

one of the prongs is relatively less strong, a finding of intellectual disability may be warranted based on the strength of other prongs [*Oats*, pp 467–8].

The Florida Supreme Court ruled that, although Mr. Thompson was able to produce evidence of all three prongs at previous hearings, “he did not receive the type of conjunctive and interrelated assessment that *Hall* requires” (*Thompson*, p 50). In closing, the Florida Supreme Court related that Mr. Thompson had yet to be afforded a “fair opportunity to show that the Constitution prohibits his execution” (citing *Hall*, p 2001). A dissenting judge voiced that *Hall* should not be given retroactive effect.

#### Discussion

In *Hall*, the U.S. Supreme Court further clarified the contours of its *Atkins* holding. The Court sought to prevent “false negatives.” Obviously, the Court is concerned that if a state’s schema for the detection of intellectual disability is too narrow, for example, by employing narrow exclusion criteria such as the bright-line IQ test in *Cherry*, then said schema increases the chances that a state may execute a truly intellectually disabled client. States must also concern themselves with “false positives,” whereby a person convicted of capital murder is erroneously deemed intellectually disabled and excused from “deserved” capital punishment. The Supreme Court holding in *Hall* indicates that the Court believed that Florida’s capital-sentencing scheme tilted too far toward the detection of false positives, thus increasing the likelihood that those convicted of capital murder, but at the same time, truly intellectually disabled, would be executed unconstitutionally. As the Court related in *Hall*: “Intellectual disability is a condition, not a number” (*Hall*, p 2000).

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## Intellectual Disability and Postconviction Relief After *Hurst*

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## The Supreme Court of Florida Re-evaluated a Death Row Inmate as to Intellectual Disability and Adequacy of Jury Waiver After the Recent Supreme Court Rulings in *Hall* and *Hurst*

In *Wright v. State*, No. SC13-1213 (Fla. March 16, 2017), the Supreme Court of Florida considered whether the trial court had erred in allowing Tavares Wright to waive his penalty-phase jury, thus obviating his *Ring* challenge (*Ring v. Arizona*, 536 U.S. 584 (2002)). The court also considered whether the trial court had erred in its rejection of Mr. Wright’s renewed motion for consideration of his intellectual disability claim. The Florida Supreme Court reviewed these questions in light of the United States Supreme Court’s decisions in *Hall v. Florida*, 130 U.S. 1986 (2014) and *Hurst v. Florida*, 136 U.S. 616 (2016). The court ruled that Mr. Wright failed to establish that he was intellectually disabled as the basis for challenging the death penalty and that he was not entitled to postconviction relief under *Hurst*, having validly waived his right to a penalty-phase jury.

#### Facts of the Case

On November 13, 2004, Tavares Wright was found guilty of two counts of first-degree murder, two counts of armed robbery with a firearm, two counts of kidnapping with a firearm, and one count of carjacking with a firearm. Mr. Wright and Samuel Pitts committed these offenses over a three-day period beginning on April 20, 2000. In separate trials, Mr. Wright and Mr. Pitts were found guilty of murdering David Green and James Felker during the course of a carjacking, kidnapping, and robbery. Mr. Wright had obtained the murder weapon during a home burglary that he had committed the prior day.

Mr. Wright waived his right to a penalty-phase jury. The jury was dismissed after the court determined that his waiver was made knowingly, intelligently, and voluntarily. The defense presented mitigating evidence of childhood trauma and neglect, as well as evidence of exposure to alcohol and cocaine *in utero*.

A hearing was held to determine whether Mr. Wright met Florida’s statutory standards for intellectual disability in capital cases. Although two defense experts differed in their opinions regarding the effects of some mitigating factors on Mr. Wright’s functioning, both agreed that he did not qualify as intellectually disabled under § 921.137 of the Florida Statutes (2000). The trial court ruled that Mr.

Wright did not meet criteria for intellectual disability. After the hearing, he received a sentence of death for each murder, as well as life imprisonment for his other charges.

While a postconviction appeal was pending before the Florida Supreme Court, the United States Supreme Court issued its opinion in *Hall*. The Court held that Florida's statutory scheme for determination of intellectual disability was unconstitutional, because it "conditioned presentation of evidence of adaptive functioning on a strict IQ score requirement" (*Wright*, p 9). In response to *Hall*, Mr. Wright appealed, filing a new motion for determination of intellectual disability. While this appeal was in progress, the U.S. Supreme Court ruled in *Hurst* that Florida's capital sentencing scheme, which requires a judge to make the final decision as to imposition of the death penalty, was unconstitutional. Although Mr. Wright had waived his right to a penalty-phase jury, he now challenged the validity of his prior waiver in light of his asserted intellectual disability. He also stated that he had only waived the "advisory jury," rather than "the jury required by the Sixth Amendment" under *Hurst* (*Wright*, p 18).

#### *Ruling and Reasoning*

The Florida Supreme Court held that Mr. Wright was not intellectually disabled under Florida law because he could not demonstrate by even a preponderance of the evidence "that he met either of the first two prongs used for determination of intellectual disability" (*Wright*, p 17). The court also rejected his challenge as to his incompetency to waive his right to a penalty phase jury. Because he was not intellectually disabled under Florida law, his prior jury waiver was still valid, and he was therefore not entitled to any *Hurst* relief.

The Florida Supreme Court referred to their own post-*Hall* decision in *Salazar v. State*, 188 So. 3d 799 (Fla. 2016), to support the decision to deny Mr. Wright's intellectual disability claim. Using *Salazar*, the court focused on two prongs: "significantly subaverage general intellectual functioning" and "concurrent deficits in adaptive behavior" (*Salazar*, p 811). As to the IQ prong, the court noted that Mr. Wright had completed seven nonabbreviated IQ tests. His scores ranged from 75 to 81. The court related that the defense expert witness, Dr. Kasper, adjusted his scores for standard error of the measurement (SEM). She testified that his first examination,

conducted in February 1991 was the most accurate. The test was a Wechsler Intelligence Scale for Children-Revised (WISC-R) on which he scored 76. Dr. Kasper argued that, because this was Mr. Wright's first IQ test, it was least susceptible to the "practice effect." Dr. Kasper opined that, to a 95 percent confidence, the SEM range derived from that score was between 69 and 82. The court also noted Dr. Kasper's testimony that Mr. Wright's score of 82 in 2005 was valid and free of any practice-effect concerns. The court also cited testimony by Dr. Gramache, the state's expert, in which he related concerns that Mr. Wright had not offered full effort on all of his IQ tests. Dr. Gramache testified that during his IQ testing of Mr. Wright, he had also administered effort testing (via the Validity Indicator Profile), which indicated that Mr. Wright had not provided full effort during the IQ testing.

Regarding the adaptive functioning prong, the court noted that Dr. Kasper had testified that Mr. Wright met the criteria only for adaptive functioning deficits in one of the three categories, the conceptual skills subsection. The court then referred to evidence in the transcript of Mr. Wright's trial, which indicated that he did not have adaptive functioning deficits. These reviewed areas included his own trial testimony, the complexity of the crime spree, his statements during his postarrest interview, and statements made by lay witnesses concerning Mr. Wright's social functioning.

In considering Mr. Wright's *Hurst* claim, the Florida Supreme Court emphasized the validity of his original jury waiver. He argued two points. First, he asserted that because he was intellectually disabled when he made the jury waiver, it was not a competent waiver. Second, he contended that he had not waived his right to a "penalty-phase jury" but only to the "advisory jury" struck down by Supreme Court's holding in *Hurst*. The court rejected both theories. Mr. Wright was not intellectually disabled when he made the waiver for the reasons above. Also, there was evidence that he wanted to waive his right to a jury in the penalty phase because of concerns about "possible 'contamination' of the jury by the trial court's admission of collateral-crime evidence during the guilt phase" (*Wright*, p 18). The court also cited an on-the-record statement, made by Mr. Wright's attorney, indicating that Mr. Wright preferred "that the judge determine whether a death sentence was appropriate because he felt that a judge would be

more objective than the same jury that convicted him” (*Wright*, p 18).

*Discussion*

Mr. Wright also made a facial challenge to Florida’s death penalty scheme, arguing that it was inherently unconstitutional, as it had allowed a judge to make the final decision as to capital sentencing. The penalty-phase jury in Florida’s pre-*Hurst* scheme was tasked with reviewing aggravating and mitigating factors and then making an advisory recommendation to the trial judge as to whether to impose the death penalty. The trial judge then reweighed the aggravating and mitigating factors and made the final decision as to whether to impose the death penalty. In *Hurst*, the Supreme Court held that “The Sixth

Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough” (*Hurst*, p 619). The Florida Supreme Court dismissed Mr. Wright’s challenge based on the validity of his previous jury waiver, but the facial challenge may be construed as going beyond the structural validity of his waiver. As Mr. Wright had argued, he was not waiving the “plenary” jury outlined in *Hurst*, but only the limited penalty-phase jury now struck down in *Hurst*. Even if he had validly waived his right to a pre-*Hurst* jury, it does not necessarily follow that he would have waived his right to a post-*Hurst* jury.

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