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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Following the trial court's denial of Wright's postconviction motion in 2013 and briefing in this Court on appeal, the United States Supreme Court issued its opinion in Hall v. Florida, 134 S. Ct. 1986 (2014). Wright then moved to relinquish jurisdiction so he could file a *renewed* motion for determination of intellectual disability.[1] Despite the State arguing that Wright was procedurally barred from relitigating this issue, this Court granted his motion and relinquished jurisdiction to the lower court to allow Wright to file a renewed motion.

On October 13, 2014, Wright filed in the trial court his renewed motion pursuant to Florida Rule of Criminal Procedure 3.203. (PCR SV1:1-7).[2] The court conducted an evidentiary hearing in early 2015 and heard testimony from lay witnesses; Wright's two trial attorneys; and mental health experts, Drs. Mary Kasper, Kevin Kindelan, and Joel Freid for the defense, and Dr. Michael Gamache for the State.

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[1] In 2005, prior to being sentenced to death, Wright filed a motion to preclude the imposition of a death sentence based on his alleged intellectual disability. The trial court conducted a hearing on his motion and found that Wright was not intellectually disabled based on his intelligence scores. Wright did not challenge this ruling on direct appeal.

[2] The State will cite to the supplemental postconviction record by referring to the supplemental volume number, and then the page number. (PCR SV__:___).

After hearing the testimony and reviewing the parties' written closing arguments, the court issued an order denying Wright's renewed motion. (PCR SV11:1858-70). The court considered all of the relevant testimony and evidence, including Wright's extensive trial testimony,[3] and made specific findings that Wright failed to prove the elements of an intellectual disability claim by clear and convincing evidence. The court noted that Wright's IQ scores, ranging between 75 and 82, "do not demonstrate (by clear and convincing evidence) that the Defendant has significant subaverage general intellectual functioning." (PCR SV11:1862). Similarly, the court did not find that Wright established that "he suffers from deficits in adaptive behavior which would rise to the level of declaring him, legally, as intellectually disabled under Florida Statutes Section 921.137(1)." (PCR SV11:1864). Wright appealed the court's ruling and this Court ordered supplemental briefing.

SUMMARY OF THE ARGUMENTS

The trial court properly concluded that Wright failed to establish his intellectual disability claim. After hearing extensive testimony regarding Wright's IQ scores, ranging from 75-82, the court properly concluded that Wright failed to

[3] The court found Wright's trial testimony "very telling and compelling in gauging" his intellectual functioning and adaptive behavior. (PCR SV11:1863).

establish significant subaverage general intellectual functioning. Regarding the second prong, adaptive functioning, the court considered Wright's trial testimony, as well as the testimony from lay witnesses, family members, and mental health experts, and properly concluded that Wright failed to carry his burden of proof of establishing deficits in his adaptive behavior.

Appellant failed to preserve any constitutional challenge to the clear and convincing evidence burden of proof set forth in Florida Statutes, section 921.137(4), by failing to raise the issue below. Furthermore, even if preserved, the claim lacks merit as the clear and convincing standard is constitutional.

ARGUMENT

ISSUE I

THE LOWER COURT'S REJECTION OF WRIGHT'S RENEWED MOTION FOR INTELLECTUAL DISABILITY IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

Although the State maintains that Wright's renewed motion for determination of intellectual disability is procedurally barred, the State recognizes that this Court overruled its objection and remanded the case to allow Wright the opportunity to relitigate this issue following the United States Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014).[4]

[4] Wright litigated this claim in 2005 before being sentenced to death. The trial court rejected his claim based on his

After filing his renewed motion, the lower court conducted an evidentiary hearing and issued an order finding that Wright failed to carry his burden of establishing that he is intellectually disabled. The State submits that the court's order is supported by competent, substantial evidence.

This Court has stated that when reviewing a trial court's ruling on a motion to bar the imposition of the death penalty due to a defendant's intellectual disability:

> [W]e examine the record for whether competent, substantial evidence supports the determination of the trial court. See Nixon, 2 So. 3d at 141 (citing Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007); Johnston v. State, 960 So. 2d 757, 761 (Fla. 2006)). **This Court cannot "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses."** Brown v. State, 959 So. 2d 146, 149 (Fla. 2007) (citing Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006)).

Dufour v. State, 69 So. 3d 235, 246 (Fla. 2011) (emphasis added). In the instant case, the trial court properly made implicit credibility determinations and his findings are supported by competent, substantial evidence. See Burns v. State, 944 So. 2d 234, 247 (Fla. 2006) (upholding trial court's finding that Dr. Gamache provided "more credible expert

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intelligence scores, and Wright did not challenge this ruling on appeal. As such, his renewed motion is procedurally barred. See Hill v. State, 921 So. 2d 579, 584 (Fla.), cert. denied, 546 U.S. 1219 (2006); In re Henry, 757 F.3d 1151 (11th Cir. 2014) (finding that the Supreme Court's decision in Hall is not retroactive to cases on collateral review).

testimony" when he opined that the defendant's low IQ scores were not indicative of intellectual disability).

The record in this case supports the trial court's determination that Wright failed to carry his burden of establishing by clear and convincing evidence that he is intellectually disabled. See § 921.137(4), Fla. Stat. (2013); State v. Herring, 76 So. 3d 891, 895 (Fla. 2011) (holding that "a defendant must prove each of the three elements [of intellectual disability under section 921.137] by clear and convincing evidence"). In order to establish that he is intellectually disabled, Wright must meet the definition as set forth in Florida Statutes, section 921.137(1):

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

§ 921.137(1), Fla. Stat. (2013).

Here, the testimony clearly supports the trial court's conclusion that Wright failed to establish that he has

"significantly subaverage general intellectual functioning." At the 2012 postconviction evidentiary hearing, as well as at the 2015 relinquishment hearing, the court heard extensive testimony regarding Wright's IQ scores, all of which were 75 or above. Wright was administered three WISC-R tests at age 10 (scores of 76, 80, and 81), the WAIS-R at age 16½ (75), and the WAIS-III at 24 years old (82 & 75). Although the United States Supreme Court recognized in Hall that IQ scores may vary because of the standard error of measurement (SEM) and therefore should not be read as a single fixed number, but rather as a range, it is clear that the majority of Wright's scores are outside the range for a finding of intellectual disability, even when factoring the SEM. Wright's lowest IQ scores barely are in the intellectually disabled range when applying *two* SEMs to his scores, "an approach that finds no support in Atkins or anywhere else." Hall, 134 S. Ct. at 2011 (J. Alito, dissenting). In fact, as noted in Hall, the petitioners were not even challenging states with a bright-line cutoff score of 75 or above because, even with the SEM, a score of 75 or above would not reflect "significant subaverage intellectual functioning." Hall, 134 S. Ct. at 1996.

Obviously, had Wright only taken one or two IQ tests during his lifetime, the SEM range of scores would perhaps be a more

persuasive indicator of Wright's intellect, but in this case, Wright took numerous IQ tests and consistently scored between 75-82. As the State's expert, Dr. Michael Gamache, explained at the hearing, these consistent scores establish a much more accurate indicator of Wright's true intelligence "range" than utilizing the SEM range. (PCR SV8:1346-49). Wright's consistent range of IQ scores between 75-82, all of which are at or above two standard deviations from the mean, is consistent with the trial court's finding that Wright's IQ scores "do not demonstrate (by clear and convincing evidence) that the Defendant has significant subaverage general intellectual functioning." (PCR SV11:1862); see also Hall, 134 S. Ct. at 2011 & n.13 (J. Alito, dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence"). As Dr. Gamache explained, this is especially the case because a defendant cannot "fake smart," but can often score lower on IQ tests simply by not putting forth full effort, as was done by Wright in this case.[5] (PCR SV8:1335); see also Green v. Johnson, 515 F.3d 290, 300 (4th Cir. 2008) (noting that

[5] Dr. Gamache noted that Wright did not put full effort into his intelligence testing, and because all intelligence tests are performance-based, Dr. Gamache had concerns with *all* of Wright's tests scores as there was no validity testing done on any of the prior tests. (PCR SV8:1330-36).

"although a person can fake a lower I.Q. score, a higher I.Q. score cannot be faked").

Not surprisingly, Wright cherry-picks two of his lowest scores (a 76 on the WISC-R first administered in 1991 when Wright was ten years old and a 75 on the WAIS-R administered in 1997) and argues that these two scores are the best indicators of his intelligence because these two scores were the least likely to have been affected by the "practice effect." In 1991, Wright took the same WISC-R test three times and the experts agreed that the practice effect is something to be concerned with when analyzing scores of the same test taken within such quick succession. (PCR SV5:913-16; SV10:1341-42). However, Dr. Gamache examined the data from the actual individual subtests scores on the three WISC-R tests and did not see any evidence of the practice effect on Wright's subsequent scores of an **80** and **81.** In fact, on Wright's third WISC-R (81), the evidence was *contrary* to any practice effect. (PCR SV8:1338-40).

Furthermore, Wright's reliance on his two lowest scores is misplaced as counsel ignores the fact that Wright scored an **82** on the WAIS-III in 2005 when he had never taken that particular test, and had not taken *any* form of a Wechsler intelligence test for over two and a half years. Dr. Gamache testified that the practice effect is something to be concerned about given the

numerous Wechsler-based tests administered to Wright, but "[m]ost of the research that documents the practice effect is based on readministration after a matter of two to four to six weeks or a couple of months." (PCR SV8:1341). Even the defense's expert, Dr. Kasper, noted that the practice effect is generally only relevant when the same test is given within one year. (PCR SV5:915-16). Dr. Kasper did not opine that the 82 score was invalid because of the practice effect. In fact, despite vaguely indicating that she had concerns about the validity of this score, she admitted that it was consistent with the confidence interval of prior tests. (PCR SV5:918). Wright's reliance on Kilgore v. State, 55 So. 3d 487 (Fla. 2011), for the proposition that the practice effect probably affected his 82 score on the WAIS-III, is erroneous as the administration of the WAIS-III in 2005 was the first time Wright ever took this specific full-scale test as opposed to the facts in Kilgore where the defendant took the same WAIS-III test six times.

Given this evidence, the trial court properly found that Wright failed to carry his burden of establishing significant subaverage intellectual functioning. Because there is competent, substantial evidence supporting the trial court's conclusion regarding this prong, this Court should affirm the lower court's ruling on this basis alone as a defendant must establish all

three prongs of his claim in order to be entitled to relief. See State v. Herring, 76 So. 3d 891, 895 (Fla. 2011) (holding that "a defendant must prove each of the three elements by clear and convincing evidence").

Although the lower court ultimately found that Wright failed to establish significant subaverage intellectual functioning, the court nevertheless followed the dictates of Hall and allowed Wright to present evidence regarding his adaptive functioning. After reviewing the evidence surrounding this second prong, the court found that Wright had not met his burden of showing deficits in his adaptive functioning which would render him legally intellectually disabled under Florida Statutes, section 921.137(1) and Florida Rule of Criminal Procedure 3.203(b) Fla. R. Crim. P. 3.203(b). This ruling is likewise supported by competent, substantial evidence.

Florida Statutes, section 921.137, defines the term "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." § 921.137(1), Fla. Stat. (2013). Both this Court and the United States Supreme Court have stated that a defendant must show "significant" limitations in adaptive behavior in order to be found intellectually disabled. See

Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002) (setting forth definitions from the American Association of Mental Retardation and the American Psychiatric Association as both requiring significant limitations in adaptive behavior); Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (stating that a defendant "must show 'significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.'").

In addressing Wright's adaptive behavior, the mental health experts examined three broad categories: conceptual skills, social skills and practical skills. The experts explained that the numerous sub-categories identified in Phillips, id., have now been subsumed into the three broad categories in the most recent versions of the DSM (DSM-5) and the AAIDD. (PCR SV6:949-52, SV9:1515-21). For example, as discussed by Dr. Gamache, he examined the following areas of adaptive behavior during his evaluation of Wright:

> · Conceptual skills – memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations.
> · Social/interpersonal skills – awareness of others' thoughts, feelings and experiences, empathy, interpersonal communications skills, friendship abilities, and social judgment.

> · Practical skills – learning and self-management across life settings, personal care, money management, recreation, self-management of behavior, and work task organization.

(PCR SV9:1527-28, 1549-50, 1571).

Dr. Gamache testified extensively regarding each of these broad categories and discussed the basis for his opinion that Wright did not have current deficits in his adaptive behavior which supported a finding of intellectual disability. See Hodges v. State, 55 So. 3d 515, 536 (Fla. 2010) (stating that relevant inquiry is a defendant's adaptive functioning as an adult); Jones v. State, 966 So. 2d 319, 326 (Fla. 2007) (holding that significant subaverage intelligence must exist at the same time as the adaptive deficits, and there must be current adaptive deficits). For the category of conceptual skills, Dr. Gamache noted that Wright has corresponded with pen pals via the Internet and, although he is limited by his formal education and a learning disability, Wright adapted by seeking the assistance of other inmates. (PCR SV9:1529-33). Wright has been able to communicate effectively with staff at Florida State Prison and other inmates, has engaged in written correspondence with family

members,[6] engaged in telephone conversations with his attorneys, and has the ability to follow instructions. (PCR SV9:1533-38).

Regarding Wright's abilities relating to money, Dr. Gamache testified that Wright had no deficits as he understands numbers and time, manages his own funds (including prior to his arrest), and engaged in transactions like dealing drugs, buying food and clothing, taking the bus, and buying flowers for his girlfriend. (PCR SV9:1538-43). The final area Dr. Gamache examined in the conceptual skills category was broadly defined as self-direction. (PCR SV9:1543-48). Dr. Gamache found that Wright did not have deficits in this area as he was very capable of setting goals and objectives and having his needs met. When viewing the entire conceptual skills category, Dr. Gamache did not find that Wright had deficits consistent with the level necessary for a finding of intellectual disability. (PCR SV9:1548-49).

In the broad category of social skills, Dr. Gamache testified regarding Wright's interpersonal skills and ability to communicate with others in a social and friendly manner. Dr. Gamache noted that Wright interacted effectively with him during his evaluation, followed orders, and displayed good social skills. (PCR V91550-51, 1555-56). Wright also regularly

[6] Wright's cousin and aunt confirmed that Wright would send correspondence and cards to them on various occasions like holidays and birthdays. (PCR SV4:648-49, 693).

interacted appropriately with attorneys, correctional officers, and other inmates.[7] (PCR SV9:1550-51). Dr. Gamache reviewed Wright's correspondence on the internet with a woman, and noted that Wright displayed a normal level of empathy and awareness of the woman's feelings and communicated appropriately with her regarding her problematic relationship with another man. (PCR SV9:1552-53, 1562-63). According to Wright, he was now more mature and more thoughtful and less impulsive than in the past and Wright attributed his behavior to his new religious and spiritual belief. Wright adapted effectively to life on death row and was no longer being written up for disciplinary reasons. (PCR SV9:1553-59). Dr. Gamache also noted that Wright had a history of heterosexual relationships and, when Wright was 18-19, he spent regular time with his girlfriend and took her to the movies, out to eat, and to the beach. (PCR SV9:1555).

In the social/interpersonal skills sub-category of utilization of community resources, both before Wright's incarceration and afterwards, Dr. Gamache noted that Wright knows how to deal with perceived problems and injustices by filing grievance requests and paperwork, he takes advantage of recreational activities, uses the mail for correspondence, and

[7] Dr. Gamache noted that Wright was able to communicate effectively with correctional staff when seeking necessities or a change to a kosher diet. (PCR SV9:1557, 1560-61).

uses resources in prison like the law library. (PCR SV9:1565-70). Based on his entire evaluation of Wright's social/interpersonal skills, Dr. Gamache concluded that Wright did not suffer deficits consistent with the criteria level necessary for a diagnosis of intellectual disability. (PCR SV9:1564-65, 1570).

Finally, in the third broad category of practical skills, Dr. Gamache testified that Wright engaged in activities of daily living like bathing, grooming, regular exercise, managing his diet and health issues, and managing his canteen account. (PCR SV9:1571-73). Wright informed Dr. Gamache that he essentially lived on his own from the ages of 13 through 18 and Wright got his own food and clothes, traveled on his own, utilized the bus system and other public facilities like the parks. (PCR SV9:1573-75). Although Wright never received a driver's license as he never studied for the written test, he drove a motor vehicle on numerous occasions. (PCR SV9:1574).

In making his evaluation, Dr. Gamache also considered Wright's pre-incarceration work history when he held a job at Albertson's warehouse as a "selector." Wright would place items from the shelves and put them on a conveyor belt to fulfill orders. (PCR SV9:1578-79). Wright obtained this job through a temporary service, and when he got paid, he would pick up his

check and take it to a neighborhood store and cash it. Wright also informed Dr. Gamache of his drug dealing business which he began participating in as a teenager. Wright utilized a pager or beeper to conduct his drug transactions. (PCR SV9:1580-82).

Dr. Gamache concluded based on his evaluation and review of documentation that Wright did not meet Florida's statutory definition of intellectual deficiency because, in addition to not having significant subaverage general intellectual functioning, Wright did not have deficits in meeting the standards of personal independence and social responsibility expected of his age, cultural group, and community. Dr. Gamache noted that he was evaluating Wright's adaptive behavior within his cultural group and community. Wright grew up in a low socioeconomic neighborhood of Polk County, and as Dr. Gamache explained, the fact that Wright did not have a checking account as an 18 or 19 year old and used a convenience store to cash his check was not uncommon within his socioeconomic group. (PCR SV9:1583-84). Likewise, the fact that Wright was in a gang and successfully sold drugs to support himself was also not an uncommon activity for someone of his age in his community. (PCR SV9:1584-86). Based on his evaluation, Dr. Gamache opined that Wright did not have deficits in his adaptive behavior, either prior to age 18, or currently. (PCR SV9:1586-87).

The defense's retained expert, Dr. Mary Kasper, also examined Wright's adaptive behavior under the three broad categories of conceptual, social and practical skills, but unlike Dr. Gamache, Dr. Kasper relied extensively on ABAS-II test scores which she personally filled out based on interviews she conducted with a number of people who knew Wright at various times during his life. (PCR SV6:957-65). Dr. Gamache, however, explained that the ABAS-II test was not scientifically valid for these purposes as peer-reviewed literature explained that the test is very susceptible to misrepresentation as the person answering the test questions can very easily make it look like the subject is impaired. Dr. Gamache also discussed Dr. Kasper's improper administration of the test by compiling numerous people's responses into a single test result. (PCR SV9:1587-90). Dr. Kasper acknowledged that her retrospective approach of speaking to numerous people and filling out the ABAS-II results herself was "much more difficult" than the normal administration of the test to a single individual or caretaker. (PCR SV6:1078-80).

In discussing Wright's conceptual skills, Dr. Kasper noted that his school records indicated Wright had problems academically and difficulties reading. According to Dr. Kasper, Wright had difficulties communicating as evidenced by his

attorneys' testimony regarding Wright's understanding of legal concepts. (PCR SV6:965-68). Dr. Kasper also relied on death row inmate Richard Shere's testimony and claimed that Wright did not understand the religious implications associated with his request to obtain a kosher diet in prison. In the category of social skills, Dr. Kasper opined that Wright had deficits in this area prior to age 16, but not currently. (PCR SV6:975). According to Dr. Kasper, Wright had deficits in his social and leisure skills as a youth because she was informed by Wright's cousin, Carlton Barnaby, and another inmate, possibly James Blake, that Wright could not play recreational sports when he was young because he could not follow the rules. (PCR SV6:976-78). Primarily, Dr. Kasper found that Wright no longer had deficits in the area of social skills because of his improved skills in controlling his emotions, having friends, and using proper manners. (PCR SV6:979-80). Finally, in the category of practical skills, Dr. Kasper opined that Wright did not have deficits in this area which were two standard deviations below the norm, either prior to age 18, or currently. (PCR SV6:981-82). Thus, Dr. Kasper opined that in her opinion, Wright has current deficits in his adaptive behavior only in the area of conceptual skills.

In rejecting Wright's claim that he has deficits in his adaptive functioning, the trial court relied on the testimony at the evidentiary hearing, as well as Wright's testimony from his trial. In fact, the court found Wright's trial testimony "very telling and compelling in gauging" his intellectual functioning and adaptive behavior. The trial court properly relied on the underlying facts of the crimes and Wright's trial testimony in making this determination. See Phillips v. State, 984 So. 2d 503, 511-12 (Fla. 2008) (noting that the planning of the murder and finding of CCP indicates the defendant has the ability to adapt to his surroundings); Nixon v. State, 2 So. 3d 137, 144 (Fla. 2009) (court did not err in considering Nixon's confession in finding that he was not intellectually disabled); Hodges v. State, 55 So. 3d 515 (Fla. 2010) (noting that defendant's actions during crime and his testimony were contrary to a finding of intellectual disability); Henry v. State, 141 So. 3d 557 (Fla. 2014) (noting that the defendant's oral advocacy refutes any claim of deficits in adaptive functioning).

The facts surrounding the three-day crime spree involving Wright's case and his trial testimony refute any claim of deficits in his adaptive functioning. The evidence established that on Thursday, April 20, 2000, Wright and two other accomplices (Aaron Silas and one of his friends) broke into Mark

Shank's home and stole a pistol and shotgun. Wright, 19 So. 3d at 284. As Wright admitted when he testified at trial, he traded marijuana to Aaron Silas in exchange for the pistol.[8] (DAR V30:4518-20). The next morning, Wright travelled to Aaron Silas' home and asked him for a ride, and while Wright was directing Silas, they drove by a house on Longfellow Boulevard where Wright committed a drive-by shooting with the pistol he obtained from the Shank burglary. (PCR SV7:1137-45; DAR V30:4526-31). After committing the drive-by shooting, Wright took Silas and Samuel Pitts to James Hogan's home, approximately fourteen miles away in Lake Alfred. Wright, 19 So. 3d at 284-85. Hogan saw the pistol on the passenger floorboard under Wright, and Silas had the shotgun in the trunk.[9] (DAR V27:3972).

Later in the same evening, Wright abducted James Felker and David Green at gunpoint after approaching their car and requesting a cigarette. Wright, 19 So. 3d at 285. Wright testified at trial that he did not participate in the murders, but instead was engaged in a drug transaction after a customer had paged him on his beeper. The evidence further established

[8] Wright testified that at this time, he was living with a friend, Corey Hudson, and he sometimes stayed with his girlfriend, Vontrese Anderson. (DAR V30:4521).

[9] Hogan saw Wright the next day (the day after the instant murders) walking up the road from the Haines City area and Wright asked Hogan for a ride back to Lakeland. (DAR V27:3977). Wright told Hogan about the murders. (DAR V27:3978-90).

that after Wright abducted Felker and Green at gunpoint, he forced Green to drive to Providence Reserve Apartments where they picked up Samuel Pitts. The men then drove the victims approximately ten miles to a remote orange grove in Polk City where Wright shot and killed the victims. While driving the victims' car that evening, Wright also fled from law enforcement and engaged in a high speed chase for ten to fifteen minutes. Id. at 285-86.

As the trial court correctly found, a review of Wright's trial testimony belies any claim that he is intellectually disabled. Dr. Kasper opined that Wright had deficits in his ability to communicate and understand legal concepts, but a review of his testimony refutes that opinion. Wright's testimony demonstrates that he clearly understood such legal concepts as taking the Fifth Amendment and refusing to answer questions regarding uncharged crimes, and Wright understood that he was going to admit to other lesser crimes during his testimony. Furthermore, Wright easily and properly communicated during his testimony. Wright detailed his gang activity, drug dealing, ability to drive, and his ability to navigate around the various communities in Polk County. Like Phillips, the evidence supporting the finding that the instant murders were committed

in a cold, calculated and premeditated manner support a finding that Wright is not intellectually disabled.

Finally, the State need not address in detail the third prong of an intellectual disability claim, onset before age 18, given Wright's failure to establish either of the first two prongs. The trial court noted that Wright's intellectual condition has existed his entire life, but that condition cannot legally be classified as intellectually disabled. (PCR SV11:1865). Although the court rejected Wright's intellectual disability claim, the court recommended that this Court consider the proportionality of his two death sentences. This Court has already conducted a proportionality review in Wright's case, and Wright is precluded from attempting to relitigate this aspect of his case at this time. See Lukeheart v. State, 70 So. 3d 503, 524-25 (Fla. 2011) (noting that defendant was precluded from raising claim relating to proportionality review in habeas petition as claim had already been raised and rejected on direct appeal); Trotter v. State, 932 So. 2d 1045, 1050-51 (Fla.2006) (holding that this court reviews proportionality on *direct* appeal) (emphasis added). Furthermore, nothing in these postconviciton proceedings alters this Court's previous finding that Wright's two death sentences were proportional. See Wright v. State, 19 So. 3d 277, 303-05 (Fla. 2009).

ISSUE II

THE BURDEN OF PROOF SET FORTH IN FLORIDA STATUTES, SECTION 921.137(4), IS CONSTITUTIONAL.

In his supplemental brief, Wright argues that Florida Statutes, section 921.137(4) is unconstitutional because it required him to prove his alleged intellectual disability by a clear and convincing burden of proof. Wright did not object to this standard in the circuit court. In fact, collateral counsel acknowledged at the outset of the evidentiary hearing that this was the applicable legal standard applied by this Court.[10] (PCR SV12:628-29). Because Wright did not preserve this issue by properly raising it below, this Court should find that the claim is procedurally barred. See Snelgrove v. State, 107 So. 3d 242, 252 n.7 (Fla. 2012) (stating that defendant failed to preserve claim that Florida's intellectual disability statute is unconstitutional because he failed to preserve the issue for appeal); Doorbal v. State, 983 So. 2d 464, 492 (Fla. 2008) ("For an issue to be preserved for appeal, it must be presented to the

[10] Wright stated in his written closing argument that Florida law requires the clear and convincing burden of proof, but counsel disagreed with this standard and asserted that it was unconstitutional. (PCR V10:1715-17). This brief mention in his written closing argument is insufficient to preserve the claim. See Deparvine v. State, 146 So. 3d 1071, 1103 (Fla. 2014) (finding that lower court properly denied claim that was first raised in written closing arguments).

lower court, and the specific legal argument or ground to be argued on appeal must be part of that presentation.").

Even if this Court addresses Wright's claim, the State submits that it is without merit.[11] Florida Statutes, section 921.137(4) requires the defendant to prove his claim of intellectual disability by clear and convincing evidence. This standard is consistent with that required for other mental health issues which may be presented in a criminal action. See Fla. R. Crim. P. 3.812(e) (competency to be executed); § 775.027(2), Fla. Stat. (insanity as an affirmative defense). Rule 3.203 did not adopt a standard of proof because of concerns that this was a substantive rather than a procedural issue and the concerns of some Justices and Rules Committee members that the burden was unconstitutional under Cooper v. Oklahoma, 517 U.S. 348 (1996). See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563, 566-67 (Fla. 2004) (Pariente, J., concurring) (noting that the challenge should be raised in the trial court so the lower court could rule on the constitutionality of the burden of proof).

In Medina v. State, 690 So. 2d 1241 (Fla. 1997), this Court

[11] The standard of appellate review in determining whether a statute is unconstitutional is *de novo* since it is a question of law. Caribbean Conservation Corp., Inc. v. Florida Fish And Wildlife Conservation Commission, 838 So. 2d 492 (Fla. 2003).

rejected a similar argument that Cooper v. Oklahoma, 517 U.S. 348 (1996), rendered unconstitutional the requirement in Rule 3.812 that there be clear and convincing evidence that a prisoner is incompetent to be executed. As the Supreme Court acknowledged in Ford v. Wainwright, 477 U.S. 399 (1996), the State has a legitimate and substantial interest in taking a capital defendant's life as punishment for a crime and the heightened procedural requirements in capital trials and sentencing procedures do not apply (in contrast to competency to stand trial determinations where the defendant's interest is substantial and the State's interest modest).

Significantly, the unpreserved issue presented here is in the context of a collateral, postconviction challenge to Appellant's death sentences, as his direct appeal became final years ago. The reduced demands of due process recognized by concurring Justices Powell and O'Connor in Ford, supra, should be noted and obviously it is not necessary or appropriate in the instant case to determine whether the standard might be different in a case presenting a challenge to section 921.137 on direct appeal of a judgment and sentence. That is simply a case for another day.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of Appellant's renewed motion for determination of intellectual disability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2015, I electronically filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: **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, **perinetti@ccmr.state.fl.us.**

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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