Filing # 11445749 Electronically Filed 03/18/2014 10:47:27 AM

RECEIVED, 3/18/2014 10:48:39, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

TAVARES J. WRIGHT,

Appellant,

v.

CASE NO. SC13-1213
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Tavares J. Wright, was charged on May 11, 2000, in a seven-count indictment with carjacking, two counts of kidnapping, two counts of robbery, and two counts of first degree premeditated murder of David and James Felker. (DAR V2:341-47).[1] At trial, Wright was represented by court-appointed attorneys Byron Hileman and David Carmichael. Trial by jury resulted in guilty verdicts on all counts. (DAR V4:707-15, V32:4971-78). Thereafter, on November 16, 2004, Wright moved to waive the jury recommendation of a sentence, and after full consideration, the court granted the request and the jury was discharged. (DAR V32:5047-5123).

On May 10, 2005, the trial court conducted a simultaneous penalty phase hearing and Spencer hearing. (DAR SV1-3, SV6:604-16). At the penalty phase, one of Wright's experts opined that Wright met the definition of mental retardation[2] contained in the

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[1] The State will cite to the postconviction record by referring to the volume number, and then the page number (PCR V__:___). The direct appeal record, consisting of 33 volumes, 3 volumes containing evidence, and 6 supplemental volumes, will be cited in the same manner and refer to the volume number (DAR V__:___) or the Supplemental Volume number (DAR SV__:___), and then the appropriate page number.

[2] The State recognizes the recent transition to replacing "mental retardation" with the term "intellectual disability," see, e.g. § 921.137, Fla. Stat. (2013), Fla. R. Crim. P. 3.203 (2013), but the State will continue to utilize the old terminology as this is the manner in which it has been referred to in the

Diagnostic and Statistical Manual (DSM). Subsequently, on September 22, 2005, after defense counsel filed a motion to bar the imposition of the death penalty, the court conducted a hearing for mental retardation and found that Wright was not mentally retarded. (DAR SV5:748-833).

On October 12, 2005, the trial court entered its sentencing order and findings supporting the imposition of a death sentence. (DAR V6:963-83). In sentencing Wright to death, the court found and gave "great weight" to three aggravating factors: cold, calculated, and premeditated (CCP) murders, avoiding arrest/witness elimination, and previously convicted of another capital felony and violent felonies.[3] (DAR V6:963-83, V15:2558-61). As to mitigation, the court found and gave some weight to the statutory mitigators that the capital felony was committed while Wright was under the influence of extreme mental or emotional disturbance; that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and Wright's age was nineteen at the time of the crimes. The trial court also considered some thirty-one non-

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postconviction proceedings below and in the applicable legal resources.

[3] The court found a fourth aggravating factor, pecuniary gain, but gave it no independent weight. (DAR V6:966).

statutory mitigating circumstances. (DAR V6:972-79). The court further reiterated that Wright is not mentally retarded (V6:963, 979).

In affirming Wright's convictions and sentences on direct appeal, this Court summarized the procedural history and facts as follows:

FACTS AND PROCEDURAL HISTORY

> With the aid of codefendant Samuel Pitts, Wright carjacked, kidnapped, robbed, and murdered David and James Felker while engaged in a three-day crime spree that spanned several areas in Central Florida. [FN2] During the crime spree, Wright was connected multiple times to a stolen pistol that matched the caliber of casings discovered at the scene of the murders. The trial court allowed the State to present evidence of these collateral acts to demonstrate the context in which the murders occurred and to explain Wright's possession of the murder weapon.
>
> > [FN2] Wright and Pitts were tried separately for the murders. Pitts was convicted of two counts of first-degree murder and other offenses related to this incident. He received sentences of life imprisonment for the murders.
>
> The spree began when Wright stole a pistol and a shotgun from the Shank family's residence in Lakeland on Thursday, April 20, 2000. On the Friday morning following the burglary, Wright used the pistol to commit a drive-by shooting in a neighborhood near the Shank residence. [FN3] That evening, Wright and Samuel Pitts abducted and Felker in Lakeland, drove '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.

[FN3] For the drive-by shooting, Wright was convicted of attempted second-degree murder and two counts of attempted felony murder.

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

The Crime Spree

The Shank Burglary: Thursday, April 20, 2000

On Thursday, April 20, 2000, Wright unlawfully entered a Lakeland home with two accomplices. Wright testified that they separated to search the house for items to steal. In one bedroom, Wright found and handled a plastic bank filled with money. One of his accomplices discovered a 12-gauge, bolt-action Mossberg shotgun and a loaded Bryco Arms .380 semi-automatic pistol with a nine-round clip in another bedroom. [FN4] The accomplice also found four shells for the shotgun in a dresser drawer. In exchange for marijuana, Wright obtained possession of the pistol from the accomplice.

[FN4] The stolen shotgun was never recovered. References to the firearm stolen from the Shank residence relate to the automatic pistol.

When Mark Shank returned home after work to discover his firearms missing, he notified the Polk County Sheriff's Office of the burglary. The Sheriff's Office lifted latent prints from the house, including several

from the plastic bank. An identification technician with the Sheriff's Office matched the latent palm print lifted from the plastic bank to Wright's palm print, confirming that Wright was inside the house where the Shank firearms were stolen. The following day, Wright used the stolen pistol during a drive-by shooting in a nearby Lakeland neighborhood.

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

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

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

> [FN5] However, a .380 handgun could not have fired the .25 caliber bullet. No explanation for the different shell casing was presented at trial, though it was implied by the defense that an exchange of gunfire occurred between Wright and

the victims. Coney and Joiner denied having a firearm at the Longfellow Boulevard residence.

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

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

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

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

Longfellow Boulevard drive-by shooting. When they arrived at the store, Wright exited the vehicle in the supermarket parking lot without further elaboration of the statement.

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

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

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

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

R.R., a juvenile who also lived at the Providence Reserve Apartments, testified that Wright informed him that Wright and Pitts drove the victims ten miles from the abduction site to a remote orange grove in Polk

City. When the victims insisted that they had nothing to give the assailants, Wright exited the car. One of the victims also exited, possibly by force, and Wright shot him. The other victim then exited, and Wright shot him as well. While one of the men continued to crawl and moan, Pitts retrieved the shotgun from the trunk and handed it to Wright, who then shot this victim in the head execution-style. Wright and Pitts abandoned the bodies and drove away in the Chrysler. [FN6]

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

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

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

The Winter Haven Carjacking:
Saturday, April 22, 2000

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

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

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

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

the murders.

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

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

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

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

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

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

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

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

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

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

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

A couple of days after the murders, Pitts attempted to sell the black bag that contained 's computer tools to a pawnshop. R.R. assisted his stepfather in securing

proceeds for the Polaroid camera from another pawnshop. The police had begun contacting pawnshops looking for the items missing from 's car and recovered the black computer bag and the pawn tickets, which led them to Pitts and R.R. [FN10] Further investigation established that three latent fingerprints from the black bag matched Wright's known fingerprints.

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

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

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

Law enforcement never recovered the shotgun used in these murders. However, a Florida Department of Law Enforcement firearms expert inspected the pistol

recovered from the mobile home park, which was identified as the pistol stolen from the Shank residence, and the firearms-related evidence collected from the various crime scenes. The expended projectiles from the pistol and those found in Wright's possession were of the same caliber but were different brands. Due to the damage sustained by some of the projectiles, the expert was unable to conclusively establish that the pistol stolen from the Shank residence fired all .380 caliber bullets discovered at the scene of the murders. However, the projectiles and the firearm were of the same caliber and displayed similar class characteristics. Five Federal .380 caliber casings discovered near the victims were positively identified as having been fired from the pistol. Thus, the stolen Shank pistol had likely been used in, and connected with, the Longfellow Boulevard drive-by shooting, the double murders of David and James Felker, and the Winter Haven carjacking.

The Trial

On October 18, 2004, Wright began his third trial on these charges. [FN11] 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.

> [FN11] The first trial began in March 2003, but resulted in a mistrial after the State's last rebuttal witness was presented. A second trial commenced in September 2003, but ended in mistrial because of a hung jury. Wright moved to recuse the trial judge after the second trial, because he had presided over four separate trials of Wright and sentenced Wright to the maximum penalty in each of the cases where Wright was convicted. These trials comprised the collateral crimes and prior felonies used in his capital trial. Consequently, a new trial judge presided over the proceedings.

During the combined penalty-phase and *Spencer* [FN1]

hearing, the State presented impact statements from the victims' families. The State introduced the certified judgments and sentences from the Longfellow Boulevard drive-by shooting and from two incidents that occurred while Wright was imprisoned prior to the capital trial. [FN13] The State also presented the testimony of the victims of the jail-related felonies. Defense counsel stipulated that the contemporaneous capital convictions supported the aggravating circumstance of a prior violent felony.

[FN12] *Spencer v. State*, 615 So.2d 688 (Fla.1993).

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

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 [FN14] or qualify as mentally retarded under section 921.137, Florida Statutes (2000). [FN15]

[FN14] A defendant may seek to show the mitigating circumstances that (1) under section 921.141(6)(b), Florida Statutes (2000), the "capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," or that (2) "the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law was

substantially impaired," pursuant to section 921.141(6)(f).

[FN15] Section 921.137(1) defines mental retardation for purposes of the statutory determination to be "significantly subaverage general intellectual functioning," which is "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities," with "deficits in adaptive behavior and manifested during the period from conception to age 18." Consistently, we have interpreted this definition to mean a defendant seeking exemption from execution must establish an intelligence quotient score of 70 or below. *See Phillips v. State*, 984 So.2d 503, 510 (Fla.2008).

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

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

Following this hearing, the trial court found four aggravating circumstances, three statutory mitigating circumstances, and several nonstatutory mitigating circumstances. [FN16] The trial court concluded that

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

> [FN16] The trial court found four aggravating circumstances: (1) Wright was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person (great weight); (2) Wright committed the felony for pecuniary gain (no weight); (3) Wright committed the homicide in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (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 v. State, 19 So. 3d 277, 283-91 (Fla. 2009).

This Court issued its mandate on September 24, 2009, and Wright did not seek certiorari review in the United States Supreme Court. On November 10, 2010, Wright filed a verified motion for postconviction relief.[4] (PCR V4-5:612-852). After conducting a case management conference, the court issued an order summarily denying Claims I, II, III, IX (subclaim 5 only), XIV, XV, and XVII, dismissing Claims XI and XII with leave to amend, and ordered that an evidentiary hearing was not necessary regarding Claim XIII.[5] The postconviction court granted Wright an evidentiary hearing on Claims IV, V, VI, VII, VIII, and subclaims 1-4 of Claim IX.[6] (PCR V7:1093-94).

On October 16-18, 2012, the trial court conducted an evidentiary hearing on Wright's postconviction claims and collateral counsel presented testimony from Wright's two trial attorneys, Byron Hileman and David Carmichael, clinical

[4] Wright filed an unverified motion on November 5, 2010, but did not file his verification until November 10, 2010.

[5] The court deferred ruling on Wright's cumulative error claim contained in Claim XVI until after hearing the evidence on his other claims.

[6] Wright waived Claim VII at the outset of the evidentiary hearing. (PCR V10:1677-78).

psychologist Dr. Mary Kasper, and seven lay witnesses.[7] Lead trial counsel Byron Hileman testified that he began his legal career in 1976 and started working on death penalty cases in 1977. During his career, Hileman handled over 70 first degree murder cases, including about 13-15 death penalty trials. (PCR V12:2097-104). In the instant case, Hileman was lead trial counsel in a number of Wright's cases spanning nearly a decade.[8] In the capital case, Hileman had co-counsel David Carmichael appointed and utilized investigator Rosalie Bolin in both the guilt and penalty phase investigation. (PCR V12:2112-16, 2121-22). Hileman testified that he brought Carmichael onto the case because he knew they had mental mitigation to offer at the penalty phase and Carmichael had a strong background with mental health issues. (PCR V12:2113). Hileman testified that he was involved in the penalty phase, but he delegated the majority of the work to Carmichael. (PCR V12:2119-21, V13:2129-31).

Prior to having co-counsel appointed, Hileman sought a

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[7] To the extent the lay witnesses' testimony is relevant to any issue, the State will address their testimony in the argument section.

[8] Hileman represented Wright in the non-capital, collateral crime cases (the Shank burglary, the Longfellow drive-by shooting, and the Taco Bell case), in the instant double homicide capital case (which went to trial three times), and in the cases stemming from Wright's actions while in prison (the Cassada and Officer Cooley aggravated battery cases). (PCR V12:2106-12, V12-13:2125-29, 2133).

psychological evaluation and neuropsychological screening done on Wright by Dr. Dolente. Dr. Dolente met with Wright, took his history and performed some testing, but did not find any supporting grounds to require a neuropsychological screening and told Hileman that he could not ethically do so. After Dr. Dolente refused to perform a neuropsychological screening, Hileman parted ways with him and sought other mental health experts with the assistance of co-counsel Carmichael's input. (PCR V12:2117-18).

Prior to the penalty phase, lead counsel Hileman learned that Wright wanted to waive the jury recommendation and proceed before the judge only due to his fear that the jury would recommend the death penalty. Hileman testified that he was not in favor of his client's decision but he fully discussed the pros and cons with Wright before the decision was made. (PCR V13:2131-32). At the penalty phase/Spencer hearing and again at the mental retardation hearing, Carmichael handled the questioning of the mental expert witnesses.

Collateral counsel questioned lead counsel Hileman on the case surrounding Wright's brutal attack of Correctional Officer Connelly.[9] Hileman recalled that he and Carmichael represented

[9] Hileman testified that they introduced evidence at that non-capital trial that the officers had provoked Wright and that was what precipitated the attack. However, because the provocation

Wright at the non-capital case involving the officer and that the cross-examination at that trial was "not terribly successful." (PCR V13:2144). In the instant case, Carmichael cross-examined Officer Connelly when he testified at the penalty phase in support of the aggravating factor that Wright had been previously convicted of a violent felony.[10] (PCR V13:2140-45). Hileman was aware that Wright had complained that he was being provoked by the jail guards and that a fellow inmate, Reginald Henry, claimed to have witnessed Officer Connelly provoking Wright, but Hileman testified that there was "very little profit" in cross-examining Officer Connelly at the penalty phase because the taunting was non-physical, was not very severe, and constituted only "minimal mitigation." (PCR V13:2140-47). Hileman acknowledged that he could not recall if he and Carmichael had specifically discussed presenting evidence of the alleged provocation by Officer Connelly at the penalty phase,

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was non-physical, it did not "justify a guard being beat half to death." (PCR V13:2147).

[10] In sentencing Wright to death, the trial court found this aggravator had been established beyond a reasonable doubt based on Wright's convictions on six other felonies: aggravated battery on a correctional officer (Correctional Officer Walter Connelly); aggravated battery on a correctional officer (the separate and unrelated attack involving Correctional Officer Dan Cooley); aggravated battery on a jail detainee (inmate victim Preston Cassada); attempted second degree murder with a firearm and two counts of attempted felony murder for the Longfellow drive-by shooting. (DAR V6:964-66).

but he did not think the evidence "amount[ed] to a hill of beans." (PCR V13:2147-48). Hileman testified that inmate witness Henry would not have been a good witness due to his background and history and further acknowledged that he had to take a light approach with impeaching Officer Connelly because he was a very sympathetic witness. (PCR V13:2171-72).

Collateral counsel questioned lead counsel Hileman regarding his claim that counsel was ineffective for failing to call inmate witnesses to impeach Byron Robinson, an inmate who testified for the prosecution at Wright's trial. Byron Robinson testified at Wright's trial that he was housed with Wright at the Polk County Jail in 2000, and Wright told him that he and codefendant Pitts approached the victims' car and entered the car with Wright brandishing a gun to control the victims. (DAR V28:4194-95). After driving to Pitts' house to pick up clothing and a shotgun, Wright and Pitts took the victims to an orange grove. (DAR V28:4197-201). Robinson testified that it was his understanding from speaking with Wright that Wright fired all of the shots and had killed both victims. (DAR V28:4201). Near the end of the State's case in chief, trial counsel Hileman informed the court that they had recently spoken to witnesses who purported to have information on two of the State's witnesses, one of which was Byron Robinson. (DAR V29:4329-31). After the

State rested, Hileman informed the court and the State that they had an additional witness list containing six witnesses, including Dahrol James, Shenard Dumas, and Jerry Hopkins.[11] (DAR V30:4502-03). Wright testified as the only defense witness, and the following day, Hileman explained to the court that he had discussed the possibility of presenting these additional witnesses with Wright, but Wright decided "that he does not wish to present any further witnesses, thus, preserving first and last closing," and counsel requested that the court conduct a colloquy with Wright regarding this decision. (DAR V30:4640-43).

At the postconviction hearing, Hileman testified that he only had a vague memory surrounding the reasons for not calling the inmate witnesses, but he recalled thinking that some of them were facing serious charges and would not cooperate with the defense and some of them were only of minimal, if any, value. (PCR V13:2150). He also reiterated the reasoning that he put on the record at the time; that he did not want to lose the "sandwich" argument in closing. (PCR V13:2150-51). Hileman explained that if he had a "dynamite witness" who could turn the trial around, he would certainly have presented him regardless

[11] Collateral counsel presented testimony from these three witnesses at the postconviction hearing regarding overhearing Byron Robinson state that it was his intent to "jump into somebody's case" in order to help himself out on his own charges. (PCR V11:1767-68, 1779, 1802-05, 1841-43).

of the sandwich issue. (PCR V13:2174-75).

Collateral counsel further questioned lead counsel Byron Hileman regarding his knowledge of Correctional Officer Norman Faulkner. In his postconviction motion, Wright alleged that trial counsel was ineffective for failing to call Polk County Correctional Officer Norman Faulkner to testify after State inmate witness Wesley Durant testified that Faulkner overheard Wright confess to Durant.[12] At Wright's trial, Durant, a jail trustee, testified that while cutting Wright's hair, Wright said "they had took these people out to this grove out in north – 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." (DAR V26:3725). In further discussing Wright's statements, Durant said that Officer Faulkner overheard their conversation and Faulkner told Durant he needed to contact law enforcement about Wright's statements or Durant could lose his trustee position. (DAR V26:3726, 3728-29). According to Durant, Officer Faulkner called Detective Davis and "got the ball rolling." (DAR V26:3729).

[12] In addition to the two inmate witnesses, Wesley Durant and Byron Robinson, three of Wright's friends testified that Wright confessed to shooting the two victims. See James Hogan (DAR V27:3978-89); Latasha Jackson (DAR V27:4067-69), and Rodnei Ruffin (DAR V28:4258-64).

At the postconviction hearing, trial counsel Hileman testified that he recalled extensively cross-examining Durant and impeached him on numerous subjects. (PCR V13:2154-55). Hileman testified that his understanding was that the Durant/Wright conversation was reported to Officer Faulkner, but he had not actually overheard the conversation.[13] (PCR V13:2155). Hileman testified that he could not recall whether Durant made any pretrial statements regarding Officer Faulkner being present when Wright confessed to Durant, or whether that information first came out at the instant trial.[14]

Co-counsel David Carmichael testified at the evidentiary hearing that he began his career as a prosecutor in 1994 and went into private practice in 2000 practicing criminal defense. Carmichael obtained board certification in criminal trial in 2001, and was appointed in the instant case in February, 2002. (PCR V13:2211-14). Carmichael testified that he was focused

[13] Officer Faulkner testified at the evidentiary hearing that he never overheard Wright confess to the murders, and if he had, he would have written a report to document it. (PCR V10:1719).

[14] Trial counsel Hileman testified that he had the prior transcripts of the two mistrials, but he could not recall Durant's testimony regarding Officer Faulkner. (PCR V13:2180-81). Similarly, co-counsel David Carmichael testified that he had cross-examined Durant at one of Wright's prior trials and he could not recall any reference to Officer Faulkner. (PCR V13:2246). Carmichael testified that he did not recall investigating any witnesses to impeach Durant, but he also did not think it was necessary because "Durant was such an easy target and so incredible." (PCR V13:2247, 2279-80).

primarily on the penalty phase in this case because he had a background with mental health issues based on his prior experience with Jimmy Ryce and Baker Act cases, as well as being married to a psychologist. (PCR V13:2216-17). Carmichael was also very familiar with the guilt phase as he had handled the guilt phase at one of the two previous mistrials. (PCR V13:2234-35).

Carmichael testified that different mental health experts were brought into the case once he came on board because the prior experts had not found that Wright met the criteria for mental retardation because his IQ scores were above 70. (PCR V13:2217-26). Carmichael sought out Dr. Waldman because he was a psychiatrist familiar with congenital difficulties and had access to the facilities at Shands Hospital and counsel planned to obtain a temporal lobe EEG and a PET scan. Counsel wanted Dr. Sesta, a neuropsychologist, because he was familiar with his work from prior cases. (PCR V13:2217-24). Ultimately, Dr. Waldman testified at the penalty phase/Spencer hearing that Wright was mentally retarded under the definition contained in the DSM, but Dr. Sesta testified that he was not. (PCR V13:2226-27). After Dr. Waldman opined that Wright was mentally retarded, Carmichael felt he had a good faith basis to pursue mental retardation as a bar to the imposition of the death penalty.

(PCR V13:2227).

Carmichael testified that he asked Wright to, among other things, color and draw pictures during the trial to project the image that he was retarded. (PCR V13:2238). Carmichael testified that his interactions with Wright were somewhat childlike, but he opined that Wright appreciated the gravity of his situation. (PCR V13:2238-39). Although he could not recall the specifics of how he obtained Wright's school records, counsel testified that he had obtained Wright's elementary school records, but none of the records contained IQ scores. (PCR V13:2228-32). Carmichael testified that he drafted the sentencing memorandum and also handled the expert witnesses at the mental retardation hearing. (PCR V13:2235-36).

Collateral counsel also presented testimony from psychologist Dr. Mary Kasper, who testified regarding her review of Wright's background and prior IQ testing. Dr. Kasper testified that she was familiar with Florida's statutory definition of mental retardation and she also discussed the definitions contained in the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV) and the American Association for Intellectual Disabilities (AAID). Dr. Kasper testified that in order to establish mental retardation pursuant to Florida Statutes, section 921.137, a defendant must show that

he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. (PCR V11:1899-1903). Under Florida's definition, the defendant needs to show two or more standard deviations from the mean score on a standardized intelligence test which means a score of 70 or below. Dr. Kasper compared Florida's statutory definition with the DSM-IV and testified that the DSM-IV utilized an IQ range up to 74 or 75 and takes into account a standard error of measurement (SEM) and possibly the Flynn effect.[15] (PCR V11:1902).

Dr. Kasper reviewed Wright's school records and noted that he did not obtain a GED as had claimed to her, but rather, had obtained a special diploma from the school system recognizing his effort. (PCR V11:1911-14). While in school, Wright was classified as emotionally handicapped and specific learning disabled (SLD) and had a special educational plan that exempted him from standardized testing. (PCR V11:1923-24).

Dr. Kasper testified at length regarding Wright's scores on IQ testing. According to Dr. Kasper, most psychologists utilize

[15] Dr. Kasper testified that the AAID gave "specific ideas on how you're supposed to correct a score to correct for the time the test has been given and standard errors of measurement," and she also stated that the AAID adjusts for the Flynn Effect. (PCR V11:1903).

the Wechsler and Stanford-Binet tests to obtain full scale IQ scores and both of these tests are approved by the Agency for Persons with Disabilities.[16] Dr. Kasper explained that IQ scores are normed based on recent census data so that the mean score is 100, and a standard deviation is 15 points either up or down. As Florida's statutory definition for mental retardation mandated two standard deviations, the score has to be 70 or below. (PCR V11:1936-39). She further testified that the "practice effect" happens when an individual takes the same IQ test over again and you would expect the score to be higher the second time, especially if there was a short interval between the tests. In the Wechsler testing manuals, the guidelines suggest one to two years as an interval to minimize the practice effect. (PCR V11:1940). As to the Flynn effect, Dr. Kasper opined that this is a very mild upward drift of scores over time. (PCR V12:1941, 1947-54).

In this case, Wright took the Wechsler Intelligence Scale for Children - Revised (WISC-R) three times in 1991 when he was ten years old (full scale IQ scores of 76, 80, and 81),[17] took

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[16] Florida Statutes, section 921.137 specifies that the standardized intelligence test be specified in the rules of the Agency for Persons with Disabilities. Dr. Kasper stated that there were six more tests approved by the APD for intelligence testing. (PCR V11:1931-35).

[17] According to Dr. Kasper, the first test was likely administered as part of a disability evaluation, the second test

the Wechsler Adult Intelligence Scale – Revised (WAIS-R) in 1997 when he was sixteen (full scale IQ score of 75), some form of the Wechsler Abbreviated Scale of Intelligence (WASI) in 2001, the WASI in 2003 at age twenty-two (score of 77),[18] and the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III) twice in 2005 at age twenty-four (full scale IQ scores of 82 and 75). (PCR V12:1942-43, V15:2534). Due to the similarities in the tests Wright took between the age of ten and twenty-four, Dr. Kasper opined that his scores would have gone up given the practice effect and the Flynn effect. (PCR V12:1947). Dr. Kasper adjusted all of Wright's IQ scores for the Flynn effect and came up with new totals for his IQ scores, and compared them to the definitions of mental retardation contained in the American Association for Intellectual Disabilities. (PCR V15:2534). Wright's full scale IQ score of 75 on the WAIS-R at age sixteen was adjusted by Dr. Kasper utilizing the Flynn effect and she testified that it was now a 69 and within Florida's statutory definition because it was below two standard deviations below the mean. (PCR V12:1970-71). In 2005, Wright took two WAIS-III

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by a school in Bartow, Florida, and the third test by a school in New York. Dr. Kasper testified that it did not appear that either of the schools were aware of any of the prior tests. (PCR V12:1961-62).

[18] Dr. Kasper stated that the two WASI abbreviated tests Wright took in 2001 and 2003 were not accepted by the APD for IQ testing. (PCR V12:1972-73).

tests within ten days and scored a full scale IQ of 82 on the first test and then a 75 on the second. Dr. Kasper testified that the same two tests should not have been administered in such a short interval because of the practice effect, but she could not explain how the practice effect was applicable in this instance as Wright's scores decreased on the second test. Dr. Kasper opined that Wright may have just been having a difficult day on the second test. (PCR V12:1981-83). Dr. Kasper testified that in her opinion, Wright met Florida's statutory definition of someone with significant subaverage intellectual functioning. (PCR V12:1984).

With regard to the adaptive functioning prior to the age of eighteen, Dr. Kasper testified that she reviewed Wright's school records, psychological reports, and information from family members and inmates who knew Wright at that time,[19] and concluded that Wright had adaptive deficits. (PCR V12:1984-93). Based on her evaluation, Dr. Kasper concluded that Wright met Florida's statutory definition of mental retardation. (PCR V12:1994).

On cross-examination, Dr. Kasper acknowledged that she did not perform any testing on Wright. (PCR V12:2017). When asked if

[19] Dr. Kasper utilized the Adaptive Behavior Assessment System (ABAS-II) when interviewing prison inmates who knew Wright, his aunt, and two cousins. She testified that the ABAS is not a test, but a method of gathering information. (PCR V12:1988, 2025-26).

she had ever seen a full scale IQ score for Wright at 70 or below, she responded that Wright had a full scale IQ score of 75 on the WAIS-R when he was sixteen years old and, when that score was adjusted by her with the Flynn effect, it resulted in a score below 70 (Flynn effect adjusted score of 69). (PCR V12:2019). Dr. Kasper disagreed with an article from the American Psychological Society that found that the Flynn effect does not comport with prevailing standards of psychological practice. (PCR V12:2020-23).

After hearing all of the testimony and reviewing the parties' written closing arguments, the postconviction court issued a detailed 91-page order denying Wright's motion for postconviction relief. (PCR V16:2688-78). This appeal follows.

SUMMARY OF THE ARGUMENTS

The postconviction court properly denied Wright's claim that his penalty phase counsel was ineffective for failing to investigate and present mitigating evidence. Trial counsel thoroughly investigated Wright's background and mental health issues, including the possibility that he was mentally retarded. Trial counsel had five mental health experts appointed in this case and eventually, one of the experts opined that Wright met the definition of mental retardation contained in the Diagnostic and Statistical Manual, but not Florida's statutory definition. The fact that trial counsel did not find a different expert to adjust Wright's IQ scores for the Flynn effect or practice effect does not equate to a finding of deficient performance. Furthermore, the court properly found that Wright failed to establish any prejudice because, even had counsel presented evidence regarding Wright's adjusted IQ scores, it would not have resulted in a different outcome. Likewise, the court properly found that trial counsel was not ineffective for failing to obtain background records, for using their retained expert, Dr. Sesta, or for failing to call inmate witnesses who had cumulative testimony to Wright's family members who actually testified at the penalty phase.

As the postconviction court correctly found, Wright failed to establish that trial counsel was ineffective for failing to challenge evidence offered by the State in support of the aggravating factor that Wright had prior violent felony convictions. The State presented brief testimony from two victims of violent attacks committed by Wright. Collateral counsel argues that trial counsel should have presented evidence from two inmates to mitigate Wright's convictions for these two offenses and to place the offenses in context. Trial counsel had valid tactical reasons for not presenting these witnesses and Wright also failed to establish prejudice as these two convictions for aggravated battery were the least serious of Wright's numerous prior violent felony convictions.

The postconviction court properly denied Wright's claim that trial counsel was ineffective for failing to impeach Wesley Durant during the guilt phase. The State presented testimony from inmate witness Durant that Wright had confessed to participating in the two murders. Wright alleged that trial counsel was ineffective for failing to present evidence that, contrary to Durant's testimony, a correction officer did not overhear Wright's confession to Durant, and for failing to present evidence from another inmate that Durant had a reputation in the community for dishonesty. The court properly

found that trial counsel was not deficient for failing to present this evidence of minimal value and further, that there was no prejudice as Durant was extensively impeached and there were four other individuals who similarly testified that Wright confessed to the murders.

Likewise, the lower court properly denied Wright's claim that trial counsel was ineffective for failing to impeach inmate Byron Robinson by presenting testimony from three inmate witnesses. Trial counsel testified that he was aware of these inmate witnesses and made a tactical decision not to call them and Wright agreed with the decision. Additionally, the court correctly found that Wright failed to establish prejudice because there were other witnesses besides Robinson who gave similar testimony regarding Wright's confession.

The court properly summarily denied Wright's claim that trial counsel was ineffective for failing to object to comments made by the prosecutor during closing argument. This Court addressed the un-objected to comments on direct appeal and found that they did not rise to the level of fundamental error. The postconviction court likewise found that Wright could not establish Strickland's prejudice standard.

Lastly, the court properly rejected Wright's cumulative error claim.

ARGUMENT

ISSUE I

THE POSTCONVICITON COURT PROPERLY FOUND THAT WRIGHT FAILED TO ESTABLISH THAT HE RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE FOR FAILING TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT AVAILABLE MITIGATION.

In his first claim on appeal, Wright argues that the postconviction court erred in denying his ineffective assistance of penalty phase counsel claim. In claim IX of his postconviction motion, Wright asserted that penalty phase counsel was ineffective at the penalty phase/Spencer hearing[20] for failing to: acquire documents, present mitigating witnesses, present experts to argue the Flynn effect or practice effect on IQ scores, and present experts to correlate fetal alcohol syndrome with IQ scores. (PCR V4:648-61). After granting Wright an evidentiary hearing on this claim and considering all of the evidence, the postconviction court found that Wright had failed to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR V16:2739-40, 2763-71). The State submits that the postconviction court properly concluded that Appellant was not entitled to

[20] Wright waived the jury recommendation portion and voluntarily chose to present mitigation to the trial judge only. At the time of his colloquy with the judge regarding his waiver, defense counsel noted that they had worked with Wright for a number of years and he is "articulate, bright, [and] aware of what's going on in his reasoning." (DAR V33:5092).

relief on his ineffective assistance of penalty phase counsel claim.

Although collateral counsel couches the instant claim as an ineffective assistance of penalty phase counsel claim, it is clear that Wright's claim is an attempt to relitigate the substantive issue of his alleged mental retardation. As such, this claim is procedurally barred as his mental retardation claim was fully litigated and rejected at the time of his sentencing proceeding in 2005, well after the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002). See generally Bobby v. Bies, 556 U.S. 825, 129 S. Ct. 2145, 2153 (2009) (refusing to find issue preclusion on issue of mental retardation because of intervening decision in Atkins and noting that "[m]ental retardation as a mitigator and mental retardation under Atkins are discrete legal issues"). As this Court noted when discussing the penalty phase proceedings in the instant case:

> 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.

Wright, 19 So. 3d at 289-90 (footnotes omitted). Wright did not challenge this ruling on appeal and thus, his substantive claim of mental retardation is procedurally barred.

In the event this Court addresses Wright's attempt to relitigate this claim under the guise of ineffective assistance of counsel, Wright must establish two general components under the United States Supreme Court's decision in Strickland in order to prevail on his claim.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance

> under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See Johnson v. State, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. Johnson, 921 So. 2d at 500. When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of

aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Wright's claim, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Wright was not entitled to postconviction relief.[21]

[21] The Strickland analysis and this Court's standard of review for such claims applies to the first four issues raised in Wright's brief.

In this appeal, collateral counsel makes the hindsight argument that trial counsel was deficient in investigating and presenting evidence at the penalty phase in order to support his claim that he is mentally retarded. Collateral counsel faults trial counsel for utilizing one of his retained mental health experts, Dr. Sesta, and further claims that counsel should have found yet another mental health expert, like his postconviction expert Dr. Kasper, to adjust Wright's IQ scores in an attempt to establish that Wright had "significantly subaverage general intellectual functioning" as set forth in Florida Statutes, section 921.137(1). As the postconviction court correctly found, Wright's claims are without merit.

Wright's trial attorneys testified that they hired a numerous mental health experts when investigating Wright's mitigation case. In October, 2001, trial counsel Hileman obtained the appointment of neurologist Dr. David McCraney because "his expert adviser" Dr. Ralph Dolente suggested that Wright be examined by a neurologist/neurosurgeon.[22] (DAR V3:477). At the same time, trial counsel Hileman sought the appointment of co-counsel. (DAR V3:474-76). Trial counsel Hileman requested

[22] On pages 50-51 of his Initial Brief, Wright states that trial counsel Carmichael rendered deficient performance "on its face" by failing to have one of his mental health experts, Dr. Sesta, appointed as a *confidential* mental health expert. Counsel provides no caselaw support for such an assertion, and Wright has not shown how he was prejudiced by counsel's actions.

the appointment of co-counsel David Carmichael, in part, because of his knowledge of mental health issues. (DAR V3:482; PCR V12:2113). In August, 2002, after Carmichael had come onto the case, trial counsel sought to replace Drs. Dolente and McCraney with Dr. Alan Waldman and Dr. Harry McClarin. (DAR V3:483-84). After examining Wright in October, 2002, Dr. Waldman suggested that neuropsychological testing be conducted to assist in explaining his findings of fetal alcohol syndrome and impaired frontal lobe. (DAR V5:856-57). An MRI and EEG were performed on Wright, and trial counsel requested the appointment of Dr. Joseph Sesta to assist counsel in preparing his defense and penalty phase and to possibly obtain PET scan testing. (DAR V3:529-31).

At the postconviction evidentiary hearing, trial counsel Carmichael testified that, in his opinion, Wright had congenital defects which made him mentally retarded and that he was raised as something of a "feral child," devoid of supervision and nurturing by his mother. (PCR V13:2217-19). Defense counsel Carmichael could not recall the details, but he testified that the original experts did not find Wright retarded so they sought new experts. Trial counsel specifically wanted Drs. Waldman and Sesta given their experience. (PCR V13:2219-26). Trial counsel testified that he never had a clear and accurate indication that

Wright was mentally retarded until Dr. Waldman testified at the penalty phase because all of his other experts would not say it.[23] After Dr. Waldman opined that Wright was mentally retarded under the DSM-IV definition, trial counsel filed a "notice of intent to rely upon § 921.137 Florida Statutes, barring imposition of the death penalty due to mental retardation." (DAR V5:743-44). The court appointed experts Drs. William Kremper and Joel Freid[24] to determine whether Wright was mentally retarded pursuant to Florida's statutory definition. (DAR V5:745). Dr. Kremper opined that on his testing Wright achieved a full-scale IQ of 82 which was not in a range obtained by individuals who are considered mentally retarded. (DAR V5:789). Dr. Kremper added that an evaluation by Dr. Sesta found a full-scale IQ of 77. (DAR V5:791). Dr. Kremper testified that Wright would not meet the criteria for mental retardation (DAR V5:817). Dr. Joel

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[23] As will be discussed in more detail, infra, Dr. Waldman testified at the non-jury penalty phase that Wright met the definition of mental retardation under the Diagnostic and Statistical Manual definition, but he acknowledged that Wright did not meet Florida's statutory definition. (DAR SV3:404-06, 477-82); see also Wright, 19 So. 3d at 291 (stating that Dr. Waldman "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").

[24] Dr. Freid had previously examined Wright in 1997 when he was sixteen years old for a disability determination, and at that time, he administered to Wright the WAIS-R and Wright scored a 75 on the test. (DAR V5:838-42).

Freid opined that Wright currently has a full scale IQ of 75 (DAR V5:755). Because neither expert found that Wright met the first prong of the statutory definition, they did not consider his adaptive functioning. After hearing the experts' testimony and considering their reports, the trial court found that Wright was not mentally retarded. (DAR V5:829).

Collateral counsel now claims that trial counsel was deficient for, among other things, failing to find an expert to adjust Wright's IQ scores using the practice effect or the Flynn Effect. As the postconviction court correctly found, Wright failed to establish either deficient performance or prejudice in this regard. (PCR V16:2763-71). As the court noted, "trial counsel made every attempt to look into the issue of mental retardation and find an expert to testify regarding the Defendant's deficiencies." (PCR V16:2766). This factual finding is clearly supported by the record. As noted, trial counsel retained the appointment of at least five mental health experts in this case, and counsel kept seeking experts until they eventually found Dr. Waldman who opined that Wright met some definitions of mental retardation, but candidly admitted that he did not meet Florida's statutory definition.

The fact that collateral counsel has retained a different expert in these postconviction proceedings to come in and offer

a more favorable opinion based on her manipulation of his prior IQ scores does not equate to a finding that trial counsel was deficient for relying on their well-qualified mental health experts.[25] See generally Diaz v. State, ___ So. 3d ____, 2013 WL 617645 (Fla. Nov. 21, 2013) (stating that trial counsel was not deficient for relying on evaluations conducted by qualified experts); Bowles v. State, 979 So. 2d 182 (Fla. 2008) (finding counsel did not perform deficiently by relying on retained mental health expert and not seeking out another mental health expert); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (holding that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction); Jones v. State, 732 So. 2d 313 (Fla. 1999) (stating that the mental health expert's opinion is not rendered less competent merely because collateral counsel has retained an expert in

[25] Wright makes a brief reference to Ake v. Oklahoma, 470 U.S. 68 (1985), in his brief at page 48 and argues that "[n]one of the experts presented at the trial level conducted a complete and constitutionally adequate mental retardation evaluation." To the extent Wright is making any substantive Ake claim, such a claim is procedurally barred as it was not raised in any fashion in the postconviction proceedings. Even if it had been raised, it would have been procedurally barred below. Marshall v. State, 854 So. 2d 1235, 1248 (Fla. 2003) (Ake claim procedurally barred because it could have been raised on direct appeal). Furthermore, such a claim is factually without merit as there was no due process violation in this case where the court appointed numerous qualified experts for Wright.

postconviction to come to a different conclusion based on similar evidence). In postconviction, collateral counsel presented testimony from psychologist Dr. Mary Kasper who adjusted Wright's prior IQ scores; all of which were 75 or higher (76, 80, 81, 75, 82, and 75). Dr. Kasper testified that the Flynn effect represents a very mild upward drift of IQ scores over time and she adjusted Wright's scores to take into account the time between when the test was normed and when Wright actually took the test. (PCR V12:1941, 1947-54). Based on her adjustments for the Flynn effect, she testified that Wright's IQ scores were 70, 74, 75, 69, 77, and 70.[26]

Clearly, trial counsel did not perform deficiently for relying on the opinions of their appointed mental health experts. In Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009), this Court summarized the history leading up to Florida's statutory definition of mental retardation, and stated:

> In 2001, the Florida Legislature enacted section 921.137, Florida Statutes (2001), which barred the imposition of a death sentence on the mentally

[26] Dr. Kasper adjusted Wright's WAIS-R test (75) with the Flynn effect and testified that the WAIS-R was normed in 1978 and Wright took it in 1997 (19 years * 0.3 = 6), and thus, taking away the 6 points gave Wright a Flynn-adjusted score of 69. The State would note, however, that in Thomas v. Allen, 614 F. Supp. 2d 1257, 1265, 1299 (N.D. Ala. 2009), aff'd, 607 F.3d 749 (11th Cir. 2010), cited by Appellant, the district court noted that the WAIS-R was normed in 1981, not 1978. Similarly, the district court stated that the WISC-R was normed in 1974 while Dr. Kasper claimed it was 1972. Id. at 1276.

> retarded and established a method for determining which capital defendants are mentally retarded. See § 921.137, Fla. Stat. (2001). The following year, the United States Supreme Court issued its opinion in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), holding that execution of mentally retarded offenders constitutes "excessive" punishment under the Eighth Amendment. In response to Atkins and section 921.137, we promulgated Florida Rule of Criminal Procedure 3.203, which specifies the procedure for raising mental retardation as a bar to a death sentence. Pursuant to both section 921.137 and rule 3.203, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See § 921.137(1), Fla. Stat. (2007); Fla. R. Crim. P. 3.203(b).

As set forth in Florida Statutes, section 921.137(1):

> [T]he 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 authorized by the Department of Children and Family Services. 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.

§ 921.137(1), Fla. Stat. (2006). In Cherry v. State, 959 So. 2d 702, 711-14 (Fla. 2007), this Court held that in order for a defendant to establish subaverage intelligence, he must score a 70 or below on a standardized test. See also Nixon, 2 So. 3d at 141; Kilgore v. State, 55 So. 3d 487, 507-09 (Fla. 2010);

Snelgrove v. State, 107 So. 3d 242, 252-53 (Fla. 2012) (noting that this Court has found support for a finding against subaverage general intellectual functioning where the defendant's IQ scores did not definitively suggest mental retardation) (citing Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) ("[T]he majority of Phillips's IQ scores exceed that required under section 921.137. Moreover, the court questioned the validity of the only IQ score falling within the statutory range for mental retardation."); Jones v. State, 966 So. 2d 319, 329 (Fla. 2007) ("Jones's scores on the WAIS were as follows: 72 (1991), 70 (1993), 67 (1999), 72 (2003), and 75 (2005). In other words, the scores did not indicate 'significantly subaverage general intellectual functioning.'")). Furthermore, Florida's bright-line score of 70 is not subject to manipulation and adjustment by the standard error of measurement (SEM) or the Flynn effect.[27] Cherry, 959 So. 2d at 712-13 (rejecting claim

[27] The State submits that applying the Flynn effect to an individual's IQ score, as opposed to group means, is not generally accepted in the scientific community. See generally Thomas v. Allen, 607 F.3d 749, 757-58 (11th Cir. 2010) (noting that "there is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning"); Thorson v. State, 76 So. 3d 667, 683 (Miss. 2011); State v. Dunn, 41 So. 3d 454, 470 n.16 (La. 2010) (noting that the court has not specifically accepted the application of the Flynn effect as scientifically valid); Ledford v. Head, 2008 WL 754486 (N.D. Ga. 2008) (unreported decision) (extensively discussing the adjustment of IQ scores

that SEM should be factored into definition so as to allow for a range of scores); Dufour v. State, 69 So. 3d 235, 246-47 (Fla. 2011) (noting that postconviction court erred in applying SEM to defendant's IQ scores); State v. Herring, 76 So. 3d 891, 893 n.4 (Fla. 2011) (declining to address the issue of adjusting individual IQ scores for the Flynn effect); see also Hall v. State, 109 So. 3d 704 (Fla. 2012), cert. granted, Hall v. Florida, 134 S. Ct. 471 (2013).

Although the postconviction court correctly found that trial counsel was not deficient for failing to find an expert like Dr. Kasper to apply the Flynn effect, the court also found that Wright failed to establish prejudice because there was no reasonable probability that Dr. Kasper's adjusted scores would have caused the trial court to reach a different conclusion regarding the weighing of the mitigation and aggravation or regarding its finding that Wright was not mentally retarded. (PCR V2768-69). Even assuming that Dr. Kasper's opinions that Wright's IQ scores should be adjusted are valid, his adjusted scores still do not qualify for a finding of subaverage general intellectual functioning as all but one are 70 or higher. Dr. Kasper did not administer any IQ testing, but reviewed Wright's prior IQ testing and noted that he had the following full scale

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for the Flynn effect and the SEM and noting that the SEM works to overestimate and underestimate IQ scores).

IQ scores: **76, 80, 81, 75, 82, and 75.**[28] Even after Dr. Kasper manipulated Wright's scores with the Flynn effect, all but one of the scores were still above 70: 70, 74, 75, 69, 77, and 70. Obviously, as the postconviction court properly found, Wright's scores, even when adjusted, would not meet Florida's statutory definition of mental retardation because his scores do not reflect significantly subaverage general intellectual functioning, and therefore would not have resulted in a different outcome.[29] See Phillips, supra;, Jones, supra.

In addition to arguing that trial counsel was ineffective for failing to find an expert to adjust Wright's IQ scores, Wright also argues in his brief that trial counsel was ineffective for failing to obtain background records, for utilizing Dr. Sesta, and for failing to present testimony from numerous inmates regarding Wright's adaptive behavior. The

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[28] Wright also scored a 77 on Dr. Sesta's abbreviated IQ test, the Wechsler Abbreviated Scale of Intelligence (WASI). (DAR V5:846-51).

[29] Although Wright has one "adjusted" score of 69, this score, assuming it is correct (see footnote 26, supra), is an outlier and lower than Wright's other "adjusted" scores of 70, 74, 75, and 77. It is well known that a defendant cannot "fake smart," but can often "fake dumb" and score lower on IQ tests simply by not putting forth full effort. See generally Green v. Johnson, 515 F.3d 290, 300 (4th Cir. 2008) ("evidence in the state habeas record established that although a person can fake a lower I.Q. score, a higher I.Q. score cannot be faked"). This would be an especially relevant factor in this instance as the adjusted 69 IQ score was obtained on an IQ test given to Wright after he was referred to Dr. Freid by the Office of Disability Determinations. (DAR V5:838-42).

postconviction court rejected Wright's claim and found that he failed to carry his burden under Strickland of establishing deficient performance and prejudice.

As previously noted, Wright was represented at trial by highly experienced litigators, including Byron Hileman who had extensive capital litigation experience and David Carmichael who was primarily responsible for the penalty phase proceeding and was aware of mental health issues given his prior legal experience with Baker Act and Jimmy Ryce cases and from speaking with his spouse who was a psychologist.[30] These two attorneys had consulted with numerous expert witnesses and eventually presented testimony at the penalty phase from Drs. Waldman and Sesta, as well as from Wright's aunt and cousin.

At the penalty phase, trial counsel presented testimony from Dr. Sesta, a board certified forensic neuropsychologist, who evaluated Wright and found him to have borderline intellectual functioning with a full scale IQ of 77, but noted that Wright was not mentally retarded. (DAR SV2:201-07). Dr. Sesta testified that Wright had been exposed to cocaine and alcohol while *in utero* and had brain abnormalities and microcephaly. Dr. Sesta testified that Wright also had

[30] Although Carmichael was primarily responsible for the penalty phase, he testified that Hileman was prepared to do the penalty phase at the second trial which ended in a mistrial. (PCR V13:2272).

antisocial personality disorder. Dr. Sesta had school records for Wright and noted that he had been in emotionally handicapped (EH) and specific learning disability (SLD) classes. (DAR SV2:233-35).

Wright's aunt, Cynthia Wright McClain, testified that Wright did not have a stable parental home life; if his mother wanted to go somewhere she would leave Wright with the witness for extended periods of time. (DAR SV2:279-280). Wright's father was in a state mental hospital and never played a role of any kind in his life. Wright was described as a follower and slow, with learning problems. (DAR SV2:285). Wright's mother used alcohol while pregnant with him. (DAR SV2:287).

Wright's cousin, Carlton Barnaby, testified that the two of them were very close as children. (DAR SV3:331). Wright did not get the same attention and love as Barnaby because he (Barnaby) had the support of two parents and friends. Barnaby also described Wright as a follower. (DAR SV3:335). Wright was in special education classes in school and was easily influenced and did not handle peer pressure very well. (DAR SV3:348-53).

Dr. Alan Waldman, a psychiatrist, evaluated Wright and noted that an EEG and MRI were conducted on Wright and these tests showed that Wright had microcephaly, a brain size about two-thirds normal size which is extremely frequent in fetal

alcohol syndrome cases. (DAR SV3:397). Dr. Waldman testified that Wright's intelligence and impairments affect his ability to perceive things and make judgments. (DAR SV3:409). Dr. Waldman opined that Wright was profoundly impaired and does not understand social strata and parrots or adopts the phrases used by whatever group he is with. (DAR V3:418-19). Such people would be highly susceptible to the influence of other individuals. (DAR SV3:420).

Dr. Waldman disagreed with Dr. Sesta's antisocial personality disorder diagnosis. (DAR SV3:422). Dr. Waldman explained that you do not have a personality disorder because of a brain injury; you have a personality change due to a general medical condition. In Wright's case it would be fetal alcohol syndrome or possibly traumatic brain injury added onto that. (DAR SV3:422-23). Dr. Waldman opined that the two statutory mental mitigators were present. (DAR SV3:426-27). Dr. Waldman added that as part of the frontal lobe damage, Wright would repeat mistakes, and he lacks the ability to retain cause and effect so he is not frustrated very long by his inability to understand things. (DAR SV3:430-31). Dr. Waldman further opined that Wright was mentally retarded under the DSM; thus triggering the necessity for the mental retardation hearing.

In the postconviction proceedings, penalty phase counsel

David Carmichael testified that he had obtained some of Wright's school records[31] and purposefully sought the appointment of Drs. Sesta and Waldman for potential mental mitigation based on their experience. Trial counsel utilized Wright's aunt and cousin to testify regarding Wright's family history and background. Although the postconviction court found that counsel could have possibly obtained more records, the information presented in the postconviction proceedings was cumulative to the testimony presented to the court at Wright's sentencing hearing. As the postconviction court noted, the trial judge was aware that Wright grew up without a stable parental life, was in special education classes, had learning problems, microcephaly, and was easily influenced by others. (PCR V16:2764).

Although collateral counsel briefly mentions that trial counsel failed to obtain all of Wright's school records, Wright has failed to identify any information contained in these records which was unknown to trial counsel or their experts. Trial counsel presented evidence from Dr. Sesta that he had Wright's school records which indicated that Wright was in

[31] Carmichael noted that the school records and information he had showed that Wright "acting poorly" at school. (PCR V13:2267). The additional records obtained by collateral counsel support counsel's conclusion as they show that Wright was consistently in trouble in school for smoking marijuana, using profane language, fighting, and getting suspended. (PCR V14-15:2336-532).

emotionally handicapped (EH) classes and had a specific learning disability (SLD), and presented similar evidence from family members about Wright's problems in school. (DAR SV2:234-35, 285-89, 348). All of this evidence was considered and weighed by the judge in his sentencing order. (DAR V6:970-79).

In Diaz v. State, ___ So. 3d ____, 2013 WL 6170645 *12 (Fla. Nov. 21, 2013), this Court noted that it need not address Strickland's deficient performance prong because "Diaz does not identify any specific facts contained in the documents that should have been brought to the attention of the judge or jury but were not." As this Court noted in Diaz, a defendant is not prejudiced by trial counsel's failure to present cumulative evidence. Id. In the instant case, because the postconviction court correctly found that Wright failed to establish that there was any unknown information contained in the records counsel failed to obtain, this Court should affirm the postconviction court's denial of this claim.

Lastly, collateral counsel attacks trial counsel's decision to present Dr. Sesta and erroneously asserts that "Dr. Sesta did the defense no good at all." Contrary to collateral counsel's hindsight claim, trial counsel was not ineffective for utilizing Dr. Sesta. Trial counsel specifically sought the appointment of Dr. Sesta because he was familiar with Dr. Sesta's expertise as

a forensic neuropsychologist. Dr. Sesta testified at the penalty phase that Wright's IQ score was 77 and in the borderline range for mental retardation, had been exposed *in utero* to cocaine and alcohol, had microcephaly and brain injuries, polysubstance abuse, and an antisocial personality disorder. In discussing Wright's IQ scores and whether the environment Wright grew up in may have affected his intelligence, Dr. Sesta noted that this was an area of debate between psychologists and that there were biological factors and cultural differences at issue, including that IQ scores for African-Americans and Caucasians differed. (DAR SV:208-10). On cross-examination, Dr. Sesta testified regarding IQ scores and noted that, ever since IQ testing started around World War I, there has been approximately one standard deviation difference between scores for Caucasians and non-Caucasians. Dr. Sesta stated that Caucasians scores are centered around 100 and non-Caucasians are at 85. (DAR SV2:249-51). Dr. Sesta agreed with the prosecutor that Wright's verbal IQ was 84, or right around normal for a non-Caucasian and his full scale IQ score of 77 was not very far off normal.[32] (DAR SV2:250).

Collateral counsel now argues that Dr. Sesta should have

[32] Dr. Sesta further testified that, even when applying a standard error of measurement, Wright's scores would range between 72 and 82. (DAR SV2:250).

never testified because of his diagnosis of antisocial personality disorder and his views on IQ scores.[33] Trial counsel Carmichael testified that he knew Dr. Sesta did not find Wright mentally retarded as this was consistent with all the other experts involved and was the reason counsel sought out Dr. Waldman. (PCR V13:2262-63). Counsel nevertheless wanted to present Dr. Sesta to the judge because Dr. Sesta had more of a medical approach and there was value in the court hearing Dr. Sesta's opinions. Although Dr. Sesta found Wright had an antisocial personality disorder, trial counsel noted that this was an Axis II diagnosis under the DSM-IV. Additionally, this Court has recognized that antisocial personality disorder is a valid mitigating circumstance. Morton v. State, 789 So. 2d 324, 329-30 (Fla. 2001). Additionally, Dr. Sesta's opinions were utilized by trial counsel in arguing for the statutory

[33] Regarding the differences in IQ scores, it appears Dr. Sesta was referring to the debate in psychology regarding this issue. See generally *Mainstream Science on Intelligence*, Wall Street Journal at A18, Dec. 13, 1994 (publishing a joint statement issued by a group of academic researchers in the field of intelligence which stated, in pertinent part, "The bell curve for whites is centered roughly around 100; the bell curve for American blacks roughly around 85"); Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (Free Press 1994) (a controversial book dealing with racial differences in IQ scores).

Court-appointed expert Dr. William Kremper also testified that he was aware of literature in the field that discussed lower IQ scores for African-Americans. (DAR V5:816-17).

mitigators as well as numerous other non-statutory mitigators.[34] (DAR SV4:495-526).

Trial counsel clearly was not ineffective for utilizing Dr. Sesta given his valuable testimony regarding a number of mitigating factors. The fact that Dr. Sesta also opined that Wright had an antisocial personality disorder does not equate to a finding that trial counsel was deficient for presenting his testimony. It certainly is not uncommon in capital cases for mental health experts to find substantial mental mitigation, but also opine that the defendant has an antisocial personality disorder, see generally Zommer v. State, 31 So. 3d 733 (Fla. 2010); Israel v. State, 985 So. 2d 510 (Fla. 2008), and it is well recognized that trial counsel is granted great latitude in decisions regarding the use of expert witnesses. Franqui v. State, 965 So. 2d 22, 31 (Fla. 2007).

In addition to failing to establish that trial counsel was deficient for presenting Dr. Sesta, Wright also failed to show that he was prejudiced. As noted, Dr. Sesta provided support for the statutory mental mitigators, as well as other mitigators found and weighed by the trial judge. Certainly had trial counsel not produced Dr. Sesta at the penalty phase, it would have been determental to the court's finding of this mitigation.

[34] The trial judge found the two statutory mental mitigators as well as a number of non-statutory mitigators. (DAR V6:970-79).

Lastly, trial counsel was not deficient for failing to present testimony from numerous lay inmate witnesses who essentially testified that Wright was a follower, an outcast, intellectually slow, and would often get into fights when he got angry. As trial counsel noted, these inmate witnesses would not make good witnesses given their background and history. Additionally, trial counsel elicited this same type of testimony from Wright's aunt and cousin; two witnesses who did not have the same credibility issues as the inmate witnesses.

In sum, Wright has failed to establish any deficient performance or prejudice in trial counsel's handling of the mitigation. The postconviction witnesses would not have affected the trial court's rejection of Wright's mental retardation claim nor the court's weighing of the statutory mental mitigating circumstances or the nonstatutory mitigators. The court found both statutory mental mitigators and gave them "some weight." Certainly the postconviction evidence would not have affected the weighing of the mitigation against the substantial aggravation in this case. 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). A review of the evidence presented in the postconviction proceeding demonstrates that there is no reasonable probability that Wright would have received a life sentence had penalty phase counsel presented any of this evidence. See Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) (noting that the defendant would not have received a life sentence had the evidentiary hearing testimony been presented at trial because the new evidence merely included much cumulative information that had already been considered and rejected by the trial court); Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000) (stating that when addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."). As Wright has failed to carry his burden of establishing both deficient performance and prejudice on the part of penalty phase counsel, this Court should affirm the lower court's denial of this claim.

ISSUE II

WRIGHT FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE BY FAILING TO CHALLENGE EVIDENCE OFFERED IN AGGRAVATION.

In claim eight of his postconviction motion, Wright argued that his trial counsel was ineffective for failing to present evidence to counter the impact of the aggravating factors relating to Wright's prior violent felony convictions occurring during his incarceration. (PCR V4:646-48). At the penalty phase, the State presented brief testimony from victim Preston Cassada regarding Wright's conviction for aggravated battery on a jail detainee, and from Correctional Officer Walter Connelly regarding Wright's conviction for aggravated battery on a correctional officer. (DAR SV1-2:141-48, 159-62). Wright now asserts that trial counsel should have introduced evidence from two inmates, Dennis Day and Reginald Henry, that would have mitigated these two prior violent felony convictions, namely: (1) evidence that Wright was one of numerous inmates implicated in the Cassada attack, and (2) that Officer Connelly verbally harassed and provoked Wright prior to the attack. The State submits that the postconviction court properly denied this claim based on a finding that Wright failed to establish deficient performance and prejudice as required by Strickland. (PCR V16:2759-63).

At the penalty phase, Walter Connelly, a jail detention deputy in 2001, testified regarding Wright's conviction for aggravated battery on a correctional officer. Officer Connelly stated that when he went to give Wright his dinner dessert, Wright sucker-punched him and knocked him unconscious. The officer was informed by an eyewitness trustee that Wright proceeded to kick or stomp on his head about fifty times. (DAR SV1:141-46). On cross-examination, defense counsel David Carmichael, inquired whether the witness had any knowledge of why Wright was in an isolation cell and asked if the witness had any knowledge of alleged mistreatment of Wright by jail staff. (DAR SV1:146-48).

With regard to Wright's conviction for aggravated battery on a correctional officer, Wright claims that penalty phase counsel was ineffective for failing to present inmate witnesses Dennis Day and Reginald Henry to testify to alleged abuse Wright encountered by Officer Connelly prior to the attack. Day and Henry both testified at the postconviction proceedings that Officer Connelly would consistently verbally harass Wright during Wright's incarceration. (PCR V10:1692-96, V11:1813-28). Henry further testified that on the day of the attack, Officer Connelly put a pen in front of Wright's face and when Wright moved it, Officer Connelly punched him. (PCR V11:1822). Both of

these inmates were known to Wright's trial counsel and both testified at Wright's trial when he was convicted of the aggravated battery involving victim Officer Connelly. (PCR V10:1699, V11:1818).

Trial counsel Hileman testified that he and co-counsel David Carmichael represented Wright at the three murder trials in the instant case, and were involved in Wright's trials for the three prior crimes including the Officer Connelly/Preston Cassada trials.[35] The Connelly/Cassada trials occurred in 2002 and Wright was convicted in each case and Hileman was aware that the State would use these cases as aggravators in the 2004 murder trial. (PCR V12:2125). Hileman testified that he was aware of the information regarding Officer Connelly allegedly provoking Wright as it had been presented at the Connelly trial, but Hileman testified that Officer Connelly's alleged provocation did not "justify a guard being beat half to death." (PCR V13:2147). Hileman further testified that the two inmates were not good witnesses and their testimony was "minimal mitigation" which did not amount "to a hill of beans." (PCR V13:2147-48, 2171).

Assuming for the sake of argument that evidence of

[35] Hileman testified that he was aware of the Cassada trial, but thought Carmichael may have handled it by himself. (PCR V13:2171).

provocation by Officer Connelly would have been admissible as "mitigating" evidence, Wright failed to establish that counsel's failure to present this evidence was deficient and that he was prejudiced. As trial counsel Hileman correctly noted, any alleged provocation by Officer Connelly was insufficient to negate the existence of the aggravating factor that Wright had actually been convicted of this violent felony. Furthermore, although the sentencing court gave the aggravating factor of prior violent felony convictions "great weight," this aggravating factor also included Wright's contemporaneous convictions for first degree murder, carjacking, kidnapping, and robbery with a firearm. (DAR V5:964-66). Additionally, the trial court considered Wright's prior violent felony convictions for attempted second degree murder with a firearm, and two counts of attempted felony murder. Thus, even if the court had been aware of the alleged provocation by Officer Connelly for this prior violent felony conviction, it would not have affected the court's weighing of this aggravator given the existence of Wright's numerous other significant violent felony convictions. As the postconviction court correctly found when denying this claim:

> The two aggravated batteries were not the most serious of the violent felony conviction considered by the trial court. The additional information Mr. Day and Mr. Henry could have provided the trial court were not

> of such a nature that they undermine confidence in the findings of the trial court with regard to the penalty phase and the weight it gave prior violent felonies.

(PCR V16:2763).

Likewise, the postconviction court properly found that Wright was unable to establish either deficient performance or prejudice regarding penalty phase counsel's handling of inmate victim Preston Cassada. The State introduced evidence that Wright and another inmate, Brandon Gatlin, were convicted of aggravated battery for attacking Cassada in the Polk County Jail and beating him into unconsciousness, resulting in him being in a coma for thirty days. (DAR SV1-2:159-62). On cross-examination, Cassada acknowledged that there were perhaps five individuals who beat him, and that he had no actual memory of Wright being one of those individuals. (DAR SV2:162).

Collateral counsel argues that penalty phase counsel performed deficiently by failing to present evidence to the judge from Dennis Day. Inmate Day testified that he was present in the jail when the attack on Cassada occurred and, although Day did not personally observe the attack, he thought that Wright was not involved. (PCR V10:1690-91). As a result of the attack, five inmates, including Day, were implicated in the battery. Wright now claims that trial counsel was ineffective for failing to present Day because the evidence that other

inmates were falsely implicated would have mitigated Wright's conviction for the attack.

This claim is without merit as trial counsel elicited evidence and made the sentencing court aware of the fact that five inmates were implicated in the attack on Cassada, but only two, including Wright, were actually convicted. As the postconviction court correctly noted when denying this claim, trial counsel also elicited testimony that the victim did not even know if Wright had struck him. (PCR V16:2762). Wright has failed to establish any deficiency on the part of counsel for failing to call inmate witness Day to testify regarding the attack on inmate Cassada. Any "lingering doubt" testimony from Dennis Day regarding Wright's involvement would have been inadmissible at the penalty phase as the evidence does not negate or mitigate in any manner Wright's conviction for aggravated battery on a jail detainee. See England v. State, 940 So. 2d 389, 406 (Fla. 2006) (stating that where the sole purpose for seeking to have the evidence admitted is to show residual or lingering doubt of the defendant's innocence, the evidence is inadmissible at the penalty phase). Additionally, as previously noted, the postconviction court found that Wright was not prejudiced because these two jail attacks were the least serious of the numerous violent felony convictions considered and

weighed by the sentencing court. (PCR V16:2763). As the evidence introduced at the postconviction proceedings would not have affected the outcome of the penalty phase in any manner, this Court should affirm the postconviction court's denial of this claim.

ISSUE III

THE POSTCONVICTION COURT PROPERLY DENIED WRIGHT'S CLAIM THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO IMPEACH STATE WITNESS WESLEY DURANT.

In his third issue on appeal, Wright asserts that the postconviction court erred in rejecting his claim that trial counsel was ineffective for failing to impeach State inmate witness Wesley Durant and for failing to present evidence from inmate James Blake that Durant had a reputation in the community for being a snitch. At Wright's third trial,[36] Wesley Durant, a jail trustee, testified that while cutting Wright's hair, Wright confessed to the murders. Durant testified that Wright said "they had took these people out to this grove out in north – 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." (DAR V26:3725). In further discussing Wright's statements, Durant said that an officer overheard their conversation and Officer Faulkner told Durant he needed to contact law enforcement about Wright's statements or Durant could lose his trustee position. (DAR V26:3726, 3728-29). According to Durant, Officer Faulkner called Detective Davis and "got the ball rolling." (DAR

[36] As previously discussed, Wright's trial attorneys represented him at the first two trials which resulted in mistrials.

V26:3729).

Defense counsel Hileman extensively cross-examined Durant and impeached him on numerous subjects, but did not inquire about any involvement by Officer Faulkner. (DAR V26:3735-59). Hileman elicited from Durant that he had ten felony convictions; two crimes involving dishonesty; that he had serious pending charges at the time and was looking to help himself out; that he refused to give a taped statement to law enforcement until he got a deal; Durant denied seeing any news reports regarding the case, but counsel impeached him with his statement to law enforcement where he admitted to seeing news flashes about the case for about a week; impeached Durant regarding his recollection of Wright's hairstyle; and impeached him regarding his knowledge of codefendant Pitts. (DAR V26:3735-59).

At the evidentiary hearing, retired Polk County Correctional Officer Norman Faulkner testified that he knew Wright and Durant during his tenure at the jail. At the time of the incident, Wright was considered a dangerous inmate and classified as code D and X, which meant he needed two officers, at a minimum, to deal with him. (PCR V10:1711-13). On direct examination, Faulkner testified that it would not have been possible for him to overhear any conversation between Durant and

Wright during the haircut due to his assignments.[37] (PCR V10:1716-17). Faulkner testified that it was possible that a trustee approached him and indicated that he needed to talk with someone based on overhearing information, in which case, Faulkner would give the inmate a sheet of paper stating that they wanted to speak to an investigator. (PCR V10:1717-18). Faulkner testified that he never overheard Wright confess to the murders, and if he had, he would have written a report to document it. (PCR V10:1719).

Trial counsel Hileman testified that he could not recall whether anyone on the defense team ever spoke with Officer Faulkner, but he remembered cross-examining Durant very vigorously and at some point, Durant stated that Officer Faulkner overheard the conversation. (PCR V13:2155). Hileman testified that his understanding of the facts 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. That was my understanding. Where that came from, I'm not sure." (PCR V13:2155). Hileman stated he did not recall knowing that Officer Faulkner denied overhearing this conversation, and if he had this information, it would have been something that he would have liked to have used. (PCR V13:2157).

[37] On cross examination, however, Faulkner indicated that he may have seen Durant cut Wright's hair. (PCR V10:1725-29).

On cross examination, Hileman testified that he could not recall whether Durant made any pretrial statements regarding Officer Faulkner being present when Wright confessed to Durant, or whether that information first came out at the instant trial.[38]

> I can't tell you, Mr. Aguero. I know I knew that he said this officer was present, meaning nearby. He also, I believe, said that he had informed the officer that he needed to talk to the authorities at some – maybe it was at some later time. I'm not sure about that.
>
> What I'm vague on is where I got the information, because I clearly 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. That would have been a great concern to me obviously, and I would have certainly explored it and deposed him and investigated that. I did not do so, which tells me inferentially that I thought there was no reason to.

(PCR V13:2175-76). Trial counsel Hileman never testified that, had he known this information, he would have called Officer Faulkner and forfeited his first and last closing argument. In fact, Hileman testified he always weighed the benefits of calling a particular witness and considered the cost of

[38] Trial counsel Hileman testified that at the time of the trial, he had the prior transcripts of the two mistrials but he had no memory of Durant mentioning Officer Faulkner. (PCR V13:2180-81). Similarly, trial counsel David Carmichael testified that he had cross-examined Durant at one of the prior trials and he could not recall any reference to Officer Faulkner. (PCR V13:2246). Collateral counsel never introduced a copy of these prior transcripts, or any other pre-trial statements made by Durant, at the evidentiary hearing.

sacrificing first and last closing, but if there was a "dynamite witness" who counsel thought might turn a trial around, he would certainly call them.[39] (PCR V13:2175).

Inmate James Blake testified that Durant is his uncle and that Durant has a reputation in the community for being untrustworthy. (PCR V10:1747-48). Blake further stated that Durant is known as a snitch. (PCR V10:1748). Blake spoke with Wright's attorneys prior to trial, but he was not called as a witness. Trial counsel Hileman was never asked specifically about his decision not to present James Blake, but he generally testified that he did not call the inmate witnesses because they were not good witnesses, had minimal value, and he did not find their testimony outweighed the benefit of having first and last closing argument.

In addressing Wright's claim of ineffective assistance of counsel, the postconviction court found that trial counsel was not deficient for failing to utilize Officer Faulkner or James Blake, and even if counsel were deficient, the court found that Wright had failed to establish prejudice as there was no reasonable probability of a different result. (PCR V16:2757-59). Trial counsel testified that he always weighed the benefits of calling a particular witness and considered the cost of

[39] Hileman never identified Officer Faulkner as a "dynamite witness."

sacrificing first and last closing, and he never identified either Officer Faulkner or James Blake as the type of witness worthy of sacrificing his sandwich closing argument.

In addressing the lack of prejudice in failing to impeach Durant with testimony from these two witnesses, the postconviction court noted that trial counsel extensively impeached Durant during cross-examination on a number of topics.[40] (PCR V16:2759). Additionally, the testimony of Durant was not a critical piece of evidence in this case and was cumulative to the testimony of other witnesses. Durant's testimony was only briefly mentioned in the State's closing argument.[41] (DAR V32:4836). Of far greater importance was the circumstantial evidence establishing Wright's guilt and the direct evidence of his confessions to *four* other witnesses: inmate Byron Robinson (DAR V28:4186-206), and three of Wright's friends, James Hogan (DAR V27:3978-89), Latasha Jackson (DAR V27:4067-69), and Rodnei Ruffin (DAR V28:4258-64). See also Wright, 19 So. 3d at 302-03 (noting that there was sufficient evidence to support both of Wright's murder convictions as well

[40] As co-counsel Carmichael noted, Wesley Durant was an "easy target and so incredible," that it was not even necessary to seek further impeaching evidence. (PCR V13:2247, 2279-80).

[41] The brief reference to Durant's testimony took only a few sentences of the prosecutor's 35-paged closing argument. (DAR V32:4836).

as each of his remaining five convictions). Thus, because the postconviction court properly found that Wright failed to carry his burden under Strickland, this Court should affirm the lower court's denial of the instant claim.

ISSUE IV

WRIGHT FAILED TO CARRY HIS BURDEN OF ESTABLISHING THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CALL THREE INMATE WITNESSES IN AN ATTEMPT TO IMPEACH A STATE'S WITNESS.

Wright alleged in his postconviction motion that trial counsel was ineffective for failing to impeach a State's inmate witness, Byron Robinson, with information that Robinson intended to commit perjury. Wright alleged that numerous other inmates overheard Robinson state that he intended to commit perjury at Wright's trial and that trial counsel was ineffective for failing to call these witnesses at trial. At the postconviction evidentiary hearing, Wright presented testimony from inmates Jerry Hopkins, Darohl James, and Shenard Dumas in support of this claim, and after hearing from these witnesses and trial counsel, the postconviction court denied the claim and found that Wright failed to establish deficient performance and prejudice as required by Strickland. (PCR V16:2754-56).

At trial, Byron Robinson testified that he was housed with Wright at the Polk County Jail in 2000. (DAR V28:4186). According to Robinson, Wright told him that he and codefendant Pitts approached the victims' car and entered the car with Wright brandishing a gun to control the victims. (DAR V28:4194-95). After driving to Pitts' house to pick up clothing and a shotgun, Wright and Pitts took the victims to an orange grove.

(DAR V28:4197-201). Robinson testified that it was his understanding from speaking with Wright that Wright fired all of the shots and killed both victims. (DAR V28:4201).

Near the end of the State's case, defense counsel informed the court that they had recently spoken to witnesses who purported to have information on two of the State's witnesses, one of which was Byron Robinson. (DAR V29:4329-31). After the State rested its case in chief, defense counsel informed the court and the State that they had an additional witness list containing six witnesses, including inmates Jerry Hopkins, Dahrol James, and Shenard Dumas. (DAR V30:4502-03). Wright subsequently testified as the only defense witness, and the following day, trial counsel requested a colloquy where counsel explained that he had discussed the possibility of presenting these additional witnesses with Wright, but Wright decided "that he does not wish to present any further witnesses, thus, preserving first and last closing." (DAR V30:4640-43).

At the postconviction evidentiary hearing, collateral counsel presented evidence from inmate witnesses Hopkins, James, and Dumas regarding Byron Robinson's stated intent of "jumping into somebody's case" in order to help himself out on his charges. Jerry Hopkins testified that Robinson was a known "snitch" and claimed that he overheard Robinson say that he was

going to jump into Wright's case and lie. Hopkins gave this information to Wright prior to the trial. (PCR V11:1767, 1779, 1783). Dahrol James similarly testified that Robinson wanted to "jump into" someone's case, but he was not worried about Wright because, according to James, Wright never spoke about his case. (PCR V11:1802-05). Shenard Dumas also testified that he overheard Robinson discussing his plan to jump into Wright's case and observed Robinson watching a news program about Wright. (PCR V11:1841-43).

Trial counsel Hileman testified that he had no recollection of his tactical reasons for not calling these inmate witnesses at the trial in 2004, but after he reviewed the transcript of the colloquy, Hileman recalled a vague memory that some of these inmates were facing very serious charges and would not talk to them and their testimony was of minimal value. (PCR V13:2148-51). In general, counsel noted that the potential inmate witnesses were not good witnesses given their background and history. (PCR V13:2171).

In denying this claim, the postconviction court stated that Wright had failed to carry his burden under Strickland of establishing deficient performance.

> The Court . . . does not find that counsel's performance fell below an objective standard of reasonableness in not calling the inmate witnesses to testify regarding Byron Robinson. Counsel made a

> tactical decision that the Defendant was apparently in agreement with, to not call any witnesses to have first and last argument.

(PCR V16:2756). Although trial counsel only had a vague recollection of his strategic decision, counsel recalled that the inmate witnesses were facing serious charges and their testimony was of "minimal value." Also, as previously noted in Issue III, supra, counsel indicated that he always weighed the benefits of calling a particular witness and considered the cost of sacrificing first and last closing, but if there was a "dynamite witness" who counsel thought might turn a trial around, he would certainly call them. Trial counsel was not deficient when he discussed the inmate witnesses' potential testimony with his client and made the informed decision not to call the witnesses, thus maintaining the strategic advantage of having first and last closing arguments. See Van Poyck v. State, 694 So. 2d 686, 697 (Fla. 1997) (finding that trial counsel had valid tactical reason for not presenting evidence as counsel did not want to give up his "sandwich" argument).

Although this Court is not required to address the second prong of Strickland given Wright's inability to establish deficient performance, see Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) ("When a defendant fails to make a showing as to one prong [under Strickland], it is not necessary to delve

into whether he has made a showing as to the other prong."), the State submits that the postconviction court correctly found that Wright also failed to establish prejudice. The fact that three inmates would have been willing to testify that Robinson had a desire to "jump into" Wright's case and possibly lie is not sufficient to undermine confidence in the jury's verdict given the fact that Robinson's testimony was completely consistent with the State's evidence, and more importantly, was cumulative to numerous other witnesses' testimony. As previously noted in Issue III, *four* other witnesses testified that Wright confessed to the murders: inmate Wesley Durant (DAR V26:3725-29), and three of Wright's friends, James Hogan (DAR V27:3978-89), Latasha Jackson (DAR V27:4067-69), and Rodnei Ruffin (DAR V28:4258-64). Because Wright failed to establish both prongs of Strickland, deficient performance and prejudice, this Court should affirm the postconviction court's denial of this claim.

ISSUE V

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED WRIGHT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS.

In claim one of his postconviction motion, Wright alleged that his trial counsel was ineffective for failing to object to comments made by the prosecutor during closing argument. The trial court summarily denied this claim, but ruled that counsel could proffer evidence at the evidentiary hearing regarding this claim. (PCR V7:1093). At the evidentiary hearing, collateral counsel proffered evidence from trial counsel Byron Hileman regarding his failure to object to the prosecutor's comments. (PCR V13:2163-69). Hileman explained that, as a general rule, he was reluctant to object to the prosecutor's closing argument because he would not want the prosecutor to do the same to him, and from a tactical perspective, it makes the jury think he is being an obstructionist and "trying to pull the wool over their eyes." (PCR V13:2166). In this case, after Hileman reviewed the prosecutor's comments when preparing the direct appeal briefs and while presenting the oral argument before this Court, he testified that he should have objected to the comments. (PCR V13:2166-67).

After conducting the evidentiary hearing, the court denied the instant claim and found that, although trial counsel was

deficient for failing to object to the comments, Wright had failed to establish prejudice under the Strickland analysis.[42] (PCR V16:2743-48). The postconviction court recognized that the prosecutor's comments were addressed by this Court on direct appeal.[43] (PCR V16:2743-48). When discussing Wright's direct appeal claim that the collateral crimes evidence became an impermissible feature of the trial, this Court found that the un-objected to comments did not rise to the level of fundamental error.

> We caution the State that some of the arguments appear to have crossed the line into asserting that Wright's propensity for violence proved that he committed the murders. For instance, the State maintained that Wright "doesn't have any problems shooting people." This theme was mentioned again in reference to the carjacking. [FN18]
>
> FN18. For example, the State made the following statements during closing argument.
>
> > He used the gun on Friday. He shot a man with it. *He certain[ly] doesn't have any problems shooting people. He shot Carlos Coney.*

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[42] Because the lower court summarily denied this claim, its ruling is tantamount to a pure question of law which this Court reviews *de novo.* Reynolds v. State, 99 So. 3d 459, 471 (Fla. 2012).

[43] The court rejected the State's argument that the instant claim was procedurally barred. See generally Conahan v. State, 118 So. 3d 718 (Fla. 2013) (finding that defendant's claims that trial counsel was ineffective for failing to object to prosecutor's misconduct were procedurally barred as this Court addressed the claims on direct appeal and found that the improper comments were harmless error).

(Emphasis supplied.)

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

(Emphasis supplied.)

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

In Consalvo v. State, 697 So. 2d 805 (Fla. 1996), this Court stated that inextricably intertwined evidence may be admissible for one purpose, yet inadmissible for another purpose. See id. at 813 (citing § 90.107, Fla. Stat. (1995)); see also Parsons v. Motor Homes of Am., Inc., 465 So. 2d 1285, 1290 (Fla. 1st DCA 1985). Admission of material evidence does not automatically mean that such evidence may be received for any probative value that it may have on any issue before the court. The State in Consalvo improperly argued a collateral burglary as collateral-crime evidence in closing argument. The State had highlighted the similarities between the collateral burglary and the charged burglary and murder. We held

that the State presented improper argument because the collateral burglary was admitted as evidence inextricably intertwined with the murder, not as collateral-crime evidence. Thus, the State's use of evidence of the collateral burglary exceeded the scope of its admission, which was to establish the entire context out of which the criminal action occurred.

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

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

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

Wright v. State, 19 So. 3d 277, 294-96 (Fla. 2009) (emphasis added).

The postconviction court found that Wright was unable to establish prejudice based on trial counsel's failure to object to the prosecutor's comments during closing arguments. In Chandler v. State, 848 So. 2d 1031 (Fla. 2003), the defendant raised a similar claim in his postconviction motion that his trial counsel was ineffective for failing to object to comments made by the prosecutor during the guilt phase closing argument. This Court affirmed the lower court's denial of this claim and stated:

> Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test. See Strickland, 466 U.S. at 694, 104 S. Ct. 2052.

Id. at 1046.

As previously noted, in order to be entitled to relief under Strickland, the defendant must show that trial counsel's

deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Strickland, 466 U.S. at 687. In order to establish prejudice, "[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." Strickland, 466 U.S. at 694. In the instant case, because this Court has already determined that the prosecutor's comments did not constitute fundamental error, Wright is unable to meet his burden under Strickland of establishing prejudice based on trial counsel's alleged deficiency. See Lukeheart v. State, 70 So. 3d 503, 523 (Fla. 2011) (holding that postconviction defendant could not establish prejudice when this Court found prosecutor's comments did not amount to fundamental error on direct appeal); Lowe v. State, 2 So. 3d 21, 38 (Fla. 2008) ("Because the Court found no fundamental error [on direct appeal], Lowe fails to demonstrate that counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the trial under Strickland."); Lugo v. State, 2 So. 3d 1, 17 (Fla. 2008) ("[W]here improper comments by a prosecutor do not constitute

reversible error, the defendant cannot 'demonstrate the prejudice requisite for a successful ineffective assistance of counsel claim.'" (quoting Hodges v. State, 885 So. 2d 338, 356 (Fla. 2004))).

Additionally, even if this Court were to once again address the prejudicial effect of the prosecutor's comments, the State submits that Wright cannot establish Strickland prejudice. As the postconviction court noted when denying this claim:

> The State presented compelling evidence from witnesses to whom the Defendant willingly described his involvement in the offenses, evidence tied the Defendant to a murder weapon, the Defendant's fingerprints were found on the car, and the blood of one of the victims was found on Mr. Wright's shoes. The Court finds no reasonable probability that, but for counsel's deficiency with regard to the un-objected to comments of the prosecutor that the result of the proceeding would have been different.

(PCR V16:2748). Further, as this Court stated on direct appeal, the prosecutor's comments regarding the collateral crimes and Wright's propensity for violence were "discussed only for a few moments during the closing argument," and did not constitute fundamental error which reached "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." Wright, 19 So. 3d at 296. Because Wright cannot establish a reasonable probability that the result of the proceedings would have been different had trial counsel objected

to the prosecutor's comments, this Court should affirm the lower court's ruling denying the instant claim.

ISSUE VI

CUMLATIVE ERROR

In his last enumeration of error, Wright asserts that he is entitled to relief because of cumulative error. However, where the individual errors alleged are either procedurally barred, or without merit, the claim of cumulative error also fails. Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999). In denying this claim, the postconviction court stated that there was no error "singularly or cumulatively which denied a fair trial to the Defendant." (PCR V16:2777). As argued throughout this Brief, Wright's claims are without merit. Because the lower court properly denied Wright's cumulative error claim, this Court should affirm the court's ruling.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Maria Christine Perinetti, Assistant CCRC-M, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, this 18th day of March, 2014.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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