phase. If it was done, it was done. If it wasn't, it wasn't. I don't recall any discussion of it. And I'll tell you, very frankly, I see it as minimal mitigation. I'm not suggesting to you there would have been anything wrong with presenting it, but, I mean, you can't really justify a guard being beat half to death unless he's physically attacking the inmate, and that was not the situation. That was taunting, this was certainly improper behavior, but not of the degree that I think is mitigating.

PC13/2147.

Unlike Mr. Hileman, Mr. Carmichael testified at the evidentiary hearing that he had no recollection regarding the evidence offered during penalty phase about the batteries of Mr. Cassada or Officer Connelly. PC13/2245. Mr. Carmichael further stated that he had no memory regarding what strategic decisions, if any, were made during the penalty phase regarding these two aggravators. PC13/2245. Even though Mr. Carmichael was designated as the second chair attorney during Mr. Wright's trial, he indicated that ultimately the "mitigation is my responsibility . . . Buck stops here when it comes to any mitigation-related issues." PC13/2235. Mr. Carmichael, however, did recall that on more than one occasion Mr. Wright had asked to be moved from the Frostproof jail due to his continued "provocation and taunts." PC13/2244.

Prejudice

The defense attorneys' failure to present any sort of mitigating evidence

regarding the batteries of Mr. Cassada or Officer Connelly during the penalty phase greatly prejudiced Mr. Wright. The circuit court in its order denying relief found that the testimony provided by Mr. Day and Mr. Henry would have been of "minimal usefulness", in part because the aggravating factor of prior violent felony convictions included contemporaneous convictions for first degree murder, carjacking, kidnapping, and robbery with a firearm. PC16/2762-63. However, the trial court relied heavily on these batteries in its sentencing order as aggravators. The court noted that both batteries were "brutal" and gave each battery "great weight" during its consideration. R6/965-66. Certainly, when one considers whether to sentence a defendant to life in prison or the death penalty, that individual's conduct in prison is especially relevant. The testimony presented during post-conviction could have helped the trial court place the prior battery convictions in context, and would have mitigated these serious aggravators.

The defense attorneys failed to present any evidence to mitigate Mr. Cassada's battery. As noted above, the defense attorneys could have presented evidence during the penalty phase that five other inmates were implicated in the attack, several of whom were later determined to be falsely accused, as only two inmates were convicted of the crime. Although Mr. Cassada testified during penalty phase that he does not recall who actually struck him, this testimony could

have been further collaborated with Mr. Day's testimony that Mr. Wright's position in the jail cell immediately after the attack led him to believe that Mr. Wright was not involved with the incident at all. Testimony regarding the number of inmates accused, coupled with Mr. Day's recollection of events would have mitigated this aggravator.

Further, the defense attorneys failed to present any evidence to mitigate the aggravator attributed to Officer Connelly's battery. Defense counsel failed to provide evidence to demonstrate the verbal abuse Mr. Wright was suffering by Officer Connelly, as well as Mr. Wright's repeated requests to be moved due to this abuse. As noted previously, much evidence existed at the time of the penalty phase to establish that Officer Connelly's battery was not unprovoked, but rather the result of weeks of verbal harassment. Both Mr. Day and Mr. Henry testified that Officer Connelly treated Mr. Wright more harshly than the rest of the inmates. Mr. Wright was subjected to racial epithets, adulteration of his food, and verbal abuse. The verbal harassment continued every time Officer Connelly was working and even occurred while Mr. Wright was on suicide watch. Mr. Henry testified that on the day of the attack, Officer Connelly was not following jail protocol, physically poked Mr. Wright's face with a pen, and threw the first punch. Defense counsel was aware of the abuse that was occurring as both Attorney Hileman and

Carmichael testified to Mr. Wright's request to be moved due to taunting and provocation. Attorney Hileman specifically noted that presentation of any such mitigating evidence would have been, in his view, minimal due to the brutal nature of the attack. While the extent of Officer Connelley's injuries are not in question, defense counsels' utter lack of mitigation to the battery left the trial court with one sided testimony of an unprovoked and brutal attack, rather than the culmination of weeks of verbal abuse. Even though this evidence would not have relieved Mr. Wright of responsibility for Officer Connelly's battery, the testimony would have placed the attack in the correct context as a continuous abusive situation between Officer Connelly and Mr. Wright, and it would have rendered Officer Connelley a much less sympathetic witness.

Defense counsel was aware of Mr. Day and Mr. Henry as potential witnesses for the penalty phase. Mr. Day testified that he had contact with Mr. Wright's attorney and testified in Mr. Cassada's battery trial. Further, Mr. Henry testified in Officer Connelly's battery trial. Both Mr. Cassada and Officer Connelly's trials occurred prior to Mr. Wright's penalty phase trial. In each of the three trials, Mr. Wright was represented by the same defense team – Attorney Hileman and Carmichael. Both men could have been called to testify for the defendant, but no effort was made to do so. It was ineffective not to provide the court with witnesses

who could have ameliorated the effect of the damaging testimony regarding the batteries to Mr. Cassada and Officer Connelly. Since the trial court gave "great weight" to these aggravators, trial counsel's failure to present any mitigating evidence concerning this aggravator prejudiced Mr. Wright.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE WHEN THEY FAILED TO IMPEACH STATE WITNESS WESLEY DURANT.

Mr. Wright alleged in Claim VI of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance by failing to impeach State witness Wesley Durant. PC8/1274-79. The circuit court held an evidentiary hearing on this claim, and found that Mr. Wright failed to establish either prong of *Strickland*. PC16/2756-59. Mr. Wright seeks review of these findings.

Testimony Presented During the Trial

During the guilt phase trial, the State presented Wesley Durant, a state prisoner who had been convicted of ten felonies and two petit thefts. R26/3719. He testified on behalf of the State in Mr. Wright's final trial, as well as the two previous mistrials. R26/3718-70. Mr. Durant was an inmate at the Polk County Jail during the spring and summer of 2000. R26/3719-20. As a trustee, Mr.

Durant worked as a barber. R26/3720. Mr. Durant testified he met Mr. Wright twice during this time, as he was assigned to cut Mr. Wright's hair. R26/3721. The first time he cut Mr. Wright's hair, they spoke for approximately thirty minutes and Mr. Wright allegedly confessed to the murders. R26/3723-28. Specifically, Mr. Durant stated: "[Mr. Wright] said. . . they had took these people out to this grove out in north . . . part of Polk County somewhere, and they met them at this Winn Dixie or something like that and they didn't cooperate and went and took them out there and did what they had to do." R26/3725.

Further, Mr. Durant noted that while Mr. Wright was confessing to the murders, Corrections Officer Faulkner overheard their conversation and encouraged Mr. Durant to report the information to the authorities. R26/3726. Only after Officer Faulkner persuaded Mr. Durant did he agree to notify law enforcement regarding the alleged confession, specifically stating:

> Well, the officer, Faulkner, the one that was sitting down there and also overheard the conversation, and after he put him back in the cell, he said that I think that you need to talk to the detective. And I say, for what, Officer Faulkner. He say, well, you being a trustee and all and – and, you know, and this – this is a fresh case, he said, you can lose – lose your position, you know . . . Well, Officer Faulkner is a – is also a correctional officer at the jailhouse, and he called Detective Davis and told Detective Davis that he overheard this inmate, you know, trustee and stuff like that. That's what really got . . . the ball rolling.

R26/3728-29.

Testimony Presented in Postconviction

During the postconviction evidentiary hearing, Mr. Wright presented testimony from retired Polk County Corrections Officer Norman Faulkner and prison inmate James Blake. Both witnesses' testimony impeached Mr. Durant's trial testimony and essentially calls into question the existence of Mr. Wright's alleged confession. Officer Faulkner and James Blake were both known to Mr. Wright's trial attorneys and would have been willing to testify during the trial proceedings.

Norman Faulkner worked as a corrections officer at the Polk County Jail from 1989 to 2009. PC10/1711. While in that capacity, Officer Faulkner came into regular contact with both Tavares Wright and Wesley Durant. PC10/1712. In contradiction to Mr. Durant's trial testimony, Officer Faulkner stated that he has "never been in the direct presence of Durant cutting Mr. Wright's hair." PC10/1725. Officer Faulkner testified he never encouraged Mr. Durant to speak with a detective nor did he ever make contact with law enforcement regarding any conversation between Mr. Wright and Mr. Durant. PC10/1722. If Officer Faulkner had personally heard Mr. Wright confess to a crime, he would be required to follow jail protocol and file a written report. PC10/1719. Specifically, Officer

Faulkner stated:

> It's – if I heard anything, whether I believed it to be true, whether I believed it to be bogus, I wrote a report. I wrote a report on one inmate that I believe jokingly said he was going to – if he was out, he'd shoot the president. I did not play at the sheriff's office. If I heard something, I wrote a report. It did not matter whether it was good, bad, or indifferent.

PC10/1721.

Further, no one from the State Attorney's office or Mr. Wright's defense team ever contacted Officer Faulkner regarding his role in allegedly overhearing the confession. PC11/1719-20. "[I]f Mr. Durant had mentioned to the prosecutor that I had heard something, I would have honestly expected them to come talk to me about it, because . . . an officer's word goes a whole lot farther than an inmate's." PC10/1719-20.

In the alternative, if Mr. Durant had approached Officer Faulkner regarding Mr. Wright's alleged confession, jail protocol would have prevented Officer Faulkner from discussing the incident with Mr. Durant. PC10/1718. Specifically, Officer Faulkner stated "if [Mr. Durant] had have said I need to speak to someone . . . I would have gotten him a piece of paper that asks to speak to an investigator. I would not have even asked him what was going on. If I'd have heard Mr. Wright say anything, I would have written a report." PC10/1718.

James Blake is Wesley Durant's nephew and has known Mr. Durant all of

his life. PC10/1747. Mr. Blake stated he and Mr. Durant know many of the same people and lived in the same community as one another. PC10/1747. Mr. Blake testified to Mr. Durant's reputation for honesty in the community and stated: "He's not a trustworthy person. Can't be trusted far as you could see him." PC10/1747-48. Further, Mr. Durant stated that Mr. Blake also has a reputation in the community for being a snitch. PC10/1748.

Officer Faulkner had no contact with Mr. Wright's defense team, attorneys or investigators. PC10/1719. However, Officer Faulkner stated he would have been willing to testify at the trial everything he testified to at the evidentiary hearing. PC10/1719. James Blake did have contact with Mr. Wright's attorneys prior to trial, but he was never called to testify in either the trial or the penalty phase proceedings. PC10/1750. Mr. Blake testified at the evidentiary hearing that he would have been willing to provide the same testimony at Mr. Wright's trial. PC10/1750.

Deficient Performance

Trial counsel's failure to impeach a key State witness is the type of representation that may fall outside the range of professionally competent assistance contemplated by the United States Supreme Court. *See, e.g., Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. N.Y. 2001); *Gonzalez-Soberal v. United*

States, 244 F.3d 273 (1st Cir. P.R. 2001); *Tyler v. State*, 793 So. 2d 137 (Fla. 2d D.C.A. 2001); *Kegler v. State*, 712 So. 2d 1167 (Fla. 2d D.C.A. 1998). That is so because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" and a "cross-examiner has traditionally been allowed to impeach, i.e., discredit [a] witness." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In the case at hand, trial counsel provided deficient performance under *Strickland* because they failed to present evidence during Mr. Wright's trial to impeach Mr. Durant's testimony. Trial counsel's performance in this case "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Both Officer Faulkner and James Blake were available to testify at Mr. Wright's trial, and if called to testify, both would have impeached Mr. Durant's testimony. Trial counsel provided deficient performance by failing to speak with these witnesses and for failing to call both to rebut Mr. Durant's testimony.

Mr. Hileman testified during the evidentiary hearing: "I remember [Mr. Durant] said at some point that [Officer Faulkner] overheard part of this conversation. My understanding of the . . . facts of the matter were that the officer was present and apparently the conversation was reported to him, but he did not actually hear any . . . admissions made by the defendant." PC13/2155. Thus, Mr.

Hileman chose not to pursue Officer Faulkner as a witness because he "came to the conclusion that the officer could not come in and testify that he heard Mr. Wright make the statements that Mr. Durant said he made." PC13/2175-76. He came to this conclusion without ever personally speaking with Officer Faulkner. PC3/434. Mr. Hileman agreed that if he were aware of Officer Faulkner's testimony as presented during the evidentiary hearing, he would have "absolutely" used it to attack Mr. Durant's testimony. PC13/2157. He noted that such testimony "would have been a great concern to me obviously, and I would have certainly explored it and deposed [Officer Faulkner] and investigated that." PC13/2175-76.

Mr. Carmichael stated during the evidentiary hearing he had no personal recollection regarding Mr. Durant's testimony as it referred to Officer Faulkner. PC13/2246. However, he "never felt it necessary" to contact Officer Faulkner to impeach Mr. Durant's testimony. PC13/2247. Mr. Carmichael thought the cross-examination of Mr. Durant was "easy" and sufficient impeachment. PC13/2280. He noted that he believed "Mr. Durant's testimony was helpful to our case." PC13/2280. Specifically, he "felt Wesley Durant was such an easy target and so incredible, I wasn't going to look for anybody to impeach him." PC13/2247.

Prejudice

Mr. Wright was prejudiced under *Strickland* as a result of trial counsels'

deficient performance for failing to call Officer Faulkner and James Blake to impeach Mr. Durant's testimony. Aside from Mr. Wright's alleged confessions, much of the evidence against Mr. Wright was circumstantial. Mr. Durant's testimony was very damaging to Mr. Wright, and it may have been the deciding factor in the jury's guilty verdict. The State also stressed the importance of this "confession" during their closing arguments.[8] Mr. Wright testified during the guilt phase that he never met Mr. Durant, and he denied making a confession to Mr. Durant. R30/4563, 4616. Mr. Wright's trial attorney argued during the defense closing argument that Mr. Durant was not credible. R31/4812.

Despite the importance of this alleged confession to the State's case, the trial attorneys failed in their duty to properly impeach Mr. Durant's trial testimony. Even though Mr. Durant asserted that Officer Faulkner overheard his conversation with Mr. Wright, Officer Faulkner was never contacted by defense counsel nor called to testify during any of Mr. Wright's three trials. If counsel had contacted Officer Faulkner, they would have discovered that he did not hear any conversation

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[8]And Mr. Durant, he didn't ask for anything either. He just told the cops this is what the guy told me. Both of these people [Mr. Durant and Mr. Robinson] sought the police out. The police didn't go down to the jail and start interviewing every inmate to see what T.J. Wright told them. This isn't some vendetta against T.J. Wright. This isn't some vendetta against T.J. Wright. This is just where the evidence leads.

R32/4836.

between Mr. Durant and Mr. Wright, nor did he assist Mr. Durant in contacting law enforcement regarding the confession. Officer Faulkner, who has no motive to lie, would have had more credibility in front of a jury than a ten-time convicted felon. His testimony would have also supported the defense's argument that Mr. Durant was not credible, as well as Mr. Wright's testimony that he did not confess to Mr. Durant. Further, trial counsel's failure to call James Blake as a witness also prejudiced Mr. Wright as Mr. Blake could have testified as to Mr. Durant's reputation in the community for dishonesty. There is a reasonable probability that if Mr. Durant was properly impeached by Officer Faulkner and Mr. Blake, the jury would have completely discredited any testimony regarding this alleged confession.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT MR. WRIGHT RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO IMPEACH A JAILHOUSE INFORMANT WHO INDICATED THAT HE WAS GOING TO COMMIT PERJURY.

Mr. Wright alleged in Claim V of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance by failing to impeach State witness Byron Robinson, a jailhouse informant who indicated that he was going to commit perjury. PC8/1273-74. The circuit court held an evidentiary hearing on

this claim, and found that Mr. Wright failed to establish either prong of *Strickland*. PC16/2754-56. Mr. Wright seeks review of these findings.

Testimony Presented During the Trial

During the guilt phase trial, the State presented ten-time convicted felon Byron Robinson, who testified about statements Mr. Wright allegedly made to him regarding the murders. R27/4186-4231. Mr. Robinson testified that he first met Mr. Wright in 2000 when they were both inmates at the Polk County Jail. R28/4186-87. They were housed together in max dorm for one to two months, and they shared a cell for part of that time. R28/4188-89. Mr. Robinson testified that he first learned about Mr. Wright's case from Mr. Wright's co-defendant, Samuel Pitts, with whom he shared a holding cell on one occasion. R28/4190, 4208. According to Mr. Robinson, although Mr. Wright did not speak with him about his case when Mr. Robinson first asked him about it, over time Mr. Wright began to open up. R28/4191-93. He testified that Mr. Wright told him that he and Mr. Pitts were together at McDonald's when they encountered two white men in a car with Virginia license plates. R28/4194. Intending to steal from these men, Mr. Wright and Mr. Pitts entered the car using Mr. Wright's gun to control the men. R28/4194-95. Mr. Wright and Mr. Pitts drove the men against their will to Mr. Pitts' house to pick up clothing and a shotgun. R28/4194-95. When the men told

them they did not have anything, Mr. Wright and Mr. Pitts took them to the orange grove, where Mr. Wright proceeded to shoot both of the men. R28/4197-4201. According to Mr. Robinson, Mr. Wright told him that he, not Mr. Pitts, fired all of the shots, which was consistent with what Mr. Pitts told him previously. R28/4201.

Mr. Robinson further testified that he called somebody in Tallahassee to report what Mr. Wright told him. R28/4203. When the prosecutor asked him why he did this, he stated, "I just did." R28/4203.

Testimony Presented in Postconviction

During the postconviction evidentiary hearing, Mr. Wright presented testimony from Jerry Hopkins, Dahrol James, and Shenard Dumas, inmates who were housed in the max dorm at the Polk County Jail with Mr. Wright and Mr. Robinson while Mr. Wright was awaiting trial. The testimony of these witnesses impeached Mr. Robinson's trial testimony and essentially calls into question the existence of Mr. Wright's alleged confession. These witnesses would have been willing to testify during the trial proceedings. PC11/1771, 1806-07, 1844.

Jerry Hopkins, Dahrol James, and Shenard Dumas were all familiar with the phrase, "jumping into somebody's case." PC11/1768, 1803, 1841. Mr. James testified that jumping into somebody's case was "help[ing] yourself out of the

trouble that you're in by [finding] somebody that's in worse trouble and finding out about their case and, I guess, calling the State or calling the prosecutor." PC11/1804. Mr. Hopkins described jumping into somebody's case as "trying to learn someone's case, whether you read it or read they [sic] case law, and turn around and make a statement saying that they know about they [sic] case . . ." PC11/1768. According to Mr. Hopkins, jumping into somebody's case basically means that the person is going to lie. PC11/1778.

There are several ways that an inmate who was looking to jump into someone's case could learn about the other person's case. Each inmate had a locker in his cell, which contained his legal work. PC11/1768. These lockers were not locked, and whenever an inmate was away from his cell, other inmates could access his locker and read about his case. PC11/1768-69. There were also newspapers and a television at the jail. PC11/1769, 1802, 1843. Mr. Wright's case received a lot of media attention, and it was constantly in the news. PC11/1769. It was clear that everyone in the jail knew what Mr. Wright was in jail for. PC11/1802.

Jerry Hopkins testified that Mr. Robinson was a known jailhouse snitch who always bragged about getting in other people's cases. PC11/1767-68. He overhead Mr. Robinson saying, "I got to do what I got to do to get out of here and

get my time back" and that he was going to jump into somebody's case. PC11/1768. He recalled plenty of times when Mr. Robinson said that he was going to lie in court. PC11/1778. He overheard Mr. Robinson tell another inmate that he was going to jump into Mr. Wright's case and lie about Mr. Wright's case. PC11/1769, 1779. Mr. Hopkins told Mr. Wright prior to his trial that Mr. Robinson was trying to get into his case, and that he should speak with his lawyer. PC11/1782-83.

Dahrol James testified that Mr. Robinson approached him at the Polk County Jail about jumping into somebody's case:

> Byron Robinson came into the dorm and he knew me from a situation in federal, and we was on the top tier and he talked to me. He was like he was trying to help his self and he was looking for a case or a situation where he could help his self, and I let him know how I feel. I just told him at the time, you know what I mean, that I wasn't getting caught up in that, and at the time I wasn't. You know what I mean? And I kind of like – he still tried to have a conversation with me from then, but I kind of like distant myself. But I went and let everyone know. I let everyone in the dorm know.

PC11/1805. Mr. James told Mr. Wright about his conversation with Mr. Robinson, but he did not worry about Mr. Wright speaking with Mr. Robinson "because he never talked to nobody about his case." PC11/1805.

Shenard Dumas overheard Mr. Robinson telling another inmate that he wanted to jump into Mr. Wright's case, and trying to get the other inmate to jump

into Mr. Wright's case with him. PC11/1841, 1843. He said that he would do whatever it takes to get his time cut. PC11/1842. Mr. Dumas recalled seeing Mr. Robinson watch a news program about Mr. Wright, and Mr. Robinson had a little smirk on his face. PC11/1843.

Deficient Performance

As Mr. Wright explained in Argument III above, trial counsel's failure to impeach a key State witness can be the basis for an ineffective assistance of counsel claim. In the case at hand, the trial attorneys provided deficient performance under *Strickland* because they failed to present evidence during Mr. Wright's trial to impeach Mr. Robinson's testimony. Mr. Hopkins, Mr. James, and Mr. Dumas were available to testify at Mr. Wright's trial. Trial counsel provided deficient performance by failing to call them as witnesses during the guilt phase to rebut Mr. Robinson's testimony.

Mr. Hileman testified at the evidentiary hearing that he vaguely recalled a colloquy during trial about the defense team's decision not to call known witnesses. PC13/2150. Although it no longer applies, the basic rule at the time of trial was that the defense was permitted to have both opening and rebuttal closing argument if it presented no evidence other than the testimony of the defendant [a.k.a. "the sandwich"]. PC13/2151. On November 10, 2004, prior to resting, Mr.

Hileman announced his intention not to call any defense witnesses, including Dahrol James, Shenard Dumas, and Jerry Hopkins, whose names were disclosed to the State days earlier, and who had "relevant information". R30/4502, 4640-41. He explained to the trial court his reason for not calling these witnesses:

> My client has indicated that he does not wish to present any further witnesses, thus, preserving first and last closing . . . We have discussed that with him. We have pointed out the advantages and disadvantages, and he's, I think, determined that that's clearly his opinion.
>
> I do want to make it clear on the record that we submitted supplemental discovery responses to demand for discovery on several witnesses here in the last few days. Those witnesses were new to us, did have relevant information . . .

R30/4640-41.

Mr. Hileman agreed that, depending on what a witness had to say, deciding not to call a defense witness in order to preserve the sandwich may be a reasonable strategic decision. PC13/2151; *See Van Poyck v. State,* 694 So. 2d 686, 697 (Fla. 1997) (concluding that there were tactical reasons for limiting the presentation of evidence that might indicate another person was the triggerman, such as losing the opportunity to give two closing arguments at the guilt phase). The circuit court in its order denying relief found that Mr. Hileman made a tactical decision that Mr. Wright was apparently in agreement with not to call these witnesses to impeach Mr. Robinson so that he could have first and last closing argument. PC16/2756.

In this case, however, counsel's decision not to call any witnesses in order to preserve the sandwich was not a reasonable strategic decision under *Strickland* because it was based on an incomplete investigation. As Mr. Wright discusses in Argument III above, Mr. Hileman agreed at the evidentiary hearing that if he were aware of Officer Faulkner's testimony as presented during the evidentiary hearing, he would have "absolutely" used it to attack Mr. Durant's testimony. PC13/2157. If trial counsel presented Officer Faulkner, they would have lost first and last closing, leaving trial counsel with no reason not to call Mr. Hopkins, Mr. James, and Mr. Dumas to impeach Mr. Robinson.

Prejudice

Mr. Wright was prejudiced under *Strickland* as a result of trial counsels' deficient performance for failing to call Mr. Hopkins, Mr. James, and Mr. Dumas to impeach Mr. Robinson's testimony. The State argued during its closing that Mr. Durant had nothing to gain by testifying in this case, R31/4835; R32/4836; a far cry from the desires Mr. Robinson expressed to his fellow inmates about wanting to "jump into somebody's case" and doing "what I got to do to get out of here and get my time back." The testimony that was presented at the evidentiary hearing would have bolstered defense counsel's argument at trial that Mr. Robinson was hoping to gain something for himself by testifying against Mr. Wright. R32/4812.

There is a reasonable probability that if trial counsel had presented the witnesses that were presented during postconviction to impeach Mr. Robinson and Mr. Durant, the jury would not have convicted Mr. Wright of first degree murder.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S IMPROPER ARGUMENT REGARDING MR. WRIGHT'S PROPENSITY TO COMMIT VIOLENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Wright alleged in Claim I of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance under *Strickland* by failing to object to the prosecutor's improper argument regarding Mr. Wright's propensity to commit violence. PC8/1257-61. The circuit court summarily denied this claim, finding that "counsel was deficient in not objecting to the prosecutor's comments during closing arguments", but that Mr. Wright was not able to meet the prejudice prong of Strickland. PC16/2743-48. Mr. Wright seeks review of these findings.

In closing argument, the prosecutor made numerous unobjected-to comments about Mr. Wright that crossed the line from comment on what the trial court had earlier decided was permissible inextricably intertwined evidence of other crimes or bad acts into assertions about Mr. Wright's propensity for violence and bad character. This was plainly noted by this court on direct appeal:

> We caution the State that some of the [prosecutor's] arguments appear to have crossed the line into asserting that Wright's propensity for violence proved that he committed the murders. For instance, the State maintained that Wright "doesn't have any problems shooting people." This theme was mentioned again in reference to the carjacking [*see* Taco Bell case, *infra*]. . . . Multiple statements that Wright "certain[ly] doesn't have any problems shooting people" lean toward an impermissible propensity-toward-violence argument.

Wright, 19 So. 3d at 293.

For example, the prosecutor emphasized Mr. Wright's alleged bad character during closing arguments, referring to Mr. Wright as a "hoodlum", a "murderer", "cold-blooded", and a "criminal" R31/4819, 4820, 4823, 4835; R32/4839, 4851. In addressing the jury on the Longfellow Boulevard drive-by shooting, the prosecutor responded to Mr. Wright's self-defense argument by saying:

> ***Well, that's crap***. It doesn't make any sense. He used the gun on Friday. He shot a man with it. ***He certain[ly] doesn't have any problems shooting people. He shot Carlos Coney .***

R31/4822-23 (emphasis added).

The prosecutor further argued propensity with these remarks:

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

R31/4824 (emphasis added).

> Carlos Coney and Bennie Joiner both know the guy. ***He shoots them, a man that he knows***. The man – the police come, he goes, "Yeah, who shot you?"

> "T.J. Wright shot me."
>
> Okay. It wasn't a mystery.
>
> So how's he going to refute that? Say he didn't shoot him? So he does the next best thing. Well, I thought maybe he was going for something.
>
> You know, you can't believe T.J. This guy wants you to believe that somebody that he has an acrimonious relationship with, they don't get along, he's driving by, sees the guy, has a gun in his car, and tells his buddy turn around and go back, I want to talk to him.
>
> Bull crap. ***He wanted to shoot him.*** That's why he told [the driver] to turn around. That's exactly what he did. ***He shot him.***

R31/4827-28 (emphasis added).

> But the second time, when you look at this map, after he dumped that car on Bolender Road and went and carjacked the Mexicans, he comes up to right there, and that's when he flees. ***That's where he shoots at Mr. Mendoza and the owner of the car*** who's since died in a car accident. ***That's where he shoots at him***.

R31/4829 (emphasis added).

On direct appeal in this case, this Court drew the following analogy with *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996):

> In *Consalvo* . . . this Court stated that inextricably intertwined evidence may be admissible for one purpose, yet inadmissible for another purpose. *See id.* at 813 (*citing* § 90.107, Fla. Stat. (1995)); *see also Parsons v. Motor Homes of Am., Inc.,* 465 So. 2d 1285, 1290 (Fla. 1st DCA 1985)). Admission of material evidence does not automatically mean that such evidence may be received for any probative value that it may have on any issue before the court. The State in *Consalvo* improperly argued a collateral burglary as

> collateral-crime evidence in closing argument. The State had highlighted the similarities between the collateral burglary and the charged burglary and murder. We held that the State presented improper argument because the collateral burglary was admitted as evidence inextricably intertwined with the murder, not as collateral-crime evidence. Thus, the State's use of evidence of the collateral burglary exceeded the scope of its admission, which was to establish the entire context out of which the criminal action occurred. Here, the evidence of collateral crimes was admitted for the limited purpose of tracing the possession of the firearm and the victim's vehicle to Wright and to map a geographical nexus of the murder. Multiple statements that Wright "certain[ly] doesn't have any problems shooting people" lean toward an impermissible propensity-toward-violence argument. *See* § 90.404(2)(a) (classifying as inadmissible evidence that is relevant solely to prove bad character or propensity). The State had received the benefit of each evidentiary ruling in that it was allowed to fully present its case, which included detailed testimony of the collateral crimes. However, when it cast Wright as a violent character who acts upon his desire to shoot people, the State abused this benefit by inappropriately taking it beyond the edge of propriety in contradiction of the evidence doctrine of Florida.

Wright, 19 So. 3d at 295.

Nevertheless, defense counsel's failure to make a timely objection precluded relief on direct appeal.

> Ultimately, in *Consalvo*, we determined that the prosecutor's improper comments constituted harmless error because no objection was raised to that usage throughout the trial, and the similarities between the two crimes did not become a feature of the trial. We reach the same result here. Defense counsel did not object to the State's use of the evidence during closing argument. As a general rule, failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000); *see also Poole v. State*, 997 So. 2d 382, 390 (Fla.

> 2008). The exception to this general rule is where the unpreserved comments rise to the level of fundamental error, which this Court has defined as "error that reaches down into the validity of the trial itself to the extent that a verdict of guilty . . . could not have been obtained without the assistance of the alleged error." *Brooks*, 762 So. 2d at 899 (*quoting McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999)). However, here it has been conceded that the prosecutor's closing argument was not so egregious as to be the basis for a challenge on appeal. In light of this concession and the lack of contemporaneous objection at the trial court level, we determine that the suspect comments during closing argument here were not properly preserved for appellate review and do not constitute fundamental error.

Id.

The last three sentences of this excerpt need to be read in context. Trial counsel provided deficient performance under *Strickland* when he failed to object to the egregious statements made by the prosecutor during closing arguments, thereby failing to preserve the issue for appellate review. It was the same attorney, Mr. Hileman, who failed to object at trial, who "conceded that the prosecutor's closing argument was not so egregious as to be the basis for the challenge on appeal." His "concession" was self-serving, and in fact was the only thing he could say other than simply admit his own ineffectiveness.

Furthermore, even if the prosecutor's improper argument did not rise to the level of fundamental error, Mr. Wright is now entitled to relief in the present postconviction proceeding under a claim of ineffective assistance. As the circuit court acknowledged in its order denying relief, "establishing prejudice under

Strickland is arguably not as stringent a standard as what constitutes fundamental error." PC16/2747-48. Florida's fundamental error doctrine allows the appellate court to review unpreserved claims on the merits only if the alleged errors "reach down into the validity of the trial itself to the extent that verdict could not have been obtained without the assistance of the error." *Derrick v. State*, 983 So. 2d 443, 463 (Fla. 2008). The fundamental error standard establishes a stringent "cannot do other" than reach a different result. In other words, to demonstrate fundamental error on direct appeal Mr. Wright would have had to prove that the verdict could only have been an acquittal if the prosecutor had not gotten away with his improper comments. The standard of prejudice for a postconviction ineffectiveness claim, on the other hand, is a "reasonable probability" of a different result. *Strickland,* 466 U.S. 668. It is a much more "defense-friendly" standard than fundamental error. In the case at hand, trial counsel's failure to object to the improper statements made by the prosecutor deprived Mr. Wright of a fair trial and undermined confidence in the outcome of the case. Mr. Wright is entitled to relief on this claim.

ARGUMENT VI

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT CUMULATIVE ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Wright alleged in Claim XVI of the motion for postconviction relief that cumulative error deprived Mr. Wright of his constitutional right to a fundamentally fair trial, which is guaranteed under the Sixth, Eighth, and Fourteenth Amendments. PC8/1315-16. *See Heath v. Jones*, 941 F. 2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F. 2d 605 (5th Cir. 1991). "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695-96. The cumulative effect of the number and types of errors involved in his trial (as discussed in Arguments I through V above), when considered as a whole, virtually dictated the sentence that he would receive. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). The circuit court denied this claim, stating that "the Court does not find that there is any error singularly or cumulatively which denied a fair trial to the Defendant." PC16/2776-77. Mr. Wright seeks review of these findings.

CONCLUSION

Based on the arguments in this brief and the record on appeal, the circuit court improperly denied Mr. Wright relief on his 3.851 motion. Mr. Wright

respectfully requests that this Honorable Court reverse the circuit court's order denying relief, vacate his conviction and sentence of death, and grant him a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT has been emailed to Stephen D. Ake, Assistant Attorney General, at capapp@myfloridalegal.com and Stephen.Ake@myfloridalegal.com and mailed via United States Postal Service to Tavares J. Wright, DOC # H10118, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 2nd day of January, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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