NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LEON HALIBURTON,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

CAPITAL CASE

Brittney Nicole Lacy*
Assistant Capital Collateral Regional Counsel
Lacyb@ccsr.state.fl.us
**Counsel of Record*

Riley Horan
Staff Attorney
Horanr@ccsr.state.fl.us

Capital Collateral Regional Counsel – South
110 SE 6th Street, Suite 701
Fort Lauderdale, Florida 33301
(954) 713–1284

COUNSEL FOR PETITIONER

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APPENDIX A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

v.

JERRY L. HALIBURTON,
Defendant.
_____________________/

CRIMINAL DIVISION: R
CASE NO.: 1982CF001893AXXXMB
1982CF001893

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTIONS TO VACATE JUDGMENT OF CONVICTION AND SENTENCE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

THIS CAUSE came before the Court upon Defendant's September 19, 2006 Second Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend (DE #751); Defendant's November 30, 2016 Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851 (DE #1177); Defendant's June 5, 2017 Amendment to Successive Motion to Vacate Judgment of Conviction and Sentence (DE #1181); and Defendant's June 14, 2019 Supplement to Amended Rule 3.851 (DE #1160). The Court has carefully considered Defendant's Motions, the State's numerous responses, the evidence and arguments presented at the May 13, 2019 evidentiary hearing, the extensive case file and record in this case, and is otherwise fully advised in the premises.

FACTUAL AND PROCEDURAL HISTORY

A full procedural history of this case can be found in the parties numerous pleadings. Accordingly, rather than recite the extensive history of this case in full, the Court offers the following abbreviated history that includes those facts pertinent to the matters now before it.

Defendant Jerry Haliburton was convicted and sentenced to death for the 1981 murder of Donald Bohannon. The facts, as briefly summarized by the Florida Supreme Court, are as follows:

> In the early morning of August 9, 1981, appellant burglarized the home of Donald Bohannon and attacked Bohannon with a knife as he slept. Bohannon died as a result of thirty-one stab wounds over his neck, chest, arms, and scrotum. After the murder appellant told his brother, Freddy, that he had killed Bohannon just to see if he could kill another human being. Finding Haliburton guilty of first-degree murder, the jury recommended the death penalty by a nine-to-three vote. The trial judge found four aggravating factors and no statutory mitigating factors. The court considered the nonstatutory mitigation circumstances placed into evidence, found them insufficient to outweigh the aggravating circumstances, and imposed the death sentence.

Haliburton v. State, 561 So. 2d 248, 249–250 (Fla. 1990) (footnote omitted). The aggravating factors the Court found to exist were (1) the capital felony was committed by a person under sentence of imprisonment; the defendant was twice previously convicted of violent felonies; the capital felony was committed while engaged in a burglary; and the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. *Id.* at 249 n. 1 (citing § 921.141(5)(a), (b), (d), (i), Fla. Stat. (1987)). Defendant's judgment and sentence became final on June 28, 1991. *Haliburton v. Florida*, 501 U.S. 1259 (1991) (cert. denied).

On September 19, 2006, Defendant filed his Second Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend (DE #751) ("Second Successive Motion to Vacate") wherein Defendant argued that he was intellectually disabled, and as such, his death sentence was unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002). The State filed its initial Response to Defendant's Second Successive Motion to Vacate (DE #760) on March 12, 2007, and on April 7, 2008, the Court entered an Order granting Defendant's Second Successive Motion to Vacate in part, ordering that Defendant was permitted to proceed under Florida Rule of Criminal Procedure 3.203 and entitled to an evaluation by an expert to determine whether Defendant was intellectually disabled.

On October 12, 2011, following the filing of Defendant's mental health evaluation report, the State filed an Amended Response to Defendant's Second Successive Motion to Vacate Judgments and Conviction (DE #1172). Therein, the State asked the Court to deny Defendant's Second Successive Motion based on the fact that Defendant's evaluation resulted in a full-scale IQ score of 74, and as a result, Defendant was unable to demonstrate he was intellectually disabled within the meaning of section 921.137, Florida Statutes. *See Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009) (rejecting claim that it is unconstitutional to terminate inquiry on intellectual disability once it has been established that a defendant's IQ is above 70). The Court initially denied the State's request to deny Defendant's Second Successive Motion, but on March 13, 2012, the Court entered an Order Granting State's Motion for Rehearing (DE #799) in which it summarily denied Defendant's Second Successive Motion to Vacate. Citing *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007), the Court ruled that Defendant's claim of intellectual disability was refuted by his IQ score of 74, and therefore was not entitled to relief. Defendant appealed, and on July 18, 2013, the Florida Supreme Court affirmed with a written opinion. *Haliburton v. State*, 123 So. 3d 1146 (Fla. 2013).

Defendant filed a petition for writ of certiorari at the United States Supreme Court, but before briefing was complete, the Supreme Court issued its opinion in *Hall v. Florida*, 572 U.S. 701 (2014), wherein the Court held that the Florida Supreme Court's interpretation of section 921.137 was unconstitutional. As explained in further detail below, the Court held that the summary denial of an intellectual disability claim based solely on an IQ score above 70 ignored the "inherent imprecision" of such tests creating "an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704. Following the Supreme Court's *Hall* decision, the Court granted certiorari in Defendant's case, vacated the Florida Supreme

Court's judgment, and remanded the case back to the Florida Supreme Court for further consideration in light of *Hall*. *Haliburton v. Florida*, 135 S. Ct. 178 (2014). On February 5, 2015, the Florida Supreme Court then vacated its July 18, 2013 Order (affirming the summary denial of Defendant's Second Successive Motion to Vacate) and remanded the case back to this Court for an evidentiary hearing under rule 3.203. *Haliburton v. State*, 163 SO. 3d 509 (Fla. 2015).

While Defendant's evidentiary hearing was pending before this Court, the United States Supreme Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), which invalidated Florida's death penalty statute under its previous decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Shortly after the Florida Supreme Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Defendant filed his Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851 (DE #1177) on November 30, 2016, raising several claims based on the *Hurst* decisions. Shortly thereafter, on motion of the parties, the Court entered an Agreed Order to Stay Proceedings on December 5, 2016, to allow the appellate courts time to determine how the *Hurst* decisions might affect Defendant's case.[1]

On May 8, 2017, the State filed its Response to Defendant's November 30, 2016 Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851 (DE #969). On June 5, 2017, Defendant filed an Amendment to Successive Motion to Vacate Judgment of Conviction and Sentence (DE #1181), and the State filed a response thereto on June 20, 2017 (DE #1182).

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[1] In the State's July 29, 2019 Post-Hearing Closing Argument Memorandum to Haliburton's Claim of Intellectual Disability, the State points out that the Court December 5, 2016 stay has yet to be lifted. As numerous pleadings and hearings have been filed and held in this case since that time, the Court considers its stay to have been lifted long ago. However, to the extent the State requests this Court explicitly lift its December 5, 2016 Stay, the Court hereby does so now.

On May 13, 2019, the Court finally held an evidentiary hearing on Defendant's *Atkins* claim. That hearing is discussed in further detail below. At the conclusion of that hearing, the Court permitted the parties to file written closing arguments regarding Defendant's *Atkins* claim, as well as separate memoranda raising any final arguments surrounding Defendant's *Hurst* claims. Defendant filed his Supplement to Amended Rule 3.851 Motion (DE #1160) (regarding his *Hurst* claims) on June 14, 2019. The State filed its Response to Defendant's Supplement to Amended 3.851 Motion on July 10, 2019 (DE #1165). Both Defendant and the State then filed their written closing arguments with respect to Defendant's *Atkins* claim on July 29, 2019 (DE #1167 and 1166, respectively).

LEGAL ANALYSIS AND RULING

I. Whether Defendant's Death Sentence is Unconstitutional under *Atkins v. Virginia*.

In Defendant's Second Successive Motion to Vacate, Defendant first argues that his death sentence violates the Eighth and Fourteenth Amendments under the United States Supreme Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002). He then argues that Florida Rule of Criminal Procedure 3.203 does not provide a constitutionally adequate procedure for resolving his claim because the rule denies death-sentenced individuals various due process rights and constitutional protections available to those who have not yet been sentenced to death, thereby violating the Equal Protection Clause. The Court finds Defendant's latter arguments have all been rejected by the Florida Supreme Court. *E.g., Kilgore v. State*, 55 So. 3d 487, 509–11 (Fla. 2010); *Nixon v. State*, 2 So. 3d 137, 145–46 (Fla. 2009). The Court therefore focuses on Defendant's *Atkins* claim.

In 2002, the United States Supreme Court ruled that executions of intellectually disabled[2]

[2] Formerly referred to as "mentally retarded." *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002); §§ 921.137, Fla. Stat. (2002), 393.063(24), Fla. Stat. (2018).

defendants constitutes cruel and unusual punishment in violation of the Eighth Amendment, "and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The *Atkins* Court declined to adopt a single method of determining which offenders were intellectually disabled and whose executions were therefore prohibited, instead leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (internal quotations omitted, alteration original).

Section 921.137, Florida Statutes (2019), thus prohibits the execution of intellectually disabled defendants. As defined in the statute, "intellectually disabled" means "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2019). "Significantly subaverage general intellectual functioning" 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." *Id.*[3] "Adaptive behavior" 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." *Id.* In order to bar imposition of the death penalty, the defendant must prove he or she is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat. (2019); *E.g.*, *Williams v. State*, 226 So. 3d 758, 768 (Fla. 2017) (citing *Franqui v. State*, 59 So. 3d 82, 92 (Fla. 2011)).

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[3] The statutory language quoted here is substantively identical to that contained in the statute when it was first adopted. *See* § 921.137(1), Fla. Stat. (2001); Ch. 2001-202, § 1, Laws of Fla. (2001).

A. Burden of Proof.

As a threshold issue, Defendant argues that the burden of proof in this proceeding should be preponderance of the evidence, and not clear and convincing evidence as required in the statute. § 921.137(4), Fla. Stat. (2019). Defendant relies on the United States Supreme Court's logic in *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996), where the Supreme Court invalidated Oklahoma's requirement that criminal defendants prove their incompetence to stand trial by clear and convincing evidence because it "imposes a significant risk of an erroneous determination that defendant is competent." This Court recognizes that some states have adopted a preponderance-of-the-evidence standard for determining whether a defendant is barred from the death penalty due to intellectual disability,[4] but Florida has yet to follow suit. And while the Florida Supreme Court recently declined to address this issue head on, *Quince v. State*, 241 So. 3d 58, 63 (Fla. 2018), that court did note in a subsequent case that the applicable standard in these proceedings is clear and convincing evidence. *Wright v. State*, 256 So. 3d 766, 771 (Fla. 2018) ("To demonstrate ID, a defendant must make this showing by clear and convincing evidence. § 921.137(4)."). Accordingly, this Court finds that under the current state of the law, it remains bound to apply the clear-and-convincing-evidence standard supplied in section 921.137(4) to these proceedings.

B. Intellectual Disability

The Court held an evidentiary hearing on Defendant's *Atkins* claim on May 13, 2019. Defense counsel presented testimony from one of Defendant's brothers, John Henry Haliburton, Jr., as well as expert testimony from Dr. I. Bruce Frumkin, Ph.D., ABPP, a forensic and clinical

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[4] *E.g.*, *Pennsylvania v. Sanchez*, 614 Pa. 1, 36 A. 3d 24, 70 (2011); *Pruitt v. State*, 834 N.E. 2d 90, 103 (Ind. 2005); *State v. Williams*, 831 So. 2d 835, 859 (La. 2002); *Murphy v. State*, 54 P. 3d 556, 573 (Okla. Crim. App. 2002); *Morrow v. State*, 928 So. 2d 315, 324 n.10 (Ala. 2004); *Howell v. State*, 151 S.W. 3d 450, 465 (Tenn. 2004).

psychologist who initially evaluated Defendant in February 1992, and again in June 2010 in support of Defendant's instant motion. The State presented testimony from Dr. Michael Brannon, Psy.D., a forensic psychologist who evaluated Defendant in June 2018 for purposes of the present proceedings. The Court finds the witnesses generally credible except as stated below.

In order to establish intellectual disability, a defendant is required to establish the following three factors: (1) significantly subaverage general intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. § 921.137(1). The Florida Supreme Court has stated *Hall* requires that "all three prongs of the intellectual disability test be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." *Walls v. State*, 213 So. 3d 340 , 346–47 (Fla. 2016) (citing *Oats v. State*, 181 So. 3d 457, 459, 467 (Fla. 2015)). However, the court has also recently reiterated that "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018) (quoting *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016) (alteration original). The Court reviews each of the three factors in turn.

1. Intellectual Functioning.

The first prong of the analysis requires Defendant to demonstrate "significantly subaverage general intellectual functioning." As noted above, significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." § 921.134(1), Fla. Stat. As explained by the United States Supreme Court in *Hall*:

> The mean IQ test score is 100. The concept of standard deviation describes how scores are dispersed in a population. Standard deviation is distinct from standard error of measurement, a concept which describes the reliability of a test and is discussed further below. The standard deviation on an IQ test is approximately 15

> points, and so two standard deviations is approximately 30 points. Thus, a test taker who performs "two or more standard deviations from the mean" will score approximately 30 points below the mean on an IQ test, *i.e.*, a score of approximately 70 points.

Hall v. Florida, 572 U.S. 701, 711 (2014). With regard to the standard error of measurement, the Florida Supreme Court summarized in *Wright*:

> There is a standard error of measurement (SEM) that affects each IQ score, which results in a range approximately 5 points above and below the raw IQ test score. *Hall*, 134 S. Ct. at 1995; DSM-5, at 37. Rather than interpreting IQ scores as a single, fixed number, medical professionals read IQ scores as a range to account for SEM. *Hall*, 134 S. Ct. at 1995; AAIDD-11, at 36. For this reason, the Supreme Court rejected the use of a strict 70-point ID cutoff in *Hall*, noting that courts must account for SEM because "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S. Ct. at 2000 (citation omitted) (quoting *Atkins*, 536 U.S. at 309 n.5, 122 S. Ct. 2242). This means that an "IQ test result of 75 [i]s squarely in the range of potential intellectual disability." *Brumfield v. Cain*, ---U.S.---, 135 S. Ct. 2269, 2278, 192 L.Ed.2d 356 (2015).

Wright v. State, 256 So. 3d 766 (Fla. 2018). Thus, the SEM must be taken into account when evaluating a full-scale IQ score for purposes of determining intellectual disability, and if a defendant scores an IQ of 75 or below, the court must consider evidence of adaptive behavior.

Over the past several decades, Defendant has submitted to a number of mental health evaluations and tests, many of which included IQ testing. On February 2, 1992, Dr. Patricia Fleming administered the Wechsler Adult Intelligence Scale–Revised ("WAIS-R"), and Defendant obtained a verbal IQ score of 79, a performance IQ score of 82, and a full-scale IQ score of **80**. Those scores were replicated in a second administration of the WAIS-R performed a week or two later by Dr. Frumkin. On January 31, 2000, Defendant was given the Wechsler Adult Intelligence Scale–Third Edition ("WAIS-III") by Dr. Hyman H. Eisenstein and achieved a verbal IQ score of 82, a performance IQ score of 80, and a full-scale IQ score of **79**. On April 30, 2009, Defendant was administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) by

Dr. Barry Crown and achieved a full-scale IQ score of **74**. Finally, on May 20, 2010, Dr. Frumkin conducted a second administration of the WAIS-IV, and Defendant again received a full-scale IQ score of **74**.[5]

According to Dr. Frumkin's 2010 Report and testimony, his most recent testing on the WAIS-IV produced a 95% confidence interval of Defendant's IQ being between 70 and 79. Although Dr. Brannon did not perform any IQ testing of his own,[6] he opined that Defendant's IQ was likely closer to the 79–80 range. (Tr. 200:22–201:8.) He based his assessment on his interview with Defendant and a review of Dr. Frumkin's 2010 Report, as well as Defendant's prison records and previous IQ scores on the WAIS-R and WAIS-III (where Defendant received IQ scores of 80 and 79, respectively). According to Dr. Brannon, while IQ scores can fluctuate, "you can't fake good," meaning a person's higher IQ scores will more accurately reflect a person's capacity, while lower IQ scores achieved on other test administrations might be attributable to a variety of potential factors. (Tr. 163:14–164:12.) "You're as smart as your highest score but not

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[5] The Court notes that a number of other IQ tests appear to have been given to Defendant over the years. School records show that Defendant earned an IQ score of 68 on the Slossen Test administered when he was fourteen (14) years old, and according to Dr. Brannon's report, the Department of Corrections administered a number of BETA and BETA-II Tests on which Defendant received IQ scores of 88, 92, and 100. But both Dr. Frumkin and Dr. Brannon testified that neither the Slosson nor the BETA Tests are accepted in the State of Florida for purposes of evaluating intellectual disability, and that both are short nonverbal tests often used for screening purposes (Slosson) or administered in group settings (BETA). (Tr. 84:15–21, 109:24–113:5; 219:23–221:24.) The Court therefore does not rely on these tests for purposes of evaluating Defendant's intellectual functioning.

[6] Dr. Brannon stated in his report that "it was not possible to conduct formal intellectual testing for this assessment due to the presence" of Defendant's counsel, which was authorized by this Court's March 20, 2018 Order. It is unclear why following the March 13, 2018 hearing on this issue and the resulting March 20, 2018 Order (which was drafted by the State), the State did not return to the Court to re-raise the issue. The Court simply assumes that, not having done so, the State no longer sought to have Dr. Brannon conduct his own administration of an IQ test.

as smart as your lowest score, so you don't get to pick them." (Tr. 163:21–23.)

The Court finds Dr. Brannon's testimony here both credible and persuasive. In addressing Defendant's 1992 WAIS-R score of 80, Dr. Frumkin testified about a phenomenon known as the "Flynn Effect," which essentially recognizes that the population as a whole is getting smarter.[7] According to Dr. Frumkin, the Flynn Effect results in the overestimation of IQ scores by about a third of a point for each year that passes since an IQ test was normed and released. As the WAIS-R was approximately thirteen years removed from the normative sample it was based on at the time it was administered to Defendant, Dr. Frumkin estimates Defendant's IQ score of 80 was overestimated by approximately 4 points. (Tr. 136:7–23.) Defendant therefore argues that in considering these early test scores, the Court must adjust for the Flynn Effect.

However, as both Dr. Frumkin and Dr. Brannon testified, there is no way to know how the Flynn Effect applies to an individual's score on a given IQ test. Thus, while the Flynn Effect is something to consider, both Dr. Frumkin and Dr. Brannon agreed it would be against standard practice to adjust an individual's score by a certain number of points to account for the Flynn Effect. (Tr. 57:25–59:14; 162:2–163:1.). Moreover, as the Florida Supreme Court recently stated, "*Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases." *Quince*, 241 So. 3d at 61. Accordingly, while the Court does believe Defendant's IQ is below average, the Court finds that Defendant has failed to demonstrate that his IQ is two or more standard deviations from the mean.

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[7] Dr. Frumkin also testified about the Practice Effect, which refers to an increase in performance on the second administration of the same test taken in close proximity to the first administration. (Tr. 60:18–62:5; 136:7–23.) However, because Defendant received the same scores on both administrations of the WAIS-R, as well as the same full-scale IQ score on both administrations of the WAIS-IV, it does not appear that the Practice Effect had an impact on Defendant's WAIS-R or WAIS-IV scores.

2. Adaptive Behavior.

The second prong of the analysis requires the Court to determine whether Defendant's intellectual functioning deficits exist concurrently with deficits in adaptive behavior. The statute defines 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. This prong is further broken down as follows:

> The DSM-5 divides adaptive functioning into three broad categories or "domains": conceptual, social, and practical. DSM-5, at 37; *see also* AAIDD-11, at 43. The conceptual domain "involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-5, at 37. The social domain "involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment." *Id.* The practical domain "involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." *Id.* According to the DSM-5, adaptive deficits exist when at least one domain "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id.* at 38; *see* AAIDD-11, at 43.

Wright v. State, 256 So. 3d 766, 773 (Fla. 2018) (footnote omitted).

Evidence of Defendant's deficits in adaptive behavior were derived from a number of different sources. Both Dr. Frumkin and Dr. Brannon reviewed a variety of records (detailed in their respective reports) and conducted clinical interviews with Defendant. Dr. Frumkin additionally administered the Wide Range Achievement Test, Fourth Edition ("WRAT-IV") to test Defendant's functional academics. He also conducted interviews with a number of Defendant's siblings, including Helen Edwards (Defendant's older sister), John R. Haliburton (Defendant's older brother), and John H. Haliburton, Jr. (Defendant's younger brother), each of whom were administered the Adaptive Behavior Assessment System-II ("ABAS-II"), as well as an interview with Charles Johnson, one of Defendant's former employers (who did not complete

the ABAS-II). Dr. Brannon also interviewed John H. Haliburton, Jr., who in turn also testified at the evidentiary hearing.

With regard to the conceptual domain, as noted above, Dr. Frumkin administered the WRAT-IV to test Defendant's functional academics. According to Dr. Frumkin's report, Defendant received a Word Reading Standard Score of 78 (lower 7%), a Sentence Comprehension Standard Score of 83 (lower 13%), a Reading Composite Standard Score of 78 (lower 7%), a Spelling Standard Score of 84 (lower 14%), and Math Computation Standard Score of 7 (lower 4%). When Dr. Frumkin testified, he drew specific attention to Defendant's math skills, which he stated was approximately at a third-grade level. (Tr. 90:6–21.) Dr. Frumkin went into further detail, providing specific examples of the types of problems featured on the test that Defendant struggled with, such as "8 minus blank equals 5," which Defendant answered as 4, and "6 divided by 2" equals blank, which Defendant was unable to answer at all. (Tr. (90:12–22.) Given Dr. Frumkin's testimony here and Defendant's scores on the WRAT-IV, the Court finds that Defendant has demonstrated a significant deficit in the area of math reasoning.

However, when it came time for Dr. Frumkin to explain the other areas in which Defendant suffered, things became a little less clear. (Tr. 101:14–102:13.) When pressed on cross-examination about what area in addition to mathematical reasoning Defendant suffered from severe deficits, Dr. Frumkin appeared to stammer a bit, stating, "He has a lot of different ones," but then needing to refer back to his notes before he was able to further answer the question. (Tr. 114:15–115:6.)

As noted above, Dr. Frumkin interviewed several of Defendant's siblings and administered them the ABAS-II. As explained in Dr. Frumkin's 2010 report, the ABAS-II "is designed to help objectively measure deficits in adaptive functioning by a respondent rating the subject [in this case,

Defendant] on a number of different Skill Areas and then comparing scores from these areas to individuals of the same age range." But as Dr. Frumkin testified, the validity of these tests is questionable when the scores produced are inconsistent, and here "there was wide variability" in how each of the family members scored Defendant. (Tr. 101:19–102:13; 138:2–11.) Nonetheless, Dr. Frumkin testified that while the scores were inconsistent, the trends in those scores (areas in which the scores reflected higher or lower functioning) were relatively consistent. (Tr. 104:7–20; 137:8–139:21.) Thus, the ABAS-II results revealed that Defendant scored highest in the social domain skills, next highest in practical domain skills, and lowest in conceptual domain skills.

These trends are consistent with the information gleaned from Dr. Frumkin's and Dr. Brannon's reports, the interviews with Defendant's siblings, and the testimony provided throughout the history of this case. With regard to the social domain, John H. Haliburton testified at the May 13, 2019 evidentiary hearing that Defendant was a positive influence on him and his siblings when they were growing up. (Tr. 33:5–19.) In terms of awareness of others, John H. Haliburton further talked about how Defendant would often bring home hungry kids from around the neighborhood so he could be sure they ate a good meal. (Tr. 34:5–9.) John H. Haliburton testified that Defendant similarly would care for his siblings' kids (Defendant's nieces and nephews), often babysitting them, and while he attempted to clarify that Defendant would not babysit the children alone (Tr. 33:13–19), that portion of John H. Haliburton's testimony appears inconsistent with his testimony from Defendant's 1988 penalty phase during which he testified that Defendant "was always there to baby-sit for . . . my sisters' and brothers' kids," and that Defendant would "always make sure that they was taken care of," and not allow his brothers or sisters to leave their kids unattended. (ROA Vol. 6, Tr. 113:15–21.) Another of Defendant's brothers, Harris Haliburton, also testified at Defendant's 1988 penalty phase, stating their mother

and sister would leave the house and leave Defendant in charge of the children, and that Defendant would always make sure the kids were fed, bathed, and put in bed. (ROA Vol. 6, Tr. 136:7–14.)

Dr. Frumkin also mentioned communication skills as an area in which Defendant struggled, noting numerous times in his report and testimony that Defendant was a "poor historian." Yet Dr. Frumkin also testified that Defendant was able to relate to him a significant amount of information about his childhood, some of which (specifically with regard to the abuse he endured at the hand of his grandmother) was corroborated by the testimony of John H. Haliburton and interviews with Defendant's siblings. (Tr. 122:18–126:24.) Further, Dr. Brannon testified that during his interview, Defendant was able to relate "a rather elaborate history without any difficulty," that Defendant would clarify and provide additional information when asked, and that Defendant "was rather precise in what he had to say and answered all [Dr. Brannon's] questions." (Tr. 176:6–13.) Dr. Brannon added that Defendant also understood and reacted appropriately to humor, which Dr. Brannon testified "shows that your brain is working in a way beyond just the give-and-take of questions." (Tr. 176:17–177:8.)

Dr. Brannon also testified that his review of Defendant's prison records revealed that during Defendant's time in prison, Defendant has submitted a number of inmate requests/complaints concerning a variety of topics, such as hot water in the showers, obtaining ice in the unit for him and his fellow inmates, obtaining medical and dental care, etc. (Tr. 196:19–197:19.) Dr. Brannon testified that not only are his requests clearly written and rational, showing his ability to communicate effectively, but they also show Defendant is "socially engaged and able to not only take care of himself but he looks out for others as well." (Tr. 204:1–25.)

With regard to the practical domain, the record demonstrates that at the time of his arrest, Defendant was living with his long-term girlfriend in West Palm Beach with whom he had a 39-

year-old son. (Tr. 169:15–20.) In terms of work, Dr. Frumkin and Dr. Brannon both testified that Defendant had performed landscaping jobs at times, though nothing longer than a few months at a time. (Tr. 86:4–88:7; 243:6–8, 266:3–7.) While John H. Haliburton testified that Defendant's landscaping job with Charles Johnson lasted for "maybe two weeks," and that Defendant could not properly perform landscaping duties (Tr. 19:2–21, 36:14–22), Dr. Frumkin testified that Mr. Johnson reported he had worked with Defendant on-and-off for a number of years, and that while Defendant "couldn't sort of plan ahead and know what to do with the next task," and had to be given very specific directions, Defendant could perform those tasks once given direction and was a hard worker (86:9–87:6).

Dr. Frumkin and Dr. Brannon both also reported that at the time of Defendant's arrest, he was enrolled in a CETA class for auto body repair. Defendant's instructor, Cyril Jones, testified at Defendant's 1988 penalty phase that Defendant was in the class for approximately twenty-three weeks (up to the time of his arrest), that he was a "good student" who "worked hard," and that he would have helped Defendant find a job in auto repair had he completed the course. (ROA Vol. 6, Tr. 14323–145:13.). Although John H. Haliburton testified at the May 13, 2019 evidentiary hearing that he had never known Defendant to have been enrolled in an auto body class, both John H. Haliburton and John R. Haliburton had testified at Defendant's 1983 penalty phase that Defendant was taking those classes and further hoped to open a business with John R. Haliburton, who is an auto mechanic. (ROA Vol. 15, Tr. 72:7–73:10; 82:10–83:1.)

Finally, returning to the conceptual domain, various records have indicated Defendant has struggled with reading and reading comprehension over the years. For example, Dr. Frumkin testified that Defendant's sister, Helen Edward, reported that Defendant had major problems in reading, and that he could not comprehend what he had read. (Tr. 103:7–12.) Dr. Frumkin testified

that John H. Haliburton reported Defendant was also poor at problem-solving skills, and that his way of resolving issues was through fighting. (Tr. 103:13–17.) However, Dr. Brannon testified that during his interview, Defendant reported that during his time in prison, Defendant had read multiple books, such as the Koran, People's History of the United States, and But They Didn't Read Me My Rights, and significantly, was able to convey to Dr. Brannon an understanding of what he had read in those books. (Tr. 183:15–188:6.) With regard to the Koran, Defendant conveyed to Dr. Brannon how the principles contained therein inspired him, "adding meaning to his life and helping him to change and think about things in a different way," and that the lessons teach how to "behave in a moral way, in a principled way; how we're supposed to behave towards other people." (Tr. 184:24–185:22.) Dr. Brannon also conveyed that Defendant's vocabulary and use of certain terms reflected Defendant's ability to think in an abstract fashion, demonstrating Defendant's deeper understanding of those concepts, which suggested Defendant is functioning on a higher level than one would expect of someone who is intellectually disabled. (202:23–203:19.)

Ultimately, having considered the evidence and record in this case, the Court agrees with Dr. Brannon's assessment. On balance, while the Court finds Defendant does suffer significant deficits in mathematical reasoning skills, the Court does not find Defendant's remaining deficits—of which there appear to be several—to be of such magnitude as to say that one or more of the adaptive function domains "is sufficiently impaired that ongoing support is needed." *Wright*, 256 So. 3d at 773 (citing DSM-V, at 38.). Stated differently, the Court finds Defendant has failed to demonstrate by clear and convincing evidence that he satisfies the second prong of the intellectual disability analysis.

3. Manifestation Prior to Age Eighteen.

The third prong of the analysis requires that the deficits in intellectual functioning and adaptive behavior "manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. While Dr. Frumkin and Dr. Brannon disagreed as to the level of Defendant's deficits, they did both agree that those deficits manifested prior to Defendant's eighteenth birthday. (Tr. 82:22–85:21; 208:3–24.) As noted above, Defendant's school records indicate that he received an IQ score of 68 on the Slossen Test at age fourteen.[8] Those same records also show that the school identified him as having a "mental handicap," as "need[ing] help in all salient areas," as having "difficulty functioning in a regular academic class," and placing him in the "exceptional student program." Further, Defendant's brother, Johnathan H. Haliburton, testified about Defendant's struggles to understand things as a child, and how his grandmother would refer to him as "stupid," "retarded," "dumb," and "good for nothing." (Tr. 12:8–13.) According to Dr. Frumkin's report, Defendant's other siblings also reported Defendant's struggles reading and doing chores that would also indicate the manifestation of Defendant's deficits at an early age. Accordingly, the Court finds Defendant has sufficiently established that his deficits manifested prior to turning eighteen.

4. Conclusion.

Having considered the extensive record in this case, as well as the testimony and evidence presented at the May 13, 2019 evidentiary hearing, the Court concludes that Defendant has failed to establish by clear and convincing evidence that he is intellectually disabled within the meaning of section 921.137(1), Florida Statutes, and his September 19, 2006 Second Successive Motion to

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[8] While the Court does not consider the Slosson Test IQ score in its analysis of the intellectual functioning prong, the Court finds that it is relevant for purposes of demonstrating manifestation of Defendant's deficits prior to the age of eighteen.

Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend must be denied.

C. Brain Damage as Equivalent to Intellectual Disability.

Defendant argues in the alternative that even if this Court finds Defendant does not satisfy the requirements to be deemed intellectually disabled under section 921.137, Defendant's brain damage is the equivalent of intellectual disability, and therefore Defendant should be barred from execution for the same reasons described in *Atkins v. Virginia*. While the Court recognizes that various records indicate Defendant may in fact suffer from brain damage, either organic or resulting from the various abuse and traumas Defendant has endured over the years, this Court is unaware of any binding authority that supports the proposition that a defendant's brain damage constitutes the equivalent of intellectual disability under section 921.134 and can therefore serve as a bar to the death penalty. Accordingly, Defendant's argument in this regard is denied.

II. Whether Defendant's Death Sentence is Unconstitutional under *Hurst v. Florida* or *Hurst v. State*.

Defendant also claims that his death sentence violates the Sixth, Eighth, and Fourteenth Amendments for a variety of reasons following the United States and Florida Supreme Court decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Defendant raised the first three of these claims in his November 30, 2016 Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851. Those claims were later amended and supplemented with an additional three claims (for a total of six *Hurst*-related claims) in his June 5, 2017 Amendment to Successive Motion to Vacate Judgment of Conviction and Sentence. Then, following this Court's May 13, 2019 evidentiary hearing, Defendant filed a Supplement to Amended Rule 3.851 Motion on June 14, 2019, updating his *Hurst*-related claims one final time.

The Florida Supreme Court has made clear that "*Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*." *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) (citing *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016)). This line of demarcation governing the retroactive application of *Hurst* has been repeatedly affirmed by the Florida Supreme Court. *E.g.*, *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Zack v. State*, 228 So. 3d 41, 47–48 (Fla. 2017); *cert. denied*, *Zack v. Florida*, 138 S. Ct. 2653 (2018); *Marshall v. Jones*, 226 So. 3d 211 (2017), *cert. denied Marshall v. Florida*, 138 S. Ct. 2677 (2018); *Pope v. State*, 237 So. 3d 926, 926–927 (Fla. 2018), *cert. denied, Pope v. Florida*, 139 S. Ct. 326 (2018); *Jennings v. State*, 265 So. 3d 460, 461 (Fla. 2018); *Thompson v. State*, 261 So. 3d 1255 (Fla. 2019); *Reese v. State*, 261 So. 3d 1246, 1246–47 (Fla. 2019). In fact, as the State correctly points out, the question the Florida Supreme Court appears to be grappling with at this point is whether to recede from its retroactivity analysis in *Asay* and *Mosley* in favor of denying relief to any defendant whose death sentence was final at the time the *Hurst* decisions were announced. *See* Order for Additional Briefing, *Owen v. State*, No. SC18-810 (Fla. Apr. 24, 2019); Order Denying Stay of Execution, *Long v. State*, No. SC19-726 (Fla. May 10, 2019) (explaining that if court were to recede from its current retroactivity analysis imposing a *Ring* cutoff for retroactivity of the *Hurst* decisions, it would be to hold that the *Hurst* decisions are not retroactive at all).

Regardless, the current state of the law is clear: relief under the *Hurst* decisions is unavailable to defendants whose death sentences were final on June 24, 2002, when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *Hitchcock*, 226 So. 3d at 217. As Defendant's conviction and sentence became final on June 28, 1991, *Haliburton v. State*, 561 So. 2d 248, 249 (Fla. 1990), *cert. denied, Haliburton v. Florida*, 501 U.S. 1259 (1991), long before

the decision in *Ring* was announced, Defendant is not entitled to relief under the *Hurst* decisions and his *Hurst*-related claims must all be denied.

The Court further points out that most if not all of Defendant's *Hurst* arguments have been rejected by the Florida Supreme Court:

With respect to Claim I (retroactive application of *Hurst* decisions), *see Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016); *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017).

With respect to Claim II (evolving standards of decency, as demonstrated by the *Hurst* decisions, render Defendant's death sentence unconstitutional under Eighth Amendment because jury's recommendation of death was not unanimous), *see Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (rejecting argument that Eighth Amendment requires retroactive application of *Hurst* decisions); *Jones v. State*, 256 So. 3d 801, 802 (Fla. 2018) ("a *Caldwell* claim based on the rights announced in *Hurst* [*v. State*] and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida Law" (quoting *Reynolds v. State*, 251 So. 3d 811, 825 (Fla. 2018)); *Hitchcock v. State*, 226 So. 3d 216, 217, n.2 (Fla. 2017).

With respect to Claim III (previously litigated postconviction claims must be reconsidered in light of *Hurst* decisions), *see, e.g.*, *Zakrzewski v. State*, 254 So. 3d 324, 324–25 (Fla. 2018); *Walton v. State*, 246 So. 3d 246, 249–52 (Fla. 2018); *Jones v. State*, 256 So. 3d 801, 802 (Fla. 2018), *Hitchcock v. State*, 226 So. 3d 216, 217, n. 2 (Fla. 2017).

With respect to Claims IV and V (various due process and equal protection arguments under the Eighth and Fourteenth Amendments, as well as the Florida Constitution, requiring retroactive application of Florida's new unanimity statute and rendering Defendant's non-unanimous-based death sentence unconstitutional), *see Lambrix v. State*, 227 So. 3d 112, 113 (Fla.

2017); *Taylor v. State*, 246 So. 3d 231, 240 (Fla. 2018) ("Finally, in *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017), and *Lambrix v. State*, 227 So. 3d 112, 113 (Fla.), *cert. denied*, --- U.S. ---, 138 S. Ct. 312, 199 L.Ed.2d 202 (2017), we rejected as without merit the claim that chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied."); *Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018) (same, and further holding penalty phase findings are not elements of capital first-degree murder); *Rogers v. State*, No. SC18-150, at *20–21, 2019 WL 419702 (Fla. Sept. 5, 2019) (affirming that penalty phase findings required by *Hurst* are not "elements" that must be determined by the jury beyond a reasonable doubt); *Rivera v. State*, 260 So. 3d 920, 928 (Fla. 2018) (rejecting argument that *Hurst* should be applied retroactively because based on *Fiore* and *In re Winship*, death penalty statute is substantive and aggravators were present in the statute since its creation); *Asay v. State*, 224 So. 3d 695, 702–03 (Fla. 2017).

Finally, with respect to Claim VI (partial retroactive application of *Hurst* decisions results in arbitrary and capricious application of death penalty, violating Eighth and Fourteenth Amendments), *see Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017) (noting claim of arbitrariness of retroactivity cutoff for *Hurst* relief has been rejected); *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (rejecting arguments of denial of due process and equal protection based on alleged arbitrariness of Florida Supreme Court's retroactivity decisions in *Asay* and *Mosley*); *Reese v. State*, 261 So. 3d 1246 (Fla. 2019) (same); *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017).

Accordingly, it is hereby

ORDERED and ADJUDGED that Defendant Jerry Haliburton's September 19, 2006 Second Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend is **DENIED**. It is further

ORDERED and ADJUDGED that Defendant Jerry Haliburton's November 30, 2016 Successive Motion to Vacate Death Sentence Pursuant to Florida Rule of Criminal Procedure 3.851, Defendant's June 5, 2017 Amendment to Successive Motion to Vacate Judgment of Conviction and Sentence, and Defendant's June 14, 2019 Supplement to Amended Rule 3.851 Motion are **DENIED**.

Defendant is advised that he has thirty (30) days in which to appeal this Order.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 27 day of September 2019.

JEFFREY COLBATH
Circuit Judge

Copies provided to:

Todd G. Scher, Esq., Assistant Capital Collateral Regional Counsel, CCRC-South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 (tscher@ccsr.state.fl.us) (tscher@msn.com)

Brittney Nicole Lacy, Esq., Assistant Capital Collateral Regional Counsel, CCRC-South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 (lacyb@ccsr.state.fl.us)

Leslie Campbell, Esq., Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401 (Leslie.Campell@myfloridalegal.com) (capapp@myfloridalegal.com)

Aleathea McRoberts, Esq., Assistant State Attorney, 401 North Dixie Highway, West Palm Beach, Florida 33401 (AMcRoberts@sa15.org)

APPENDIX B

331 So.3d 640
Supreme Court of Florida.

Jerry Leon HALIBURTON, Appellant,
v.
STATE of Florida, Appellee.

No. SC19-1858
|
June 17, 2021

Synopsis
Background: Defendant, who had been convicted of first-degree murder and sentenced to death, moved for determination of intellectual disability as bar to execution and filed successive motion for postconviction relief. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Jeffrey Colbath, J., denied motions. Defendant appealed.

Holdings: The Supreme Court held that:

competent, substantial evidence supported trial court's finding that defendant failed to establish he had significantly subaverage general intellectual functioning;

evidence supported trial court's decision not to apply Flynn effect;

competent, substantial evidence supported trial court's conclusion that defendant failed to demonstrate by clear and convincing evidence that he had deficits in adaptive behavior;

defendant failed to demonstrate that any mental deficits manifested prior to his 18th birthday;

trial court conducted holistic review in determining whether defendant had intellectual disability; and

defendant failed to establish that he had intellectual disability by preponderance of the evidence.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion; Post-Conviction Review.

***642** An Appeal from the Circuit Court in and for Palm Beach County, Jeffrey Colbath, Judge – 501982CF001893AXXXMB

Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, Brittney N. Lacy, Assistant Capital Collateral Regional Counsel, and Todd G. Scher, Special Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Rhonda Giger, Assistant Attorney General, West Palm Beach, Florida, for Appellee

Opinion

PER CURIAM.

Jerry Leon Haliburton, a prisoner under sentence of death, appeals the trial court's order denying his motion for a determination of intellectual disability as a bar to execution, which was filed under Florida Rule of Criminal Procedure 3.203 and section 921.137, Florida Statutes (2019), and his amended successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons we explain, we affirm the denials of relief.

I. BACKGROUND

Haliburton was convicted of the 1981 first-degree murder of Donald Bohannon and is under sentence of death. We affirmed Haliburton's conviction and death sentence on direct appeal. *Haliburton v. State*, 561 So. 2d 248, 249-50 (Fla. 1990). We also affirmed the denial of his initial motion for postconviction relief and denied his petition for a writ of habeas corpus, *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997), and affirmed the denial of his first successive motion for postconviction relief, *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006) (table).

In the wake of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), Haliburton filed a second successive motion for postconviction relief, under Florida Rules of Criminal Procedure 3.851 and 3.203, seeking to vacate his death sentence on the ground that he was intellectually disabled. We affirmed the summary denial of

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that motion because Haliburton failed to demonstrate that his IQ was 70 or below and thus failed to establish that he is intellectually disabled under our interpretation of the law at that time. *Haliburton v. State*, 123 So. 3d 1146 (Fla. 2013), *vacated*, 574 U.S. 801, 135 S.Ct. 178, 190 L.Ed.2d 8 (2014), *order vacated on reconsideration*, 163 So. 3d 509 (Fla. 2015). Upon this Court's affirmance of the denial of his intellectual disability claim in 2013, Haliburton petitioned the United States Supreme Court for a writ of certiorari. Shortly thereafter, the Supreme Court issued its decision in *Hall v. Florida*, 572 U.S. 701, 704, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), holding that Florida's "rigid ***643** rule" interpreting section 921.137(1), Florida Statutes, [1] as establishing a strict IQ test score cutoff of 70 or less in order to present additional evidence of intellectual disability "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." The Supreme Court granted Haliburton's petition for certiorari and remanded to this Court for further consideration in light of *Hall*. *Haliburton*, 574 U.S. 801, 135 S.Ct. 178. On remand from the Supreme Court, this Court vacated its prior decision and remanded this case to the trial court for an evidentiary hearing on Haliburton's intellectual disability claim. *Haliburton*, 163 So. 3d 509.

Three witnesses testified at the evidentiary hearing; two were called by Haliburton—one of his brothers, John H. Haliburton, and Dr. Bruce Frumkin, a forensic and clinical psychologist—and one was called by the State—Dr. Michael Brannon, a forensic psychologist. John H. [2] testified that when they were young, Haliburton had trouble understanding things and doing chores, and although Haliburton completed the ninth grade, he needed help with his schoolwork. When Haliburton got older, John H. never knew him to live alone, drive a car, pay bills, or have a bank account.

Dr. Frumkin first evaluated Haliburton in 1992. At that time, he administered Haliburton the Wechsler Intelligence Scale-Revised (WAIS-R) IQ test, on which Haliburton obtained a full-scale IQ score of 80. Dr. Frumkin became involved in the case again in 2010 when he was asked to evaluate Haliburton for intellectual disability. In 2010, Dr. Frumkin administered Haliburton the WAIS-IV, on which Haliburton obtained a full-scale IQ score of 74. According to Dr. Frumkin, based on the score of 74 and its 95 percent confidence interval, there is a 95 percent chance that Haliburton's actual IQ is between 70 and 79. [3] Dr. Frumkin testified that the 70-79 range is consistent with all of the valid IQ test scores that Haliburton has ever achieved, which, in addition to the 80 and 74 obtained by Dr. Frumkin, include a second 80 (obtained by Dr. Fleming using the WAIS-R in 1992), a 79 (obtained by Dr. Eisenstein using the WAIS-III in 2000), and another 74 (obtained by Dr. Crown using the WAIS-IV in 2009). [4] Dr. Frumkin now questions the 80 that Haliburton obtained on the WAIS-R in 1992. He now believes that score was overestimated by approximately four points, due to the Flynn effect. [5]

***644** Dr. Frumkin testified that, in his opinion, Haliburton does have "significantly subaverage intelligence," based upon the fact that "he came across as someone with intellectual deficiencies," "[h]e was a very poor historian," and based on the score of 74 on the WAIS-IV in 2010. Additionally, Dr. Frumkin observed during his evaluation that Haliburton had very poor vocabulary, was very concrete in his thinking, had to have questions asked simply and repeated, was "off on timeframes," and that his reading, spelling, and arithmetic abilities varied from the fourth to fourteenth percentiles.

To assess Haliburton's adaptive functioning, Dr. Frumkin administered the Adaptive Behavior Assessment System-II (ABAS-II) to Haliburton's sister, Helen, and his brothers, John R. and John H. Dr. Frumkin determined the raw numbers produced by those assessments to be invalid for Helen and John H. but noted that there was general agreement among the siblings in terms of Haliburton's strongest and weakest areas.

Dr. Frumkin opined that Haliburton has two or more deficits in adaptive functioning and thus meets the adaptive deficits prong of the intellectual disability standard. Dr. Frumkin found that Haliburton had deficits in the conceptual domain based on his poor math skills, but he was vague in his testimony regarding in which other domain Haliburton had substantial deficits. In his report, Dr. Frumkin wrote, "He would have had at least major deficits in functional academic skills, using community resources, self-direction, and in communication."

Dr. Frumkin also testified that onset of Haliburton's condition occurred before the age of eighteen. This was based upon school records indicating that Haliburton had intellectual problems and difficulty functioning in school, was in special education classes, and a notation in the records that he "needs help in all salient areas." Based on his findings regarding Haliburton's subaverage intelligence, adaptive deficits, and the timeframe during which those problems manifested, Dr. Frumkin concluded that Haliburton is intellectually disabled.

Dr. Brannon evaluated Haliburton in June 2018. Prior to the evaluation, Dr. Brannon reviewed school records,

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prison records, and the scores on the WAIS tests previously administered to Haliburton. During the evaluation, Haliburton said that he completed the ninth grade in special education classes but had problems in school with hyperactivity, attentiveness, and following rules. He admitted to always being in some kind of trouble at school and bullying his peers. Haliburton discussed being sentenced to a "reform school" as a juvenile and serving three stints in prison as an adult, prior to the murder. He also had multiple arrests for driving offenses. Haliburton said he had never been married but reported being involved in a seventeen or eighteen-year relationship and living with his girlfriend at the time of his arrest for the murder. Haliburton reported using alcohol and a wide variety of drugs—heroin, amphetamines, barbiturates, cocaine, and marijuana—on a daily basis, beginning around age fourteen or fifteen. He provided Dr. Brannon with an accurate medical history and a rather elaborate personal history, which was not contradicted by any of the records. He reported being able to prepare basic meals but said that the women in his life had done most of the cooking and laundry for him. Haliburton reported reading every day in prison. He reads from the Koran, westerns, political books, black history, and books about the ***645** history of the United States and of Islam. He mentioned reading *Liberty Defined* by Ron Paul, [*A*] *People's History of the United States* by Howard Zinn, and *But They Didn't Read Me My Rights!* by Michael Cicchini, and he was able to convey to Dr. Brannon an understanding of what he had read in those books. He said he watches world news, C-SPAN, political shows, and follows the progress of bills.

Dr. Brannon observed that Haliburton's vocabulary was rich with words that would be expected from someone who was well within their upper high school years, which, Dr. Brannon said, is more consistent with the 79-80 IQ scores Haliburton achieved than the scores of 74. Haliburton could discuss concepts like "rights," "liberty," and "justice," and understand them in an abstract fashion. He had made multiple clear and grammatically correct written requests to prison authorities about the living conditions and his medical and dental needs, which Dr. Brannon reviewed.

Regrading Haliburton's IQ, Dr. Brannon acknowledged the Flynn effect and the practice effect [6] but said there is no way of applying those theories in any sort of reasonable scientific way to Haliburton. Dr. Brannon concluded that Haliburton had neither significantly subaverage general intellectual functioning nor significant deficits in his adaptive functioning. In Dr. Brannon's opinion, Haliburton did not meet the criteria for intellectual disability.

Following the evidentiary hearing, Haliburton filed, with leave of court, a supplement to his then-pending *Hurst*-related amended 3.851 motion. In those filings, Haliburton contended that his death sentence, which was imposed following a nonunanimous jury recommendation of death, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments, as described in both *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So. 3d 487 (Fla. 2020), *cert. denied*, ––– U.S. ––––, 141 S. Ct. 1051, 208 L.Ed.2d 521 (2021). The trial court ultimately issued an order on September 27, 2019, denying Haliburton's intellectual disability and *Hurst* claims. This appeal follows.

II. ANALYSIS

Haliburton raises three issues on appeal. He asserts that the trial court erred in failing to find that he is intellectually disabled; that section 921.137(4), Florida Statutes, which requires a defendant to prove his intellectual disability by clear and convincing evidence, is unconstitutional; and that his death sentence imposed following a nonunanimous jury recommendation of death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. We address each claim in turn.

A. Intellectual Disability

In 2002, the United States Supreme Court held in *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242, that the Eighth and Fourteenth Amendments to the United States Constitution forbid the execution of persons with intellectual disability. The Court observed that "clinical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." 536 U.S. at 318, 122 S.Ct. 2242. Similarly, under Florida law, " 'intellectual disability' means significantly subaverage general intellectual functioning existing ***646** concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2019). "Significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified

in the rules of the Agency for Persons with Disabilities."[7] *Id.* "Adaptive behavior" "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." *Id.* Thus, to establish intellectual disability as a bar to execution, a defendant must demonstrate (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen.

Until 2014, section 921.137(1) was interpreted as requiring that a defendant have an IQ of 70 or below in order to meet the first prong of the intellectual disability standard —significantly subaverage general intellectual functioning— and failure to present an IQ score of 70 or below precluded a finding of intellectual disability. *Cherry v. State,* 959 So. 2d 702, 712-13 (Fla. 2007), *abrogated by Hall*, 572 U.S. 701, 134 S.Ct. 1986. In *Hall*, the Supreme Court held that Florida's "rigid rule" interpreting section 921.137(1) as establishing a strict IQ test score cutoff of 70 or less in order to present additional evidence of intellectual disability "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. at 704, 134 S.Ct. 1986. The Court further held that when assessing the intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement (SEM) of IQ tests. *Id.* at 723, 134 S.Ct. 1986. And "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [±5], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* If the defendant fails to prove any one of the three components of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled. *See Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016); *accord Williams v. State*, 226 So. 3d 758, 773 (Fla. 2017); *Snelgrove v. State*, 217 So. 3d 992, 1002 (Fla. 2017).

"In reviewing determinations of [intellectual disability], this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). "This Court 'does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.' " *Id.* (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)).

1. Significantly Subaverage General Intellectual Functioning

The relevant IQ scores presented by Haliburton at the evidentiary hearing ranged from 74 to 80. His most recent testing using the WAIS-IV in 2010 has a confidence interval of 70-79, "meaning there's a 95 percent chance that his IQ score is between 70 and 79," according to Dr. Frumkin. Applying the SEM to Haliburton's highest IQ score reveals that his true IQ could be as high as 85. Dr. Brannon testified regarding the reasons why ***647** the other evidence in this case points to Haliburton's true IQ being in the 79-80 range, rather than on the low end of 70. Dr. Brannon based his assessment on his evaluation of Haliburton, his review of Dr. Frumkin's 2010 report, Haliburton's prison records, and Haliburton's earlier IQ scores of 80—achieved twice—on the WAIS-R and 79 on the WAIS-III.

The trial court found "Dr. Brannon's testimony here both credible and persuasive." The trial court declined to apply the Flynn effect to Haliburton's scores of 80, stating that "while the Flynn effect is something to consider, both Dr. Frumkin and Dr. Brannon agreed it would be against standard practice to adjust an individual's score by a certain number of points to account for the Flynn effect."

We conclude that the trial court's finding that Haliburton failed to establish that he has significantly subaverage general intellectual functioning is supported by competent, substantial evidence in the record. Dr. Brannon thoroughly explained why the totality of the evidence in this case supports the conclusion that Haliburton's true IQ is in the 79-80 range —which does not satisfy this prong—including his scores on the Test of Adult Basic Education, which were consistent with an IQ of 79-80, his vocabulary, his reading and television interests, his ability to think abstractly, his ability to give an accurate, detailed account of his personal history, and Dr. Brannon's testimony that "you can't fake good," "meaning a person's higher IQ scores will more accurately reflect a person's capacity, while lower IQ scores achieved on other test administrations might be attributable to a variety of potential factors." The trial court found Dr. Brannon to be more credible than Dr. Frumkin, and we will not now disturb that finding.

The trial court's decision not to apply the Flynn effect to Haliburton's scores of 80, and view them as scores of 76, is also supported by the evidence. The trial court noted that "both Dr. Frumkin and Dr. Brannon agreed it would be against standard practice to adjust an individual's score by a certain number of points to account for the Flynn effect." Indeed, Dr. Frumkin testified that "the Flynn effect has to do with

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populations, it doesn't have to do with individuals so you can't say a specific individual is automatically X number of points slower based upon the Flynn effect, the true IQ score has to do with populations." Dr. Frumkin said that he disagrees with psychologists who "subtract that Flynn effect number from the IQ score and say this is the person's IQ." He "do[es not] believe one should do that because [the Flynn effect] has to do with population[s] and not ... a specific individual." Dr. Frumkin noted that "[b]oth the score of 80 [in 1992] is what it was and the score of 74 in 2010 is what it was, except that score of 80, I didn't talk about Flynn."

Dr. Brannon agreed that the Flynn effect is something to consider when using older, standardized tests, but he also testified that there is no way of applying the Flynn effect "in any sort of reasonable scientific way" to Haliburton or any individual. He explained that it is especially important to be cautious with the Flynn effect in regards to individuals at the lower end of the IQ spectrum, because "the brightest people or average to above average people" at the high end of the spectrum—who, Dr. Brannon said, would intuitively be expected to be more intellectually curious—may be affected the most by the Flynn effect. Dr. Brannon further opined that "applying group norms [like the Flynn effect] to individuals is trickery[,] especially when you don't know where they fall in the distribution." Moreover, this Court previously observed that there is no requirement that the Flynn effect be applied ***648** to IQ scores in intellectual disability cases. *Quince v. State*, 241 So. 3d 58, 61 (Fla. 2018). We therefore find no error in the trial court's decision to decline to apply the Flynn effect to adjust Haliburton's scores of 80 downward.

2. Deficits in Adaptive Behavior

Section 921.137(1) defines "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." This Court has further elaborated on this prong, as explained in the DSM-5 [8] and the AAIDD-11 [9]:

> The AAIDD-11 and DSM-5 definitions are mostly similar to the statutory definition. *Compare* § 921.137(1), *with* DSM-5, at 37, *and* AAIDD-11, at 6, 43. Comparable to IQ scores, the AAIDD-11 recommends that adaptive deficits be established by standardized tests when an individual scores approximately two standard deviations below the population mean, with the results accounting for SEM. AAIDD-11, at 47; *see also* DSM-5, at 37.
>
> The DSM-5 divides adaptive functioning into three broad categories or "domains": conceptual, social, and practical. DSM-5, at 37; *see also* AAIDD-11, at 43. The conceptual domain "involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-5, at 37. The social domain "involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment." *Id.* The practical domain "involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." *Id.* According to the DSM-5, adaptive deficits exist when at least one domain "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id.* at 38; *see* AAIDD-11, at 43.

Wright v. State, 256 So. 3d 766, 773 (Fla. 2018).

Dr. Frumkin testified,

> [Y]ou know there are three main areas; conceptual, social and practical, but there's a number of different subcategories in these different areas. And if you're showing that someone has to have two or more deficits in adaptive functioning, it's two of more of any of these dozens of various different areas that you're looking at.

But while Dr. Frumkin considers a domain "sufficiently impaired that ongoing support is needed" if there is a deficit in one of the subcategories within a domain, both the DSM-5 and AAIDD-11 require not just a deficit in a subcategory of a domain, but that an entire domain be "sufficiently impaired that ongoing support is needed in order for the person to perform adequately in" that domain.

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Dr. Frumkin administered the Wide Range Achievement Test-4 (WRAT-4) to Haliburton, which measures functional academics, on which Haliburton achieved a word reading standard score of ***649** 78 (seventh percentile), a sentence comprehension standard score of 83 (thirteenth percentile) a reading composite standard score of 78 (seventh percentile), a spelling standard score of 84 (fourteenth percentile), and a math computation score of 73 (fourth percentile). Because Haliburton's math computation score was low on the WRAT-4, Dr. Frumkin concluded that "he has a deficit there." Essentially, Dr. Frumkin considered Haliburton's low functional academic score in math computation to be sufficient to establish that Haliburton's conceptual domain "is sufficiently impaired that ongoing support is needed in order for [Haliburton] to perform adequately in one or more life settings."

Dr. Frumkin also administered the ABAS-II to three of Haliburton's siblings but ultimately concluded that the numerical results were invalid. Dr. Frumkin found that his interviews of Haliburton's siblings "produced the best information" regarding Haliburton's adaptive functioning. He noted that Haliburton's sister said that Haliburton had major problems in reading and could not comprehend what he did read; he could not do laundry as a child, and as he got older, he still could not really cook, clean, or wash clothes; and as a teenager, he tried to help younger children with their homework, but he did not know how to do the work himself. John R. said that Haliburton "wasn't smart" in math, reading, and science; he did not believe Haliburton knew how to cook; and that Haliburton's "memory is not too good." And John H. said that Haliburton lacked common sense; only knew how to solve problems by fighting; was unable to follow directions involving more than three city blocks; would leave out the middle of a story; and was unable to communicate instructions to people. Dr. Frumkin also interviewed Haliburton's former employer, Charles Johnson, who described Haliburton as a "worker bee" who did as he was told and did not have the mental capacity to organize or plan ahead.

Besides Haliburton's deficit in math, which falls in the conceptual domain, Dr. Frumkin did not reveal on direct examination in which other domain Haliburton was sufficiently impaired. When pressed on cross-examination regarding in which other domain he found sufficient impairment, Dr. Frumkin was still vague. A conjunctive review of Dr. Frumkin's report and testimony suggests that the two domains in which he found deficits sufficient to conclude that Haliburton met the adaptive functioning prong were the conceptual and social. But because Dr. Frumkin testified that the social domain was Haliburton's strongest domain, it is not entirely clear that Dr. Frumkin found any deficit in the social domain sufficient to meet the criteria for this prong. Dr. Frumkin did write in his report, "While his relative strength is in the area of social and interpersonal skills, he still seems deficient in that as well," but Dr. Frumkin's opinion that Haliburton "seems deficient" is equivocal and does not imply that the deficit was such that it rendered the entire social domain sufficiently impaired that ongoing support is needed. And Dr. Frumkin did not testify that Haliburton had deficits in all three domains but made only the conclusory statement he had "little doubt that Mr. Haliburton has, and had, concurrent deficits in adaptive functioning in at least two areas."

Dr. Brannon disagreed with Dr. Frumkin's conclusion that Haliburton met the adaptive deficits prong. Dr. Brannon reviewed Haliburton's school records and noted that in the last three years of his formal education his grades ranged from above average to failing and it was reported that Haliburton did not complete his education due to behavioral problems. Dr. Brannon reviewed prison records from a ***650** previous incarceration which noted that Haliburton was a full-time student, enrolled in both an academic program, in which he was described as having "average ability," and a vocational auto body repair program. Haliburton was also enrolled in a CETA auto body program before he went to prison. Dr. Brannon noted that Haliburton made multiple clear and grammatically correct written requests over a period of time to prison authorities about the living conditions and his medical and dental needs.

In concluding that Haliburton's deficits do not rise to the level required to satisfy the second prong of the intellectual disability standard, Dr. Brannon wrote that Haliburton's "ability to engage in Activities of Daily Living (ADLs) appeared intact at the time of his arrest and during the course of the current assessment." But according to the DSM-5, the severity of the deficits required for an intellectual disability diagnosis "limit functioning in one or more activities of daily life." DSM-5, at 33.

The trial court agreed with Dr. Brannon, writing,

> Ultimately, having considered the evidence and record in this case, the Court agrees with Dr. Brannon's assessment. On balance, while the Court finds Defendant does suffer significant deficits in mathematical reasoning skills, the Court does not find Defendant's remaining deficits—of

> which there appear to be several—to be of such magnitude as to say that one or more of the adaptive function domains "is sufficiently impaired that ongoing support is needed." *Wright*, 256 So. 3d at 773 (citing DSM-V, at 38.). Stated differently, the Court finds Defendant has failed to demonstrate by clear and convincing evidence that he satisfies the second prong of the intellectual disability analysis.

The trial court's conclusion that Haliburton "has failed to demonstrate by clear and convincing evidence that he satisfies the second prong of the intellectual disability analysis" is supported by competent, substantial evidence. This Court has defined clear and convincing evidence as an "intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). Here, Dr. Frumkin's testimony and written evaluation both lack clarity as to the domains in which he found Haliburton to have impairment sufficient to satisfy the second prong of the intellectual disability standard. Dr. Frumkin never explained why he found these domains "sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings" or in which "life setting" ongoing support was needed. Having "little doubt" that Haliburton has concurrent deficits in adaptive functioning in at least two areas and "seem[ing] deficient" in a domain do not rise to the level of clear and convincing evidence.

As to the math deficit, Dr. Frumkin did not explain why being in the fourth percentile in functional academic math would require "ongoing support." Moreover, Dr Frumkin was unable to establish these adaptive deficits "by standardized tests when an individual scores approximately two standard deviations below the population mean," as suggested by the AAIDD-11 and DSM-5. Although Dr. Frumkin administered the WRAT-4 to Haliburton, he did not indicate that any of Haliburton's scores—including his math computation score —fell approximately two standard deviations below the population mean.

***651** In his initial brief to this Court, Haliburton also asserts that in concluding that he did not meet the adaptive deficits prong, the trial court did what *Moore v. Texas*, ––– U.S. ––––, 137 S. Ct. 1039, 1050, 197 L.Ed.2d 416 (2017), "expressly forbids it to: it scoured the record for putative strengths to offset or explain the deficits it did find." We disagree.

Moore—as do the DSM-5 and the AAIDD-11—cautioned against overemphasizing perceived adaptive strengths when evaluating the adaptive deficits prong. 137 S. Ct. at 1050. But we have long recognized that

> the trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists. Rather, after it considers "the findings of experts and *all other evidence*," Fla. R. Crim. P. 3.203(e), it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations.

Dufour v. State, 69 So. 3d 235, 250 (Fla. 2011). Rather than "overemphasizing perceived adaptive strengths" or "scour[ing] the record for putative strengths to offset or explain the deficits it did find," the trial court here, in its detailed analysis of this prong, properly considered the findings of both experts as well as all of the other evidence, including the evidence that rebutted many of the limitations posited by Dr. Frumkin, before concluding that Haliburton failed to meet this prong.

3. Age of Onset

As to the third prong of the intellectual disability standard, the trial court noted that "[w]hile Dr. Frumkin and Dr. Brannon disagreed as to the level of Defendant's deficits, they did both agree that those deficits manifested prior to Defendant's eighteenth birthday." The parties appear to incorrectly interpret this statement as a finding that Haliburton established that he met this third prong, but that is not what the trial court said. The trial court was simply saying that Haliburton's deficits—which it had already determined were insufficient to establish intellectual disability—were also present when he was a minor.

Where significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior is not established, there is no relevant condition that could have manifested prior to age eighteen to establish the third prong. Manifestation prior to age eighteen of subaverage intellectual functioning or adaptive deficits that do not rise to the levels required to meet the first two prongs of the

intellectual disability standard is irrelevant to a determination of intellectual disability.

Because competent, substantial evidence supports the trial court's findings that Haliburton failed to establish that he has significantly subaverage intellectual functioning or concurrent deficits in adaptive behavior sufficient to meet the second prong of the intellectual disability standard, Haliburton necessarily cannot meet the third prong. Thus, the trial court did not err in failing to find that Haliburton meets the third prong.

4. Holistic Review

Haliburton argues that the trial court failed to conduct a "holistic review" that considers all three prongs of the intellectual disability standard together in an interdependent fashion. Haliburton relies on *Hall* and language in *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015) (citing *Hall*, 572 U.S. at 723, 134 S.Ct. 1986), stating that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." Without endorsing the ***652** quoted portion of *Oats*, we note that language has no application in this case. Here, we do not have "one" prong that is "relatively less strong"; we have three prongs that were not established.

Further,

> *Hall* recognizes that the existence of an IQ score evidencing significantly subaverage general intellectual functioning is a threshold requirement for determining whether an individual is intellectually disabled: "For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists *once the SEM applies and the individual's IQ score is 75 or below* the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." *Hall*, [572 U.S. at 714, 134 S.Ct. 1986] (emphasis added).

Walls v. State, 213 So. 3d 340, 350 (Fla. 2016) (Canady, J., dissenting), *overruled by Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). Thus, even in cases where a trial court considers evidence of multiple prongs of the intellectual disability test, the "threshold, independent requirement [that significantly subaverage general intellectual functioning be established in accordance with section 921.137(1) once the SEM is taken into account] should not be cast aside in the name of 'holistic review.' " *Id.* (Canady, J., dissenting).

Moreover, the trial court did conduct a "holistic review." It did not reach its conclusion that Haliburton failed to establish that he is intellectually disabled based solely on his failure to meet the first prong of the intellectual disability standard but instead proceeded to conduct a detailed analysis of the testimony concerning the adaptive deficits prong and the "conjunctive and interrelated assessment" of all three prongs of the standard as completed by *Hall*, 572 U.S. at 723, 134 S.Ct. 1986, and *Oats*. Thus, we conclude that the trial court did not err in failing to conduct a "holistic review."

B. Section 921.137(4), Florida Statutes

Haliburton also argues that he is entitled to relief because section 921.137(4), Florida Statutes (2019), which requires that defendants establish their intellectual disability by clear and convincing evidence, is unconstitutional under *Atkins* and the Eighth and Fourteenth Amendments to the United States Constitution, and that his claim of intellectual disability should have been analyzed under the more lenient preponderance of the evidence standard instead. But the trial court discredited Haliburton's own expert, without whose testimony the preponderance of the evidence standard clearly could not be met. Thus, because we conclude that Haliburton's claim would have failed even under the preponderance of the evidence standard, we need not address the constitutionality of the clear and convincing evidence standard in section 921.137(4). *See Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.").

C. Nonunanimous Death Recommendation

During the pendency of the intellectual disability litigation below, Haliburton filed a successive 3.851 motion in light of *Hurst*, 577 U.S. 92, 136 S.Ct. 616, *Hurst v. State*, 202 So. 3d 40, *Asay v. State*, 210 So. 3d 1 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), contending that his death sentence imposed following a nonunanimous jury recommendation of death violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. Haliburton concedes that we have in other cases repeatedly rejected the same arguments he has made ***653** but wishes to preserve them for federal review, pursuant to our instruction in *Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000). We therefore affirm the denial of

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the successive motion containing these claims without further discussion.

III. CONCLUSION

For these reasons, we affirm the trial court's order denying Haliburton's motion for a determination of intellectual disability as a bar to execution and his amended successive motion for postconviction relief.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., recused.

All Citations

331 So.3d 640, 46 Fla. L. Weekly S177

Footnotes

1 Section 921.137 prohibits the imposition of the death penalty upon the intellectually disabled and defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."

2 Haliburton also has a brother named John R. Haliburton, who previously testified in this case but is now deceased. Each brother will be referred to by his first name and middle initial.

3 Dr. Frumkin explained that the standard error of measurement (SEM) is not always five points on each side of the score obtained; rather it depends on the test. For the WAIS-IV, the SEM is four points down and five points up, according to Dr. Frumkin.

4 Haliburton also references a score of 75 on another WAIS-R administered by Dr. LaFehr Hession in 1988, but the trial court did not rely on this score for reasons unknown, and Haliburton does not allege that the trial court erred in failing to consider this score. Thus, we do not consider it here.

5 "The Flynn effect refers to a theory in which the intelligence of a population increases over time, thereby potentially inflating performance on IQ examinations. The accepted increase in scoring is approximately three points per decade or 0.33 points per year." *Quince v. State*, 241 So. 3d 58, 60 n.2 (Fla. 2018).

6 This Court has explained that "[t]he practice effect causes an individual's IQ scores to rise if that individual was administered the same IQ test within one year." *Thompson v. State*, 208 So. 3d 49, 56 n.9 (Fla. 2016).

7 The tests approved by the rules of the Agency for Persons with Disabilities are the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale. Fla. Admin. Code R. 65G-4.011.

8 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

9 American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010).

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APPENDIX C

Supreme Court of Florida

THURSDAY, JANUARY 27, 2022

CASE NO.: SC19-1858
Lower Tribunal No(s).:
501982CF001893AXXXMB

JERRY LEON HALIBURTON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and/or Reconsideration is hereby denied.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.
LABBARGA, J., recused.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

HON. JEFFREY J. COLBATH
HON. JOSEPH ABRUZZO, CLERK
ALEATHEA HAYES MCROBERTS
HON. JOSEPH GEORGE MARX, JUDGE
HON. KRISTA MARX, JUDGE
BRITTNEY NICOLE LACY
TODD G. SCHER
RHONDA GIGER

APPENDIX D

EXCEPTIONAL CHILD EDUCATION
Palm Beach County Schools
SLOSSON REPORT SCREENING EVALUATION

I. Child's Name: Haliburton, Jerry
Birth Date: 9-19-54 Current Grade: 8
Parent's Name: Mr. James Harris
Parent's Address: 619-5th St., WPB Phone:
School: Central Junior High
Source of Referral: Guidance Dept.

II. General Observations of Client
A. Personal Appearance: Extremely neat and well-dressed.
B. Rapport: Rapport easily established
C. Child's Mode of Response: clear, responsive

III. Slosson Intelligence Test for Children and Adults (SIT)
A. Test Data:
1. CA = 14-2
2. MA = 9-8
3. IQ = 68
B. Date of Administration: 11-8-68
C. Recommendation: Exceptional Child Program.

Lillian P. Lane
(Examiner)

Copy to Central Jr. & VR 11-19-68
" " " " 5-13-69

REFERRAL FORM

Person Referring Jimmie N. Bennett

Position Title Guidance Coordinator

School Central Junior High

MAIL TO:

Mrs. Marjorie Crick
Ex. Child Education
Admin. Annex, Bldg. 503-S
Sixth Street, North
West Palm Beach, Florida

Social Security Number ____________
(If none, leave blank)

Name Haliburton, Jerry   Date November 8, 1968

Parents Name: [redacted] James Harris   Telephone No. ____________

Home Address 619 5th Street, WPB

Mailing Address same as above

Date of Birth 3/3/54   Sex M   Current Grade in School [redacted]

Physical or Mental Handicap Mental handicap

Problems Because of Handicap Has difficulty functioning [redacted]

Sloeson Intelligence Test IQ 68

(When available, please attach copies of psychological and medical reports which will become part of the student's Confidential File.)

Comments:

Marjorie Crick

approved

copy to Central Jr & VR 11-19-68   11-15-68

" " " " 5-13-69   ORJ

NAME: Haliburton, Jerry (LAST) (FIRST) (MIDDLE) COUNTY: Palm Beach (USE PENCIL) SCHOOL: ~~CENTRAL JUNIOR HIGH~~ Roosevelt Elem (USE PENCIL)

RACE: N SEX: M PLACE OF BIRTH: West Palm Beach, Fla (CITY) (COUNTY) (STATE) DATE OF BIRTH: 1954-2-3 (YEAR) (MO.) (DAY) DATE OF ENTRANCE: (YEAR) (MO.) (DAY) FROM

	NAME (Use pencil)	ADDRESS (Use pencil)	PHONE	OCCUPATION (pencil)	BUSINESS ADDRESS (pencil)	PHONE	Church Preference—Check if Member	Parents Own Home
Father	Jessie ... Harris	1019 - 5th St		Taxi Driver			(__)	(Use Pencil)
Mother	(Legal Guard. - at [illegible])						(__)	Yes(__) No(__)

Marital Status: Living Together ____ Divorced ____ Separated ____
Father: Deceased ____ Remarried ____
Mother: Deceased ____ Remarried ____
Pupil Lives with: Both Parents ____ Father ____ Mother ____ Guardian ____
Name of Guardian ____ Address ____ Phone ____
Language spoken in the home ____

ECONOMIC STATUS of FAMILY (pencil)	19__	19__	19__
Good	( )	( )	( )
Moderate	( )	( )	( )
Low	( )	( )	( )
Unknown	( )	( )	( )

Authority for Birth Date: ( ) Birth Certificate; ( ) Other; ( )

(Use Pencil)	Number Older	Number Younger	No. in School	Number Employed
Brothers				
Sisters				

2. SCHOOL RECORD GRADES 1-6

YEAR	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__
GRADE					6 EM			
Term (No. Weeks)					96 days			
Days Absent					2			
Chief Cause (Code)*								
SUBJECTS	Year Average	Year Average	Year Average	Year Average	Year Average	Year Average	Year Average	Year Average
Citizenship					I			
Reading					I			
Language					U			
Spelling					I			
Writing					U			
Social Studies					I			
Arithmetic					I			
Science					S			
Health					S			
Art					VS			
Music					VS			
Physical Ed.					✓			
Promoted								
Retained					Adams			

3. SCHOOL RECORD GRADES 7-8

Grade 7 Year 1967 1968; Term (Weeks) 36 Length of Class Period 55; Days Absent 3 Chief Cause [illegible]

Subjects	Periods Per Week	Marks 1st Sem.	Marks 2nd Sem.	Yr. Av.	Units
Eng Noot	5	D	D	D	
MATH Howe	5	D	F	F	
SCI Miller	5	D	F	F	
SS Bel	5	E	F	F	
PHY ED [illegible]	5	F	D	D	
ENRICH	5	F			
Art PSY SS		C			
		C			

Place in Spec Ed

Credits for Year ~~[illegible]~~
Total Credits ____

Grade 8 (Sd) Year 1968 1969; Term (Weeks) 36 Length of Class Period 55; Days Absent 4 ; Chief Cause 5

```
HALIBURTON JERRY      2723   M   08 68-9   27

SHOP 8         802 D      R  MUS G 8    632 D    R
PY ED M 8      562        C  B   B           R
HEALTH         902        C  C   C           B
OCC ED         606        B  B   B           B
MATH           900        B  B   B           B
LNG ARTS       901        B  C   B           B

HPA 1.6667 NGS-036 PTS-060
```

Promoted

Credits for Year ____
Total Credits ____

Grade ____ Year 19__ 19__; Term (Weeks) ____ Length of Class Period ____; Days Absent ____; Chief Cause ____
Credits for Year ____
Total Credits ____

4. TEST PROGRAM SUMMARY

SCHOLASTIC ABILITY

Test	Form	Date Given	% ile Rank	M.A.	M.A. C.P.	I.Q.
[illegible] Test		11/6/68				68

ACHIEVEMENT

Name of Test	Form	Date Given	Grade Equiv.	% ile Rank

OTHERS

Name of Test	Form	Date Given	Score
500392 JLH 6910 S.C.A.T.		0101010	

*Code: S—Sickness of pupil; SH—Sickness in home; W—Work away from home; B—Bad Weather; T—Tr[...]

FLORIDA CUMULATIVE GL[...]NCE RECORD—GRADES 1-12

NAME Haliburton (LAST) Jerry (FIRST) (MIDDLE) COUNTY Palm Beach (USE PENCIL) SCHOOL Roosevelt [illegible] (USE PENCIL) CENTRAL JUNIOR HIGH

STUDENT NAME HALIBURTON JERRY L

JLH

6. SECONDARY SCHOOL RECORD GRADES 9—12

Grade 9 Year 19 69 19 70
Term (Wk.) 36 Length of Class Period
Days Absent ; Chief Cause

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units
OC ED MATH		C			
OC ED ENG		C			
OC ED SOC		C			
BUS GE		C			
HLTH I		F			
READ OE		F			
V-SPTS		D			
W3 other [illegible] School 10-9-69					

Credits for Year
Total Credits

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____ ; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year
Total Credits

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____ ; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year
Total Credits

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____ ; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year
Total Credits

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____ ; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year
Total Credits

7. GRADUATION DATA

Year ____ Month ____ Day ____

Number in class ____

Quartile Rank: 1st ( ); 2nd ( ); 3rd ( ); 4th ( )

FLORIDA STATEWIDE 9th GRADE TESTS

FLORIDA 12th GRADE PLACEMENT TEST

Total	Psy.	Eng.	S.S.	N.S.	M.S.	Fr.	Lat.	Sp.

NATIONAL MERIT SCHOLARSHIP QUALIFYING TEST

Date:

CEEB	VERBAL	QUANT.			
Date:					

8. EXTRA-CURRICULAR ACTIVITIES

Activity (Code)*	7	8	9	10	11	12
Annual						
Band						
Baseball						
Basketball						
Class Officer						
Club						
Club						
Club						
Dramatics						
Football		✓				
Officer for Home Room						
Student Body						
Orchestra						
Safety Patrol		✓				
Student Coun.						
School Paper						

*Codes: M—Major, A—A[illegible] B—Below Average, W—Withdrawn

9. EVALUATION OF PERSONAL ASSETS

Comments on Special Interests, Abilities, Aptitudes, and Achievements

Comments on Character and Citizenship

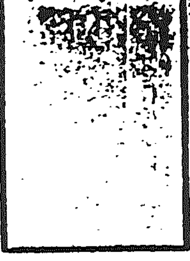
Further information helpful in evaluating this student for post-high school education and employment

STUDENT	STUDENT NAME	SCHOOL
2723	HALIBURTON JERRY	CENTRAL

10. COMMENTS

Grade and Date	Teacher or Counselor	SPECIAL INTERESTS, OBSERVATIONS, SUGGESTIONS, AND RECOMMENDATIONS	FOLLOW-UP

PHOTOGRAPH



Grade

Age

9. COMMENTS

Grade and Date	Teacher or Counselor	SPECIAL INTERESTS, OBSERVATIONS, SUGGESTIONS, AND RECOMMENDATIONS
1		
2		
3		
4		
5A 1966-67	Adams	[illegible]
6		
7		
8 JAN 1969		

GRADE LEVEL	PARTICIPATION IN DISCUSSION	INVOLVEMENT IN C.S. ACTIVITIES	PURSUIT OF INDEPENDENT STUDIES	EVIDENCE OF PERFORMANCE	CRITICAL & QUESTIONING ATTITUDE	DEPTH OF UNDERSTANDING	PERSONAL RESPONSIBILITY	CONSIDERATION FOR OTHERS
08	4 11	4 2	15	13 2	4 11	4 2	4 11	4 2

1. NAME Haliburton, Jerry (LAST) (FIRST) (MIDDLE) COUNTY Palm Beach (USE PENCIL) SCHOOL CENTRAL JUNIOR HIGH / Roosevelt Elem. (USE PENCIL)

RACE N SEX M. PLACE OF BIRTH West Palm Beach, Fla. (CITY) (COUNTY) (STATE) DATE OF BIRTH 1954-2-3 (YEAR) (MO.) (DAY) DATE OF ENTRANCE ____ FROM ____ (YEAR) (MO.) (DAY)

	NAME (Use pencil)	ADDRESS (Use pencil)	PHONE	OCCUPATION (pencil)	BUSINESS ADDRESS (pencil)	PHONE	Church Preference—Check if Member	Parents Own Home
Father	James Harris	619 5th St.		[illegible]			(__)	(Use Pencil)
Mother	(Legal Guardian - ad [illegible])						(__)	Yes(__) No(__)

Marital Status: Living Together ____ Divorced ____ Separated ____

Father: Deceased ____ Remarried ____

Mother: Deceased ____ Remarried ____

Pupil Lives with: Both Parents ____ Father ____ Mother ____ Guardian ____

Name of Guardian ____ Address ____ Phone ____

Languages spoken in the home ____

ECONOMIC STATUS of FAMILY (pencil)	19__	19__	19__
Good	( )	( )	( )
Moderate	( )	( )	( )
Low	( )	( )	( )
Unknown	( )	( )	( )

Authority for Birth Date: ( ) Birth Certificate ( ) Other ( )

(Use Pencil)	Number Older	Number Younger	No. in School	Number Employed
Brothers				
Sisters				

2. SCHOOL RECORD GRADES 1-6

YEAR / GRADE	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__	19__-19__
GRADE					5R			
Term (No. Weeks)					96 days			
Days Absent					2			
Chief Cause (Code)*								
SUBJECTS	Year Average	Year Average	Year Average	Year Average	Year Average	Year Average	Year Average	Year Average
Citizenship					I			
Reading					I			
Language					I			
Spelling					U			
Writing					I			
Social Studies					U			
Arithmetic					I			
Science					I			
Health					I			
Art					S			
Music					VS			
Physical Ed.					VS			
Promoted					✓			
Retained								
					Adams			

3. SCHOOL RECORD GRADES 7-8

Grade 7 Year 1967 1968

Term (Weeks) 36 Length of Class Period 55

Days Absent 3; Chief Cause b

Subjects	Periods Per Week	Marks 1st Sem.	Marks 2nd Sem.	Yr. Av.	Units
Eng. Naet	5	D	D	D	
MATH Hood	5	D	F	F	
SCI Miller	5	D	F	F	
SS Bey	5	F	F	F	
PHYS ED Nad	5	F	D	D	
ENRICH	5	F			
Art, PSY 55		C			
		C			

Placed in Spec. Ed.

Credits for Year ____

Total Credits ____

Grade 8 (606) Year 1968 1969

Term (Weeks) 36 Length of Class Period 50

Days Absent 4; Chief Cause 5

HALIBURTON JERRY 2723 M 08 68-9 27

SHOP 8	802	D	R	MUS G 8	632	D R
PY ED M 8	562		C	B	B	R
HEALTH	902		C	C	C	B
OCC ED	606		B	B	B	B
MATH	900		B	B	B	B
LNG ARTS	901		B	C	B	B

Promoted

HPA 1.6667 NGS-036 PTS-060

Credits for Year ____

Total Credits ____

Grade ____ Year 19__ 19__

Term (Weeks) ____ Length of Class Period ____

Days Absent ____; Chief Cause ____

Subjects	Periods Per Week	Marks 1st Sem.	Marks 2nd Sem.	Yr. Av.	Units

Credits for Year ____

Total Credits ____

4. TEST PROGRAM SUMMARY

SCHOLASTIC ABILITY

Name of Test	Form	Date Given	% ile Rank	M.A.	M.A. G.P.	I.Q.
[illegible] Test		11/6/68				68

ACHIEVEMENT

Name of Test	Form	Date Given	Grade Equiv.	% ile Rank

OTHERS

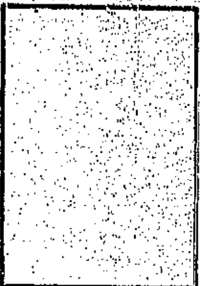
Name of Test	Form	Date Given	Score
FLORIDA STATE-WIDE NINTH GRADE TESTING PROGRAM — S.C.A.T. / FLA. 9TH-GRADE ACHIEVEMENT TEST; SCHOOL NO. 500392; JLH 6910 7 6 8101010 8 4			

*Code: S—Sickness of pupil; SH—Sickness in home; W—Work away from home; B—Bad Weather; T—Truancy.

FLORIDA CUMULATIVE GUIDANCE RECORD—GRADES 1-12

NUMBER	STUDENT NAME	SCHOOL
2723	HALIBURTON JERRY	CENTRAL

10. COMMENTS



Grade and Date	Teacher or Counselor	SPECIAL INTERESTS, OBSERVATIONS, SUGGESTIONS, AND RECOMMENDATIONS	FOLLOW-UP	Date

5. COMMENTS

PHOTOGRAPH

Grade

Age

Grade and Date	Teacher or Counselor	SPECIAL INTERESTS, OBSERVATIONS, SUGGESTIONS, AND RECOMMENDATIONS
1		
2		
3		
4		
5th 1966-67	Adams	Jerry needs help in all subject areas. Assigned to Sixth Grade.
6		
7		
8 JAN 1969		

GRADE LEVEL	PARTICIPATION IN DISCUSSION	INVOLVEMENT IN C.R. ACTIVITIES	PURSUIT OF INDEPENDENT STUDIES	EVENNESS OF PERFORMANCE	CRITICAL & QUESTIONING ATTITUDE	DEPTH OF UNDERSTANDING	PERSONAL RESPONSIBILITY	CONSIDERATION FOR OTHERS
08	4 11	4 2	15	13 2	4 11	4 2	4 11	4 2
	1 2 3 4 5 6	1 2 3 4 5 6	1 2 3 4 5 6	1 2 3 4 5	1 2 3 4 5 6	1 2 3 4 5 6	1 2 3 4 5	1 2 3 4 5 6

A44

1. NAME Haliburton, Jerry (LAST) (FIRST) (MIDDLE) COUNTY Palm Beach (USE PENCIL) SCHOOL CENTRAL JUNIOR HIGH Roosevelt Elem. (USE PENCIL)

STUDENT NAME
HALIBURTON JERRY L
JLH

(626)

6. SECONDARY SCHOOL RECORD GRADES 9—12

Grade 9 Year 1969 1970
Term (Wk.) 36 Length of Class Period 55
Days Absent ____; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units
OC ED MATH		C			
OC ED ENG		C			
OC ED SOC		C			
BUS G I		F			
HLTH I		F			
READ BI		F			
V-SPTS		D			
W3 other Palmer School					
10-9-69		V			

Credits for Year ____
Total Credits ____

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year ____
Total Credits ____

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year ____
Total Credits ____

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year ____
Total Credits ____

Grade ____ Year 19__ 19__
Term (Wk.) ____ Length of Class Period ____
Days Absent ____; Chief Cause ____

Subjects	Periods Per Week	1st Sem.	2nd Sem.	Yr. Av.	Units

Credits for Year ____
Total Credits ____

A45

7. GRADUATION DATA

Year ____ Month ____ Day ____

Number in class ____

Quartile Rank: 1st ( ); 2nd ( ); 3rd ( ); 4th ( )

FLORIDA STATEWIDE 9th GRADE TESTS

FLORIDA 12th GRADE PLACEMENT TEST

Total	Psy.	Eng.	S.S.	N.S.	M.S.	Fr.	Lat.	Sp.	

NATIONAL MERIT SCHOLARSHIP QUALIFYING TEST

Date:								

CEEB Date:	VERBAL	QUANT.			

8. EXTRA-CURRICULAR ACTIVITIES

Activity (Code)*	7	8	9	10	11	12
Annual						
Band						
Baseball						
Basketball						
Class Officer						
____ Club						
____ Club						
____ Club						
Dramatics						
Football		✓				
Officer for Home Room						
Student Body						
Orchestra						
Safety Patrol		✓				
Student Coun.						
School Paper						

*Code: M—Major; A—Average; B—Below Average; W—Withdrew.

9. EVALUATION OF PERSONAL ASSETS

Comments on Special Interests, Abilities, Aptitudes, and Achievements ____

Comments on Character and Citizenship ____

Further information helpful in evaluating this student for post-high school education and employment ____

APPENDIX E

Filing # 111132653 E-Filed 07/31/2020 09:55:57 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1858

JERRY LEON HALIBURTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Special Assistant CCRC
Florida Bar No. 0899641

BRITTNEY N. LACY
Staff Attorney
Florida Bar No. 116001

CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH
110 S. E. 6th Street, Suite 701
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from the denial of a motion pursuant to Florida Rules of Criminal Procedure 3.851 following an evidentiary hearing. Jerry Leon Haliburton appeals the circuit court's denial of his successive motion for postconviction relief, arguing that the Eighth Amendment precludes Mr. Haliburton's execution because he is intellectually disabled and categorically prohibited from receiving a death sentence as defined by *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 574 U.S. 701 (2014) and Florida Rules of Criminal Procedure 3.203.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the records of appeal to this Court:

(R __) – record on appeal from Mr. Haliburton's first trial (SC60-64510).

(PCR __) – record on appeal from 1994 3.850 appeal, which also contains the record on appeal of Mr. Haliburton's 1988 retrial (SC60-83749).

(T __) – transcripts from 1993 postconviction evidentiary hearing (SC60-83749).

(Supp. PCR2 __) – record on appeal from 2012 3.851 appeal (SC12-893).

(2019-R __) – transcripts and record on appeal from 2019 postconviction evidentiary hearing (the instant appeal, SC19-1858).

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Haliburton has been sentenced to death. Although this appeal involves a successive Rule 3.851 motion, this is the first opportunity that Mr. Haliburton has had to argue the merits of his intellectual disability issue after the evidentiary hearing that this Court ordered and the current Eighth Amendment jurisprudence regarding intellectual disability. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, on which Mr. Haliburton's life will turn.

Mr. Haliburton's right to appeal the denial of postconviction relief and to be meaningfully heard implicates his right to due process and equal protection. Individualized appellate review of all capital appeals, whether in the course of direct or collateral proceedings, is required by the Florida Constitution and is as necessary as individualized sentencing in a capital case. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."). "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. 701, 724 (2014). Denying Mr. Haliburton the opportunity to fully present and argue his claims does not comport with due process. Thus, pursuant

to Rule 9.320 of the Florida Rules of Appellate Procedure, Article I, Section 21 of the Florida Constitution, which provides access to courts, and Article V, Section 3(b)(1) of the Florida Constitution, which mandates this Court's jurisdiction to hear death penalty appeals, Mr. Haliburton respectfully moves this Court for oral argument on his appeal.

STATEMENT OF THE CASE

a. Trial and Retrial

The Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, entered the judgment of conviction and sentence of death at issue.

On August 9, 1981, the victim's body was discovered. At the end of September 1981, a Palm Beach grand jury failed to indict Mr. Haliburton for first-degree murder. At the beginning of November 1981, a grand jury again refused to indict Mr. Haliburton for murder. In March of 1982, Mr. Haliburton's brother Freddie came forward with an allegation that Jerry had confessed the murder to him, after Freddie received a phone call from his ex-wife Sharon Williams claiming that Jerry had raped her (a charge which she later dropped). Just one week later, on March 24th, with Freddie's testimony about Jerry's purported confession in hand, the State reconvened the grand jury for a third time and finally obtained an indictment for first-degree murder and burglary (R 940-41). Mr. Haliburton was twenty-seven years old.

The jury found Mr. Haliburton guilty on both counts, and the judge sentenced him to death. On appeal, this Court granted a new trial because the trial court erred in refusing to suppress statements which Mr. Haliburton had given to law enforcement after an attorney had been retained and requested that the questioning stop. *Haliburton v. State*, 476 So. 2d 192, 193-94 (Fla. 1985). The State sought

certiorari review by the U.S. Supreme Court, which granted certiorari, vacated the conviction, and remanded to this Court for further consideration. *Florida v. Haliburton*, 475 U.S. 1078 (1986). On remand, this Court reinstated its reversal of Mr. Haliburton's convictions and sentence and remanded for a new trial. *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987).

Between Mr. Haliburton's first trial and the retrial, his brother Freddie contacted one of Mr. Haliburton's trial attorneys to make a sworn statement recanting his trial testimony. At his deposition, Freddie explained that he "had to" recant because his "motive at the time [of trial] was to get back at Jerry for what he did to my ex-wife Sharon Williams" (PCR 1599). Freddie also admitted that "most" of his trial testimony was false: "What was not true is was we have never held a conversation. [Jerry] never admitted murder to me" (PCR 1600). He also admitted that police detective Houser and prosecutor Paul Moyle had told him details about the murder. Houser told him that the killer had entered through the jalousie windows and Freddie "made that statement off of what Houser said" (PCR 1612). Moyle told him that the victim "threw his hands up in defense and this is where I got that from and put into my story" (PCR 1613-14). By the time Mr. Haliburton's retrial began, Freddie had recanted his recantation to Musgrove.

Mr. Haliburton's second trial spanned three days and the penalty phase spanned just over four hours. As he had done at the first trial, Freddie Haliburton

testified that Jerry had confessed to him (PCR 2889-90). The other key witness for the State was Sharon Williams, Freddie's ex-wife, who testified that Jerry had attacked her at knifepoint (PCR 2828-30).

After deliberating for a mere 45 minutes, the jury returned an advisory death recommendation by a vote of nine to three (PCR 3275). The jury had been instructed on only one mitigating circumstance—the "catchall" mitigating factor (PCR 3263). On April 11, 1988, the judge alone found four aggravators[1] and no mitigators. On appeal, this Court affirmed Mr. Haliburton's convictions and sentence. *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990).

b. Collateral Proceedings

In January 1992, then-Governor Lawton Chiles signed a death warrant scheduling Mr. Haliburton's execution for March 1992. Mr. Haliburton filed a Florida Rule of Criminal Procedure 3.851 motion[2] and a request for a stay of execution; the stay was granted and the trial court ordered an evidentiary hearing on Mr. Haliburton's claims of ineffective assistance of counsel and that the State had

[1] The trial court found that the capital felony was committed by a person under sentence of imprisonment; that Mr. Haliburton was twice previously convicted of violent felonies; that the capital felony was committed while engaged in a burglary; and that the homicide was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. *See* § 921.141 (6)(a), (b), (d), (i), Fla. Stat. (1987).

[2] Prior to 1993, Rule 3.851 motions were only authorized for cases where a death warrant was signed. *See In re Rules of Criminal Procedure*, *Rule 3.851*, 503 So. 2d 320 (Fla. 1987).

violated *Brady v. Maryland*, 373 U.S. 83 (1963). Following the hearing, the circuit court denied relief in a two-page order (PCR 861-62). On appeal, this Court affirmed the denial of the Rule 3.850 motion and denied Mr. Haliburton's petition for a writ of habeas corpus. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997).

Mr. Haliburton subsequently filed a petition for writ of habeas corpus in federal court challenging his conviction and sentence of death. The district court denied all but two claims, which were set for evidentiary hearing September 11-13, 2000. After the hearing, the district court denied relief. *Haliburton v. Sec'y, Dept. of Corr.*, 160 F. Supp. 2d 1382 (S.D. Fla. 2001). The Eleventh Circuit Court of Appeals affirmed the denial. *Haliburton v. Sec'y, Dept. of Corr.*, 342 F. 3d 1233 (11th Cir. 2003), *cert. denied*, 541 U.S. 1087 (2004).

While his Eleventh Circuit appeal was pending, the U.S. Supreme Court issued *Ring v. Arizona*, 536 U.S. 584 (2002). On June 19, 2003, Mr. Haliburton filed a petition for writ of habeas corpus in this Court based on *Ring* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Court denied the petition without issuing an opinion. *Haliburton v. Crosby*, 865 So. 2d 480 (2003) (unpublished table decision).

After the U.S. Supreme Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Haliburton filed a successive Rule 3.851 motion on November 30, 2004, seeking a hearing on his claim that he is ineligible for execution due to his

Intellectual disability ("ID").[3] The motion was premised on Florida Rule of Criminal Procedure 3.203, which the Court promulgated on October 1, 2004, and which set forth the procedures to be used in litigating ID claims. In that motion, Mr. Haliburton also claimed that *Ring* required that a jury must decide unanimously and beyond a reasonable doubt whether a defendant is ID, as ID is a factual issue upon which a defendant's eligibility for death turns.

The motion was dismissed due to technical defects, and Mr. Haliburton appealed. This Court affirmed the summary denial of Mr. Haliburton's motion on procedural grounds, without prejudice to his right to re-file a motion in compliance with Rule 3.203(c)(2). *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006) (unpublished table decision).[4] On September 19, 2006, Mr. Haliburton filed a new motion in

[3] Although previous pleadings have used the term "mental retardation," this motion uses the term "intellectual disability" or "ID." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

[4] The Court's 2006 disposition of Mr. Haliburton's appeal is merely a reported affirmance published in a table of decisions; however, the Court did issue an explanation of its ruling in an unpublished order:

> Jerry Leon Haliburton, a prisoner under sentence of death, appeals the circuit court's denial of his successive motion for postconviction relief under rule 3.850. We have jurisdiction. *See* Art. V, §§ 3(b)(1), Fla. Const. The court denied relief because Haliburton failed to comply with Florida Rule of Criminal Procedure 3.203(c)(2), which requires that, in a motion for determination of mental retardation, the defendant must state the names and addresses of the experts who evaluated or tested him. Finding no merit to Haliburton's claim, we affirm the denial of his 3.850 motion. This affirmance is without

compliance with the Court's directive, listing the names of several experts who had evaluated Mr. Haliburton previously—although none had evaluated him for ID—and attached previously prepared reports of several mental health experts (Supp. PCR2. 1-99).

Subsequently, Dr. Bruce Frumkin conducted a clinical interview of Mr. Haliburton and administered several tests, including the Wechsler Adult Intelligence Scale-IV ("WAIS-IV"), the Wide Range Achievement Test-4 ("WRAT-4"), the Validity Indicator Profile ("VIP"), the Test of Memory Malingering ("TOMM"), and the Rey 15 Item Memory Test ("Rey"). Dr. Frumkin also reviewed records and conducted several interviews to assess Mr. Haliburton's adaptive functioning. On the WAIS-IV, Mr. Haliburton obtained a full-scale score of 74, with the confidence interval falling between 70 and 79. Dr. Frumkin found that Mr. Haliburton met the criteria for ID (Supp. PCR2. 130-135).

The State moved to dismiss Mr. Haliburton's 3.851 motion on October 12, 2011 (Supp. PCR2. 143-149). The circuit court denied the State's motion to dismiss and granted an evidentiary hearing (Supp. PCR2. 642). The State filed a motion for rehearing, arguing that because Mr. Haliburton had obtained IQ scores over 70, he could not be intellectually disabled given the bright-line cutoff of 70 established by

> prejudice to Haliburton's right to file a motion that complies with Rule 3.203(c)(2).

Haliburton v. State, SC05-1811 (Fla. July 10, 2006).

Cherry v. State, 959 So. 2d 702 (Fla. 2007) (Supp. PCR2. 154-345). The trial court granted the State's motion, summarily denied Mr. Haliburton's 3.851 motion, and canceled the evidentiary hearing (Supp. PCR2. 499-502).

Mr. Haliburton appealed the summary denial and this Court affirmed on the basis of *Cherry*, rejecting Mr. Haliburton's constitutional challenge to the *Cherry* standard. *Haliburton v. State*, SC12-893, 123 So. 3d 1146 (Fla. 2013) (unpublished table decision).[5] Approximately one month after the Court denied rehearing in Mr.

[5] The Court again issued an unpublished opinion, however, this time providing its reasoning. Noting that the trial court "summarily denied Haliburton's motion because he failed to demonstrate that his IQ was 70 or below," the Court then wrote:

> To prove [ID], a defendant must demonstrate "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007) (quoting § 921.137(1), FLA. STAT. (2002)). To satisfy the requirement of "significantly subaverage general intellectual functioning," the defendant must establish that he has an IQ of 70 or below. *State v. Herring*, 76 So.3d 891, 895 (Fla. 2011), *cert. denied*, 133 S.Ct. 28 (2012); *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007). In *Turner v. State*, 46 So.3d 568, 2010 WL 3802538 (Fla. 2010) (table), this Court stated that "[b]ecause the expert reports conclusively rebutted the first-prong of Turner's Atkins claim, the trial court did not err in summarily denying Turner's claim that he was [ID]." Haliburton scored 74 on the IQ test administered by his expert and submitted to the trial court as part of this claim. Haliburton has never scored 70 or below on any standardized intelligence test recognized under section 921.137(1), Florida Statutes (2006). Therefore, the trial court did not err in summarily denying Haliburton's claim.

Haliburton's case, the U.S. Supreme Court granted certiorari in *Hall v. Florida*, 571 U.S. 973 (2013), to address the issue of whether the bright-line IQ cutoff of 70 established by the Florida Supreme Court in *Cherry* was unconstitutional under *Atkins*—the very issue Mr. Haliburton had presented in his appeal to this Court and which this Court had explicitly rejected.

On February 19, 2014, Mr. Haliburton filed a petition for writ to certiorari to the U.S. Supreme Court, arguing that the court's summary denial of his ID claim based on *Cherry* was unconstitutional. While the petition was pending, the Supreme Court decided *Hall v. Florida*, 572 U.S. 701 (2014) and held that Florida's rule requiring an IQ score of 70 or less to determine ID was unconstitutional*,* abrogating this Court's decision in *Cherry.* On October 6, 2014, the Supreme Court granted Mr. Haliburton's petition for writ of certiorari, vacated his death sentence, and remanded the case to this Court for reconsideration in light of *Hall*. *Haliburton v. Florida*, 574

> Haliburton also contends that this Court should overrule its decision in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), because it is unconstitutional. This Court has repeatedly rejected Haliburton's argument that imposing a bright-line cutoff IQ score of 70 for finding a defendant to be [ID] and ineligible to be executed is unconstitutional. *See, e.g. Herring*, 76 So.3d at 895; *Franqui v. State*, 59 So.3d 82, 94 (Fla. 2011); *Nixon v. State*, 2 So.3d 137, 142-43 (Fla. 2009). Therefore, Haliburton is not entitled to relief.

(2019-R 153-54); *Haliburton v. State*, SC12-893, 123 So. 3d 1146 (Fla. 2013) (unpublished table opinion).

U.S. 801 (2014).[6] Upon reconsideration, this Court unanimously vacated its previous order and remanded the matter for an evidentiary hearing. *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015) ("Upon reconsideration of this matter as ordered by the U.S. Supreme Court in *Haliburton v. Florida*, 135 S.Ct. 178 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203").

While the case was in the circuit court in the pre-hearing stages,[7] the Supreme

[6] In the memorandum in response it filed in the Supreme Court, the State agreed that the matters should be remanded to the "Florida Supreme Court for further review in light of the Court's opinion in *Hall v. Florida*." (State's Mem. in Resp., July 30, 2014) (citations omitted).

[7] On remand, the State announced ore tenus at various hearings as early as March 25, 2015 its intention to secure a mental health expert to perform an evaluation on Mr. Haliburton (2019-R 1359-1360). In May 2017, the State informed the Court that it had retained Dr. Wade Myers, but he had been unable to evaluate Mr. Haliburton, who had undergone hernia surgery (2019-R 1438). However, as Defense counsel told the court, the State had not made any arrangements to schedule Dr. Myers's evaluation in over a year and a half (2019-R 1438). In July 2017, the State told the court that it was "running into a little difficulty in getting dates for the State's expert to evaluate the Defendant, but that should be resolved before the end of the summer" (2019-R 1463-64). At an October 2017 hearing, the State announced that Dr. Myers had yet to conduct the evaluation because the prosecutor "didn't realize we were under a time constraint" and had been in trial in other cases (2019-R 1480). At a hearing in December 2017, the State announced that Dr. Myers still had not conducted his evaluation of Mr. Haliburton (2019-R 1493-94). At a March 2018 hearing, the State announced that Dr. Myers had still not conducted his evaluation; Defense counsel noted that "this has been pending for a long time" and that the State has had "plenty of time to have this evaluation done" and Mr. Haliburton would be prejudiced if a hurried hearing date was scheduled without adequate time to depose the State's expert and to prepare for the hearing (2019-R 1501-02). It was after this hearing that the State hired Dr. Brannon, the expert who ultimately did evaluate Mr. Haliburton and who testified at the evidentiary hearing.

Court decided *Hurst v. Florida*, 136 S.Ct. 616 (2016), and the Florida Legislature's enactment of Chapter 2016-13 soon followed. Mr. Haliburton subsequently filed a motion to stay his pending postconviction proceedings given that this Court was grappling with *Hurst v. Florida*'s implications on pending cases, including older postconviction cases like Mr. Haliburton's (2019-R 215-17). The lower court declined to issue a stay at that point, reasoning that because Mr. Haliburton had not yet filed a Rule 3.851 motion raising that precise issue, the motion to stay was not yet ripe (2019-R 1419).

Subsequently, Mr. Haliburton filed a Rule 3.851 motion challenging his convictions and sentence of death pursuant to *Hurst v. Florida*, and this Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d (Fla. 2016) (2019-R 232-66). He also renewed his motion to stay all postconviction proceedings (2019-R 267-74). The lower court held a hearing on December 1, 2016 (2019-R 231), and considering the lack of opposition from the State, stayed the pending proceedings (2019-R 277; 1424).

On December 22, 2016, this Court issued two opinions addressing retroactivity of *Hurst*: *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016). On March 13, 2017, the Florida Legislature codified *Hurst v. State* by enacting Chapter 2017-1, which granted capital defendants the right to a life sentence unless a jury returns a unanimous death recommendation.

The previously entered stay in proceedings having been *de facto* lifted in light of *Asay* and *Mosley*, the State filed a response to Mr. Haliburton's *Hurst*-based Rule 3.851 motion on May 8, 2017 (2019-R 279-302). Shortly thereafter, Mr. Haliburton sought to amend his Rule 3.851 motion to address retroactivity issues raised by the State and to include a challenge to the newly enacted Ch. 2017-1 (2019-R 303-10). At a status held May 22, 2017, the lower court struck the pleading due to its length, but granted Mr. Haliburton leave to refile a shorter pleading (2019-R 1433). The court also directed both parties to file memoranda of law in addition to the Rule 3.851 pleadings (2019-R 1449-51).

On June 5, 2017, Mr. Haliburton filed his amended Rule 3.851 in compliance with the page limitation imposed by the court (2019-R 421-56). The State responded to the motion (2019-R 457-73) and notified the court that the parties had jointly agreed to dispense with additional briefing on the *Hurst* and related claims given the extensive briefing they had already submitted (2019-R 474-76). The court later granted the parties' request (2019-R 477).[8]

In the meantime, and in anticipation of the evidentiary hearing on the ID issue, the State informed the defense in March 2018, that it had contracted with Dr. Michael

[8] Following the evidentiary hearing on Mr. Haliburton's ID claim, on June 14, 2019, he filed, pursuant to leave of court, an additional supplement to the still pending *Hurst*-related amended 3.851 motion (2019-R 508-23). The State responded on July 10th, and the court ultimately denied his motion in the same order as the ID issue (2019-r 808; 924). Both these matters are on appeal in this proceeding.

Brannon to evaluate Mr. Haliburton. However, the State advised the defense that Dr. Brannon objected to Defense counsel being in the room during any IQ testing. Defense counsel responded and requested that the State provide the grounds for the objection. The State did not answer (2019-R 1513).

On March 13, 2018, the State brought the issue before the court and made an ore tenus motion to preclude the attendance of defense counsel during IQ testing (2019-R 1511-13). Defense counsel argued that Rule 3.203 provided that defense counsel may attend an evaluation of their client, and established Florida case law provides that a criminal defendant is entitled to the presence of his or her attorney during a compulsory mental health evaluation. The court issued an Order allowing Defense Counsel to be in the room during the evaluation (2019-R 1514-15).

Dr. Brannon met with Mr. Haliburton at Union Correctional Institution on June 3, 2018. Defense counsel Nicole Noel and Assistant State Attorney Aleathea McRoberts both attended. Dr. Brannon administered some testing instruments but did no IQ testing. Six months later, Mr. Haliburton's counsel received Dr. Brannon's report[9] and subsequently deposed Dr. Brannon on February 14, 2019.

The evidentiary hearing was conducted on May 13, 2019 (2019-R 528-804). Following the hearing, the parties filed legal memoranda (2019-R 821-62; 863-913).

[9] Dr. Brannon's report was subsequently introduced into evidence at the evidentiary hearing (2019-R 1785-93), as were the notes from his evaluation of Mr. Haliburton (2019-R 1802-10).

State's Memorandum). On September 27, 2019, the lower court entered an order denying relief (2019-R 924-45). A timely notice of appeal was filed (2019-R 1319-20). This appeal follows.

c. 2019 Evidentiary Hearing

On May 13, 2019, the lower court held an evidentiary hearing on Mr. Haliburton's ID claim. The hearing lasted nearly a full day and included the testimony of three witnesses: Mr. Haliburton's brother, John Henry Haliburton, Jr. (hereinafter "John" or "John Haliburton"), Defense Expert Dr. Bruce Frumkin, and State Expert Dr. Michael Brannon. Additionally, the following six exhibits were admitted: Defense Exhibit 1 – Curriculum Vitae of Dr. Bruce Frumkin; Defense Exhibit 2 – Report of Dr. Bruce Frumkin, June 23, 2010; Defense Exhibit 3 – West Palm Beach School Records of Jerry Haliburton; Defense Exhibit 4 – Dr. Michael Brannon Notes from clinical interview of Jerry Haliburton on June 1, 2018; State Exhibit 1 – Curriculum Vitae of Dr. Michael Brannon; and State Exhibit 2 – Report of Dr. Michael Brannon, December 13, 2018.

i. Defense Witnesses

A. John Henry Haliburton, Jr.

John Haliburton testified that he and Jerry grew up in West Palm Beach, Florida. As children, they lived for an extended period of time with their grandmother while their mother worked multiple jobs (2019-R 537; 550). John and

Jerry come from a home of approximately twenty-three siblings; when they were children, approximately seven or eight siblings lived in the home (2019-R 537).

During the time the children lived with their grandmother, they suffered severe physical, emotional and mental abuse. John struggled to find a word to define the abuse stating, "Hell is not even a good word for it" (2019-R 539).[10] He continued, "It's a lot of things from my childhood that I think, to be honest with you, I never wanted the world to know about because . . . I feel like it's – it's – his struggle was real." (2019-R 554). John testified that their grandmother was particularly abusive to Jerry; when she would come home the children would hide, but Jerry froze in fear (2019-R 540). The other children would have to tell Jerry how and where to hide (2019-R 540). Their grandmother called Jerry "Stupid. Retarded. Dumb. Good for nothing" (2019-R 539).

John explained that although he is Jerry's younger sibling, he took responsibility most often to help his brother (2019-R 548; 553). It was clear to John that his brother was different because he, as the younger brother, understood things that Jerry did not (2019-R 540-41). John was well aware that Jerry could not cook

[10] Details of Mr. Haliburton's childhood abuse are documented in Defense Exhibit 2, Dr. Bruce Frumkin's June 23, 2010 written report, and have also been provided to the courts in prior proceedings and are part of the record. Courts that have reviewed Mr. Haliburton's case have also noted his childhood characterized by, *inter alia*, physical and sexual abuse, poverty, and neglect. *See, e.g*. *Haliburton v. Sec'y, Dept. of Corr.*, 342 F. 3d 1233, 1244 (11th Cir. 2003).

as a child, and as an adult, he relied on his mother, sisters and girlfriends to provide food (2019-R 544). Jerry could make a basic sandwich but required guidance (2019-R 544). John explained that Jerry could not complete the household chores without assistance from other siblings and relied on those around him for food, shelter, and guidance (2019-R 542).

Their grandmother was very strict about the completion of chores and would make the children "pay for it" if they weren't done correctly (2019-R 542-43). Laundry was particularly important, the children were responsible for washing, hanging, ironing, folding, and putting away all laundry. Jerry could not fold the laundry and instead balled up the clothing (2019-R 543). The siblings then had to iron for Jerry because they feared he would hurt himself (2019-R 543). John explained that the siblings did the chores for Jerry (2019-R 547).

Jerry's inability to understand chores extended to yard work. John recalled a time when Jerry was asked to rake leaves and could not comprehend raking the leaves in the direction of the trash bin, instead, he raked the leaves away (2019-R 545). When it came time to load the leaves into the trash bin, Jerry would put the leaves directly into the bin instead of using a bag. The siblings would then have to empty the bin and start over (2019-R 546). Because the siblings were frustrated that Jerry made their tasks more difficult, they would often complete the chores for him (2019-545). Much like their worry with his use of the iron, the siblings could not

trust Jerry to operate the lawn mower (2019-R 546). John explained that if there was an item stuck in the mower, Jerry would not think to shut off the mower before flipping the mower over and reaching for the item (2019-R 546).

John witnessed Jerry's difficulty with schoolwork firsthand. John was in a lower grade but would assist Jerry with his homework (2019-R 553). John explained that while Jerry was elevated from grade to grade, he did not necessarily pass or complete the work given (2019-R 558).

John testified that Jerry never lived on his own, never paid any bills, and never opened a bank account. John witnessed Jerry use money to buy things. When Jerry handed money to the store clerk, he accepted whatever the clerk returned to him (2019-548). Jerry never counted the money, and often would walk away before the clerk had a chance to hand over change (2019-R 548).

Although Jerry did not understand how to fold laundry, cook, iron, rake leaves, mow the lawn, count money, John looked up to his brother. John fondly remembered his brother as the greatest football player and his personal hero. Jerry "could run. He was strong. He was just so good" (2019-R 541). However, he clarified that "no, he - - he didn't just – he didn't run the plays; you just give him the ball and he said, see ya" (2019-R 541).

John testified that Jerry was a good influence on the younger children, but he was never tasked with watching the children alone (2019-R 560).

B. Dr. Bruce Frumkin

Dr. Frumkin is licensed to practice psychology in four states and has obtained a diplomate in forensic psychology from the American Board of Professional Psychology. Dr. Frumkin has dozens of publications in the area of psychology, including a publication in the American Judges Association (2019-R 570-72). Dr. Frumkin has published on the topic of ID, and his work on evaluating intelligence has been cited by Dr. James Flynn[11] (2019-R 572). Dr. Frumkin has administered thousands of IQ tests over the span of his career and has testified nearly five hundred times as an expert in psychology (2019-R 575-76).

Mr. Haliburton's collateral counsel initially hired Dr. Frumkin in 1992[12] to evaluate Mr. Haliburton to potentially be used to support allegations in a Rule 3.850 motion (2019-R 580). Following the U.S. Supreme Court decision in *Atkins v. Virginia*, collateral counsel re-contacted Dr. Frumkin to specifically assess whether Mr. Haliburton met the criteria for ID (2019-R 582). In conjunction with his two clinical interviews and forensic evaluations of Mr. Haliburton himself, Dr. Frumkin interviewed several lay witnesses and reviewed extensive records including: Florida

[11] Dr. James Flynn is famous for his extensive research and publications on the increase of IQ scores throughout the world, also known as the Flynn Effect.

[12] In 1992, Mr. Haliburton's death warrant was signed and his execution scheduled; a stay of execution was ultimately granted in order to allow the parties to conduct an evidentiary hearing without operating under the exigencies of a death warrant.

Department of Corrections Inmate File, Florida State Prison Inmate File, 1971 St. Mary's Hospital Records, 1991 Report of Dr. Patricia Fleming, 2000 Report of Dr. Eisenstein, raw data from April 30, 2009 IQ test administered by Dr. Crown, penalty phase testimony of eleven witnesses, depositions of nine witnesses, trial testimony of two witnesses, and multiple affidavits (2019-R 591-92; (Defense Exhibits 2, 3); (*see also* Supp. PCR2 1-99 (Second Successive Motion to Vacate Judgments of Conviction and Sentence with Special request for Leave to Amend, Exhibit 9, filed Sept. 19, 2006)).

Dr. Frumkin explained that ID, as defined by both Florida courts and the American Association of Intellectual and Development Disabilities ("AAIDD"), is a diagnosis in which a person has "significantly subaverage intelligence; they have to have deficits in adaptive functioning in two or more areas, and there has to be an onset prior to the age of 18" (2019-R 583). "Significantly subaverage intelligence" is measured by IQ testing and that a score of "approximately 70" is statistically significant. However, these numbers are approximate values and are not exact; an IQ score "isn't a fixed number that doesn't vary" (2019-R 585). Determining the weight given to a score depends on multiple variables; each score must be considered in light of a number of factors including measurement error, practice effect, the Flynn Effect, and the circumstances in which the test was given.

Measurement error, Dr. Frumkin testified, or the standard error of measure

("SEM") is the confidence interval in which a score must be considered. The SEM "is approximately plus or minus 5 points in either direction, but it could vary by a point or two depending on the actual IQ score" (2019-R 584). He explained that each confidence interval requires a statistical calculation as there is a precise science behind measurement error. These calculations are available in a resource chart for reference (2019-R 590). Because there is a measurement error, "an IQ score of 74 means the same thing as an IQ score of 70, you can't say the person who has an IQ score of 74 is smarter or brighter than the person with the IQ score of 70. They mean the same thing" (2019-R 585).

Dr. Frumkin explained the Flynn Effect, noting that the older the test instrument, the more likely that the person's IQ score will be an "overestimation of his true intelligence" (2019-R 586). The Flynn Effect "has to do with populations […] getting brighter every year by about a ***third of an IQ point***" (2019-R 658) (emphasis added). This means that a test normed eighteen years earlier could result in a score that is overestimated by approximately six points depending on the test that is administered; and Dr. Frumkin noted that it is difficult to assess how much an individual is affected by the Flynn Effect, but in general, "it would probably create an artificially higher IQ score than a lower one" (2019-R 659). While overestimation may not be drastic in terms of points, the Flynn Effect does matter (*Id.*).

Dr. Frumkin addressed practice effect and explained that a person "may have

a better performance because of practice" if IQ tests are given close in time (2019-R 587). Research shows that a test should not be administered within a year of a second time and that practice effect could account for 5 points on the overall IQ score (2019-R 588-89).

The two IQ tests most commonly used by psychologists and the only two tests recognized by Florida law to be used in consideration of whether someone is ID are the Wechsler Adult Intelligence Scale (WAIS) and the Stanford-Binet (2019-R 594; 640). Dr. Frumkin explained that the WAIS-IV, the most current WAIS test, is an individually administered test that measures "intelligence from a number of different areas" and is considered the gold standard of IQ tests (2019-R 594).

Dr. Frumkin differentiated the BETA and Slosson tests which are considered screening tests for a quick glimpse at a person's intelligence. Dr. Frumkin testified that neither test is accepted as an appropriate measure for intellectual ability in the State of Florida and he does not believe that they are accepted anywhere (2019-R 639-41).

On May 20, 2010, Dr. Frumkin conducted a clinical interview of Mr. Haliburton and administered several tests, including the WAIS-IV. Dr. Frumkin conducted the tests in a visiting room for death row inmates at the Florida Department of Corrections, Union Correctional Institution. Although Dr. Frumkin would have preferred to administer psychological testing at his office, the setting

was “a pretty decent place to give the testing” (2019-R 622).[13] Dr. Frumkin also administered the Validity Indicator Profile (VIP), the Test of Memory Malingering (TOMM), and the Rey 15 Item Memory Test (Rey); these are effort tests, also known as malingering tests, which assess a person’s overall effort given during testing. (2019-R 597-98; 603-05). Dr. Frumkin explained that these tests determine whether someone is “purposely trying to do poorly” or “trying to exaggerate intellectual or cognitive problems” (2019-R 601, 604). In Dr. Frumkin’s expert opinion, Mr. Haliburton gave his best effort in all of the psychological testing, including the effort tests (2019-R 619).

Dr. Frumkin testified that, on the WAIS-IV, Mr. Haliburton obtained a full-scale score of 74, with the confidence interval falling between 70 and 79 (2019-R 615; 657). Indeed, **on questioning by the State**, Dr. Frumkin noted that all of Mr. Haliburton’s IQ scores, achieved on accepted test instruments under the statute, have all fallen within a window of 70-79, not counting any Flynn Effect or practice effect:

> Q [by ASA McRoberts] And that confidence interval that you’re talking about when you were saying that before that 95 percent certain using the statistical analysis is that his

[13] On cross-examination, the State asked whether Dr. Frumkin was aware of any concerns from testing companies regarding the presence of third-party witnesses in examinations (2019-R 644). Dr. Frumkin explained that testing companies are concerned with “questions and answers to IQ tests floating around in the general public domain” and “releasing the raw psychological test data to non-psychologists, or at least to non-psychologists without some sort of protective order . . .” (2019-R 644). In order to limit who is in the room, the evaluations can be video recorded (2019-R 670).

IQ is somewhere between 70 and 79?

A [by Dr. Frumkin]. Yes, I mean, not counting any Flynn Effects or Practice Effects but just the potential measurement error from that particular test.

Q And that's consistent with all of the testing that's ever been given to him, and we take out the DOC a the Slosson, I mean, all of the current valid testing that you reviewed and done yourself, he has always fallen somewhere between 70 and 79?

A Yes.

(2019-R 657) (emphasis added).[14]

Dr. Frumkin opined that Mr. Haliburton has significantly subaverage intellectual functioning as required by Florida Statute and Florida law:

Q Now, based on your evaluation of Mr. Haliburton, do you have an opinion about whether Mr. Haliburton meets the criterial for intellectual disability?

A I believe he does meet the criteria.

Q And what is your opinion as to prong number one?

A That he does have significantly subaverage intelligence.

[14]Dr. Frumkin testified that although he performed IQ testing in 1992 and administered a WAIS-R on which Mr. Haliburton obtained a full scale score of 80, he no longer agrees with his overall assessment (2019-R 588-81). As he explained, he was at the beginning of his forensic psychology career (2019-R 581). At the time, the science was not yet developed with regard to intellectual disability and the Flynn Effect was not yet applied (2019-R 581; 661-62). In 1992, the WAIS-R was eleven years old, which means Mr. Haliburton's score of 80 was an overestimate of his true intelligence and his overall score could have been affected by nearly four points (2019-R 581; 661-62). Dr. Frumkin also noted that he administered the testing within a week of Dr. Fleming who also administered a WAIS-R in 1992 (2019-R 663).

Q And what is your opinion based on?

A Based upon a number of factors: One, behaviorally, he came across as someone with intellectual deficiencies. He was a very poor historian. He provided some information, but he constantly got confused in terms of time frames and chronology of events and that sort of thing so that was, you know, one area.

Q Before I ask you – in terms of the WAIS-IV, I don't think we talked about what the actual result was on the WAIS-IV. What was your – what was the full-scale score that he obtained on the WAIS-IV?

A Well, the Full Scale IQ Score was 74, which is in the lower 5 percentile range, and then the confidence interval is 70 to 79, meaning that there's a 95 percent chance – not counting anything having to do with Flynn Effects, but there's a 95 percent chance that his IQ score is between 70 and 79.

Q And that falls within the – excuse me, the definition as required by Florida Statute and Florida law –

A Yes.

Q -- of significantly subaverage intellectual functioning?

A Yes.

(2019-R 608-09); (s*ee also* 2019-R 622 ("Q: [] So overall in terms of the first prong, just to conclude on that, your opinion is that he does meet the first prong of a criteria for intellectual disability; correct? A: Yes")).

Dr. Frumkin's opinion as to prong one was buttressed by school records from the Palm Beach County School District. These records, which also established that onset of Mr. Haliburton's ID issues began could be traced well before the age of 18,

revealed that he completed only up to the 9th grade and, as Dr. Frumkin explained:

> He was in special education class—exceptional child education classes, a record from November 8 of 1968 from the Palm Beach County schools—I'm quoting, difficulty functioning in a regular academic class, end of quotes.
>
> There's another entry that talked about him having, quote, a mental handicap, end of quotes.
>
> In 1968, 769, note from the school record says, "Jerry needs help in all salient areas," end of quotes.
>
> So there's certainly documentation that he's having problems in school because of intelligence.

(2019-R 611).

Addressing the second prong of the ID test, Dr. Frumkin explained that in order to establish that a person has adaptive deficits, he must have deficits in at least two categories of adaptive functioning (2019-R 622-24). Dr. Frumkin explained:

> Adaptive functioning is basically a collection of conceptual social and practical skills that are learned by people to be able to do in their everyday life. So it's how well someone is able to function adaptively in society.
>
> So with conceptual skills, what I'm talking about are, their language, their functional academics, their literacy, managing money, time management, being able to manage a number of concepts, self-direction, you know, that sort of thing.
>
> With social, it has to do with, you know, their interpersonal skills, their social responsibility, their self-esteem, their gullibility, their naivety, their social problem-solving, their ability to follow rules and not to be victimized, those sorts of things.

> And then the practical has to do with -- practical skills have to do with activities of daily living, their personal care; are they able to dress themselves; are they able to brush their teeth; are there occupational skills; are they able to meet their healthcare needs; their travel, how are they able to travel; are they able to follow schedules and routines; their use of safety issues, and things like that -- their use of money; telephoning, being able to use telephones, that sort of thing.
>
> So those are the -- you know there are three main areas; conceptual, social and practical, but there's a number of different subcategories in these different areas.

(2019-R 622).

In order to assist in his assessment of the adaptive functioning deficit prong, Dr. Frumkin administered a Wide Range Achievement Test (WRAT-IV), which measures multiple different areas of functional academics including reading, spelling and arithmetic (2019-R 595-96; 623-24). Mr. Haliburton exhibited deficits in math and communication (2019-R 616-17; 624); scores on the WRAT-IV subtests ranged from lower 4th to 14th percentile and his math score is at a lower 4th percentile, placing him at a 3rd grade level (2019-R 617).

Mr. Haliburton's performance on the WRAT-4 was consistent with ID, and there were no signs of a learning disability.[15] Based upon the tests of effort he

[15]Dr. Frumkin distinguished learning and other disorders like Attention Deficit Hyperactivity Disorder ("ADHD") from ID (2019-R 634-36). ADHD, just like ID, is diagnosed using specific testing (2019-R 634). A person with ADHD would have deficits in concentration but would not necessarily have a lower or higher IQ and vice versa (2019-R 635). The two diagnoses are not mutually

conducted, Dr. Frumkin had no reason to believe that Mr. Haliburton was attempting to feign or exaggerate his level of cognitive deficits. Mr. Haliburton "was a very poor historian" and he "constantly got confused in terms of time frames and chronology of events . . ." (2019-R 608). Mr. Haliburton had "very poor vocabulary" which required Dr. Frumkin to have to use "very simple words" when communicating; Mr. Haliburton could not "really form extractions" and "was concrete in his thinking" (2019-R 616).

In addition to the clinical evaluation of Mr. Haliburton and the administration of tests, Dr. Frumkin's comprehensive evaluation also consisted of several interviews to assess Mr. Haliburton's adaptive functioning. In 2009, Dr. Frumkin interviewed Mr. Haliburton's former employer Charles Johnson. Mr. Haliburton worked for Mr. Johnson at some point before he was arrested on above-entitled matter. It was unclear exactly when he was employed and for how long, but Mr. Haliburton told Dr. Frumkin that his longest held job was for approximately 4-5 months. Mr. Johnson told Dr. Frumkin that Mr. Haliburton was a hard worker who did what he was told, but that he could not remember a sequence of tasks (2019-R 613-14).

exclusive, a person with ADHD can also be ID (2019-R 635). Dr. Frumkin did not see any indicia of ADHD during his evaluation of Mr. Haliburton, nor was there any school record or any notation in more than twenty-seven years of prison records that would indicate ADHD (2019-R 635.).

Dr. Frumkin also interviewed and administered the Adaptive Behavior Assessment System 2nd Edition (ABAS-II) on three of Mr. Haliburton's siblings: Helen Edwards, John Robert Haliburton, John Henry Haliburton, Jr. (2019-R 606). The ABAS-II, Dr. Frumkin explained, is a test/series of questions administered to witnesses who have firsthand experience with the examinee. The questions help an examiner understand how the examinee was able to perform tasks throughout their life (2019-R 628-33).

The scores of this test greatly rely on the reporter's ability to remember the details of the individual and can be difficult if the reporter has their own limitations (2019-R 629). Dr. Frumkin testified that he has written on the precise topic of the difficult in administering tests like the ABAS-II if the reporter is a poor historian (*Id.*). Mr. Haliburton's siblings scored in a range from 50-69 on the ABAS-II; however, he explained, it was clear that the family members had limitations of their own and may not have understood the questions or how to answer (2019-R 629-30). Nonetheless, Dr. Frumkin testified that the score of 50 places Mr. Haliburton in the "lower one-tenth of one percent range in terms of adaptive functioning" and the score of 69 puts Mr. Haliburton in the lower 2 percentile range (2019-R 629). Based on his own observations and the interviews, Dr. Frumkin opined that Mr. Haliburton functions closer to the 69 score, the lower 2 percentile range (2019-R 629).

Dr. Frumkin relied more on the descriptions the family gave of Mr. Haliburton

as opposed to the individual testing data. For example, he confirmed from Mr. Haliburton's oldest sister Helen Edwards that Mr. Haliburton had poor reading comprehensions kills, and he could not complete basic chores in the home such as washing clothes or cooking (2019-R 630). Ms. Edwards recalled their grandmother beating Jerry because he did not know how to wash his clothes (2019-R 630). Ms. Edwards told Dr. Frumkin that even as Jerry grew older, he still could not cook, clean, or do laundry (2019-R 630).

In his interview, John Henry Haliburton, Jr. explained to Dr. Frumkin that his older brother had poor problem-solving skills and lacked common sense (2019-R 630). John R. Haliburton, another of Mr. Haliburton's brothers, told Dr. Frumkin that his brother was not smart and did not believe his brother even was able to cook (2019-R 630). His brother was not up to speed on academics and almost overdosed because he could not properly take his medication (2019-R 630).

Dr. Frumkin found that the although the overall adaptive functioning scores obtained from the family members varied, the data from each sibling consistently scored Mr. Haliburton's social abilities higher than his conceptual skills (2019-R 631). Dr. Frumkin explained that this is because Mr. Haliburton understood how to tell a joke and make those around him laugh, to take away from the embarrassment of him not understanding how to perform a task (2019-R 631). Mr. Haliburton "was very friendly, gregarious sort of person" who did not want to appear stupid; this

behavior is called "masking," a method employed by individuals with deficits to hide deficiencies (2019-R 632).

Dr. Frumkin explained that a person with even extreme deficits in adaptive functioning will also demonstrate strengths (2019-R 624). This is why the definition of ID only considers only deficits (2019-R 625). For example, Dr. Frumkin noted that a person with ID can learn a skill, such as hotwiring a car; however, that does not take away from their diagnosis of ID if they have deficits in two areas of adaptive functioning (2019-R 625).

Dr. Frumkin explained that evidence of a person's learned behavior/strength only illustrates that they can potentially learn a skill (2019-R 625). Often a person with ID will learn to do things because he has the support of someone, whether it be a loved one or boss, that teaches him through consistent repetition (2019-R 625-26).[16] This is particularly the case in structured environments—like prison—where Mr. Haliburton is limited in the decisions he can make for himself (2019-R 626). Dr. Frumkin concluded that Mr. Haliburton had deficits in adaptive functioning in at

[16] The State asked Dr. Frumkin about Mr. Haliburton's alleged experience in an auto body repair class upon leaving prison in 1973 (2019-R 652-53). However, the State could not provide any evidence confirming Mr. Haliburton attendance or completion of the course (2019-R 653). And despite the lack of any confirmation, Dr. Frumkin explained: "and you know, hypothetically, even if he was able to learn how to paint a car or take a dent out of a car, so that's a very positive and that's a really good thing, and it doesn't mean he doesn't have intellectual disability or deficits in adaptive functioning" (2019-R 654).

least two areas, and therefore, met the second criteria for intellectual disability (2019-R 624).

According to Mr. Haliburton's school records, Dr. Frumkin found that Mr. Haliburton was ID before the age of 18 (2019-R 610). Palm Beach County school records from November 8, 1968 confirmed Mr. Haliburton only completed up to the 9th grade and that he was in special education classes (2019-R 611). These records also state that Mr. Haliburton had "difficult functioning in regular academic classes" and that "Jerry needs help in all salient areas" (2019-R 611; *see also* 2019-R 1795, Defense Exhibit 2). While in school, Mr. Haliburton was administered the Slosson intelligence test, a quick screening test for intelligence, on which he scored a 69 (2019-R 612).

Dr. Frumkin opined that based on the records he reviewed, interviews conducted, and the testing he administered, Mr. Haliburton met the criteria for ID to a reasonable degree of psychological certainty (2019-R 633-34).

ii. State Witnesses

A. Dr. Michael Brannon

The State called Dr. Michael Brannon, a forensic psychologist (2019-R 676). Dr. Brannon testified that he is "a scientist practitioner," however, he does not conduct research and has never published in peer reviewed journals (2019-R 678). Dr. Brannon is not board certified (2019-R 737).

Prior to conducting an evaluation, Dr. Brannon agreed that it is important to review records because "you want to see what testing has been done" (2019-R 684). In anticipation of Mr. Haliburton's evaluation, Dr. Brannon interviewed just one witness, John Henry Haliburton, Jr. (2019-R 681). He claimed to have reviewed records from Florida State Prison Corrections, school records, and Dr. Frumkin's 2010 report (2019-R 683). Dr. Brannon **did not** review the material Dr. Frumkin relied on, noting "I assume he had some materials I didn't" (2019-R 783-84). Nor did he review prior testing done by other experts in the case such as Dr. Barry Crown, Dr. Susan LeFehr Hession, or Dr. Patricia Fleming, or any of the numerous affidavits, depositions, penalty phase or trial transcripts from lay and expert witnesses who have testified in the numerous proceedings over the last thirty-seven years (2019-R 740-42; 784).

On June 1, 2018, Dr. Brannon met with Mr. Haliburton in a visiting room on death row located at the Florida Department of Corrections Union Correctional Institution (2019-R 164). His evaluation consisted of an interview of Mr. Haliburton and the administration of one effort test (2019-R 788; *see also* State Exhibit 2).

Dr. Brannon did not conduct any IQ testing himself and was familiar only with three of Mr. Haliburton's full scale IQ scores: an 80 on testing administered by Dr. Frumkin in 1992,[17] a 79 on testing administered by Dr. Eisenstein in 2000, and

[17] *See supra* note 15.

a 74 on testing administered by Dr. Frumkin in 2009 (2019-R 685; 743). Dr. Brannon testified that he has "great respect" for Dr. Frumkin and did not find any issue with his testing; in fact, his decision not to perform additional adaptive testing on Mr. Haliburton or his siblings was based on the fact that Dr. Frumkin had already conducted them (2019-R 784-85). However, Dr. Brannon was not aware that Mr. Haliburton has two ***additional*** IQ scores of 74 and 75 (2019-R 740-41). Dr. Brannon did not review Dr. Susan LaFehr Hession's testing in 1988, on which Mr. Haliburton received a full scale score of 75 on the WAIS-R, nor did he review Dr. Crown's testing in 2009 from which Mr. Haliburton received a full scale score of 74 (2019-R 740-741).

When assessing the reliability of an IQ score, Dr. Brannon acknowledged that the Flynn Effect "should be a consideration" in an older test although how much an individual is affected is difficult to discern (2019-R 744). Although Dr. Brannon is aware courts have adjusted scores based on the Flynn Effect, he disagrees with individual adjustment (2019-R 786). He explained, however, "you would always mention that if it's a test that's – especially if it's years old, **you would certainly mention that as a possible effect on the score. Absolutely**" (2019-R 786) (emphasis added).[18] In his overall assessment of Mr. Haliburton's IQ scores, Dr.

[18] Despite acknowledging that one would "always" mention the possible Flynn Effect on a test, especially an older test, Dr. Brannon's written report made *no mention* of the Flynn Effect on the previous IQ scores obtained by Mr. Haliburton

Brannon did not consider that the two scores of 80 were obtained on an eleven-year-old exam; he was not even familiar with the age of the tests used in this case (2019-R 744-45).

Dr. Brannon testified that practice effect must also be considered when assessing the reliability of a score (2019-R 753-54). He agreed that back-to-back testing would "absolutely" affect performance items, if an individual is given the same test. When asked about the practice effect in this case, Dr. Brannon was not aware that Dr. Fleming and Dr. Frumkin administered the same test, the WAIS-R, and that the tests were administered within a week of each other (2019-R 754).

Dr. Brannon ultimately did not agree that Mr. Haliburton has subaverage intellectual functioning, and therefore did not meet prong one of the ID criteria. In Dr. Brannon's opinion, a person is expected to fall in the range of intelligence **of their highest score** to the exclusion of all other scores obtained (2019-R 1264) ("So whatever your highest number is, is what your capacity is so that's what you are"). "Other factors" apparently not attributable to intelligence deficits explain any lower scores (2019-R 691). Dr. Brannon concluded that because two of three scores he was familiar with in Mr. Haliburton's case were in the higher range, then 79 and 80 must be indicative of Mr. Haliburton's abilities despite acknowledging at the same time

that Dr. Brannon chose to consider. He clearly could not have mentioned the Flynn Effect on the scores obtained by Dr. LaFehr Hession or Dr. Fleming because Dr. Brannon was not even aware of those scores.

that "IQ is best measured on a range" (2019-R 749).

Dr. Brannon relied on the three scores with which he was familiar and Mr. Haliburton's results on two additional tests: the BETA and the TABE, both of which were administered decades earlier by the prison and are **not** tests recognized by the Florida statute. Dr. Brannon chose to use the results from the decades-old BETA and TABE testing results as "sources of data" in formulating his opinion that Mr. Haliburton was not ID despite acknowledging that they are not tests to be "used in terms of formulating criteria for intellectual disability…" (2019-R 748). Unlike the Wechsler scales, the BETA is a group test which as administered in prison (2019-R 747-48). He could not say whether there were a hundred or a thousand people taking the test at the time (2019-R 748). Dr. Brannon acknowledged that he was not aware of any details regarding the administration of the test, how it was monitored or how it was scored, and that it was even possible that someone else could have taken the test for Mr. Haliburton (2019-R 747).

Dr. Brannon also relied heavily on Mr. Haliburton's scores from two TABE Tests, another group test of adult basic education, taken in 1984 and 1985 (2019-R 726; 774). Dr. Brannon was not familiar with when the TABE test was normed, nor was he familiar with the Flynn Effect on this test and explained, "there is likely a Flynn effect for all things, so I don't know if its's been specifically measured for the TABE" (2019-R 775-76). Despite relying on the TABE tests as a source of data to

reject a finding of ID in Mr. Haliburton's case, Dr. Brannon himself has ever administered the TABE because "it's not a generally accepte3d test within forensic psychology" (2019-R 777).

Despite relying on two prison-administered tests on which Mr. Haliburton obtained scores that assisted Dr. Brannon in rejecting a finding of ID, Dr. Brannon chose not to consider Mr. Haliburton's score of 68 on the Slosson screening test given by the Palm Beach County schools. When asked whether Slosson is helpful to establish IQ, Dr. Brannon replied,

> Right. It's usually given to designate children who are having problems or difficulties That's when it's used the most often and needs some kind of special placement so that's usually when the Slosson is used, but it's just a screening measure, it's not a comprehensive IQ Test.

(2019-R 782). He did, however, concede that the Slosson is a pretty reliable estimate of a person's IQ, and he himself had administered in in the past (unlike the BETA test on which he did rely) (2019-R 782-83).

Dr. Brannon spent a significant portion of his testimony on the second prong of the ID analysis: adaptive deficits. In support of his opinion, Dr. Brannon relied on his clinical interview of Mr. Haliburton and his interview of John Henry Haliburton, Jr. Unlike Dr. Frumkin, Dr. Brannon did not administer any adaptive functioning testing because Dr. Frumkin had already completed those tests (2019-R 784-85).

Dr. Brannon explained that Mr. Haliburton was open and willing to offer

details about his childhood (2019-R 694-95). Dr. Brannon described Mr. Haliburton's childhood as maladaptive, chaotic and dysfunctional (2019-R 695; 755). Dr. Brannon explained that Mr. Haliburton had "about as many bad things as you could have happen in one home" including rampant physical and sexual abuse. (2019-R 695; 755). When Dr. Brannon asked him about his childhood, Mr. Haliburton described it as "happy" and told Dr. Brannon, "I guess, that's how you're supposed to live" (2019-R 695).

Dr. Brannon did not ask many follow up or clarifying questions of Mr. Haliburton. For instance, at the hearing, Dr. Brannon learned for the first time that Mr. Haliburton is one of at least twenty-three children, with seven or eight children living at the home at one time. He said that this information "surprised" him. When Defense counsel asked if he ever asked Mr. Haliburton how many siblings were in the home, Dr. Brannon said "no" (2019-R 765-76).

Mr. Haliburton attended special education classes until leaving school after the 9th grade (2019-R 692). Records show that he had very good attendance (2019-R 233). While Dr. Brannon claimed that Mr. Haliburton was bored and exhibited behavioral problems that were documented in school records (2019-R 698; 757), Dr. Brannon ultimately could not identify where this information was located in the records, and when asked if he wanted to review the records in court, Dr. Brannon answered "no" (2019-R 757-58). When pressed further, Dr. Brannon also agreed that

neither the school records nor the thousands of pages of prison records contain any mention of an undiagnosed attention deficit disorder (2019-R 760).

Mr. Haliburton required assistance to get up for school; however, he was able to dress himself (2019-R 764). Mr. Haliburton did not walk the two blocks to school alone, the children walked together (2019-R 764; 767). The children did not have to cook or organize meals before school, they ate breakfast at school (2019-R 764). While at school, Mr. Haliburton only knew when to change classes when the teachers told him (2019-R 768). John Haliburton told Dr. Brannon that as a child, reading was a serious struggle for Mr. Haliburton and that he would get frustrated because he could not read along with his sister (2019-R 771).

Dr. Brannon testified that Mr. Haliburton "played a variety of sports" but his testimony only included mention of football (2019-R 704). While Dr. Brannon listed skills he believes are required to play football, he did not explain that Mr. Haliburton possessed any of these skills and abilities (2019-R 705). Dr. Brannon conceded that Mr. Haliburton was never the captain of the team in the two school years he played football; and in fact, he was allowed to roam the field because he could not comprehend the plays or understand the coach (2019-R 763).

The women in the Haliburton household did more of the cooking and cleaning (2019-R 179-80). Dr. Brannon did not offer where he learned that information or if he himself came to the conclusion after learning that the sisters took over more of

the chores Mr. Haliburton would not handle. Mr. Haliburton can make a sandwich "if need be," however "the more elaborate means beyond the sandwich, the women made in the home" (2019-R 706). Dr. Brannon testified that Mr. Haliburton "could buy a meal out" (T2 179), but he did not ask Mr. Haliburton where he purchased food, how often, or what he purchased.

Dr. Brannon testified that Mr. Haliburton described making macaroni and cheese for the kids (2019-R 706). On cross examination, defense counsel asked whether it was actually beans and weenies, and Dr. Brannon responded, "I don't remember, whatever is in my notes" (2019-R 789).

Dr. Brannon testified that Mr. Haliburton's school, the store, and the places where he played sports were all located within a few blocks of the home (2019-R 765). Mr. Haliburton never took public transportation and has never had a driver's license (2019-R 716; 766). Growing up, the Haliburton children did not have a clock and knew they to be home by dark (2019-R 767). Dr. Brannon testified that Mr. Haliburton told him he wore a watch (2019-R 716), but on cross examination, defense counsel asked whether Mr. Haliburton actually told Dr. Brannon that he looked at a watch sometimes and that he didn't have a watch but his girlfriend did, and Dr. Brannon responded, "I don't remember I know that he said he used to use a watch or used a clock in order to be able to know how to get to places on time" (2019-R 788-89).

Mr. Haliburton has never lived on his own, and Dr. Brannon agreed that it would be very hard for Mr. Haliburton to do so (2019-R 771).

Dr. Brannon reported that Mr. Haliburton told him he got to work on time, stayed as long as he was supposed to, and arranged for rides (2019-R 709, 716); however, on cross, he agreed that Mr. Haliburton actually told him that "Mr. Johnson's truck picked him up for work" (2019-R 789).

Dr. Brannon explained that at one point, Mr. Haliburton worked for his father in a lawn care business (2019-R 769). In order to get to work, Mr. Haliburton waited outside for his father and brother to pick him up (2019-R 769). Mr. Haliburton's work was not steady, he worked when the family asked him (2019-R 769). Dr. Brannon learned from John that Mr. Haliburton's employment with his father was terminated because he drove the lawn mower over rocks (2019-R 769). He further explained that Mr. Haliburton could not understand the tasks he was asked to complete (2019-R 769).

The State asked whether Mr. Haliburton had told Dr. Brannon that his longest relationship was 17-18-years long prior to his arrest (2019-R 696-97). However, Dr. Brannon did not corroborate the dates or length of relationship nor did he refer to records or conduct witness interviews (2019-R 756). As Dr. Brannon acknowledged, the actual existence or length of Mr. Haliburton's relationship was irrelevant; what mattered was only "that's what he said to me" (2019-R 757). Accordingly, Dr.

Brannon did not question Mr. Haliburton about the child he had, he did not ask whether he knew the date of birth, whether he had changed a diaper, or whether he had ever participated as a father to the child.

Dr. Brannon testified that Mr. Haliburton told him he played chess a lot (2019-R 773), yet he did nothing to ascertain the accuracy of what Mr. Haliburton was telling him (2019-R 773). Dr. Brannon never asked him what a bishop was, or a queen, or a rook (2019-R 773-74). It only mattered to Dr. Brannon that Mr. Haliburton told him he played chess; Dr. Brannon did not interview any guards or inmates and agreed that he does not know if it is true that Mr. Haliburton has played an actual game of chess in his life or has ever won a game of chess (2019-R 773).

Dr. Brannon reported that Mr. Haliburton told him he watches the news and likes to be aware of what is going on in the world (2019-R 718). On cross-examination, however, Dr. Brannon testified that the last time Mr. Haliburton told him the last time he actually watched the news was during Hurricane Irma in 2016 (2019-R 789).

Dr. Brannon testified that Mr. Haliburton gave him the names of three books he told him he was reading (2019-R 713). However, on cross-examination, Dr. Brannon explained that what actually happened was that Mr. Haliburton did not initially recall any "list" of books and had to get a list after the lunch break (2019-R 790). Dr. Brannon had a lapse of memory about this incident and acknowledged that

his notes were a better memorialization of what happened.

Mr. Haliburton also reported to Dr. Brannon that he has read the Koran approximately 30 times and that it provided him with "basic messages" (2019-R 711). He described Mr. Haliburton's understanding to include:

> So he, basically, told us that the chapters tell us -- told him about what God wants for us, sort of guidelines on life; how we're supposed to behave in a moral way, in a principled way; how we're supposed to behave towards other people.

(2019-R 712). Mr. Haliburton did not retell any stories or use names in his explanations.

Dr. Brannon opined that Mr. Haliburton "seemed to do pretty well in regard to taking care of himself in a controlled setting albiet within the jail. ***He takes classes, vocational classes and completes them there***" (2019-R 728) (emphasis added). Dr. Brannon continued:

> His grooming and ability to bathe and clothe himself is acceptable within that setting, and he seems to be able to maneuver around there without much difficulty and reports that on the outside that, despite the assistance he was setting in some areas, that he could do the basic tasks to be able to get him through, including work and take vocational courses and be involved in his life in an interactive way where he's using community resources; he's self-directed; he's taking care of himself; he's able to get through in the course of his day, so both outside the community and inside the jail -- inside the prison, which, not that we're saying he doesn't have deficits, but it doesn't seem to be significant deficits that interfere in all of these ways in his adaptive skills, he appears to be doing better

> than that, both in and out of the prison setting.

(2019-R 729). When Dr. Brannon conducted his interview, Mr. Haliburton had been on death row nearly 30 years. He agreed that in this time, Mr. Haliburton is in ***solitary confinement*** and is provided approximately one hour of yard time a week (2019-R 777) (emphasis added). There are no "vocational classes" offered to death row inmates; rather, Mr. Haliburton primarily sits in his cell, watches television, and prays (2019-R 778-79).

As for access to community resources, Mr. Haliburton told Dr. Brannon that he walked down the street to the welfare clinic when he was ill (2019-R 772). His mother handled the scheduling because he was not capable of making his own appointments (2019-R 772).

As to prong three, Dr. Brannon testified that Mr. Haliburton meets the criteria, specifically noting that he was "identified as having a low IQ and place in special education classes before the age of 18" (2019-R 735).

Ultimately, Dr. Brannon did not disagree that Mr. Haliburton suffered from intellectual and adaptive deficits, but merely that they were not of a nature to warrant a finding of ID:

> So I don't argue that he has deficits. *I do think he has deficits; I don't think he's in the average IQ range I think he has deficits in his adaptive skills as well as his intellectual skills, but not to where it meets criteria for intellectual disability.*

(2019-R 730) (emphasis added).

SUMMARY OF THE ARGUMENTS

Mr. Haliburton is intellectually disabled (ID) and thus the Eighth Amendment prohibits his execution. First, the Court should determine that the "clear and convincing" evidence burden of proof allocated by Florida law is unconstitutional, and the lower court should be given the opportunity to reassess the evidence through the prism of a preponderance standard. The lower court did not perform a proper holistic evaluation of the three prongs of the ID test, looking at each independently rather than interdependently. It also erred in its assessment of the first prong, failing to contemplate that the actual scores achieved by Mr. Haliburton on the most recent IQ test (a 74), qualifies him for a finding of ID. As to the second prong, the lower court found that Mr. Haliburton had established significant adaptive deficits in a number of areas, but arbitrarily concluded that the deficits were not meaningful enough to warrant a conclusion that the adaptive deficit prong had been established. Given that the court properly found that Mr. Haliburton had established the third prong, its failure to conduct the holistic evaluation and consider all of the prongs together is reversible error, particularly given that the adaptive deficits the court found to warrant a finding of the third prong were the very same deficits it somehow found lacking as to the second prong. This incongruity cannot be reconciled with prevailing standards for properly assessing ID in capital cases.

Mr. Haliburton's death sentence violates the Sixth, Eighth, and Fourteenth Amendments as described in *Hurst v. Florida* and *Hurst v. State*. The Court's recent decision in *State v. Poole* cannot be applied to Mr. Haliburton in a manner consistent with the Constitution.

ARGUMENT I

MR. HALIBURTON'S INTELLECTUAL DISABILITY PROHIBITS HIS EXECUTION UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE LOWER COURT EMPLOYED AN UNCONSTITITUTIONAL BURDEN OF PROOF, ERRONEOUSLY REQUIRING MR. HALIBURTON TO ESTABLISH THAT HE IS INTELLECTUALLY DISABLED BY CLEAR AND CONVINCING EVIDENCE. AT A MINIMUM THIS CAUSE SHOULD BE REMANDED WITH DIRECTIONS THAT THE LOWER COURT RE-ASSESS MR. HALIBURTON'S CLAIM UNDER A PREPONDERANCE OF THE EVIDENCE STANDARD.

a. Introduction

The Eighth Amendment to the United States Constitution prohibits the execution of an individual, like Mr. Haliburton, who suffers from ID, *see Atkins v. Virginia*, 536 U.S. 304 (2002), and requires a "holistic" evaluation of Mr. Haliburton's ID claim. *See Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S.Ct. 1039 (2017); *Moore v. Texas,* 139 S.Ct. 666 (2019); *Brumfield v. Cain*, 135 S.Ct. 2269, 2278-82 (2015); *Hall v. State*, 201 So. 3d 628 (Fla. 2016); *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017); *Oats v. State*, 181 So. 3d 457 (Fla. 2015). A "holistic" analysis consists of a "conjunctive and interrelated assessment" of all three

prongs of the ID test because they are "interdependent." *Oats*, 181 So. 3d at 467. "[I]f one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs." *Id*. (citing *Hall*, 574 U.S. at 723). In other words, it is not enough that the court *address* the three prongs of the ID test, it must actually *perform* a "holistic" analysis employing a burden of proof that does not result in an unacceptable risk that Mr. Haliburton will be executed despite his ID.

b. Standard of Review

Whether Mr. Haliburton has established the three prongs of the test for ID is a legal conclusion subject to *de novo* review on appeal. *State v. Herring*, 76 So. 3d 891, 894 (Fla. 2011). Likewise, whether the lower court conducted a proper "holistic" evaluation, which consists of an actual *evaluation* of the three prongs of ID in an *interdependent manner*, is unquestionably a legal issue and thus subject to *de novo* review. *Id*. Any factual determinations subsidiary to the ultimate legal questions are reviewed under the "competent and substantial evidence" standard. *Allen v. State*, 261 So. 3d 1255, 1269 (Fla. 2019).

c. The Lower Court Imposed an Unconstitutionally High Burden of Proof and a Remand is Required for Reassessment Under Preponderance of Evidence Burden of Proof.

In the proceedings below, Mr. Haliburton challenged the constitutionality of the clear and convincing burden of proof for ID claims found in Florida Statutes

Section 921.137(4) (2013) (2019-R 895-900).[19] The lower court acknowledged Mr. Haliburton's legal challenges but felt bound by the fact that this Court "noted" in a 2018 case that the Florida statute imposed a clear and convincing burden (2019-R 930).[20] The case the lower court referred to—*Wright v. State*, 256 So. 3d 766 (Fla. 2018)—merely acknowledged the burden the statute allocates; *Wright* **did not address a constitutional challenge of any sort** to the clear and convincing burden contained in section 921.137(4). Despite numerous opportunities to do so, this Court has yet to squarely address the constitutionality of the clear and convincing standard, instead disposing those cases on other grounds.[21] Thus, the question remains open. But burdens of proof, like standards of review, matter,[22] and given the importance

[19] Aside from Florida, only Arizona imposes a clear and convincing evidence burden on a defendant seeking to establish ID. *See* Ariz. Rev. Stat. § 13-753 (2011). Although Colorado, Delaware, and Indiana passed statutes requiring clear and convincing evidence for *Atkins* claims, Delaware's statute was struck down, Colorado no longer enforces the death penalty, and the Indiana Supreme Court has held that a clear-and-convincing standard was unconstitutional under *Atkins* and *Cooper*. *See Pruitt v. State,* 834 N.E. 2d 90, 103 (Ind. 2005).

[20] *But see Fla. Dept. of Agriculture & Consumer Services v. City of Pompano Beach*, 792 So. 2d 539, 547 (Fla. Dist. Ct. App. 2001) ("[C]ircuit courts have the power, in all circumstances, to consider constitutional issues").

[21] *See Franqui v. State*, SC19-203, 2020 WL 2205327 (Fla. May 7, 2020); *Quince v. State*, 241 So. 3d 58, 63 (Fla. 2018); *Dufour v. State*, 69 So.3d 235 (Fla. 2011); *Phillips v. State*, 984 So. 2d 503 (Fla. 2008); *Jones v. State*, 966 So. 2d 319 (Fla. 2007); *Burns v. State*, 944 So. 2d 234 (Fla.2006); *Trotter v. State*, 932 So. 2d 1045 (Fla. 2006); *Nixon v. State*, 2 So. 3d 137 (Fla. 2009).

[22] *See State v. J.P.* 907 So. 2d 1101, 1120 (Fla. 2004) (Cantero, J., dissenting) ("Not only is the applicable standard the threshold determination in any constitutional analysis; it is often the most crucial. In this case, it has made all the difference.").

of the issues Mr. Haliburton submits that the Court should once and for all settle it, conclude that the clear and convincing burden is unconstitutional, and remand this matter to the circuit court for evaluation of the evidence under a preponderance of evidence standard.

The clear and convincing evidence standard found in section 921.137(4) is impermissibly high and unconstitutional not only under the Eighth Amendment[23] but under the Due Process Clause of the Fourteenth Amendment. As the United States Supreme Court has explained: "[t]he function of a standard of proof, as that concept is embodied is the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks [s]he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington,* 441 U.S. at 423. Burdens of proof "often drive[] the result," *Raulerson v. Warden*, 928 F.3d 987, 1013 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part), and can be "decisive of the outcome." *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

[23] *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 574 U.S. 701 (2014); *Moore v. Texas*, 137 S.Ct. 1039 (2017); *Moore v. Texas,* 139 S.Ct. 666 (2019).

Because a fundamental constitutional right is at issue here—and the Eighth Amendment right of an intellectually-disabled defendant not be executed is such a right—any burden of proof must not "create an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704; *See also Moore*, 137 S.Ct. at 1044 (striking factors used in Texas to determine intellectual disability because they "creat[e] an unacceptable risk that persons with intellectual disability will be executed"); *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent").

This Court should look to the *Cooper* standard for guidance in assessing the proper burden to establish to prohibit the execution of the intellectually disabled rather than the clear and convincing standard that is applicable in other contexts such as insanity to be executed. *See Raulerson*, 928 F.3d at 1011 (Jordan, J., concurring in part and dissenting in part) ("Where a fundamental constitutional right is involved—and the Eighth Amendment right of an intellectually-disabled defendant not to be executed is such a right—*Cooper* provides the governing precedent under the Due Process Clause"). A sanity to be executed claim is a very different proceeding from an intellectual disability issue, with different constitutional concerns. A review of the circumstances surrounding the adoption of Florida Rules

of Criminal Procedure 3.811 and 3.812 is necessary to provide adequate context for this argument.

Rule 3.811 was enacted as a direct response to *Ford v. Wainwright*, 477 U.S. 399 (1986). *See In re Emergency Amendment to the Florida Rules of Criminal Procedure* (Rule 3.811, Competency to be Executed), 497 So. 2d 643 (Fla. 1986). *Ford* held that it was unconstitutional to execute someone who was insane at the time of execution. *Ford v. Wainwright*, 477 U.S. 399 (1986). *Ford* did not specifically set out a burden of proof, but instead left the task of providing adequate procedures and safeguards up to the states. This Court has interpreted *Ford* (and Rule 3.811) to mean that a defendant must prove his incompetence to be executed by clear and convincing evidence.

In *Medina v. State*, 690 So. 2d 1241 (Fla. 1997) the Court explained the differences between a competency to stand trial claim (at issue in *Cooper*) and an insanity to be executed claim (at issue in *Ford*) by observing that in a competence to stand trial posture, the defendant's interest was substantial and the State's interest was modest, but in a competency to be executed posture, the State's interest was substantial and the defendant's interest was modest. *Medina,* 690 So. 2d at 1247. The Court then cited with approval Justice Powell's concurrence in *Ford,* which explained, "the only question raised [by the competency to be executed claim] is not *whether*, but *when*, his execution may take place. *Id*. (emphasis in original).

On the other hand, a State is prohibited under the Eighth Amendment from executing a defendant with ID because "society views [intellectually disabled] offenders as categorically less culpable than the average criminal." *Atkins* at 316. Moreover, because of the reduced capacity of ID offenders, there is a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id*. at 321 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). These risks include the fact that defendants with ID "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 321.

Similarly, in *Cooper,* the Supreme Court explained that competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. 517 U.S. at 1376 (citing *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975)). The *Cooper* Court also distinguished cases, like *Patterson v. New York*, 432 U.S. 197, 201-02 (1977), involving the determination and allocation of the burden of proof in state-created defenses. *See Cooper*, 517 U.S. at 367-68 ("[U]nlike *Patterson*, which concerned procedures for proving a statutory defense [*i.e.* extreme emotional disturbance], we consider here whether a State's procedures for guaranteeing a fundamental

constitutional right are sufficiently protective of that right").[24]

The constitutional concerns against executing an offender with ID are more analogous to the concerns against trying an incompetent defendant. Trying the incompetent defendant and one with ID encompass the same risks: limited ability to consult with counsel, capacity to testify relevantly, and ability to fully understand the proceedings. Also, unlike in *Ford,* the question about ID and the death penalty *is in fact* "*whether*, [not] *when* the execution will take place." *Ford*, 477 U.S. at 425. Because the interests of the defendant are more substantial and the interests of the State more modest when dealing with *eligibility* for the death penalty, imposing a standard of clear and convincing evidence violates due process. Additionally, "requiring the defendant to prove [intellectual disability] by clear and convincing

[24] Several states have relied on *Cooper* to analyze their states' procedures for determining ID. *See, e.g. Pennsylvania v. Sanchez*, 36 A. 3d 24, 70 (Pa. 2011); *Pruitt v. State*, 834 N.E. 2d 90, 1203 (Ind. 2005); *State v. Williams*, 831 So. 2d 835, 859 (La. 2002); *Murphy v. State*, 54 P. 3d 556, 573 (Okla. Crim. App. 2002); *Morrow v. State*, 928 So. 2d 315, 324 n.10 (Ala. 2004). The Indiana Supreme Court, for example, overturned its precedent requiring defendants to prove ID by clear and convincing evidence. *See Pruitt*, 834 N.E. 2d at 103. That precedent had disregarded *Cooper* because "execution of the [intellectually disabled] had not yet been held to violate the Federal Constitution." *Id*. at 101. Once *Atkins* established the constitutional nature of the right, however, *Cooper*, applied and barred the state from requiring the defendant to prove his disability by clear and convincing evidence. *Id*. at 101-03 ("The reasoning of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation . . . . [T]he implication of *Atkins* and *Cooper* is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law").

evidence imposes a significant risk of an erroneous determination that the defendant is [not intellectually disabled]." *Cooper*, 571 U.S. at 363.

Mr. Haliburton urges this Court to conclude that the clear and convincing evidence standard burden of proof is too high, imposes a significant risk of an erroneous determination that a defendant is not ID, and violates Due Process and the Eighth Amendment.[25] Just as "[a] State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability," *Hall,* 572 U.S. at 704, so too does a State risk executing a defendant with ID by requiring him to prove his ID by clear and convincing evidence.

[25] States rejecting a clear and convincing standard have determined that no state interest justified the higher burden. *See Sanchez*, 36 A. 3d at 70 ("[W]e are persuaded that a different allocation or standard of proof [than preponderance] are not necessary to vindicate the constitutional right of mentally retarded capital defendants recognized in *Atkins*, or to secure Pennsylvania's 'interest in prompt and orderly disposition of criminal cases'"); *Pruitt*, 834 N.E. 2d at 103 ("We do not deny that the state has an important interest in seeking justice, but we think the implication of *Atkins* and *Cooper* is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence."); *Howell v. State*, 151 S.W. 3d 450, 465 (Tenn. 2004) ("[W]ere we to apply the statute's 'clear and convincing' standard on light of the newly declared constitutional right against the execution of the mentally retarded, the statute would be unconstitutional. . . . [Because] the risk to the petitioner of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest. . . . The balance, under these circumstances, weighs in favor of the petitioner and justifies applying a preponderance of evidence standard at the hearing"); *Williams*, 831 So. 3d at 859-60 ("Clearly, in the *Atkins* context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded (life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded").

Because the lower court applied an unconstitutionally high standard of proof, this matter should be remanded for the circuit court to re-evaluate the evidence under the preponderance standard, a standard that even the lower court noted had been adopted in other states (2019-R 930). A re-evaluation under the lower standard is critical here because although the lower court in fact determined many of the issues in Mr. Haliburton's favor even under the higher clear and convincing standard, it declined to find in Mr. Haliburton's favor on a number of important issues rejected *in light of* the higher standard. For example, although concluding that Mr. Haliburton's intellectual functioning was "below average," the lower court declined to find that Mr. Haliburton had met the clear and convincing burden as to prong one (2019-R 934). As to prong two, despite finding that Mr. Haliburton had "demonstrated a significant deficit in the area of math reasoning" and several other "remaining deficits—of which to there appear to be several," the lower court could not conclude that he had "demonstrate[d] by clear and convincing evidence that he satisfies the second prong of the intellectual disability analysis" (2019-R 940). Notably, the court *did* find that Mr. Haliburton had satisfied the third prong, concluding that "Defendant has sufficiently established that his deficits manifested prior to turning eighteen" (2019-R 941). Given these findings, this was a close case, and the lower court should be given the opportunity to reassess its findings through the prism of a constitutional standard of proof that is not so high as to

unconstitutionally exclude Mr. Haliburton from proving his case.

d. The lower court did not perform the requisite holistic evaluation which would have resulted in a finding that Mr. Haliburton is intellectually disabled.

In evaluating whether Mr. Haliburton has established that he is ID, the lower court was obligated to conduct a "holistic" analysis, which required it to consider all of the prongs of the ID test together in an interdependent fashion. *See Hall*, 572 U.S. at 712 ("the medical community accepts that all of this evidence [on all three prongs] can be probative of intellectual disability, including for individuals who have an IQ test score above 70"); *id*. at 723 (ID test is a "conjunctive and interrelated assessment" and "a person with an IQ score above 70 may have such severe adaptive problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). *See also Oats*, 181 So. 3d at 467-68 (noting that three prongs are "interdependent" and that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs").

In expressing its view of its obligation to evaluate the three prongs of the ID test, the lower court acknowledged the law mandating an *interdependent* holistic evaluation of all three prongs (2019-R 931). Notwithstanding this recognition, the lower court opted instead to follow other decisions seemingly at odds with that law—specifically *Quince v. State*, 241 So. 3d 58 (Fla. 2018), and *Salazar v. State,*

188 So. 3d 799 (Fla. 2016)—two cases that mandate a prong-by-prong evaluation and that if "the defendant fails to prove any one of these components, the defendant *will not found to be intellectually disabled*" (2019-R 931) (quoting *Quince*, 241 So. 3d at 62, and *Salazar*, 188 So. 3d at 812) (emphasis added).

Mr. Haliburton submits that, once again, a lower court appears to have been confused by conflicting decisions from this Court defining a "holistic" evaluation.[26] Citing *Quince* and *Salazar*, the lower court determined that Mr. Haliburton did not independently meet the first and second prongs of the ID test,[27] a conclusion consistent with *Quince, Salazar*, and some other cases. *See, e.g. Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009). But this is not the "holistic" analysis mandated by *Hall* and its progeny; rather, a proper analysis required the lower court to consider the first prong in an interrelated fashion ***along with*** the evidence as to the other two prongs. *See Hall*, 572 U.S. 701. The Court in its 2015 decision in *Oats* correctly noted that "these factors are interdependent" and that "if one of the prongs is relatively less

[26] Mr. Haliburton writes "once again" because this is a recurring problem. For example, a similar issue was raised in *Franqui v. State*, SC19-203, 2020 WL 2205327 (Fla. May 7, 2020), where the lower court aligned itself with the series of cases from this Court teaching that a prong-by-prong analysis, rather than an interdependent holistic one, was appropriate. This Court did not clarify the confusion in *Franqui,* declining to revisit *Salazar* and other cases suggesting a court can reject a finding of ID if one prong is not independently met. *Franqui*, 2020 WL 2205327 at *2-3. Thus, the confusion remains.

[27] The lower court found that Mr. Haliburton did establish the third prong (2019-R 941).

strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." *Oats*, 181 So. 3d at 467-68. But the Court's subsequent decisions in *Quince* and *Salazar*, for example, undermine this recognition and have sown confusion in the lower courts. This Court should take the opportunity to revisit those decisions and clarify the correct analysis to be employed by lower courts.

1. First prong

"Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and Florida "may not execute anyone in 'the *entire category* of [intellectually disabled] offenders." *Moore v. Texas,* 137 S.Ct. 1039, 1051 (2017) (emphasis added) (quoting *Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)). Florida defines ID as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting during the period from conception to age 18." Fla. R. Crim. P. 3.203(b). "Significantly subaverage general intellectual functioning" is understood as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." *Id.* Two or more standard deviations from the mean score on an IQ test, which is 100, indicates that an IQ "approaching 70" or under is consistent with ID. *See Hall v. Florida,* 572 U.S. at 722-724; *Hall v. State*. 201 So. 3d 628, 634-35. Considering that it is the prevailing clinical standard to afford a five-point SEM to the tested individual due to the "statistical fact" that imprecision inherently exists in IQ testing,

an IQ score of 75 or below is consistent with a diagnosis of ID. *See id.* As the Supreme Court clarified in *Hall v. Florida*, an IQ test's "standard error of measurement 'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.'" *Moore,* 137 S.Ct. at 1049.

In *Hall v. State*, this Court determined that Freddie Lee Hall was ID and ineligible to be executed. The Court noted the various scores he had obtained over the years on recognized IQ testing instruments: on a WAIS-R administered in 1986, Mr. Hall's score was an 80. On a WAIS-III administered in 1995, Mr. Hall's score was a 74. On another WAIS-III administered in 2002, Mr. Hall's score was 71. And on a WAIS-IV administered in 2008, Mr. Hall's IQ score was a 72. Despite the fact that none of the scores reflected a score of 70 or below, the Court concluded that the various scores did not preclude a finding of intellectual disability: "when determining the eligibility for the death penalty of a defendant who has an IQ test score *approaching 70*, Florida courts may not bar the consideration of other evidence of deficits in intellectual and adaptive functioning." *Hall,* 201 So. 3d at 634-35.

In *State v. Herring*, 76 So. 3d 891 (Fla. 2011), the Court initially rejected Ted Herring's claim of intellectual disability because he did not obtain a score on an IQ test "below 70": he scored an 83 on the Wechsler Intelligence Scale for Children (WISC) administered in 1972 and an 81 on a 1974 WISC. *Id.* at 893 n.4. He obtained a 72 on a WISC-Revised in 1976. *Id*. On a 2004 WAIS-III, Herring obtained a full-

scale score of 74. *Id*. Even adjusting the scores for the Flynn Effect, the Court rejected Herring's ID claim because "the scores do not fall below 70." *Id*. However, in light of *Hall v. Florida*, the Court reversed itself and vacated Herring's death sentence because he "has IQ scores *under 75* from tests administered both before and after age 18 and he has previously established deficits in adaptive functioning and significantly subaverage intellectual functioning." *Herring v. State*, SC15-1562, 2017 WL 1192999 (Fla. March 31, 2017) (emphasis added). There were no new scores at issue in *Herring*; the lowest score he obtained on an authorized test (the WAIS-III from 2004) was a 74.[28]

Mr. Haliburton's test scores are in line with—and in some cases are lower than—those at issue in *Hall*, *Herring*, and *Cherry*. At the outset, it is important to note the lack of disagreement between Dr. Frumkin and Dr. Brannon on one important fact as to the first prong: both agreed that Mr. Haliburton has intellectual deficits. The lower court also agreed that Mr. Haliburton has intellectual deficits (2019-R 934). Dr. Brannon's only meaningful disagreement with Dr. Frumkin[29]

[28] Roger Cherry also has had his death sentence vacated in light of *Hall v. Florida*, obtained full-scale IQ test scores of 72. *See Cherry v. Jones*, 208 So. 3d 701 (Fla. 2016).

[29] Dr. Brannon expressed no fault with Dr. Frumkin's testing or the procedures he employed in his evaluation of Mr. Haliburton; in fact he has "great respect" for Dr. Frumkin (T2 257). Indeed, the lower court found the witnesses "generally credible" with some exceptions (2019-R 931).

rested on the degree of those deficits (2019-R 730;[30] 734-35[31]), and the degree is what this first prong comes down to.[32] However, as a matter of medical standards and the law, Dr. Brannon's decision to rely *exclusively* on (1) a score of 80 obtained on a WAIS-R administered by Dr. Frumkin in 1992 without consideration of the SEM, or the Flynn Effect, or the practice effect, as to that score of 80,[33] (2) a decades-old score of 100 on a BETA test administered by the Department of Corrections notwithstanding Dr. Brannon's own acknowledgment of the inefficacy and unreliability of the BETA test as a valid instrument for intelligence testing,[34] and (3)

[30] In Dr. Brannon's words: "I do think he has deficits, I don't think he's in the average IQ range. I think he has deficits in his adaptive skills as well as his intellectual skills, but not to where it meets criteria for intellectual disability" (2019-R 730).

[31] When asked by defense counsel: "your ultimate conclusion, you don't disagree that Mr. Haliburton has deficits intellectually, nor do you disagree that he has deficits in adaptive functioning – your quibble is with the degree, is that correct," Dr. Brannon answered "[c]orrect" (2019-R 734-35).

[32] This is one of the primary reasons why the standard of review is so important in this case and why the Court should address Mr. Haliburton's constitutional arguments. *See* Section III, *supra*.

[33] As noted *infra*, Dr. Brannon did know that Mr. Haliburton had been administered the WAIS-R by Dr. Patricia Fleming within a week of Dr. Frumkin's administration, thus raising the specter of inflated scores due to a practice effect. When confronted with this fact, Dr. Brannon said that Dr. Fleming did not give a WAIS-R but rather a WAIS-III (2019-R 749-50). Dr. Brannon was mistaken and acknowledged that he was not aware that Mr. Haliburton had been given two WAIS-R tests within a week of each other (2019-R 753-54).

[34] Dr. Brannon admitted that the BETA is not a test recognized by the Florida statute for assessment of ID (2019-R 748). Ultimately, the lower court excluded from its consideration the results of the BETA test (2019-R 933 n.5) but failed to consider that Dr. Brannon *did* rely on the test in rejecting the first prong's application to Mr. Haliburton.

a decades-old score on a TABE test also administered in a prison which apparently revealed that Mr. Haliburton scored in the 11th grade for vocabulary skills (2019-R 726), but without any basic much less personal understanding of the TABE test,[35] was simply unreasonable. The only reason Dr. Brannon refused to consider any other scores aside from these is because, in his view, "whatever your highest number is, is what your capacity is so that's what you are" (2019-R 691). *See also id.* ("So if you score 80, then that's the range you should expect that someone in there your IQ will fall, which is the low average range, or it was back then; but if you score lower than that, that's not your capacity, and there could be other factors that might explain why you scored there"). This testimony is beleaguered by error, because factors such as the SEM, the Flynn Effect, practice effect, and reliance on reliable testing instruments are critical in assessing Mr. Haliburton's intellectual functioning. Latching onto a high score, no matter how that score was obtained, no matter what test it was obtained on, and ignoring the SEM and practice effects is completely contrary to medical standards that guide this Court's assessment.

Notably, Dr. Brannon had little to say about the most recent (and the *only*

[35] As with the BETA testing, the lower court did not appear to consider the TABE test results either, although the order does not explicitly mention the TABE testing by name (2019-R 933 n.5). Yet Dr. Brannon relied on the TABE results as well as the BETA results, a fact not considered by the Court when assessing the weight of Dr. Brannon's discounting of the other reliable test results.

recent)[36] WAIS-IV administered to Mr. Haliburton (by Dr. Frumpkin) in 2010, on which Mr. Haliburton obtained a full-scale IQ score of 74, with the SEM interval falling between 70 and 79. This is unquestionably a score within the range identified in *Hall v. Florida* and the Florida Statute. The lower court, too, barely referenced the most recent score on the most reliable test because of Dr. Brannon's reliance on the "higher scores" obtained on two decades-old obsolete WAIS-R tests (2019-R 933-34). However, while the WAIS is an acceptable testing instrument, the early version, the WAIS-R is not based on "current intelligence theory" and is not supported "by clinical research and factor analytic results" making it a less reliable and valid testing measure than the WAIS-IV. Gordon E. Taub, PhD & Nicholas Benson, PhD, *Matters of Consequence: An Empirical Investigation of the WAIS III and WAIS IV and Implications for Addressing the Atkins Intelligence Criterion*, Journal of Forensic Psychology Practice, 13:27-48, 32 (2013). The WAIS-IV was the first test developed on these important factors making it the most reliable test available. Specifically, empirical data shows that the WAIS-IV is more reliable in measuring IQ as well as determining whether someone is intellectually disabled. *Id*. Therefore, greater weight should be afforded to a WAIS-IV score than that of a WAIS-III (or WAIS-R) because the score is "more valid, reliable, and consistent

[36] Dr. Brannon made a unilateral decision not to administer any IQ testing to Mr. Haliburton. The State could have selected an expert to perform IQ testing but chose not to, as the lower court found (2019-R 933 n.6).

with the publisher's theoretical model to measure intelligence . . ." *Id*. at 47.

Moreover, even not accounting for the Flynn Effect, Dr. Frumpkin testified that all of the scores obtained by Mr. Haliburton on recognized standardized testing instruments over the years were consistent: for example, Mr. Haliburton obtained a full-scale score of 80 on the two WAIS-R tests administered in 1992, a score which, when applying the SEM, would be approximately a 75 at the low end of the range,[37] a full-scale score of 75 on another WAIS-R administered by Dr. LaFehr Hession in 1988, a score which, when applying the SEM, would be approximately 70 at the low end of the range,[38] a full-scale score of 79 on the WAIS-III administered by Dr.

[37] Dr. Brannon agreed that the 80 on the 1992 WAIS-R administered by Dr. Frumkin would translate to a 75 on the lower end of the range when the SEM is accounted for (2019-R 742-43). It is important to recognize, however, that Dr. Frumkin no longer agreed with his assessment in the 1992 testing because, *inter alia*, the WAIS-R was, in 1992, an 11-year old test and thus Mr. Haliburton's score would have been an overestimate of this true intelligence by nearly four points (2019-R 661). Moreover, Dr. Brannon, who latched on to the 80 obtained by Dr. Frumkin in 1992 as establishing Mr. Haliburton's "true intelligence" (2019-R 749), did not consider either the SEM or the Flynn Effect when discussing the 1992 score of 80 on the WAIS-R. on an 11-year old testing instrument (2019-R 744-45; 775). Given the SEM and the Flynn Effect, and the 80 scores on the 1992 WAIS-R administrations are entirely consistent with Mr. Haliburton's score of 74 on the WAIS-IV and with a diagnosis of ID. Indeed, as noted above, Freddie Hall, whose death sentence has since been vacated by this Court, had also obtained a full-scale score of 80 on a WAIS-R in 1986. *Hall,* 201 So.3d at 634-35

[38] Dr. Brannon was not made aware by the State that Dr. LaFehr Hession had tested Mr. Haliburton in connection with his capital murder trial and issued a report noting that Mr. Haliburton obtained a full-scale score of 75 on the WAIS-R. Why Dr. Brannon would not be armed with, or have armed himself with, all of the pertinent scores obtained by Mr. Haliburton over the years was never explained by either Dr. Brannon or the State. The lower court, too, overlooked this score.

Eisenstein, a score which, when applying the SEM, would be approximately 74 on the low end of the range,[39] and a full-scale score of 74 also on the WAIS-IV administered by Dr. Barry Crown in 2009, a score which, when applying the SEM, would be approximately 69 or 70 on the low end of the range (T2 213-14).[40]

All of the scores obtained by Mr. Haliburton over the years on recognized and reliable testing instruments, when taking into consideration the SEM, are well within the range of scores that establish the first prong of the ID test. Mr. Haliburton's test scores are in line with—and in some cases are lower than—those at issue in *Hall*, *Herring*, and *Cherry*. To the extent that the lower court determined that Mr. Haliburton could not meet the clear and convincing standard as to prong 1, the Court should examine the arguments challenging the constitutionality of the burden and remand for consideration under a preponderance standard. Moreover, the lower court did not evaluate the other prongs in conjunction with the first prong, which

[39] Perhaps because it was a somewhat higher score, Dr. Brannon was made aware of the 79 score on the WAIS-III administered by Dr. Eisenstein. However, Dr. Brannon acknowledged that this score was in the same consistent range as all of the other scores on the various WAIS tests administered to Mr. Haliburton over the decades (2019-R 685).

[40] As with the score (75) obtained by Dr. LaFehr Hession, Dr. Brannon claimed ignorance of the fact that Dr. Crown administered a WAIS-IV to Mr. Haliburton in 2009 on which he obtained a full-scale score of 74 (2019-R 740). Dr. Brannon remembered that this issue was brought up at his deposition but he took no steps to inquire of the State about Dr. Crown's testing nor made any further efforts to educate himself about that testing. His incuriosity is perhaps unsurprising given his lack of consideration of any of Mr. Haliburton's lower IQ scores and more than troubling given the lower court's reliance on Dr. Brannon's testimony.

constitutes a failure to heed the proper analysis mandated by the Supreme Court and this Court.

2. Second Prong

In Florida, "adaptive behavior" 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." Fla. R. Crim. P. 3.203(b). 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. This is consistent with clinical standards and with Dr. Frumkin's testimony (2019-R 583-85).[41]

In addressing prong 2, the lower court did find that Mr. Haliburton had established a number of adaptive deficits. (*See* 2019-R 936 ("the Court finds that Defendant has demonstrated a significant deficit in the area of math reasoning")). It also found that Mr. Haliburton had established "remaining deficits—of which there

[41] The American Psychological Association's diagnostic criteria for Intellectual Disability are found in the Diagnostic Statistical Manual ("DSM"). The prior version, the DSM-IV-TR required that a person establish deficits in adaptive functioning in at least two of the following domains: practical, social, and conceptual; however, the current manual, the DSM 5, requires that a person show deficits in only one domain. American Psychological Association, Diagnostic and Statistical Manual of Mental Disorders 38 (5th ed. Text Rev. 2013) (1952) [hereinafter DSM-5]. Mr. Haliburton has established that he meets this criterion.

appear to be several" but that those were not of such "magnitude" as to require "ongoing support" (2019-R 940) (citing *Wright v. State*, 256 So. 3d 766, 773 (Fla. 2018) (citing DSM-IV, at 38)).[42] Despite acknowledging that Mr. Haliburton had met the very high clear and convincing evidence standard to establish adaptive deficits in a number of areas—a finding which should have meant that prong 2 was satisfied—the lower court then did what the law expressly forbids it to: it scoured the record for putative strengths to offset or "explain" the deficits it did find.

When assessing this second prong, the focus is on the defendant's deficits in adaptive functioning, not his strengths. *Moore v. Texas*, 137 S.Ct. 1039, 1050 (2017) ("the medical community focuses the adaptive-functioning inquiry on adaptive deficits" and criticizing state court for "overemphasiz[ing] Moore's perceived adaptive strengths" such as that Mr. Moore "lived on the streets, mowed lawns, and

[42] The lower court's reference to the language in *Wright* about "ongoing support" appears to be understood by the lower court to mean that Mr. Haliburton must have to establish that he needs some sort of physical or other assistance in order to establish ID. But the lower court took the "ongoing support" reference out of context; indeed, the whole sentence from *Wright* reads: "According to DSM-5, adaptive deficits exist when at least <u>one</u> domain 'is sufficiently impaired that ongoing support is needed *in order for the person to perform adequately* in one or more life settings *at school*, at work, at home, or in the community.'" *Wright*, 256 So.3d at 773 (emphasis added). In other words, what "ongoing support" means in this context is that an individual should be, for example, placed in specialized education classes in school due to intellectual or other deficits. This is what "ongoing support" means—support for the individual to "perform adequately" in school. Of course, Mr. Haliburton was placed in special education classes well before the age of 18, a determination that the lower court in fact made (2019-R 941).

played pool for money"). Moreover, there is no "nexus" between adaptive deficits and the deficits in IQ from prong 1. Indeed, this was one of the criticisms leveled at the Texas court in *Moore*, which had found that "Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related." *Moore,* 137 S.Ct. at 1051. However, the Supreme Court rejected that analysis as inconsistent with the medical community, which views childhood academic failures and trauma as "*risk factors* for intellectual disability." *Id.* (emphasis in original). In other words, this Court must look to behaviors from Mr. Haliburton's childhood as "factors [] to explore the prospect of intellectual disability further" rather than mine the record for reasons "to counter the case for a disability determination." *Id. Accord Wright v. State,* 256 So. 3d 766, 775 (Fla. 2018) (defending its adherence to *Moore* because, *inter alia*, "we did not rely on ID risk factors as a foundation to counter an ID determination"); *Moore v. Texas*, 139 S.Ct. 666, 671 (2019) (noting that Texas court had again "departed from clinical practice" by requiring Moore to prove that his "problems in kindergarten" stemmed from his intellectual disability rather than "emotional problems").

Mr. Haliburton more than established deficits in adaptive functioning sufficient to warrant a finding that he has met prong two of the test for ID. Again, as with the first prong, it is important to note that there is little disagreement with the

State's expert on whether Mr. Haliburton has deficits in adaptive functioning: Dr. Brannon conceded he does (2019-R 734-35) (expressing no disagreement that Mr. Haliburton "has deficits in adaptive functioning"); (2019-R 730) ("I do think he has deficits. . . . I think he has deficits in his adaptive skills"). And the lower court found that he does (2019-R 940). But as with the first prong, Dr. Brannon's ultimate refusal to find prong two came down to a matter of degree. However, as explained below, Dr. Brannon's focus was misplaced, an error that also led the lower court astray in its ultimate rejection of prong 2 despite finding significant adaptive deficits.

Mr. Haliburton's adaptive deficits—properly evaluated under the correct standards—are amply established by the testimony of his brother, by Dr. Frumkin, and by the record in this case as a whole, including Dr. Frumkin's interview with Mr. Haliburton's former employer and his review of the wealth of background information in the case that Dr. Brannon did not consider or of which he was unaware. There were abundant risk factors for ID in his childhood years, as Mr. Haliburton's brother compellingly recounted. Mr. Haliburton's brother described the environment in which the siblings were raised: "Hell is not even a good word for it" (2019-R 539). Jerry's "struggle was real," and was often called "stupid" and "dumb" and "retarded" and "good for nothing" by his own grandmother (2019-R 539). Jerry did not understand things like his other siblings did, he could not really cook a meal for himself, or complete household chores without assistance from his siblings, and

he always relied on others for food, shelter, and guidance (2019-R 542). He could not properly fold laundry; rather he would ball up his clothes (2019-R 542). He was not allowed to iron because of a fear that he would hurt himself (2019-R 543). He could not comprehend directions for raking leaves in the direction of the trash bin (2019-R 545). Jerry never lived on his own, never paid any bills, and never had a bank account.

Jerry also had difficulty in school. John, despite being the younger sibling, would help Jerry with homework and although he was elevated from one grade to another, he did not necessarily pass or complete all the work given (2019-R 553; 558). John's recollections are corroborated by the accounts of other siblings with whom Dr. Frumkin spoke, like Mr. Haliburton's sister, Helen Edwards,[43] and another brother John R. Haliburton,[44] as well as school records, which were reviewed by Dr. Frumkin (2019-R 610). Dr. Frumkin explained, Mr. Haliburton completed to the 9th grade but was in special education classes (2019-R 611). These records also stated that Mr. Haliburton had "difficulty functioning in regular

[43] Ms. Edwards told Dr. Frumkin that Jerry had poor reading skills and could not complete basic chores in the home such as cooking or washing clothes (2019-R 630). In fact, Jerry would be beaten by their grandmother because he did not know how to wash his clothes (2019-R 630).

[44] John R. Haliburton told Dr. Frumkin that his brother was not smart and hardly ever saw his brother cook anything (2019-R 630). He also recounted an episode when Jerry nearly overdosed because he could not properly take medication, he could not remember how many pills he was supposed to take (2019-R 630.).

academic classes” and that “Jerry needs help in all salient areas” (2019-R 611). Based on all the records he reviewed, interviews conducted, and testing he administered, Dr. Frumkin testified that Mr. Haliburton met the criteria for prong two (2019-R 633-34).

Dr. Brannon did not meaningfully dispute the information about Mr. Haliburton’s background; nor, to a large extent, could he because he was not even aware of the basic historical information about Mr. Haliburton’s background such as the number of siblings he had. Rather, Dr. Brannon engaged in an analysis which is the antithesis of what the law requires. Instead of acknowledging Mr. Haliburton’s deficits in adaptive functioning for what they are—deficits—Dr. Brannon viewed his role as requiring him to scour the record for information to offset the deficits that Dr. Brannon himself found Mr. Haliburton to possess. Unfortunately, the lower court, too, engaged in this process rather than accepting that the adaptive deficits it unquestionably found in this case were sufficient to establish prong 2.

For example, Dr. Brannon testified that Mr. Haliburton was “bored” in school and exhibited behavior problems or “problems following rules and regulations”; but when asked where this information was located in the records he purportedly reviewed, Dr. Brannon said he did not bring the records with him to court and ultimately conceded that there was nothing in the school records to back up his statements (2019-R 758-60). And rather than accept the records for what they

exhibit, Dr. Brannon attempted to offset their import by speculating that perhaps the (nonexistent) "behavioral problems" were what led to Mr. Haliburton's poor academic performance or poor testing results (2019-R 692). Nothing supports this statement.[45]

Dr. Brannon also testified extensively to Mr. Haliburton's putative "skills" at adapting to perhaps the most structured environment possible: death row. The lower court, too, detailed this information in support of rejecting prong 2 (2019-R 938). Yet the Supreme Court has now twice admonished that such information is of limited—if any—relevance to an ID determination. *Moore*, 137 S.Ct. at 1050 ("In addition, the CCA stressed Moore's improved behavior in prison . . . Clinicians,

[45] Dr. Brannon's penchant for loosely detailing information was evident during his testimony about Mr. Haliburton's "life" on death row. For example, Mr. Haliburton told Dr. Brannon that he "plays chess" (2019-R 713; 773). But Dr. Brannon never asked Mr. Haliburton any specific questions about his putative "chess" knowledge; he never asked Mr. Haliburton what a bishop was, or a rook, or a queen or any other chess piece (2019-R 774). He ultimately acknowledged having no idea if Mr. Haliburton had played an actual game of chess in his life, much less won one (2019-R 773). Dr. Brannon also testified that Mr. Haliburton told him that, while on death row, he "takes classes, vocational classes, and completes them there" (2019-R 729). But death row inmates are not allowed to take classes of any kind, they are in solitary confinement. Ultimately, Dr. Brannon was forced to admit that in the thousands of pages of corrections records he claimed to have reviewed, there was no documentation of any such course taken by Mr. Haliburton (2019-R 760-61).

Dr. Brannon also attempted to mislead on occasion; for example, Dr. Brannon testified on direct examination that Mr. Haliburton knew who Dr. Seuss was; but on cross-examination, armed with Dr. Brannon's actual notes, Mr. Haliburton's defense counsel uncovered the fact that Mr. Haliburton actually first mentioned Star Trek (2019-R 790-91). Dr. Brannon then attempted to explain away his testimony ("He initially said that, that he goes, oh, yeah, yeah, but then he differentiated, correct").

however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is") (citing DSM-V, at 38; AAIDD-11 User's Guide 20); *Moore*, 139 S.Ct. at 671 (the length and detail of court's discussion of prison behavior "is difficult to square with our caution against relying on prison-based development").

In short, Mr. Haliburton has more than amply established adaptive deficits under the appropriate legal standards. The adaptive deficits the lower court did find were sufficient to establish the second prong of the ID test, particularly when assessed interdependently with prong 1 and prong 3, which the lower court also found in Mr. Haliburton's favor.

3. Third Prong

There is no dispute as to whether Mr. Haliburton met the third prong. The State's expert agreed it was established, and the lower court found that Mr. Haliburton had met his burden to establish that his deficits manifested prior to the age of 19 (2019-R 941). The lower court's conclusion is supported by the facts and the law. *See Oats v. State,* 181 So. 3d 457, 468 (Fla. 2015). *See also Brumfeld v. Cain*, 135 S.Ct. 2269, 2282 (2015) (third prong simply requires defendant demonstrate that his "intellectual deficiencies manifested while he was in 'the developmental stage'—that is, before he reached adulthood").

e. Conclusion

This Court remanded Mr. Haliburton's intellectual disability claim for holistic assessment of his claim under the appropriate clinical definitions and constitutional standards as set out in *Hall v. Florida*. However, the lower court ignored the significant changes in the law, which require reliance on prevailing norms in the scientific and medical community regarding the assessment of intellectual disability, and instead, denied Mr. Haliburton's claim relying on a cursory and elementary understanding of the science. Indeed, the lower court also imposed an unconstitutional burden of proof on Mr. Haliburton. This cause should be remanded for the "holistic" evaluation intended by this Court under a burden of proof consistent with the Eighth and Fourteenth Amendments. In the alternative, this Court should find that Mr. Haliburton is intellectually disabled and constitutionally excluded from execution based on *Atkins*, *Hall* and the evidence already presented in this case.

ARGUMENT II

MR. HALIBURTON'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

During the pendency of the litigation below concerning Mr. Haliburton's intellectual disability, Mr. Haliburton filed a Rule 3.851 motion, an amendment thereto, and a supplement to the amendment, in light of a series of decisions issued by the United States Supreme Court and this Court (2019-R 232-66; 421-56; 508-

23). These decisions included *Hurst v. Florida*, 136 S.Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). In his motions, Mr. Haliburton contended that his non-unanimous death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments as described in both *Hurst v. Florida* and *Hurst v. State*.

Mr. Haliburton acknowledges that this Court has, in numerous cases, rejected the arguments he has made under both *Hurst v. Florida*, *Hurst v. State*, and the arguments relating to the Florida statute. Under the procedure articulated by the Court in *Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000),[46] Mr. Haliburton herein

[46]In *Sireci,* the Court noted its concern about the voluminous nature of the postconviction motions and appellate briefing filed in the case. Sireci's counsel noted their obligation to preserve legal issues in the event of a change in law, and this Court reached a compromise when counsel are confronted with this situation:

> We understand and certainly appreciate defense counsel's valid concern. Notwithstanding, there is no need to unnecessarily burden any court with issues which simply detract focus from arguably meritorious claims. Accordingly, **we take this opportunity to suggest that issues which are being raised solely for purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance**. It is the real concern of any court that attempts to disguise improper arguments may actually conceal meritorious claims.

Sireci, 773 So. 2d at 41 n.14 (emphasis added). *See also Johnston v. State*, 70 So.3d 472, 483 n.9 (Fla. 2011).

designates the issues he raised below herein as being raised on appeal for preservation purposes: that his death sentence violates the Sixth Amendment right to trial by jury pursuant to *Hurst v. Florida*; that his death sentence violates the Sixth, Eighth, and Fourteenth Amendments pursuant to *Hurst v. State*; that his non-unanimous death sentence violates the Eighth Amendment and the evolving standards of decency as demonstrated by *Hurst v. Florida* and *Hurst v. State*; that his death sentence and sentencing jury instructions violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and that Florida's capital sentencing statute requiring unanimity, as well as the statutory construction applied by the Court in *Hurst v. State*, must be retroactively applied to his case as failure to do so would violate Due Process and Equal Protection as well as the Eighth and Fourteenth Amendments.

Mr. Haliburton acknowledges that since the lower court entered its order, this Court decided *State v. Poole*, SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020). In *Poole*, the Court receded from the statutory construction of Florida's capital sentencing statute in *Hurst v. State.* In *Hurst v. State*, this Court held that whether aggravating circumstances were sufficient to justify a death sentence was a factual question that must be submitted to and found by a jury unanimously just like any other element of a criminal offense. In other words, the Court in *Hurst v. State*, in its statutory construction of the capital statute, determined that it was an element of capital murder, a higher degree of murder for which death was an authorized

sentence. The statutory construction of section 921.141 announced in *Hurst v. State* was binding substantive law until *Poole* issued on January 23, 2020. When a court construes a statute and identifies the elements of a statutorily defined criminal offense, the ruling constitutes substantive law dating back to the statute's enactment. *Bousley v. United States,* 523 U.S. 614 (1998); *Fiore v. White*, 531 U.S. 225 (2001); *Bailey v. United States*, 516 U.S. 137 (1995); *Rivers v. Roadway Exp., Inc*., 511 U.S. 298, 312-13 (1994); *Bunkley v. Florida*, 538 U.S. 835 (2003).

In light of *Poole*, Mr. Haliburton acknowledges that *Hurst v. State* does not control to any criminal offense after *Poole* issued. But as to criminal offenses committed prior to *Poole* (like Mr. Haliburton's), *Hurst v. State* was and is controlling substantive law. Neither the Due Process Clause nor the Ex Post Facto Clause permit the Court to erase *Hurst v. State* as a nullity. Accordingly, Mr. Haliburton's death sentence cannot stand because the *Hurst v. State* error was not harmless given that there was a non-unanimous jury verdict.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. Haliburton submits that his death sentences must be vacated at this time.

Respectfully Submitted,

/s/ Todd G. Scher
TODD G. SCHER
Assistant Capital Collateral Counsel
Florida Bar No. 0899641

tscher@msn.com
schert@ccsr.state.fl.us

/s/ Brittney Nicole Lacy
BRITTNEY NICOLE LACY
Staff Attorney
Florida Bar No. 116001
lacyb@ccsr.state.fl.us

CCRC-South
110 S.E. 6th Street, Suite 701
Fort Lauderdale, FL 33301
(954) 713-1284
(954) 713-1299 (fax)

COUNSEL FOR MR. HALIBURTON

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font, pursuant to Florida Rules of Appellate Procedure 9.100 (I).

/s/ Brittney Nicole Lacy
BRITTNEY NICOLE LACY
Staff Attorney
Florida Bar No. 116001
lacyb@ccsr.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief has been filed with the Court and served on opposing Counsel, Assistant Attorney General Rhonda Giger, using the Florida Courts e-filing portal on the 31st of July, 2020. Counsel further certifies that on the same day a copy has been mailed to Mr. Haliburton via U.S. Mail, first class postage prepaid.

/s/ Brittney Nicole Lacy
BRITTNEY NICOLE LACY
Staff Attorney
Florida Bar No. 116001
lacyb@ccsr.state.fl.us

APPENDIX F

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IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1858

JERRY LEON HALIBURTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
Attorney General
Tallahassee, FL

Rhonda Giger
Assistant Attorney General
Florida Bar No.: 0119896
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, Jerry Leon Haliburton, Defendant below, will be referred to as "Haliburton", Defendant, or Appellant. The State of Florida will be referred to as "State". References to the record will be "ROA" followed by the page number. References to Haliburton's initial brief filed with this court (Case No. SC19-1858) will be "IB" followed by the page number.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to this Court's judgment as to whether oral argument is necessary in this matter.

STATEMENT OF THE CASE AND FACTS

Appellant is in custody and under a sentence of death. He was convicted of First-Degree murder pursuant to a valid judgment of guilt entered on October 7, 1983. The facts are as follows:

BACKGROUND

> In the early morning of August 9, 1981, Donald Bohannon's home was burglarized, and he was attacked with a knife as he slept. "Bohannon died as a result of thirty-one stab wounds over his neck, chest, arms, and scrotum." *Haliburton v. State*, 561 So. 2d 248, 249 (Fla. 1990) (per curiam). His body was found in his bed later that afternoon by his estranged girlfriend, Teresa Kast. "The perpetrator had gained entry to [Bohannon's] apartment by removing glass panes from a jalousie door. Fingerprint evidence led the police to" Haliburton. *Haliburton v. State*, 476 So. 2d 192, 193 (Fla. 1985),

vacated, 475 U.S. 1078, 106 S. Ct. 1452, 89 L. Ed. 2d 711 (1986).

On August 13, 1981, the police took Haliburton to the station house, advised him of his rights, and questioned him for several hours. During the interrogation, Haliburton gave a recorded statement wherein he "admit[ted] breaking in and seeing the body," but "did not admit to committing the murder." *Id*. Nevertheless, he was arrested and charged with first degree murder and burglary. The grand jury, however, returned an indictment only for burglary. FN3 Thereafter, on December 17, 1981, Haliburton's counsel waived his right to a speedy trial to secure more time to prepare for the burglary trial.

On March 12th or 15th of 1982, Haliburton's brother, Freddie, and Sharon Williams, Freddie's girlfriend, recorded statements at the police station and at the State Attorney's Office FN4 indicating that on separate occasions Haliburton admitted to each of them that he committed the murder. FN5 Armed with this additional evidence, the state attorney secured a grand jury indictment on the murder charge on March 24, 1982. Subsequently, in September of 1983, Haliburton was convicted of burglary and first-degree murder and sentenced to death. Nelson E. Bailey represented Haliburton at trial. FN6 On direct appeal, the Florida Supreme Court reversed his convictions and remanded the case for a new trial, because it found that Haliburton's statement to the police without his attorney present, but after his attorney arrived at the police station and requested to see him, should have been suppressed. FN7

The State sought certiorari review from the United States Supreme Court, and, on March 24, 1986, the Supreme Court vacated the judgment and remanded the case to the Florida Supreme Court for reconsideration in light of *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). See *Florida v. Haliburton*, 475 U.S. 1078, 106 S. Ct. 1452, 89 L. Ed. 2d 711 (1986) (per

curiam). In *Moran*, the Supreme Court declined to find a violation of the United States Constitution where the police failed to inform the defendant that his attorney was attempting to contact him before he waived his Fifth Amendment rights. 475 U.S. at 423–24, 106 S. Ct. 1135. The Supreme Court noted in *Moran*, however, that its decision did not "disable the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Id*. at 428, 106 S. Ct. 1135. Thus, on remand, the Florida Supreme Court maintained its position that the failure to suppress Haliburton's statement violated the due process provision of the Florida Constitution, and, once again, reversed Haliburton's convictions and remanded the case for a new trial. See *Haliburton v. State*, 514 So. 2d 1088, 1090 (Fla. 1987) (per curiam).

Haliburton's second trial began on January 25, 1988, and Bailey was appointed as defense counsel again. The jury convicted Haliburton of burglary and first-degree murder and voted nine to three in favor of the death penalty. See *Haliburton*, 561 So. 2d at 249. After considering the evidence, the trial judge found four aggravating factors, FN8 no statutory mitigating factors, and insufficient nonstatutory mitigating circumstances to outweigh the aggravating factors. Therefore, the court imposed the death sentence.

The Florida Supreme Court affirmed the conviction and sentence on direct appeal. *Id*. at 252. Thereafter, Haliburton's execution was scheduled for March of 1992, but in February of 1992 he filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850 and a motion for a stay of execution. See *Haliburton v. Singletary*, 691 So. 2d 466, 468 (Fla. 1997) (per curiam). A stay was granted on March 12, 1992 to allow the trial court to consider his postconviction motion to vacate. Subsequently, the trial court denied some of the claims in his Rule 3.850 motion and scheduled an evidentiary hearing for the others. After

conducting the hearing, the trial court denied the remaining claims, FN9 and, thereafter, Haliburton appealed the denial of his Rule 3.850 motion FN10 and filed a petition for state habeas corpus relief. FN11 On January 9, 1997, the Florida Supreme Court affirmed the trial court's order denying his Rule 3.850 motion and denied his petition for state habeas corpus relief.

FN3 In September and November of 1981 the State twice failed to indict Haliburton for Bohannon's murder.

FN4 For ease of reference, we will refer to Freddie's statement at the State Attorney's Office as his March 15, 1982 statement. Freddie gave that statement in the presence of Assistant State Attorney Paul O. Moyle, Sergeant David Houser, and a court reporter. The parties, however, have been unable to locate a transcript of the March 15, 1982 statement.

FN5 In early March of 1982 Williams filed a charge of sexual battery against Haliburton after he allegedly held a knife to her throat and attempted to rape her. Apparently, after Freddie learned about the charge, he and Williams told police about Haliburton's alleged confessions to each of them. Later that year, Williams dropped the charge against Haliburton.

FN6 Although the record is unclear as to who represented Haliburton throughout the original prosecution, it appears that he originally was represented by Mitchell Beers. Bailey assumed the role of Haliburton's counsel, however, before the first trial. Then, Charles Musgrove handled the successful appeal, and Bailey and Musgrove handled the second trial, with Bailey functioning as lead counsel. Bailey is now a judge on the Fifteenth Judicial Circuit of Florida.

FN7 The Florida Supreme Court also rejected Haliburton's claim that his waiver of a speedy trial applied only to the burglary charge. See *Haliburton*, 476 So. 2d at 193.

FN8 The aggravating factors were as follows:

[t]he capital felony was committed by a person under sentence of imprisonment; the defendant was twice previously convicted of violent felonies; the capital felony was committed while engaged in a burglary; and the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. *Haliburton*, 561 So. 2d at 249 n. 1.

FN9 The trial court also denied Haliburton's motion for a rehearing.

FN10 In the appeal of the denial of his Rule 3.850 motion, Haliburton raised the following nine claims:

(1) whether the successor judge properly ruled on [his] motion for rehearing; (2) whether the state withheld exculpatory evidence and whether counsel's performance was deficient during the guilt phase; (3) whether counsel's performance was deficient at the penalty phase; (4) whether the jury instructions and aggravating circumstances were unconstitutionally vague and overbroad; (5) whether the state complied with [his] chapter 119 requests; (6) whether counsel was ineffective in advising [him] to waive speedy trial rights on the burglary charge; (7) whether counsel was ineffective regarding prosecutorial misconduct; (8) whether the jury instructions improperly shifted the burden to [him]; and (9) whether [he] was denied due process when the governor signed his death warrant before the two-year time limit for filing a motion for post-conviction relief expired.

> *Haliburton*, 691 So. 2d at 468–69. Claims four and eight were procedurally barred, and, as Haliburton's stay was granted in March of 1992, he conceded that claim nine was moot.
>
> FN11 In his petition for state habeas corpus relief, Haliburton asserted the following five claims:
>
> (1) whether appellate counsel's ineffectiveness precluded reliable adversarial testing; (2) whether appellate counsel was ineffective for failing to raise a claim that the sentencing court precluded him from presenting mitigating witnesses; (3) whether appellate counsel failed to argue that the evidence was insufficient to prove guilt; (4) whether counsel was ineffective for not raising on appeal the court's refusal to permit counsel to argue that the grand jury would not indict [him] solely on physical evidence; and (5) whether inadequate limiting instructions on aggravating factors violated [his] right to a reliable capital sentence. *Haliburton*, 691 So. 2d at 472.

Haliburton v. Sec'y For Dept. Of Corr., 342 F. 3d 1233, 1235–37 (11th Cir. 2003).

Following his state court litigation, Haliburton sought federal habeas corpus relief from the United States District Court. *Haliburton v. Sec'y for the Dep't of Corr*., 160 F. Supp. 2d 1382, 1384, 1387, 1390 (S.D. Fla. 2001). After an evidentiary hearing, relief was denied, and that denial was affirmed on appeal. *Haliburton v. Sec'y For Dept. Of Corr*., 342 F. 3d 1233 (11th Cir. 2003), cert denied, 541 U.S. 1087 (2004)

In 2002, the United States Supreme Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002) finding it unconstitutional to execute an intellectually disabled inmate. Following Atkins, the Florida Supreme Court in October 2004, promulgated Rule

3.203, Fla. R. Crim. P., and gave defendants who had completed their state postconviction litigation until November 30, 2004 to file an Atkins claim asserting intellectual disability barred execution. Haliburton filed this claim which the trial court summarily denied without prejudice, and the Florida Supreme Court affirmed. *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006). Haliburton returned to the circuit court and on "September 19, 2006, relying on *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), Haliburton filed his second successive postconviction motion under Florida Rules of Criminal Procedure 3.851 and 3.203, seeking to vacate his death sentence on the ground that he is intellectually disabled (ID). On March 13, 2012, the trial court summarily denied Haliburton's motion because he failed to demonstrate that his IQ was 70 or below." *Haliburton v. State*, 123 So. 3d 1146 (Fla. 2013). Haliburton filed a petition for writ of certiorari.

After obtaining an extension of time, on February 19, 2014, Haliburton filed a certiorari petition in the United States Supreme Court. Before the State's response was due, the Supreme Court issued *Hall v. Florida*, 134 S. Ct. 1986 (2014). At the State's request, the case was remanded to the Florida Supreme Court.[1] In turn, the

[1] *See also*, *Haliburton v. Florida*, 135 S. Ct. 178 (2014) (stating "[o]n petition for writ of certiorari to the Supreme Court of Florida. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Florida for further consideration in light of *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 1007 (2004)."

Florida Supreme Court remanded to the circuit court stating "[u]pon reconsideration of this matter as ordered by the United States Supreme Court in *Haliburton v. Florida*, 135 S. Ct. 178 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203." *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015).[2]

On November 30, 2016, Haliburton filed another successive Rule 3.851 motion. This motion is addressed as a *Hurst v. Florida* claim, which is now before this court as a minor component of the current matter.

THE 2019 EVIDENTIARY HEARING

The evidentiary hearing to address the claim of intellectual disability was conducted on May 13, 2019 during which Haliburton presented a mental health expert - Dr. Bruce Frumkin, and Appellant's youngest brother – John Haliburton, Jr. The State called Dr. Michael Brannon. The mental health experts' testimony described a variety of documents as well as a personal recounting of interviews with people related to the case.

[2] In May of 2020, this court issued its opinion in *Phillips v. Florida,* No. SC18-1149, 2020 WL 4727425 (2020 Fla.) which overruled the previous holding that the decision in *Hall v. Florida* was to be retroactively applied. It is noteworthy that had this court not vacated its previous order affirming the lower court's decision that Haliburton was not ID, this appeal would be moot as Haliburton's judgment and sentence became final on June 28, 1991.

The parties simultaneously submitted written closing memoranda on July 29, 2019. (PCR 821-913) After weighing the evidence and using "the criteria set forth in the DSM-5" (PCR 923), on September 27, 2019, the postconviction court ruled that Haliburton had not proven an intellectual disability under the standard required by the court rule. The court also denied Haliburton's claims regarding *Hurst v. Florida*. In its order, the postconviction court discussed the appropriate burden of proof, the three prongs of ID, the testimony of the mental health experts, and the factual history of the case. The postconviction court's order is summarized below.

<u>THE APPPLICABLE BURDEN OF PROOF</u>

"Significantly sub average general intellectual functioning" was defined by the postconviction court as performance that is "two or more standard deviations from the mean score on a standardized intelligence test." PCR 929. The postconviction court also noted that in order to bar imposition of the death penalty, the defendant must prove an intellectual disability "by clear and convincing evidence. § 921.137(4), Fla. Stat. (2019); *E.g., Williams v. State,* 226 So. 3d 758, 768 (Fla. 2017) (citing *Franqui v. State,* 59 So. 3d 82, 92 (Fla. 2011))." *Id.*

The postconviction court rejected Haliburton's assertion that the appropriate burden of proof is preponderance of the evidence, and stated:

> This Court recognizes that some states have adopted a preponderance- of-the-evidence standard for determining whether a defendant is barred from the death penalty due to intellectual disability,[4] but Florida

> has yet to follow suit. And while the Florida Supreme Court recently declined to address this issue head on, *Quince v. State,* 241 So. 3d 58, 63 (Fla. 2018), that court did note in a subsequent case that the applicable standard in these proceedings is clear and convincing evidence. *Wright v. State,* 256 So. 3d 766, 771 (Fla. 2018) ("To demonstrate ID, a defendant must make this showing by clear and convincing evidence. § 921.137(4)."). Accordingly, this Court finds that under the current state of the law, it remains bound to apply the clear-and-convincing-evidence standard supplied in section 921.137(4) to these proceedings.
>
> FN4 E.g., *Pennsylvania v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 70 (2011); *Pruitt v. State*, 834 N.E. 2d 90, 103 (Ind. 2005); *State v. Williams*, 831 So. 2d 835, 859 (La. 2002); *Murphy v. State*, 54 P. 3d 556, 573 (Okla. Crim. App. 2002); *Morrow v. State*, 928 So. 2d 315, 324 n.10 (Ala. 2004); *Howell v. State*, 151 S.W. 3d 450,465 (Tenn. 2004).

PCR 930.

<u>THE APPELLANT DID NOT SHOW SIGNIFICANTLY SUB-AVERAGE INTELLECTUAL FUNCTIONING</u>

With respect to Haliburton's history of mental health and IQ exams, the court noted:

> Over the past several decades, Defendant has submitted to a number of mental health evaluations and tests, many of which included IQ testing. On February 2, 1992, Dr. Patricia Fleming administered the Wechsler Adult Intelligence Scale-Revised ("WAIS-R"), and Defendant obtained a verbal IQ score of 79, a performance IQ score of 82, and a full-scale IQ score of 80. Those scores were replicated in a second administration of the WAIS-R performed a week or two later by Dr. Frumkin. On January 31, 2000, Defendant was given the Wechsler Adult Intelligence Scale-Third Edition ("WAIS-III") by Dr.

Hyman H. Eisenstein and achieved a verbal IQ score of 82, a performance IQ score of 80, and a full-scale IQ score of 79. On April 30, 2009, Defendant was administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) by Dr. Barry Crown and achieved a full-scale IQ score of 74. Finally, on May 20, 2010, Dr. Frumkin conducted a second administration of the WAIS-IV, and Defendant again received a full-scale IQ score of 74.5.

According to Dr. Frumkin's 2010 Report and testimony, his most recent testing on the WAIS-IV produced a 95% confidence interval of Defendant's IQ being between 70 and 79. Although Dr. Brannon did not perform any IQ testing of his own, he opined that Defendant's IQ was likely closer to the 79-80 range. (Tr. 200:22-201:8.) He based his assessment on his interview with Defendant and a review of Dr. Frumkin's 2010 Report, as well as Defendant's prison records and previous IQ scores on the WAIS-Rand WAIS-III (where Defendant received IQ scores of 80 and 79, respectively). According to Dr. Brannon, while IQ scores can fluctuate, "you can't fake good," meaning a person's higher IQ scores will more accurately reflect a person's capacity, while lower IQ scores achieved on other test administrations might be attributable to a variety of potential factors. (Tr. 163:14-164:12.) "You're as smart as your highest score but not as smart as your lowest score, so you don't get to pick them." (Tr. 163:21-23.)

FN5 The Court notes that a number of other IQ tests appear to have been given to Defendant over the years. School records show that Defendant earned an IQ score of 68 on the Slossen Test administered when he was fourteen (14) years old, and according to Dr. Brannon's report, the Department of Corrections administered a number of BETA and BETA-II Tests on which Defendant received IQ scores of 88, 92, and 100. But both Dr. Frumkin and Dr. Brannon testified that neither the Slosson nor the BETA Tests are accepted in the State of Florida for

> purposes of evaluating intellectual disability, and that both are short nonverbal tests often used for screening purposes (Slosson) or administered in group settings (BETA). (Tr. 84:15-21, 109:24-113:5; 219:23-221:24.) The Court therefore does not rely on these tests for purposes of evaluating Defendant's intellectual functioning.
>
> FN6 Dr. Brannon stated in his report that "it was not possible to conduct formal intellectual testing for this assessment due to the presence" of Defendant's counsel, which was authorized by this Court's March 20, 2018 Order. It is unclear why following the March 13, 2018 hearing on this issue and the resulting March 20, 2018 Order (which was drafted by the State), the State did not return to the Court to re-raise the issue. The Court simply assumes that, not having done so, the State no longer sought to have Dr. Brannon conduct his own administration of an IQ test.

PCR 932-34.

The postconviction court found that Dr. Brannon's testimony and reasoning was more credible than that of Dr. Frumkin. This was, in part, based upon Dr. Frumkin's reliance upon the "Flynn effect". The court discussed the application of the Flynn effect and its relevance to Haliburton, stating:

> The Court finds Dr. Brannon's testimony here both credible and persuasive. In addressing Defendant's 1992 WAIS-R score of 80, Dr. Frumkin testified about a phenomenon known as the "Flynn Effect," which essentially recognizes that the population as a whole is getting smarter.7 According to Dr. Frumkin, the Flynn Effect results in the overestimation of IQ scores by about a third of a point for each year that passes since an IQ test was normed and released. As the WAIS- R was approximately thirteen years removed from the normative sample it was based on at the time it was administered to

> Defendant, Dr. Frumkin estimates Defendant's IQ score of 80 was overestimated by approximately 4 points. (Tr. 136:7-23.) Defendant therefore argues that in considering these early test scores, the Court must adjust for the Flynn Effect.
>
> However, as both Dr. Frumkin and Dr. Brannon testified, there is no way to know how the Flynn Effect applies to an individual's score on a given IQ test. Thus, while the Flynn Effect is something to consider, both Dr. Frumkin and Dr. Brannon agreed it would be against standard practice to adjust an individual's score by a certain number of points to account for the Flynn Effect. (Tr. 57:25-59:14; 162:2-163:1.). Moreover, as the Florida Supreme Court recently stated, "Hall does not mention the Flynn effect and does not require its application to all IQ scores in Atkins cases." *Quince*, 241 So. 3d at 61.
>
> FN7 Dr. Frumkin also testified about the Practice Effect, which refers to an increase in performance on the second administration of the same test taken in close proximity to the first administration. (Tr. 60:18-62:5; 136:7-23.) However, because Defendant received the same scores on both administrations of the WAIS-R, as well as the same full-scale IQ score on both administrations of the WAIS-IV, it does not appear that the Practice Effect had an impact on Defendant's WAIS-R or WAIS-IV scores.

PCR 934.

The postconviction court rejected the Flynn effect based on the reasoning stated by this Court in *Quince v. State*, 241 So.3d 58 (Fla. 2018), *cert. denied sub nom.*, 139 S. Ct. 202 (2018) and found, "while the Court does believe Defendant's IQ is below average, the Court finds that Defendant has failed to demonstrate that his IQ is two or more standard deviations from the mean" PCR 934. Thus, Appellant had not shown by clear and convincing evidence that he satisfied the first prong.

NO FINDING OF ADAPTIVE DEFICITS

Addressing the second prong of adaptive deficits - "how well a person meets community standards of personal independence and social responsibility"- the postconviction court referenced both the statute and the DSM-5 when outlining the appropriate determinative criteria, noting:

> The statute defines 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. This prong is further broken down as follows:
>
>> The DSM-5 divides adaptive functioning into three broad categories or "domains": conceptual, social, and practical. DSM-5, at 37; *see also* AAIDD-11, at 43. The conceptual domain "involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-5, at 37. The social domain "involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment." *Id*. The practical domain "involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." *Id*. According to the DSM-5, adaptive deficits exist when at least one domain "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id*. at 38; see AAIDD-11, at 43.

> *Wright v. State*, 256 So. 3d 766, 773 (Fla. 2018) (footnote omitted).

PCR 935-36.

Referencing Dr. Frumkin and Dr. Brannon's examinations, the postconviction court analyzed each of the three domains – conceptual, social, and practical. PCR 935-40. The postconviction court noted that there was an abundance of evidence derived from a variety of sources regarding Haliburton's adaptive deficits and considered that the ABAS-II results revealed that Defendant scored highest in the social domain skills, next highest in practical domain skills, and lowest in conceptual domain skills. There was, however, a disagreement as to the extent of the deficits. PCR 608; 730.

The Conceptual Domain

When looking at the evidence surrounding the conceptual domain, the court noted:

> Dr. Frumkin administered the WRAT-IV to test Defendant's functional academics. According to Dr. Frumkin's report, Defendant received a Word Reading Standard Score of 78 (lower 7%), a Sentence Comprehension Standard Score of 83 (lower 13%), a Reading Composite Standard Score of 78 (lower 7%), a Spelling Standard Score of 84 (lower 14%), and Math Computation Standard Score of 7 (lower 4%). When Dr. Frumkin testified, he drew specific attention to Defendant's math skills, which he stated was approximately at a third-grade level. (Tr. 90:6-21.) Dr. Frumkin went into further detail, providing specific

> examples of the types of problems featured on the test that Defendant struggled with, such as "8 minus blank equals 5," which Defendant answered as 4, and "6 divided by 2" equals blank, which Defendant was unable to answer at all. (Tr. (90:12-22.) Given Dr. Frumkin's testimony here and Defendant's scores on the WRAT-IV, the Court finds that Defendant has demonstrated a significant deficit in the area of math reasoning.
>
> However, when it came time for Dr. Frumkin to explain the other areas in which Defendant suffered, things became a little less clear. (Tr. 101:14-102:13.) When pressed on cross- examination about what area in addition to mathematical reasoning Defendant suffered from severe deficits, Dr. Frumkin appeared to stammer a bit, stating, "He has a lot of different ones," but then needing to refer back to his notes before he was able to further answer the question. (Tr. 114:15-115:6.)

PCR 936.

The court also considered information about Haliburton's current activities in prison. Specifically, there was focus on his behaviors and activities. When applying this information, the court again found Dr. Brannon to be more credible based on the specifics of the testimony provided, and stated:

> [V]arious records have indicated Defendant has struggled with reading and reading comprehension over the years. For example, Dr. Frumkin testified that Defendant's sister, Helen Edward, reported that Defendant had major problems in reading, and that he could not comprehend what he had read. (Tr. 103:7-12.) Dr. Frumkin testified that John H. Haliburton reported Defendant was also poor at problem-solving skills, and that his way of resolving issues was through fighting. (Tr. 103:13-17.) However, Dr. Brannon testified that during his interview, Defendant

> reported that during his time in prison, Defendant had read multiple books, such as the Koran, People's History of the United States, and But They Didn't Read Me My Rights, and significantly, was able to convey to Dr. Brannon an understanding of what he had read in those books. (Tr. 183:15-188:6.) With regard to the Koran, Defendant conveyed to Dr. Brannon how the principles contained therein inspired him, "adding meaning to his life and helping him to change and think about things in a different way," and that the lessons teach how to "behave in a moral way, in a principled way; how we're supposed to behave towards other people." (Tr. 184:24-185:22.) Dr. Brannon also conveyed that Defendant's vocabulary and use of certain terms reflected Defendant's ability to think in an abstract fashion, demonstrating Defendant's deeper understanding of those concepts, which suggested Defendant is functioning on a higher level than one would expect of someone who is intellectually disabled. (202:23-203:19.)

PCR 939-40.

The Social Domain

With respect to the social domain, all of the evidence presented suggested that this was Haliburton's strongest area which was consistent with the test scores considered by the court. Here, when discussing this area, the court noted that the witnesses were essentially in agreement as to Haliburton's abilities in this area. However, the court discounted Dr. Frumkin's assertion that Haliburton was a "poor historian" and instead determined that Dr. Brannon's testimony was more credible. PCR 938.

The Practical Domain

Finally, the court then turned to the area of practical domain. When assessing this, the court considered that at the time of his arrest, Haliburton was living with his girlfriend, had an adult son, and generally maintained gainful employment. There was also testimony from both doctors that Haliburton had been attending an auto body repair course for 23 weeks immediately prior to his arrest and was on track to complete it. In a previous hearing, the instructor testified that Haliburton was a "good student" and that he "worked hard". The instructor further said that he would have helped Haliburton obtain employment upon course completion. ROA 942. All of this evidence showed reasonable practical abilities.

Ultimately, after considering all of the offered testimony, the court concluded that Haliburton had failed to meet the requirements of this prong, despite his recognized deficits with math reasoning abilities. In support of this determination the postconviction court stated:

> [T]he Court agrees with Dr. Brannon's assessment. On balance, while the Court finds Defendant does suffer significant deficits in mathematical reasoning skills, the Court does not find Defendant's remaining deficits- of which there appear to be several-to be of such magnitude as to say that one or more of the adaptive function domains "is sufficiently impaired that ongoing support is needed." Wright, 256 So. 3d at 773 (citing DSM-V, at 38.). Stated differently, the Court finds Defendant has failed to demonstrate by clear and convincing evidence that he satisfies the second prong of the intellectual disability analysis.

PCR 940.

The deficits appeared prior to age 18, though not to the level of intellectual disability

Reviewing the third prong in determining whether Appellant's alleged deficits manifested before the age of 18, the postconviction court noted that despite the disagreement as to the severity of those deficits, there was agreement that they were, at whatever level, present prior to Haliburton reaching age 18. PCR 941. In making this determination, the postconviction court focused on the testimony from both experts as well as Haliburton's brother, regarding Haliburton's early difficulties in school.

> Those same records also show that the school identified him as having a "mental handicap," as "need[ing] help in all salient areas," as having "difficulty functioning in a regular academic class," and placing him in the "exceptional student program." Further, Defendant's brother, Johnathan H. Haliburton, testified about Defendant's struggles to understand things as a child, and how his grandmother would refer to him as "stupid," "retarded," "dumb," and "good for nothing." (Tr. 12:8-13.) According to Dr. Frumkin's report, Defendant's other siblings also reported Defendant's struggles reading and doing chores that would also indicate the manifestation of Defendant's deficits at an early age. Accordingly, the Court finds Defendant has sufficiently established that his deficits manifested prior to turning eighteen.

PCR 941.

Accordingly, after thorough review of the testimony and the voluminous records related to the case the postconviction court concluded that Appellant had

failed to prove, by clear and convincing evidence, that he is intellectually disabled under § 921.137 (1), Fla. Stat. (2017) and denied Appellant's motion. PCR 941.

APPELLANT'S CLAIMS OF CONSTITUTIONAL VIOLATIONS UNDER *HURST* ARE WITHOUT MERIT

Turning to Haliburton's *Hurst* claims, the postconviction court rejected each of them, stating:

> Regardless, the current state of the law is clear: relief under the *Hurst* decisions is unavailable to defendants whose death sentences were final on June 24, 2002, when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *Hitchcock*, 226 So. 3d at 217. As Defendant's conviction and sentence became final on June 28, 1991, *Haliburton v. State*, 561 So. 2d 248, 249 (Fla. 1990), cert. denied, *Haliburton v. Florida*, 501 U.S. 1259 (1991), long before the decision in *Ring* was announced, Defendant is not entitled to relief under the Hurst decisions and his Hurst-related claims must all be denied.

PCR 943-44.

On October 25, 2019, Appellant filed a notice of appeal stemming from this order. On July 31, 2020, Appellant filed his initial brief. This answer brief follows.

SUMMARY OF THE ARGUMENT

Appellant failed to establish by clear and convincing evidence that he is intellectually disabled and often mischaracterizes the postconviction court's findings of fact and implicit rejection of specific expert testimony. Clear and convincing evidence is the constitutional standard which the postconviction court followed and which is clearly outlined in sections §§921.137(1)-(4) of the Florida Statutes and

Florida Rule of Criminal Procedure 3.203. Appellant failed to meet the definition of intellectual disability because he does not suffer from significant subaverage intellectual functioning or concurrent adaptive functioning deficits which were onset before the age of 18. Because the postconviction court properly relied on current medical standards set forth in the DSM-5 and reviewed all presented evidence concerning the three prongs when analyzing Appellant's intellectual disability claim, this Court should affirm the postconviction court's determination that Appellant has not met the criteria set forth on any of the prongs of intellectual disability.

Appellant's arguments fail on the merits because he is not entitled to a jury determination on his postconviction intellectual disability claim, and as his case was final prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002) decision, he is not entitled to retroactive relief under *Hurst v. Florida* or *Hurst v. State.*

STANDARD OF REVIEW

As this Court recently stated:

> [I]t is necessary to clarify what *Moore* did not change— our standard of review. As noted in *Glover v. State*, 226 So. 3d 795 (Fla. 2017), neither *Hall* nor *Moore* "alter[ed] the standard for reviewing the trial court's determination as to whether the defendant is intellectually disabled." *Id.* at 809.
>
> In reviewing the circuit court's determination that [the defendant] is not intellectually disabled, "this Court examines the record for whether **competent, substantial evidence supports the determination** of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). [This

> Court] "[does] not 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). However, [this Court] appl[ies] a de novo standard of review to any questions of law. *Herring*, 76 So. 3d at 895.

Glover, 226 So. 3d at 809 (alterations in original) (quoting *Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015)). *Wright v. State*, 256 So. 3d 766, 769 (Fla. 2018), *reh'g denied*, No. SC13-1213, 2018 WL 5734373 (Fla. Nov. 1, 2018), *cert. denied*, 139 S.Ct. 2671 (2019).

ARGUMENT

1. APPELLANT WAS GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE AS TO ALL THREE PRONGS OF INTELLECTUAL DISABILITY BUT FAILED TO PROVE HE WAS INTELLECTUALLY DISABLED BY CLEAR AND CONVINCING EVIDENCE.

The postconviction court properly conducted a holistic review of the intellectual disability requirements in accordance with *Hall v. Florida*, 572 U.S. 701 (2014), and correctly found that Appellant did not present clear and convincing evidence of all of the intellectual disability prongs. Florida Statutes § 921.137(1) and § 921.137(4) explicitly state that for a defendant to establish a claim of intellectual disability, he must establish by clear and convincing evidence 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. *See* § 921.137(1), (4), Fla. Stat. (2019) ("If the court finds, **by clear and**

convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death…." (emphasis added)). The postconviction court properly followed that burden of proof in determining that Appellant was not intellectually disabled under the law.

A. Clear and convincing evidence is the appropriate and applicable burden of proof standard under section 921.137(4) which governs a Rule 3.203 evidentiary hearing.

Contrary to Appellant's assertion that Rule 3.203 is "silent on the evidentiary burden" and therefore means a lower burden is more proper, the governing law is found in the Florida Statutes and dictates how a trial court is to conduct a Rule 3.203 evidentiary hearing. It explicitly establishes the burden of proof as "clear and convincing evidence". § 921.137(1), Fla. Stat. (2019). The postconviction court noted that it was using the clear and convincing evidence standard and cited to the Florida Statute and longstanding case law. PCR 930. As such, the postconviction court correctly followed what it was mandated to follow at the time it conducted its Rule 3.203 inquiry.

Additionally, Appellant argues that clear and convincing evidence is not the "proper burden of proof" and that it runs afoul of the Eighth and Fourteenth Amendments of the Constitution. IB at 47. Appellant argues that by stating in its order that the postconviction court applied the clear and convincing evidence standard, "the court applied an unconstitutionally high standard of proof." IB 53.

Specifically, Appellant did not raise this constitutional issue during the actual evidentiary hearing but noted in its "Motion for Post-Conviction Relief" that the standard of clear and convincing evidence ran contrary to the holdings in *Hall* and *Moore v. Texas*, 137 S. Ct. 1039 (2017).

First, Appellant is conflating two separate issues by arguing that the legal burden of proof diminishes the force of the consensus in *Moore* and *Hall*. However, this Court has already stated unequivocally that the holdings in *Moore* and *Hall* do not "alter the standard for reviewing the trial court's determination as to whether the defendant is intellectually disabled." *See Glover v. State*, 226 So. 3d 795, 809 (Fla. 2017) (reiterating clear and convincing evidence is the standard that the trial court employs even where "*Hall* authorizes defendants who, like Glover, have IQ scores within the SEM to raise an intellectual disability claim,"); *Wright*, 256 So. 3d at 778 ("we can again conclude that Wright failed to prove adaptive deficits **by clear and convincing evidence—a conclusion that *Moore* did not alter**." (emphasis added)."The clear-and-convincing-evidence standard, although not insatiable, is still demanding." *See Raulerson v. Warden*, 928 F. 3d 987, 1007 (11th Cir. 2019)) (finding "a state prisoner may prove the factual predicate of an *Atkins* claim in federal court with clear and convincing evidence even when the state in which he was convicted and sentenced imposes a more demanding burden of proof for precisely the same factual issue") (citing *Miller-El v. Dretke*, 545 U.S. 231, 240

(2005) (quotations omitted)). While Appellant cites to dicta in the *Raulerson* opinion, importantly the opinion approves of the clear and convincing evidence standard and highlights that the *Atkins*[3] Court expressly decided to "leave to the States the task of developing appropriate ways to enforce [Atkins's] constitutional restriction." *Id.* at 1008 (citing *Atkins v. Virginia*, 536 U.S. at 317 (alteration adopted) (citations omitted)). IB 48.

As explained *infra*, after being informed of the views of the defense and state medical experts, both of whom had varying medical opinions, the postconviction court, as the fact finder, took into consideration the opposite theories in determining what evidence was credible. The trial court weighed the evidence adopting the standard from the Florida statute which was in line with this Court's recent decisions and Florida law. Therefore, the postconviction court did not err by applying this standard. Secondly, there was no due process violation. Despite Appellant's assertion that "this was a close case" this is not supported by the evidence. IB 53. In making this "close case" claim, Appellant misconstrues the lower court's ruling. While the court did find that Appellant's deficits manifested prior to the age of 18, this finding is meaningless if those deficits do not reach the level of intellectual disability- which they do not. The court undertook the proper analysis using the appropriate burden of proof in making its finding that Haliburton was not ID.

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002).

B. The impact of *Moore v. Texas* on the holistic approach required by *Hall v. Florida* does not remove the postconviction court's ability to make factual findings and credibility determinations on each prong.

The postconviction court analyzed the evidence properly and consistently in light of *Moore* because the postconviction court's analysis of intellectual disability was consistent with prevailing current clinical standards and based on a proper credibility determination of the conflicting experts' opinions. The Supreme Court's decision in *Moore* does not call into question the postconviction court's findings that Appellant "failed to establish that he is intellectually disabled within the meaning of section 921.137(1), Florida Statutes." PCR 941.

In *Moore*, the Texas Court of Criminal Appeals (CCA) reversed a lower court's decision finding Moore intellectually disabled because the lower court "erroneously employed intellectual- disability guidelines currently used in the medical community rather than the 1992 guidelines adopted by the CCA in Ex *parte Briseno*, 135 S.W. 3d 1 (2004)." *Moore*, 137 U.S. at 1044. Employing the *Briseno* analysis, the CCA found five of Moore's IQ scores unreliable and only considered valid his scores of 74 and 78.*Id.* at 1047. Notably, when looking at these two scores, the CCA discounted the lower end of the SEM range associated with these scores due to Moore's academic behavior and performance when taking the tests and concluded that his scores ranked above the intellectually disabled range. *Id.* at 1049-50. The Supreme Court reversed and concluded that the CCA's analysis of Moore's

intellectual functioning was irreconcilable with *Hall* because the CCA had not accounted for the SEM and had deviated from prevailing clinical standards by relying on the outdated 1992 guidelines. *Id.* at 1049-50.

Despite Appellant's suggestion as to what *Moore* and *Hall* require, this Court has made clear that in reviewing each prong under a holistic approach, "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Wright v. State*, 213 So. 3d 881, 895, 898 (Fla. 2017) (holding that Wright failed to prove that he is of subaverage intellectual functioning and "[f]or this reason alone, Wright does not qualify as intellectually disabled under Florida law."); *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016). This Court has clarified that although "no single factor can be considered dispositive," "even after *Hall*, a failure to prove any one prong of the intellectual disability is a failure to prove the claim." *Foster v. State*, 260 So. 3d 174, 179 n.7 (Fla. 2018) (citing *Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018)); *Williams v. State*, 226 So. 3d 758, 773 (Fla. 2017) (citing *Salazar*, 188 So. 3d at 812)). As shown below, Appellant failed to prove any of the prongs by clear and convincing evidence.

i. There was competent substantial evidence for the postconviction court to determine that Appellant did not prove by clear and convincing evidence that he had subaverage intellectual functioning.

> [W]hile an assessment of intellectual disability involves "conjunctive and interrelated" factors, *Hall*, 134 S. Ct. at 2001, if a defendant cannot produce an IQ score

> that shows significantly subaverage intellectual functioning even when the standard error of measurement is taken into account, the claim will fail for lack of proof of the first prong.

See Foster, 260 So. 3d at 179 n.7 (citing *Quince*, 241 So. 3d at 62). Where an IQ score "is close to, but above 70, courts must account for the test's standard error of measurement." *See Moore*, 137 S. Ct. at 1049 (citing *Hall*, 572 U.S. at 712, 723-24 (finding "[a} test's standard error of measurement [SEM] "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." (citations omitted)); *see also Glover*, 226 So. 3d at 809 ("when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.").

The historical record in this case is voluminous and offers significant amounts of relevant information relating to the ultimate question as to whether Haliburton is intellectually disabled. For his original claim, pursuant to Fla. Crim Pro R 3.203, Haliburton enlisted the services of Dr. Frumkin to offer support to this assertion. In June of 2010, Dr. Frumkin rendered his findings in a formal report. Therein, Dr. Frumkin referenced a battery of tests that he had administered to Haliburton, which included the Wechsler Adult Intelligence Scale-IV (WAIS IV), the Wide Range Achievement Test-4 (WRAT-4), the Validity Indicator Profile (VIP), Test of Malingered Memory (TOMM), and the Rey 15 Item Memory Test (Rey).

Haliburton’s subset scores range from a low of 73 to a high of 84 with a full-scale IQ of 74. Now, Dr. Frumkin attempts to re-work and significantly lower the IQ numbers on Haliburton’s original score of 80 by applying the “Flynn Effect.”[4] Also without dispute is the fact that three previous doctors enlisted by Haliburton in prior collateral challenges, for the purposes of establishing organic brain damage, also never found his IQ score to fall below 79. For instance, in 1992 Dr. Patricia Fleming’s finding of Verbal Score of 79 and a performance score of 82 for a full-scale IQ of 80 on WAIS-R PCR 932. In 1992, the very same Dr. Bruce Frumkin upon whom Haliburton currently relies for support of his claim, found a verbal score of 79 and a performance score of 82 for a full scale of 80 after administering the WAIS-R. *Id*. In 1999, Dr. Hyman Eisenstein a board-certified neuropsychologist

[4] In his 2010 report, Dr. Frumkin states “Mr. Haliburton obtained a Full Scale IQ score of 80 on the WAIS-R. I had opined that he functioned at the Low Average range of intelligence. This was in error. First, although I correctly stated that the confidence interval at the 66% range was between 77 and 83, and a score of 80 is technically Low Average (80 is the cutoff), if I had taken into consideration the standard error of measurement, I should have said he functioned at the Borderline to Low Average range. More significantly though, during the time period in which he was tested, psychologists did not take into consideration what is known as the Flynn Effect…Thus I was comparing Mr. Haliburton in 1992 to individuals from 1979-1980. His score was likely an overestimation by approximately four points.” Dr. Frumkin is referencing his 1992 evaluation of Mr. Haliburton. (PCR 1798).

opined that Haliburton obtained a verbal score of 82 and a performance score of 80 for a full scale of 79 in the WAIS-R. PCR 932.[5]

Finally, in preparation for the latest evidentiary hearing, Haliburton again secured the services of Dr. Frumkin who now testified that when he administered the WAIS-IV to Haliburton, his full-scale score was 74. Dr. Frumkin continued on to say that there is a 95% chance that Haliburton's IQ score is between 70 and 79. PCR 609.

Dr. Frumkin discussed Haliburton's difficulty in school, noting that he was in special education classes, that he had difficulty functioning in a regular academic class and that a school record had stated, "Jerry needs help in all salient areas". PCR 611. Dr. Frumkin also noted that Haliburton worked doing yard maintenance for an extended period of time for the same employer who described Haliburton as a "worker bee" who could complete tasks if given proper direction. PCR 614. Dr. Frumkin testified that Haliburton had a poor vocabulary and was "off on timeframes" yet offered no tangible proof to support the belief, even conceding on cross-examination that he assumed Haliburton was incorrect and the other sources were accurate. PCR 616; 646-47.

[5] The only score under 70 that Haliburton has received on any test was on the Slosson Test which he was given at age 14. Although Haliburton was assessed at a 68, both Dr. Frumkin and Dr. Brannon agree that this test is not accepted (Dr. Frumkin said not accepted "anywhere" PCR 641) and is not reliable. PCR 612; PCR 735.

Significantly, Haliburton's argument that the "Flynn effect" must be considered when analyzing the import of the full-scale IQ score is also without merit and does not warrant relief. First, contrary to his argument, recognition of the "Flynn effect" is not universal and is not a required application to all IQ scores.[6]

> As many courts have already recognized, *Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases. *E.g., Black v. Carpenter*, 866 F. 3d 734, 746 (6th Cir. 2017) (noting that Hall does not even mention the Flynn effect and does not require that IQ scores be adjusted for it), petition for cert. filed, No. 17–8275 (U.S. Mar. 26, 2018); *Smith v. Duckworth*, 824 F. 3d 1233, 1246 (10th Cir. 2016) ("Hall says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."), cert. denied, —– U.S. ——, 137 S. Ct. 1333, 197 L. Ed. 2d 526 (2017); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F. 3d 600, 639 (11th Cir. 2016) ("Hall did not mention the Flynn effect. ... There is no 'established medical practice' of reducing IQ scores pursuant to the Flynn effect. The Flynn effect remains disputed by medical experts, which renders the rationale of Hall wholly inapposite."), cert. denied, —– U.S. ——, 137 S. Ct. 1432, 197 L.Ed.2d 650 (2017). Although the AAIDD's DPID publication may now advocate the adjustment of all IQ scores in Atkins cases that were derived from tests with outdated norms to account for the Flynn effect, "Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, —– U.S. ——, 137 S. Ct. 1039, 1049, 197 L. Ed. 2d 416 (2017). Because Quince has not demonstrated that Hall requires that his IQ scores be adjusted for the Flynn effect, and there is competent, substantial evidence in the

[6] This portion of the *Quince* decision was also quoted and relied upon by the postconviction court. PCR 934.

> record to support the trial court's decision not to apply the Flynn effect to adjust Quince's IQ scores, Quince is not entitled to relief on this claim.

Quince v. State, 241 So. 3d 58, 61, (Fla. 2018).

Second, the DSM-IV-TR says nothing about subtracting IQ points to account for the "Flynn effect," and such is contrary to the standard of the profession of psychology. See Hagan, L. Drogon, E., Guilmette T., Adjusting IQ scores for the Flynn Effect: Consistent with the Standard of Practice, Professional a Psychology: Research and Practice, 2008, Vol. 39, No. 6, 619-25. This is supported by Dr. Frumkin's own statement:

> Though, the Flynn Effect has to do with populations, it doesn't have to do with individuals so you can't say a specific individual is automatically X number of points slower based upon the Flynn Effect, the true IQ score has to do with populations. But what I do when I testify, I talk about the Flynn Effect and how, you know, generally it may be an overestimation of his true level of intelligence because of the Flynn Effect, but you can't – you know, a lot of psychologists automatically subtract that Flynn Effect number from the IQ score and say this is the person's IQ.

PCR 585.

Third, knowing that Dr. Frumkin's most recent modified finding that Haliburton's full-scale IQ is 74 is wholly contrary to previous reports and appears to be result driven (i.e. supporting a finding of intellectual disability) it is rendered unreliable. In an effort to explain the inconsistency in his finding in 1992 that

Haliburton's IQ was 80,[7] Dr. Frumkin opined in his 2010 report, that he erred in 1992 because he did not account for the Flynn effect which when applied would have given Haliburton an IQ scale of 76. (PCR 661-62). Presumably the recognition of "his error" in 1992 would indicate that the full-scale IQ score found in 2010, includes recognition of the "Flynn Effect." In any event the "manipulation" of Haliburton's IQ scores by Dr. Frumkin are enough to call into question the accuracy of the results, as was tacitly recognized by the postconviction court when if found Dr. Brannon's testimony to be reliable, thereby rejecting that of Dr. Frumkin. PCR 934.

In support of its decision, the postconviction court relied on the variety of information gathered over the course of the many years of litigation related to this case noting that Appellant had submitted to a number of mental health evaluations and tests and noted that Appellant's previous scores were generally between 79 and 82. It was not until this current evidentiary hearing that Appellant's scores fell into the lower levels, between 74 and 74.5.[8] PCR 932.

In assessing Haliburton's intellectual disability challenges, *Oats* must be considered. In *Oats*, the Court held that the trial court had erred in finding that Oats,

[7] It is important to recognize that if the standard margin of error were applied, this score would go up to 84-85. PCR 743.

[8] The full history of previous testing can be found on pages 10-11 of this brief and on pages 932-33 of the post-conviction record. The actual testing numbers were not included in this section of argument to avoid redundancy.

whose IQ "is between 54 and 67, well within the range for an individual who has an intellectual disability" thus "was unable to establish that his intellectual disability manifested before the age of 18 – one of the three required prongs in Florida's statutory test for determining an intellectual disability". In so determining the error, the Court cited to *Brumfield v. Cain*, 576 U.S. 305 (2015), observing that all three prongs of intellectual disability "generally must be considered in tandem." *Oats*, 181 So. 3d at 459. While Oats is instructive, it is not the circumstance in the present case. In fact, later cases from this Court have clarified what the scope entails.

In *Williams v. State*, 226 So. 3d 758, 773 (Fla. 2017), this Court noted:

> We recently reiterated that '[i]f the defendant fails to prove any one of the components [delineated in section 921.137(1), Florida Statutes], the defendant will not be found to be intellectually disabled.' *Salazar v. State*, 188 So. 3d. 799, 812. Because competent, substantial evidence supports the postconviction court's conclusion that Williams failed to establish the second prong of the intellectual disability standard, we affirm the determination that Williams does not qualify as intellectually disabled under Florida law."

See also Zack v. State, 228 So. 3d 41, 47 (Fla. 2017)(*Hall* relief denied for failure to prove the first prong).

In *Quince v. State*, this Court held that:

> Although *Hall* requires courts to consider all three prongs of intellectual disability in tandem, we have recently reiterated that "[i]f the defendant fails to prove any one of the components, the defendant will not be found to be intellectually disabled." *Salazar v. State*, 188 So. 3d 799,

> 812 (Fla. 2016); accord *Williams v. State*, 226 So. 3d 758, 773 (Fla. 2017), petition for cert. filed, No. 17-7924 (U.S. Feb. 26, 2018); *Snelgrove v. State*, 271 So. 3d 992, 1002 (Fla. 2017). And while Hall requires a holistic hearing, "defendants must still be able to meet the first prong of [the intellectual disability standard]." *Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017), petition for cert. filed, No. 17-8134 (U.S. Mar. 12, 2018). Thus, because Quince failed to meet the significantly subaverage intellectual functioning prong (even when the SEM is taken into account), he could not have met his burden to demonstrate that he is intellectually disabled.

Quince, 241 So. 3d at 62.

During Haliburton's Federal Habeas Corpus evidentiary hearing, the defense offered a variety of experts to address their claims about Haliburton's mental deficiencies. The Court denied Haliburton's claim, flatly and unequivocally rejecting Haliburton's experts' opinions by noting:

> At the federal evidentiary hearing, this Court heard from the petitioner's mitigating evidence experts Susan La Hehr Hession and Dr. Faye Sulton. Ms. Hession testified that back in 1988 when she spoke to trial counsel, she did not know about the petitioner's alleged suffering from sex abuse. Dr. Sultan, a well known anti-death penalty witness, spoke about the petitioner's drug abuse, sex abuse, suicide attempts and **incredibly concluded, unequivocally, that based on petitioner's handwriting** the petitioner suffered from organic brain syndrome. In opposition at the federal habeas hearing, the State called Dr. Hyman Eisenstein, who testified that, although the petitioner had poor language and vocabulary skills, he tested normal for abstract reasoning and cognitive skills.

Haliburton v. Secretary for Dept. of Corrections, 160 F. Supp. 2d 1382, 1391 (2001). (Emphasis added). The State acknowledges that this component of the federal evidentiary hearing was to address Haliburton's claims of ineffective assistance of counsel and was not specifically offered to show an intellectual disability. However, it is relevant that this is the testimony that was proffered to support a previous claim surrounding Haliburton's intellectual capacity.

The defense expert here, Dr. Frumkin, asserts Haliburton meets the prong of significantly subaverage intelligence because he "came across as someone with intellectual deficiencies" and because he was "a very poor historian". He attempts to support this prong with his newest IQ score of 74, noting that the confidence interval "may" bring it as low as 70. PCR 607-08. Inexplicably, Dr. Frumkin also attempts to support his finding of significantly subaverage intelligence with the fact that Haliburton remained gainfully employed with the same person for an extended period of time. Dr. Frumkin seems to posit that because Haliburton was a "worker bee" who "worked hard" but could not plan ahead to the next task without direction that he meets prong one. PCR 613-14. Arguably, the information regarding Haliburton's work history equally supports the fact that Haliburton was like many who are employed in the field of manual labor and was simply unmotivated and not a go-getter.

As such, the postconviction court was able to review the record and find that there was competent substantial evidence to suggest that prong one had not been met, given not every score would be lowered four to five points just for the Flynn effect. To this point, the postconviction court noted that it was persuaded by the expressed reasoning of this Court in *Quince*, cited *supra*, to support the finding regarding the lack of subaverage intellectual functioning.

Importantly, "*Hall* does not stand for the proposition that credibility findings are improper when they conflict with medical standards. Instead, the language justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70." *See Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017), *cert. denied*, 138 S. Ct. 927 (2018) (citing *Hall*, 572 U.S. at 709-13) for the proposition that "*Hall* looks to the medical community "[t]o determine if Florida's cutoff rule is valid," but does not change credibility determinations in intellectual disability proceedings."). Therefore, there was competent substantial evidence to support the postconviction court's decision to reject the Flynn effect and to rule that Haliburton failed to demonstrate that is IQ is two or more standard deviations from the mean. PCR 934.

ii. <u>Appellant failed to establish that he had concurrent significant deficits in his adaptive functioning.</u>

As previously noted, under Florida law, a defendant claiming intellectual disability as a bar to execution must establish by clear and convincing evidence 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." *See* § 921.137(1), Fla. Stat. (2018). 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." *Id*. The postconviction court, citing the DSM-5, noted adaptive functioning "involves three domains: conceptual, social, and practical" and quoted the full DSM-5 definition . PCR 935.

As this Court has held:

> The deficits "must be **directly related** to the intellectual impairments" associated with the first prong; namely, "reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding." *Id.* at 37–38. The diagnostic requirements of the second prong are met when at least one of these domains "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." *Id.* at 38.

Hampton v. State, 219 So. 3d 760, 779 (Fla. 2017) (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013))(emphasis added).

In this case, the postconviction court allowed Appellant to present further evidence of adaptive functioning regardless of the IQ scores which is compliant with the requirements of *Hall*. In analyzing the second prong, the postconviction court

considered both Dr. Frumkin's and Dr. Brannon's testimony. PCR 924-946. Additionally, the postconviction court incorporated the full appellate record, as well as all of the information contained in other collateral proceedings, and repeatedly referenced this in its closing memorandum. *Id*.

Appellant primarily attacks the postconviction court's credibility determinations and accuses the court as one which ignored the record and misrepresented key evidence by Appellant's witnesses. IB at 66-70. However, a postconviction court has the benefit of observing the witnesses' testimony and making credibility determinations. *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008) ("Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions. S*ee Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) ("This Court does not ... second guess the circuit court's findings as to the credibility of witnesses.") (citing *Trotter v. State*, 932 So. 2d 1045, 1050 (Fla. 2006)); *Bottoson v. State*, 813 So. 2d 31, 33 n. 3 (Fla. 2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.")").

In this case relating to the conceptual domain, after listening to the evidence from both experts, the postconviction court found that although Appellant indeed

had deficits in math reasoning there was little or no evidence to support deficits in other areas. The postconviction court noted:

> However, when it came time for Dr. Frumkin to explain the other areas in which Defendant suffered, things became a little less clear. (Tr. 101:14-102:13.) When pressed on cross-examination about what area in addition to mathematical reasoning Defendant suffered from severe deficits, Dr. Frumkin appeared to stammer a bit, stating, "He has a lot of different ones," but then needing to refer back to his notes before he was able to further answer the question. (Tr. 114:15-115:6.)
>
> As noted above, Dr. Frumkin interviewed several of Defendant's siblings and administered them the ABAS-II. As explained in Dr. Frumkin's 2010 report, the ABAS-II "is designed to help objectively measure deficits in adaptive functioning by a respondent rating the subject [in this case, Defendant] on a number of different Skill Areas and then comparing scores from these areas to individuals of the same age range." But as Dr. Frumkin testified, the validity of these tests is questionable when the scores produced are inconsistent, and here "there was wide variability" in how each of the family members scored Defendant. (Tr. 101:19-102:13; 138:2-11.) Nonetheless, Dr. Frumkin testified that while the scores were inconsistent, the trends in those scores (areas in which the scores reflected higher or lower functioning) were relatively consistent. (Tr. 104:7-20; 137:8-139:21.) Thus, the ABAS-II results revealed that Defendant scored highest in the social domain skills, next highest in practical domain skills, and lowest in conceptual domain skills.

PCR 936-38. When the postconviction court refers to things as “questionable” or “unclear”, it can be inferred there was no competent, substantial evidence, and the

factual findings it is setting forth in the order is what the postconviction court determined to be competent, substantial evidence.[9]

Likewise, Appellant faults the postconviction court for not treating the testimony of lay persons as absolute truths, such as the testimony of Appellant's brother, John Haliburton. IB at 66-68. However, this was something that the United States Supreme Court in *Moore* cautioned against. *Moore*, 137 S. Ct. at 1051-52 ("[t]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled . . . Those stereotypes, much more than medical and clinical appraisals, should spark skepticism."). Further, there was good reason to take a closer look at what Appellant's siblings and friends disclosed to Dr. Frumkin as large parts were quite contradictory to previous claims (much of which was given under oath at Appellant's sentencing proceeding in 1983 and penalty phase proceeding in 1988). See, generally, PCR 1034-1048.[10]

[9] See ANTONIN SCALIA, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (1997) ("expressio unius est exclusio alterius. Expression of the one is exclusion of the other. What it means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other.").

[10] This assertion will be elaborated on, *infra*, with specific examples made by Haliburton's family during a previous hearing where a different outcome was desired.

Appellant is fundamentally asking for this Court to "second guess" the postconviction court's determinations regarding the credibility of the witnesses, which is "contrary to this Court's case law." *See Diaz v. State*, 132 So. 3d 93, 122 (Fla. 2013) (holding that "this Court is required to respect the postconviction court's determination as to the credibility of the experts' testimonies regarding the deficits in adaptive functioning prong) (citing *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011); *Brown*, 959 So. 2d at 149). As such, there was competent substantial evidence for the postconviction court to find that Appellant did not prove any deficits in the conceptual domain by clear and convincing evidence.

As to the two remaining domains, the postconviction court's factual findings are not contradictory or in violation of the Supreme Court's pronouncements in *Moore* and comply with prevailing clinical standards. In *Moore*, the Supreme Court found that the Texas court's consideration of Moore's adaptive behavior deviated from prevailing clinical standards. *Moore*, 137 S. Ct. at 1050. Specifically, the Court faulted the Texas court for overemphasizing Moore's adaptive strengths and concluding that his strengths overcame "the considerable objective evidence of Moore's adaptive deficits." *Id*. The Court cautioned in *Moore* that a trial court should

not overemphasize an individual's adaptive strengths and should not rely on strengths developed in a controlled setting like prison.[11] *Id.*

Appellant conflates the postconviction court's order to suggest it "then did what the law expressly forbids it to do: it scoured the record for putative strengths to offset or 'explain' the deficits it did find." IB at 65. However, unlike in *Moore*, the postconviction court here did not find considerable objective evidence of Appellant's adaptive deficits. In fact, the postconviction court's order demonstrates it evaluated the evidence or lack thereof to determine whether the claimed adaptive deficits actually existed. *See Williams*, 226 So. 3d at 769 ("In evaluating adaptive deficits. . . after [the trial court] considers "the findings of experts and all other evidence," Fla. R. Crim. P. 3.203(e), it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations.") (citing *Dufour v. State*, 69 So. 3d 235, 250 (Fla. 2011)).

In synthesizing the evidence presented relating to the social domain, the court focused on the testimony from both of the experts, noting there seemed to be

[11] See *Moore*, 137 S. Ct. at 1050 (citing DSM-5 and noting that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained").

agreement amongst both of the experts, as well as the family who was interviewed, that this was Appellant's strongest area.

Finally, when analyzing the practical domain, Dr. Frumkin suggested that Appellant was a "worker bee" who could only complete tasks with very specific direction. PCR 614. Dr. Brannon, on the other hand, reported that Appellant had spoken at length about his work in the lawn care business, what it entailed (arriving to work on time, listening to instructions, getting to job sites, cutting lawns, etc.) and that he had, in fact, liked the work. PCR 709. Both Dr. Frumkin and Dr Brannon testified about a course that Appellant had nearly completed; testimony that the postconviction court accepted as an important factor:

> Dr. Frumkin and Dr. Brannon both also reported that at the time of Defendant's arrest, he was enrolled in a CETA class for auto body repair. Defendant's instructor, Cyril Jones, testified at Defendant's 1988 penalty phase that Defendant was in the class for approximately twenty-three weeks (up to the time of his arrest), that he was a "good student" who "worked hard," and that he would have helped Defendant find a job in auto repair had he completed the course. (ROA Vol. 6, Tr. 14323-145:13.). Although John H. Haliburton testified at the May 13, 2019 evidentiary hearing that he had never known Defendant to have been enrolled in an auto body class, both John H. Haliburton and John R. Haliburton had testified at Defendant's 1983 penalty phase that Defendant was taking those classes and further hoped to open a business with John R. Haliburton, who is an auto mechanic. (ROA Vol. 15, Tr. 72:7-73:10; 82:10-83:1.)

PCR 939. Thus, the factual evidence demonstrated to the postconviction court that both Appellant's employment history as well as his employment potential, did not support a deficit in the practical domain.

When Dr. Frumkin opined that prong two was satisfied based on lack of adaptive functioning noting a deficit in math, he then gave a lengthy opinion on what adaptive functioning is in a general sense, concluding that Haliburton possessed deficits in at least two areas. PCR 628. Without ever specifying what the second areas might be, Dr. Frumkin again went into a general description focusing on his interviews with Haliburton's family, discussing his interactions with them, their descriptions of Haliburton, and how the family members scored the defendant. Dr. Frumkin noted the family members told him that Haliburton did not know how to "wash clothes", had "poor problem-solving skills", could not "follow direction", did not know "how to cook" to name a few. PCR 630-31. After noting that everyone agreed that Haliburton received high scores in the areas of social and interpersonal skills, Dr. Frumkin simply concluded that he would summarize Haliburton's level of adaptive functioning as "poor" and that "he certainly meets criteria two for intellectual disability" stating that he has "two or more deficits in adaptive functioning." PCR 633. Even though Dr. Frumkin appears to have taken the information provided by Haliburton's family as verities, the postconviction court understandably did not do so. Considering each of the family members knew exactly

what was going to be done with the results of their interviews, it means that, whether it was done intentionally or not, the information provided to Dr. Frumkin to support his finding regarding prong two was likely result driven and can thus be considered biased and unreliable.[12]

Further, this case is distinguishable from Moore in that the postconviction court did not "overemphasize" Appellant's strengths while in prison, as Appellant suggests. *See Wright*, 256 So. 3d at 776-777 (holding no *Moore* violation occurred where the postconviction court's credibility determinations relied on expert testimony with regard to connected adaptive deficits and "did not arbitrarily offset deficits with unconnected strengths.")

As this Court recently analyzed in *Wright*:

> In *Moore*, one of the reasons that the Supreme Court reversed was because the CCA "overemphasized" the defendant's adaptive strengths. *Id*. The CCA concluded that the defendant's adaptive strengths "constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits" even though the "medical community focuses the adaptive-functioning

[12] Importantly, Haliburton was arrested for this crime when he was 27 years old. All of the siblings interviewed were only able to reference a discrete number of years during childhood where they had enough exposure to Haliburton in order to have exposure to the facts used to form their opinion – in other words, this was not a family unit where all of the children lived together in the same house from birth until they reached the age of majority. All of the evidence seems to suggest that all of the children lived a very tumultuous childhood, were repeatedly and frequently moved from house to house, with no stability to speak of. Further, the siblings were not kept together during each of these moves which further limited the exposure to assist in a meaningful opinion of Appellant's abilities.

> inquiry on adaptive deficits." *Id.* The Supreme Court further explained that "the CCA stressed Moore's improved behavior in prison" despite experts' "caution[ing] against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.* (quoting DSM-5, at 38). It is uncertain exactly where *Moore* drew the tenuous line of "overemphasis" on adaptive strengths. In fact, that uncertainty spawned the dissent's criticism. *Id.* at 1058-59 (Roberts, C.J., dissenting) ("The Court faults the CCA for 'overemphasiz[ing]' strengths and 'stress[ing]' Moore's conduct in prison, ante, at 1050, suggesting that some—but not too much—consideration of strengths and prison functioning is acceptable. The Court's only guidance on when 'some' becomes 'too much'? Citations to clinical guides." (alterations in original)).

Id. at 776.

While the postconviction court referenced Appellant's conduct and descriptions of his current incarceration, this was only one basis of the entire analysis on the issue and was a valid consideration when analyzing Appellant's alleged deficits in adaptive behavior. The postconviction court did not arbitrarily offset deficits with unconnected strengths because those considerations were also consistent with clinical standards for evaluating adaptive behavior which the postconviction court noted would be reflective of "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility…" including "awareness of other's thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment" as well as "competence in memory, language, reading, writing,

math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations" PCR 935. As such, Appellant's descriptions of preferred reading material, favorite television shows, current religion, and ability to adapt to prison life demonstrated that he did not suffer from these conceptual difficulties as an adult. Similarly, Appellant's requests on behalf of not only himself, but other inmates, are indicative of Appellant's ability to communicate effectively as well as his social engagement. They also show both a desire and ability to take care of not only himself, but that he is also committed to looking out for others. PCR 938.

Additionally, the skills in prison were not overemphasized when considering the competent, substantial expert testimony regarding Appellant's behavior before being incarcerated. To this point, most of the postconviction court's analysis of the skills that Appellant exhibited while in prison were indicative that Appellant did not suffer from adaptive deficits in the social domain. PCR 937-38. Thus, the postconviction court had competent, substantial evidence to find Appellant did not suffer from adaptive deficits and did not overemphasize skills developed in prison, which only furthered the already established lack of existing deficits.

Finally, while Appellant takes exception to the testimony of lay persons not being accepted as verities by the postconviction court, the court did in fact consider and reject components of the testimony. IB 67-69. The postconviction court is not required to reiterate and repeat its factual findings in certain sections of its order for

this Court to find that there was competent, substantial evidence to support the postconviction court's ultimate determinations. Moreover, the standard is competent substantial evidence to support the court's factual findings; not what evidence the postconviction court rejected.

In fact, it is argued by the State, and accepted by the postconviction court that the current testimony of the lay witnesses, as well as the information provided by these witnesses to the experts, is unreliable because of their inherent inconsistencies. This becomes clear when John H. Haliburton's testimony from the previous hearing is compared to his testimony at the 2019 evidentiary hearing. Additionally, the State argues Dr. Frumkin's expert opinion is further undermined when the Court considers his heavy reliance upon the Haliburton family's historical facts to support his assertion of intellectual disability. The following statements were given under oath during the penalty phases which followed both of Haliburton's convictions.

During Haliburton's first penalty phase, John Henry Haliburton, Jr. made the following sworn statements:

- After the defendant's release from prison in January of 1981, he got a job working on cars (painting, fixing, and body shop work) and was in CETA (Comprehensive Employment and Training Act) training to do autobody work. ROA 1035.
- The defendant and brother John Richard Haliburton (JR) discussed opening an autobody shop together (JR is an auto mechanic). ROA 1036.
- At the time of the murder, the defendant was working full time in an autobody program. ROA 1037.

- The defendant was not violent toward family or neighbors. ROA 1037.
- The defendant was not disturbed or violent. He was normal and tried to make everyone happy. The defendant would tell jokes and laugh. He was the family joker who would cheer up people. ROA 1037-38.
- After the defendant got out of prison he was not as happy go lucky – he was more mature and wanted to get his life together and did get his life together. ROA 1043.

The following statements were made by another of the defendant's brothers, John Richard Haliburton (JR):

- JR and the defendant were in contact on a daily basis from January of 1981 until the defendant's arrest for murder in August of 1981. ROA 1046.
- In 1981, the defendant was taking care of his family, working, and going to school. ROA 1046.
- JR had made plans with the defendant to get a business together. JR was to be the mechanic and the defendant was going to do the autobody work. ROA 1046.
- The defendant was in CETA program studying to do autobody work. ROA 1046.
- In 1981, JR never saw the defendant violent with anyone. He was always helpful and didn't express hard feelings toward neighbors, either black or white. ROA 1047
- JR saw no signs of any mental problems in 1981. ROA 1047

During the defendant's second penalty phase in 1988, the family members' statements were largely consistent with their testimony in the first penalty phase hearing, with additional family members offering evidence. The relevant statements are below.

John Henry Haliburton, Jr. testified as follows:

- The defendant has close family ties with his mother and siblings. ROA 1219.
- The defendant is good to his siblings. ROA 1219.
- The defendant told John "don't do the things I did, but do as I say." ROA 1219.
- The defendant has been a positive influence on John Haliburton Jr.'s children and has been kind, makes the kids feel loved, cares for them and will protect them. ROA 1220.
- Since 1981, the defendant has an improved attitude on life and is more positive. ROA1221-22.
- The defendant was not a fighter. He was very helpful to the community, for example, the mixed-race neighborhood residents. ROA 1222-23.
- The defendant would babysit his sibling's children, make sure the children were taken care of, would not leave the children unattended, and protected them. "He would not allow my brothers and sisters to leave their kids 'wide open'" (meaning unattended.) ROA 1223.
- The defendant would bring hungry kids from the neighborhood home for a meal. ROA 1223-24.

John Richard Haliburton (JR) testified as follows:

- Since the defendant has been incarcerated, JR has maintained contact with the defendant including letters and visits. ROA 1233-34.
- The defendant is close with his family and tells the kids to do the right thing. The defendant loves his family and has a positive influence on the children and they love him. ROA 1233.
- While growing up, the defendant was helpful to friends and strangers who were hungry were brought home for a meal. ROA 1234.
- Since 1981, the defendant acts a lot stronger and positive toward good things and his outlook on life has improved. ROA 1235.

Freddie Haliburton, a younger brother, testified as follows:

- Growing up, the defendant was a good influence on Freddie and did not want him to fall behind. The defendant leaned on Freddie not to follow in the bad things the defendant had done. ROA 1241.
- The defendant told Freddie to stay in school and to do better things in life and would get on Freddie's case when he did something wrong and would tell him what he had done that was wrong. ROA 1241.

Harris Haliburton, one of the Appellant's older brothers testified as follows:

- The defendant has close ties to his family, and sometimes his mother and sister would leave the defendant in charge of the kids. The defendant would make sure everyone ate and got a bath before bed and would allow television until it was time for bed and then would put them to bed. This was before 1981. ROA 1246.
- The defendant would "ride" his siblings about their care of their kids. ROA 1246.
- The defendant brought hungry people home to be fed when he was growing up. ROA 1248.
- In the summer of 1969 when the defendant was 14 or 15, there was a head-on accident and the defendant went to help. He broke open the door to one car and helped the lady lay back calmly. The defendant told the lady not to touch her head because there was lots of glass. When another black male stole the lady's bag, the defendant went after the man and brought the lady's bag back to her. The defendant would not take anything for his efforts. ROA 1248-51.
- When a white football player hit one of their brothers, the defendant stopped Harris from hitting the white boy. The defendant then went to talk to the white boy and got both Harris and the white boy laughing. ROA 1251-52.

Cyril Jones, a teacher in the Palm Beach school system testified as follows:

- He taught the defendant in the CEDA program in 1981 from March of 1981 to August 1981, some 23 weeks, teaching him auto repair and auto-body repair. ROA 1254.

- The defendant was a good student who worked hard, never gave Cyril any trouble, and was very polite. ROA 1254.
- Cyril would have helped the defendant find a job if he had been able to complete the course.[13] ROA 1255.

Finally, and possibly the most noteworthy, is what the defendant himself had to say during the hearing:

- He has close ties to family even presently and has matured in prison. "I'm beginning to comprehend more of the world and myself. That's what I'm into, getting rid of self and letting God take control, in that direction." ROA 1269.
- Haliburton said he used to have violence in him, but now he has matured. "But now I'm going in a different route. I express myself mentally." ROA 1271.

And lastly, when discussing how he guides younger inmates out of dangerous situations, the defendant stated:

> As you know, in that kind of situation, people begin to get frustrated, angry, they don't know how to deal with things. And I try to tone them down so they can deal with it mentally. Because violence only breeds violence. This is the point of view I try to show them. That way they have a better perspective on life. I see a lot of mean in them. That's why I can go to them and sit down and talk to them. There's a lot of kids in there and they don't want to listen to you. If you begin to talk to them and treat them like men, they tone down….
>
> Like I said before, I had bad parts about myself that I didn't like, that I didn't know how to deal with. I didn't know how to express myself like a mature individual. The only way I knew was through violence at that time. But

[13] Haliburton did not complete this course due to his arrest for the instant murder charge.

> now I'm going in a different route. I express myself mentally.

ROA 1270-71.[14]

When taking into account the considerable emphasis that Dr. Frumkin placed on the information received from these outside sources, it is impossible not to question the validity of his opinion. This contrary information is provided to show that the current statements given to Dr. Frumkin are unreliable. Quite simply, because of their contradictory nature with the prior sworn testimony, the new accounts cannot be trusted. Essentially, if the input date is not truthful, accurate and timely, then the resulting output is unreliable and of no useful value. As a result, the final report of Dr. Frumkin and his ultimate opinion of intellectual disability, which relied upon those biased and inconsistent statements is also unreliable, cannot be trusted, and therefore must be discounted.

iii. <u>Appellant did not prove by clear and convincing evidence that he had deficits rising to the level of intellectual disability which manifested prior to age 18.</u>

Appellant was required to not only prove prongs I and II by clear and convincing evidence, but also "the age of manifestation." *See Salazar*, 188 So. 3d at 813 ("The United States Supreme Court explained that this prong requires that a

[14] When acknowledging the disparity between the current accounts and testimony and the older testimony, it is important to recognize that the apparent goal of the testimony offered during the penalty phase was for Appellant to avoid a death sentence and was not offered to address an intellectual disability.

defendant demonstrate that his "intellectual deficiencies manifested while he was in the 'developmental stage'—that is, before he reached adulthood." *Brumfield v. Cain*, 576 U.S. 305 (2015).").

Appellant claims that there is "no dispute" as to whether he satisfied the third prong of the intellectual disability criteria by clear and convincing evidence. IB at 71. However, satisfying prong three is meaningless unless prongs one and two have also been satisfied. While it is true that Dr. Brannon acknowledged that Appellant's deficits did manifest prior to the age of 18, Dr. Brannon also very clearly stated that those deficits did not meet the criteria of intellectual disability. PCR 730. In fact, what Dr. Brannon said was that Haliburton was "[I]dentified as having low IQ and placed in special education classes before the age of 18. PCR 735. Dr. Brannon also testified, as noted in the postconviction court's order, "I don't argue that he has deficits. I do think he has deficits, I don't think he's in the average IQ range. I think he has deficits in his adaptive skills as well as his intellectual skills, but not to where it meets criteria for intellectual disability. PCR 730; 894. In other words, the fulfillment of prong three is meaningless as it is nullified by Appellant's inability to prove both prongs one and two by clear and convincing evidence.[15]

[15] The irrelevance of prong three absent the satisfaction of prongs one and two is supported by Dr. Frumkin's testimony when he noted specifically that Appellant had "[o]nset of **intellectual disability** before age 18. Emphasis added. PCR 610.

Regarding prong three, Dr. Frumkin seems to base his opinion that this prong was met on the fact that Haliburton completed only up to the ninth grade and had difficulty functioning in a regular academic class. While he references some quotes, one noting that Haliburton had a "mental handicap" and the other saying, "Jerry needs help in all salient areas", the simple facts are that this information only supports the notion that Haliburton had some difficulty in school – nothing about the information suggests that the difficulty was based on his lack of intellectual capacity. PCR 611.

In fact, while Appellant's own defense expert Dr. Frumkin was oddly silent on recounting any actual factual history related to him by Haliburton regarding his childhood, Dr. Brannon went into it quite extensively, noting:

> He was in special education classes and, then, of course, we also knew that there were some tumultuous, maladaptive dysfunctional things that happened in his home in his childhood as he was growing up.
>
> We also knew there were some problems following rules and regulations so we knew from the records early on. So all of those things can have an impact on results of early testing, school records, etc….
>
> So he again explained to me a pretty dysfunctional family upbringing, complete with different kinds of abuse, both physical and sexual abuse. So he reported that things were quite chaotic there as a result of that and said that he had lived with his grandmother but also had lived with his mother. He said he ran away from home based upon the abuse that he was getting both from the grandmother and a stepfather, physical and sexual abuse.

> He reported that in school that he had problems both with hyperactivity and attentiveness. He talked about being bored in school. He said he had behavioral problems there as well, so a lot of difficulties and problems in terms of, you know, following the rules and regulations in school. He said he was never suspended or expelled, but that he was always in some kind of trouble.

PCR 692; 695; 698.

In fact, it is equally as likely that Haliburton's eventual disenrollment from school in the 10th grade was attributable to his tumultuous home life, his lack of motivation, an undiagnosed attention deficit hyperactivity disorder, substance abuse, preference for sports or social activities, boredom, or any other disruptions one may imagine and was not, in fact, due to any adaptive deficit. Here, the reality is that the evidence supports the notion that Appellant's adaptive deficits prior to the age of eighteen are "a result of behavioral or psychological issues (rather than intellectual disability)"and thus "does not run afoul of *Hall*." *See Glover*, 226 So. 3d at 810 (holding "[t]estimony and records provide substantial and competent evidence Glover was able to communicate, care for himself, and live normally in his home with others," and "his performance at school belies any contention of intellectual disability.").

Considering all of this, there is competent substantial evidence to support the postconviction court's ruling that Appellant did not prove by clear and convincing evidence that he is intellectually disabled.

2. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE FIFTH, SIXTH, EIGHTH, OR FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION.

Florida's death penalty statute, Fla. Stat. § 921.141 (2017), was amended after, and in comport with, the decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Neither *Hurst* nor the new statute create a new crime with new elements. Haliburton's attempt to avoid this Court's retroactivity ruling by asserting a substantive statutory right under the new statute is patently without merit. The postconviction court correctly denied Haliburton's claims presented in the successive postconviction motion. In any event, as Haliburton's judgment and sentence became final on June 28, 1986,[16] he is foreclosed from receiving *Hurst* relief.[17]

A. The statutory construction in Hurst II does not constitute substantive law.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court held that the jury must find the aggravators that make the defendant eligible for the death sentence. *Id*. at 622. The Court expressly recognized that the error in allowing a sentencing judge to find the existence of aggravating factors, independent of a jury's fact-finding, is subject to harmless error review. Holding with tradition though, the Court remanded *Hurst* back to this Court for a harmless error analysis. *Id*. at 624.

[16] *Haliburton v. Florida,* 501 U.S. 1259 (1991).
[17] In *State v. Poole*, 292 So. 3d 694 (Fla. 2020), this Court receded from its prior decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

The *Hurst v. Florida* decision emanated from the earlier Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Apprendi*, the Supreme Court held that a defendant is entitled to a jury determination of any fact designed to increase the maximum punishment allowed by a statute. *Id*.

Subsequently, in *Ring v. Arizona*, the Court extended its holding in *Apprendi* to capital cases. *Ring*, 536 U.S. at 589. "Arizona's capital sentencing scheme violated *Apprendi's* rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." *Hurst v. Florida*, 136 S. Ct. at 621. "Specifically, a judge could sentence [a defendant] to death only after independently finding at least one aggravating circumstance." *Id*. Because it was the judge, and not a jury, which conducted the fact-finding to enhance the penalty, "Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment." *Id*.

In *Hurst v. Florida*, the Court held that Florida's capital sentencing structure violated *Ring* because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst v. Florida*, 136 S. Ct. at 621-22. Also, under *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), the jury's role in sentencing a defendant to capital punishment was viewed as advisory. *Spaziano*, 433 So. 2d at 512. Thus, the Supreme Court held Florida's capital sentencing structure, "which required the judge alone to find the existence of an aggravating circumstance",

violated its decision in *Ring*, and overruled portions of its prior decisions of *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Hurst v. Florida*, 136 S. Ct. at 622-25.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

In *Schriro v. Summerlin*, the Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was procedural and non-retroactive. *Id*. at 353. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id*. The Court concluded its opinion by stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims

indefinitely in hopes that we will one day have a change of heart. *Summerlin*, 542 U.S. at 358.

Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. *Ring* did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial. If *Ring* was not retroactive, then *Hurst v. Florida* cannot be retroactive since that case is merely an application of *Ring* to Florida. In fact, the decision in *Hurst v. Florida* is based on an entire line of jurisprudence, none of which has ever been held to be retroactive. See *DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam) (holding the Court's decision *in Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F. 3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F. 3d 864, 866-67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi's* "prototypical procedural rule" in various contexts, are not retroactive); *Crayton v. United States*, 799 F. 3d 623, 624-25 (7th Cir. 2015) cert. denied, 136 S. Ct. 424 (2015) (holding that *Alleyne v. United States*, 570 U.S. 99 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply

retroactively). Since the Supreme Court has expressly found that *Ring* was not retroactive, *Hurst v. Florida*, which applied *Ring* to invalidate Florida's statute, is also not retroactive under federal law.

Upon remand, this Court had to interpret and apply the *Hurst v. Florida* decision to the facts in that case. However, this Court did not limit its review to the question of whether the error under the Sixth Amendment was harmless as identified by the Supreme Court. Instead, this Court concluded that the state constitutional right to a jury trial mandates that a defendant's right to unanimous jury findings regarding the elements of a criminal offense applies not only to the existence of an aggravating factor but also to whether the aggravating factors are sufficient and are not outweighed by mitigating circumstances. Using that starting point, this Court found such a *Hurst* error was not harmless. This Court also found that the *Hurst* error was not retroactive to those defendants whose cases were final before *Ring*. *Asay v. State*, 210 So. 3d 1 (Fla. 2016). The *Asay* decision is binding on lower courts and is dispositive of the *Hurst* claim.

Hurst reflected a change in this state's decisional law, and, in *Asay*, this Court concluded "that *Hurst* should not be applied retroactively to [a] case, in which the death sentence became final before the issuance of *Ring*." *Asay*, 210 So. 3d at 22. However, Haliburton, whose sentence became final in 1986, asserts that he has a right to retroactivity. IB 74.

Florida's new capital sentencing scheme, neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). These changes to the sentencing procedure did not create a new offense. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Haliburton's case had been in place for decades. The only changes made for a death recommendation were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation.

Under Florida law, there is no crime expressly termed "capital first-degree murder." Florida law prohibits first-degree murder, which is, by definition, a capital crime. Rather, in Florida, first-degree murder is, by its very definition, a capital felony. Thus, the crime of first-degree murder, of which Haliburton was convicted, is defined in section 782.04 as a capital felony—this is regardless of whether the death penalty is ultimately imposed. This illustrates that the penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) before the court can impose the death penalty for first-degree murder, and (2) only after a conviction or adjudication of guilt for first-

degree murder has occurred. Thus, Haliburton's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder—during the guilt phase. The conviction for first-degree murder must occur before and independently of the penalty-phase findings required by *Hurst* and its related legislative enactments.

If a rule of law is not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. See Fla. Std. J. Inst. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). Florida law has required that the State prove aggravators at the beyond-a-reasonable-doubt standard of proof for over three decades. *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So. 2d 270, 286 (Fla. 2004)); cf. *Floyd v. State*, 497 So. 2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt").

B. The impact of *State v. Poole*

The revision to Florida's death penalty statute in 2017 was made in the aftermath of *Hurst* and implements the changes from *Hurst*. In general, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc*., 67 So. 3d 187, 195 (Fla. 2011). There is no express statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. *See also* Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6-7 (noting that this Court's retroactive application to post-*Ring* decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further, as the Eleventh Circuit Court of Appeals noted in *Lambrix v. Secretary, Dep't of Corr*., 872 F. 3d 1170, 1183 (11th Cir. 2017):

> [N]o U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute.

Defendants are simply not entitled to a new penalty phase every time there is a change in the sentencing statute. *See also Asay v. State*, 224 So. 3d 695, 703 (Fla.

2017) (rejecting claim that chapter 2017-1 "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"). In *Asay* and *Mosley v. State*, 209 So. 3d 12 38 (Fla. 2016), this Court determined which cases were to receive the benefit of *Hurst*. This Court has consistently precluded *Hurst* from being applied retroactively to capital defendants, like Haliburton, whose sentences were final pre-*Ring*. There is nothing in *Hurst*, or its progeny, to indicate that Florida's new sentencing scheme creates a greater offense of capital murder.

What is more, this Court recently receded from *Hurst v. State* and clarified that *Hurst v. Florida* only requires that "a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, 292 So. 3d 694, 697 (Fla. 2020); *McKinney v. Arizona*,[18] 140 S. Ct. 702, 705 (2020).

With regard to the additional *Hurst v. State* requirements, the Court clarified that any aggravator is sufficient to impose death; therefore, no additional sufficiency determination is required. See *Poole*, 292 So. 3d at 709:

> [O]ur Court was wrong in *Hurst v. State* when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously. Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.

[18] Notably, the Court also held that *Hurst v. Florida*, like *Ring* before it, is not retroactive. *McKinney*, 140 S. Ct. 702, 708 (2020) ("*Ring* and *Hurst* do not apply retroactively on collateral review").

Finally, with regard to the additional *Hurst v. State* requirement of a unanimous jury recommendation, the Court held:

> [W]e further erred in *Hurst v. State* when we held that the Eighth Amendment requires a unanimous jury recommendation of death. The Supreme Court rejected that exact argument in *Spaziano v. Florida*, 468 U.S. 447 (1984). See *Spaziano*, 468 U.S. at 465; *see also Harris v. Alabama*, 513 U.S. 504, 515 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence."). We are bound by Supreme Court precedents that construe the United States Constitution.

Poole, 292 So. 3d at 711.

With regard to the second and third additional requirements specifically, (weighing and recommendation, respectively), this Court expressly stated that "Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) [weighing] selection finding or that the jury recommend a sentence of death." *Poole*, 292 So. 3d at 709; *see also id*. at 721 ("There is no basis in state or federal law for treating as elements the additional unanimous jury findings and recommendation that we mandated in *Hurst v. State*.").

Additionally, the Court clarified that weighing aggravating circumstances and mitigating factors "is not a 'fact' that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Poole*, 292 So. 3d at 710. Accordingly, that determination need not be made by a jury because the Eighth

Amendment does not require jury sentencing in capital cases. *Id*. at 715, citing *Hurst v. Florida*, 136 S. Ct. at 621.

In applying the decision to the facts of this case, it is clear there was no underlying constitutional error. In this case, like *Poole*, Haliburton's jury made the required finding of an aggravating (or "eligibility") factor, and that is all that either the United States or Florida Constitutions require.

The right to a jury trial under the Sixth Amendment and its corresponding provision in the Florida constitution has been limited to just that, the trial, not sentencing. See *Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from the Supreme Court has mandated jury sentencing in a capital case, and such a holding would require reading a mandate into the Constitution that is simply not there.

With its decision in *Poole*, the Florida Supreme Court determined that it had erred in *Hurst* in several ways, including by holding that the "Eighth Amendment requires a unanimous jury recommendation of death." *Poole*, 292 So. 3d 694 at 711. In reaching this conclusion, the Court outlined Florida's historical capital sentencing

law, as well as, "the principles underlying the [U.S.] Supreme Court's capital punishment cases" and noted, "Those cases 'address two different aspects of the capital decision-making process: the eligibility decision and the selection decision."' *Id*. at 707 (quoting *Tuilaepa v. California*, 512 U.S. 967, 971 (1994)). While the eligibility decision narrows the class of those who commit murder to persons eligible for a more severe sentence, the selection decision encompasses a determination whether a person eligible for the death penalty should receive such a sentence. *Poole*, 292 So. 3d 694 at 707. After analyzing the distinctions between those two decisions, the *Poole* opinion unambiguously announced:

> This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution, mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

Poole, 292 So. 3d 694 at 709. Rather, the Florida Supreme Court concluded, "The section 921.141(3)(b) selection finding is not a fact."' *Id*. (emphasis added). The Court explained its rationale: "A subjective determination like the one that section 921.141(3)(b) calls for cannot be analogized to an element of a crime; it does not lend itself to being objectively verifiable. Instead, it is a 'discretionary judgment call that neither the state nor federal constitution entrusts exclusively to the jury."' *Id*. at 709-10 (quoting *State v. Wood*, 580 S.W. 3d 566, 585 (Mo. 2019)). Thus, in partially,

but significantly, receding from *Hurst v. State*, *Poole* unequivocally states that the jury is constitutionally required to make only one finding: "the existence of one or more statutory aggravating circumstances." *Poole*, 292 So. 3d 694 at 709.

This Court has repeatedly upheld Florida's death penalty statutes against claims that the death sentence is arbitrarily and capriciously imposed. *See, e.g.*, *Hodges v. State*, 885 So. 2d 338, 359 & n. 9 and 10 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"). The Florida Supreme Court has also repeatedly rejected similar "cruel and unusual punishment" claims "that Florida's death penalty system is not in accord with evolving standards of decency." *Correll v. State*, 184 So. 3d 478, 485 (Fla. 2015); see *Hunter v. State*, 175 So. 3d 699, 710 (Fla. 2015); *McLean v. State*, 147 So. 3d 504, 514 (Fla. 2014); *Kimbrough v. State*, 125 So. 3d 752, 53-54 (Fla. 2013); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the trial court's denial of Haliburton's Successive Postconviction Motion.

Respectfully submitted,
ASHLEY MOODY
ATTORNEY GENERAL

/S/ RHONDA GIGER
Assistant Attorney General
Florida Bar No. 0119896
1515 N. Flagler Drive, Suite 900
West Palm Beach, Florida 33401
Telephone: 561.837.5016
Rhonda.Giger@myfloridalegal.com
E-Service: capapp@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Todd G. Scher, Counsel for Defendant at: schert@ccsr.state.fl.us, and Brittney Lacy, Counsel for Defendant at: lacyb@ccsr.state.fl.us, this 20th day of August, 2020.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this foregoing Answer Brief is 14-point Times New Roman, in compliance with Rule 9.100 (1), Florida Rules of Appellate Procedure.