NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LEON HALIBURTON,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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June 27, 2022

CAPITAL CASE

QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth and Fourteenth Amendments preclude the execution of defendants with intellectual disability, but left to the States the task of developing a mechanism to determine who is intellectually disabled, including the standard of proof.

Of the 24 states that have the death penalty, only Florida and Arizona employ the higher clear and convincing standard of proof.

This case presents the question whether it is consistent with the Eighth and Fourteenth Amendments for States to impose on a capital defendant the burden of proving intellectual disability by clear and convincing evidence.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jerry Leon Haliburton, a death sentenced individual in the State of Florida, was the Movant/Petitioner in the circuit court and the Appellant in the Florida Supreme Court.

The State of Florida, Respondent, was the Respondent in the circuit court and the Appellee in the Florida Supreme Court proceedings.

NOTICE OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings relate to this case:

Underlying Trial:

Circuit in and for Palm Beach County, Florida
State of Florida v. Jerry L. Haliburton, No. 1982-CF-001893 (Merged with case No. 1981-CF-005015)
Judgment Entered: April 11, 1988

Direct Appeal:

Supreme Court of Florida, Case No. SC60-72277
Jerry Haliburton v. State of Florida, 561 So. 2d 248 (Fla. 1990)
Judgment Entered: June 18, 1990

Supreme Court of the United States, Case No. 90-5512
Jerry Haliburton v. State of Florida, 111 S. Ct. 2910 (1991)
Judgment Entered: June 28, 1991

Initial Postconviction Proceeding:

Circuit in and for Palm Beach County, Florida
State of Florida v. Jerry Haliburton, No. 1982-CF-001893
Judgment Entered: April 13, 1994

Supreme Court of Florida, Case No. SC60-83749
Jerry Leon Haliburton v. State of Florida, 691 So. 2d 466 (Fla. 1997)
Judgment Entered: April 10, 1997

State Habeas Proceeding:

Supreme Court of Florida, Case No. SC60-79382
Jerry Leon Haliburton v. Harry K. Singletary, Jr., Sec'y Fla. Dep't of Corr., 691 So. 2d 466 (Fla. 1997)
Judgment Entered: April 10, 1997

Postconviction Proceeding:

Circuit in and for Palm Beach County, Florida
State of Florida v. Jerry Leon Haliburton, No. 1982-CF-001893
Judgment Entered: December 19, 2000

Supreme Court of Florida, Case No. SC01-413
Jerry Leon Haliburton v. State of Florida (no opinion)
Judgment Entered: November 5, 2001

Federal habeas Proceedings:

United States District Court for the Southern District of Florida
Jerry Leon Haliburton v. James v. Crosby, Sec'y Fla. Dep't of Corr., No. 98-8225-CIV-MORENO, 160 F. Supp. 2d 1382 (S.D. Fla. Sept. 10, 2001)
Judgment Entered: September 10, 2001

United States Court of Appeals for the Eleventh Circuit, Case No. 01-15865
Jerry Leon Haliburton v. James v. Crosby, Sec'y Fla. Dep't of Corr., 342 F.3d 1233 (11th Cir. 2003)
Judgment Entered: August 21, 2003

United States Court of Appeals for the Eleventh Circuit, Case No. 01-15865-P
Jerry Leon Haliburton v. James v. Crosby, Sec'y Fla. Dep't of Corr., 87 Fed. Appx. 716 (11th Cir. 2003)
Judgment Entered: October 21, 2003

Supreme Court of the United States, Case No. 03-9553
Jerry Leon Haliburton v. James v. Crosby, Sec'y Fla. Dep't of Corr., 124 S. Ct. 2813 (2004)
Judgment Entered: June 7, 2004

Second State Habeas Proceeding:

Supreme Court of Florida, Case No. SC03-1108
Jerry Leon Haliburton v. James v. Crosby, Sec'y Fla. Dep't of Corr.
Judgment Entered: December 19, 2003

Second Postconviction Proceeding:

Circuit in and for Palm Beach County, Florida
State of Florida v. Jerry Haliburton, No. 1982-CF-001893
Judgment Entered: March 1, 2005

Supreme Court of Florida, Case No. SC05-1811
Jerry Leon Haliburton v. State of Florida
Judgment Entered: July 10, 2006

Third Postconviction Proceeding:

Circuit in and for Palm Beach County, Florida
State of Florida v. Jerry Haliburton, No. 1982-CF-001893
Judgment Entered: March 13, 2012

Supreme Court of Florida, Case No. SC12-893
Jerry Leon Haliburton v. State of Florida, 123 So. 3d 1146 (Fla. 2013)
Judgment Entered: September 24, 2013

Supreme Court of the United States, Case No. 13-10790
Jerry Haliburton v. State of Florida, 135 S. Ct. 178 (2014)
Judgment Entered: November 7, 2014

On remand:

Supreme Court of Florida, Case No. SC12-893
Jerry Leon Haliburton v. State of Florida, 163 So. 3d 509 (Fla. 2015)
Judgment Entered: February 5, 2015

Proceedings on Remand for Evidentiary Hearing

Circuit in and for Palm Beach County, Florida
State of Florida v. Jerry Haliburton, No. 1982-CF-001893
Judgment Entered: September 27, 2019

Supreme Court of Florida, Case No. SC19-1858
Jerry Haliburton v. State of Florida, 331 So. 3d 640 (Fla. 2021)
Judgment Entered: January 27, 2022

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PETITION FOR A WRIT OF CERTIORARI

Jerry Leon Haliburton respectfully petitions for the issuance of a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. The order of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County denying that motion is unreported. That order is attached as Appendix A. On June 17, 2021, the Florida Supreme Court affirmed the lower court's decision, in an opinion reported as *Haliburton v. State*, 331 So. 3d 640 (Fla. 2021). That opinion is attached as Appendix B.

JURISDICTION

The Florida Supreme Court's final judgment was entered on June 17, 2021 and denied rehearing on January 27, 2022. That order is attached as Appendix C. On April 19, 2022, Justice Thomas extended the time for filing of this petition through June 27, 2022. This Court has jurisdiction to review it under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Haliburton's Background

Jerry Leon Haliburton's intellectual disability became clear early on. Born September 19, 1954, Haliburton was one of more than 23 siblings.[1] Surrounded by adults with addiction and their own deficits in functioning, Haliburton was subject to habitual abuse and neglect, and was often targeted because of his cognitive limitations.

Because his mother, Eula worked multiple jobs and his father, John Henry was an alcoholic absent from their lives,[2] the children spent several years in the care of their grandmother, Minnie Mae Jones. The full record in this case, from trial through postconviction, is rife with detailed accounts of Minnie's incessant and terrifying abuse of the children, specifically targeting Haliburton. Minnie was a terrible alcoholic who used the monthly assistance check to pay for her Gordon's gin supply while forcing the children to rummage through the garbage bins behind local grocery stores to find food that she would wash and feed the children. If they failed, Minnie reacted violently. She would beat the children for hours with iron cords, fan belts, and switches, often until they bled. Sometimes the beatings occurred multiple times in one day (2000-Fed EH Vol. 1, 63–64, 66–67).

Haliburton's siblings noticed that he "didn't have common sense" and could

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[1] John Henry Haliburton, Sr. had many extramarital affairs resulting in such a large and combined family. Not all 23 children lived in the home. There were more siblings when Haliburton was very small, and by the time he was in adolescence, approximately 7 or 8 children were in the home at once.

[2] The record shows that John Henry gave Haliburton beer and vodka when he was only two-years-old.

not cook or even complete household chores without supervision or assistance. His siblings reported that he struggled to perform basic tasks including making sandwiches or folding clothing. Minnie focused her abuse on Haliburton, calling him "stupid" and "retarded." It made matters worse when he couldn't perform chores as she demanded (2019-R 630; 2000-Fed EH Vol. 1, 63).

School records establish that Haliburton had cognitive impairments, specifically identifying a "difficulty functioning in a regular academic class," "need[ing] help in all salient areas," and that he has a "mental handicap." (App. 39). Haliburton struggled to read and perform his school work. Although younger than Haliburton, his brother John Henry Haliburton, Jr. (John Henry, Jr.) assisted him with homework. The school system elevated Haliburton from grade to grade despite his failing grades and inability to complete assignments (*see* App. 38–45, 125).

At about nine years old, Haliburton and seven siblings moved back in with their mother. Eula could not read or write and was terrible with money. Eula worked multiple jobs leaving the children unsupervised and uncared for. At the time, she was involved with a man named Roosevelt Ford, the two fought violently and he beat the children (2000-Fed EH Vol. 2, 72).

Around this time, James Harris, a man in his forties, rented a room in the building. He attempted to take on the father role of the children, paying special attention to the boys. He, too, beat Haliburton and his siblings; and overtime, it became clear he was molesting Haliburton and his brothers. Whenever Mr. Harris made a misstep, he would convince Eula he was in the right. Eula minimized

concerns about his treatment toward the children and moved Haliburton into Mr. Harris's room, essentially selling Haliburton to Mr. Harris in exchange for presents and money. Mr. Harris repeatedly molested and raped Haliburton (2000-Fed EH Vol. 1, 62–65; Vol. 1, 126; Vol. 2, 75; Vol. 2, 87).

At around eleven, another older man named James Rogers entered Haliburton's life. Mr. Rogers introduced Haliburton to heroin, supplying and infecting him with the drug over and over again for hours on end. They also drank and took pills (2000-Fed EH Vol. 2, 77).

Haliburton suffered from headaches and blackouts. His mental health deteriorated quickly, and by the age of 14, he attempted suicide at least three times. On one occasion, he crashed a car into a tree which resulted in a deep-coma and multi-day hospitalization (2019-R Supp 1798).

In 1968, at age 14, he was administered the Slosson Intelligence Test for Children and Adults (SIT) and scored an overall IQ of 68. The school declared Haliburton to have a mental handicap and placed him in special education classes to combat his slow progress. Haliburton dropped out of school after the 9th grade (App. 40).

At the age of 27, Haliburton was indicted for the murder of a neighbor, Donald Bohannon. After a jury found him guilty and recommended the death penalty, the Florida Supreme Court reversed the conviction and sentence on appeal. *Haliburton v. State*, 476 So. 2d 192, 193–94 (Fla. 1985). The State sought certiorari review by this Court, which reversed and remanded. *Florida v. Haliburton*, 475 U.S.

1078 (1986). On remand, the Florida Supreme Court reinstated its reversal of the conviction. *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987).

Haliburton's second trial spanned three days and the penalty phase just over four hours. The jury deliberated for a mere 45 minutes and returned a non-unanimous advisory death recommendation by a vote of nine to three after the judge explained that the final decision as to punishment rested solely on the court. In 1988, Haliburton was again sentenced to death. *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990); (*see also* App. 59–60).

Haliburton's convictions and death sentence have been upheld throughout his collateral proceedings. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997) (affirming the denial of motion for postconviction relief and denying a state habeas petition); *Haliburton v. Crosby*, 342 F.3d 1233 (11th Cir. 2003), *cert. denied*, *Haliburton v. Crosby*, 541 U.S. 1087 (2004).

While Haliburton's Eleventh Circuit appeal was pending, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). Haliburton filed a petition for writ of habeas corpus in the Florida Supreme Court based on *Ring* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which the court denied. *Haliburton v. Crosby*, 865 So. 2d 480 (2003) (Table). In his state habeas petition, Haliburton highlighted his cognitive impairments and limitations.

B. Intellectual Disability Litigation

Following this Court's issuance of *Atkins v. Virginia*, 536 U.S. 304 (2002), on October 1, 2004, the Florida Supreme Court promulgated Florida Rule of Criminal

Procedure 3.203 setting forth procedures to determine whether capital defendants are intellectually disabled.

Haliburton timely filed a successive postconviction motion challenging his conviction and sentence under Rule 3.851 (Florida's standard postconviction procedure in death cases)[3] asserting his ineligibility for execution due to his intellectual disability. He further argued that *Ring* required that a jury must decide unanimously decide and beyond a reasonable doubt whether a defendant is intellectually disabled, because intellectual disability is a factual issue upon which a defendant's eligibility for death turns. In support, counsel submitted a 2010 report of Dr. Bruce Frumkin who conducted a clinical interview of Haliburton and administered several tests including The Wechsler Adult Intelligence Scale – IV (WAIS-IV) (2019-R 1795–1800). Haliburton obtained a Full-Scale IQ score of 74 on the WAIS-IV with the confidence interval being between 70 and 79. Dr. Frumkin found that the IQ score was within the range of mild mental retardation (2019-R 609).

To assess Haliburton's adaptive functioning, Dr. Frumkin conducted interviews of several siblings and a former employer. He used both the Adaptive Behavior Assessment System-II (ABAS-II) and the Vineland Adaptive Behavior Scales (VABS-II) in his interviews of the siblings and conducted the Wide Range Achievement Test-4 (WRAT-4). Dr. Frumkin concluded that Haliburton has deficits

[3] Successive Motion to Vacate Sentence of Death with Special Request for Leave to Amend, Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. 82–1893, filed December 1, 2004.

in functional academic skills, using community resources, self-direction, and communication (2019-R Supp 1798–99).

Dr. Frumkin also reviewed voluminous records from Department of Corrections (DOC) records, prior neuropsychological reports and raw data, and school records. A review of Haliburton's school records in conjunction with the information of Haliburton's coma and drug use led Dr. Frumkin to believe that cognitive deficits were developmental and that the onset was prior to the age of 18 (2019-R 667; 2019-R Supp 1800).

Dr. Frumkin concluded that Haliburton is intellectually disabled, noting that his 74 full scale IQ score "is likely a slight overestimation of his true intellectual functioning," and "is significantly subaverage and statistically equivalent to an IQ score of 70." Dr. Frumkin further noted that he has a number of significant deficits in adaptive functioning and that his deficiencies began prior to 18 (2019-R 1800).

Relying on *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) *abrogated by Hall v. Florida*, 572 U.S. 701 (2014), the circuit court summarily denied Haliburton's motion because his IQ score was above the arbitrary bright-line cut-off IQ score of 70. Haliburton filed a petition for writ to certiorari to this Court, challenging the lower court's reliance on *Cherry*. While that petition was pending, this Court issued *Hall v. Florida,* holding that Florida's rule requiring an IQ score of 70 or less to determine intellectual disability was unconstitutional, abrogating the Florida Supreme Court's decision in *Cherry*. This Court reasoned that Florida's system using a hardline IQ score requirement to determine who is intellectually disabled

was contrary to established clinical practice, "[i]ntellectual disability is a condition not a number." *Hall*, 572 U.S. at 723.

In light of *Hall*, this Court granted Haliburton's petition for writ of certiorari, vacated the state court's denial of his intellectual disability claim, and remanded the case to the Florida Supreme Court. *Haliburton v. Florida*, 135 S. Ct. 178 (2014) (mem.). Upon reconsideration, the Florida Supreme Court vacated its previous order and remanded to the circuit court for an evidentiary hearing pursuant to Rule 3.203. *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015).

The circuit court held an evidentiary hearing which lasted nearly a full day and included the testimony of three witnesses: Haliburton's younger brother, John Henry Haliburton, Jr., Defense Expert Dr. Bruce Frumkin, and State Expert Dr. Michael Brannon. Documentary evidence was also introduced including expert reports from both Dr. Brannon and Dr. Frumkin, notes from Dr. Brannon's interview with Haliburton, and Haliburton's school records (2019-R 528–804).

As a threshold mater, Haliburton argued that the clear and convincing burden of proof Florida imposes in intellectual disability cases is impermissibly high and unconstitutional under both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Noting that the Florida Supreme Court has not squarely addressed these issues, Haliburton urged the circuit court to look to the opinion in *Cooper v. Oklahoma*, 517 U.S. 348 (1996) for guidance in assessing the proper burden to prohibit the execution of intellectually disabled defendants (2019-R 895–900).

John Henry Haliburton, Jr. testified about their lives as children, confirming much of the detail provided above. He struggled when talking about the abuse stating, "Hell is not even a good word for it." 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." John explained how his brother's limitations made him a greater target for their grandmother, when she came home, he froze in fear and the siblings had to help him hide. Haliburton struggled to complete chores – John recalls him struggling to fold clothes, make a basic sandwich or even think to use a trash bag when filling it with leaves – causing the other children to complete them for him in order to avoid further abuse from Minnie. She called Haliburton "Stupid. Retarded. Dumb. Good for nothing." (2019-R 539; 542–43; 554; 541).

Even as the younger brother, John understood things Haliburton did not and assisted Haliburton with his homework. While Haliburton was elevated from grade to grade, even if he failed or did not complete the work given (2019-R 554; 557). Haliburton never lived on his own, never paid any bills, and never opened a bank account. John observed Haliburton use money to buy things, but when he handed money to the store clerk, Haliburton just accepted whatever the clerk returned to him. John testified that Haliburton never counted the money, and often would walk away before the clerk had a chance to hand over change (2019-R 548).

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. He has dozens of publications in the area of psychology, including a publication in the American Judges Association (2019-R 571; 573; 574–75).

Dr. Frumkin testified about the testing he administered to Haliburton in 2010. Haliburton obtained a full-scale score of 74 on the WAIS-IV, with the confidence interval falling between 70 and 79. He noted that all of Haliburton's IQ scores, achieved on accepted test instruments under the statute, have all fallen within a window of 70–79. This establishes that Haliburton has significantly subaverage intellectual functioning as required by Florida Statute and Florida law (2019-R 657; 609).

Dr. Frumkin administered a WRAT, which measures multiple different areas of functional academics including reading, spelling and arithmetic. Dr. Frumkin determined that Haliburton exhibited deficits in math – placing him in lower 4th to 14th percentile or a 3rd grade level – and communication (2019-R 596–97; 617; 624).

Dr. Frumkin testified that Haliburton's performance on the WRAT-4 is consistent with intellectual disability, and there were no signs of a learning disability. Based upon the tests of effort he conducted, Dr. Frumkin had no reason to believe that Haliburton was attempting to feign or exaggerate his level of cognitive deficits. He testified that Haliburton had "very poor vocabulary" which required Dr. Frumkin to have to use "very simple words" when communicating. He explained that Haliburton could not "really form extractions" and "was concrete in his thinking." Dr. Frumkin spent four hours with Haliburton during this

evaluation, and he opined that Haliburton "came across as someone with intellectual deficiencies." (2019-R 608; 616).

Dr. Frumkin testified about the prior interviews he had conducted as well as the ABAS-II he had administered on Haliburton's three siblings: older sister, Helen Edward; older brother, John R. Haliburton; and younger brother, John H. Haliburton. He also interviewed Haliburton's former landscaping employer, Charles Johnson. 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, a topic Dr. Frumkin has written about. Dr. Frumkin testified that Haliburton's siblings scored in a range from 50–69 on the ABAS-II; however, the family members had limitations of their own and may not have understood the questions or how to answer. Nonetheless, Dr. Frumkin testified that the score of 50 places Haliburton in the "lower one-tenth of one percent range in terms of adaptive functioning" and the score of 69 puts Haliburton in the lower 2 percentile range. Based on his own observations and the interviews, Dr. Frumkin opined that he believes Haliburton functions closer to the 69 score, the lower 2 percentile range (2019-R 629–30).

Interviews with his family members confirmed that Haliburton struggled with normal, routine day-to-day tasks.

Helen Edwards explained that Haliburton had poor reading comprehension skills. She noted that even as her brother got older, he still could not cook, clean or do laundry. As a result of his inability to complete these basic chores, grandma

Minnie often targeted him for abuse (2019-R Supp 1799).

John Henry Jr. explained that Haliburton had no problem-solving skills, lacked common sense, and was unable to follow directions involving more than three blocks (2019-R Supp 1799).

His older brother, John R., told Dr. Frumkin that Haliburton "wasn't smart." He didn't believe Haliburton knew how to cook and hardly ever saw him try. John R. explained that Haliburton was not "up to speed" on academics and that he almost overdosed because he could not remember how to properly take his medication (2019-R 630; 2019-R Supp 1799).

Dr. Frumkin concluded that Haliburton had deficits in adaptive functioning in at least two areas,[4] and therefore, met the second criteria for intellectual disability (2019-R 633).

Looking to Haliburton's school records, Dr. Frumkin found that Haliburton was intellectual disability before the age of 18. Dr. Frumkin opined that based on the records he reviewed, interviews conducted, and the testing he administered, Haliburton met the criteria for intellectual disability (2019-R 610; 633– 34).

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

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[4] It is important to note that the updated criteria of Intellectual Disability only require deficits in one domain. AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. Text Rev. 2013) (1952).

In support of Dr. Brannon's testimony, he interviewed Haliburton and one sibling. Dr. Brannon administered one effort test, and did not conduct any IQ testing. The State has never conducted any IQ testing of Haliburton.

Dr. Brannon reviewed only a portion of the records available, acknowledging that he did not review the material Dr. Frumkin relied on. He did not review prior testing data or reports from more than five other practitioners nor did he review 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 prior thirty-eight years. Dr. Brannon was only "familiar" with three of Haliburton's five prior test scores. He was not aware of two IQ scores of 74 and 75, nor did he review data from these tests. (2019-R 784; 740–42).

Dr. Brannon ultimately concluded that he does not agree that Haliburton has subaverage intellectual functioning, and therefore he does not meet prong one of the intellectual disability criteria. Dr. Brannon concluded that because two of three scores he was familiar with were in the higher range, 79 and 80, those must be indicative of Haliburton's abilities. Dr. Brannon did not consider the full-scale IQ score of 75 Haliburton received in 1988 (prior to the 79 and 80 Brannon considered), the full-scale of 74 he received in 2009, or the score of 68 on the Slosson screening test given by the Palm Beach County schools.

With respect to adaptive functioning, Dr. Brannon relied on his clinical interview of Haliburton and his interview of John Henry Haliburton, Jr. Unlike Dr. Frumkin, Dr. Brannon did not administer any adaptive functioning testing, and

noted that Dr. Frumkin had already completed the testing (2019-R 785).

In his interview of Haliburton, Dr. Brannon asked only surface-level questions and did not ask follow up or clarifying questions to ascertain whether Haliburton knew or understood the answers he gave. At the hearing, he described his findings and opinions using vague, blanket statements, many of which are belied by the record (*see* 2019-R 734–791). When asked about the gaps, Dr. Brannon filled in the gaps with his own assumptions.

Dr. Brannon did not revise his position when confronted with data showing that he had wrong impressions and beliefs of the case. For example, Dr. Brannon testified that Haliburton's poor performance at school was a result of boredom and bad behavior that was documented in the records. On cross, Dr. Brannon admitted that neither the school records nor the thousands of pages of prison records contain any mention of an undiagnosed attention deficit disorder or behavioral issues (2019-R 758–59).

Dr. Brannon knew Haliburton has a child, but did not follow up and ask whether he knew the child's birthdate or ever changed a diaper. He testified about Haliburton's ability to play football and listed skills he believes are required, yet he acknowledged Haliburton was allowed to roam the field because he could not comprehend the plays (2019-R 705; 736). Dr. Brannon testified that Haliburton arranged for rides to work, however, on cross, he agreed that Haliburton told him that "Mr. Johnson's truck picked him up for work" (2019-R 716; 789).

According to Dr. Brannon, Haliburton claimed he played a lot of chess and

could beat the doctor. Dr. Brannon, however, never asked Haliburton about the rules, or to name the pieces. He did not interview any guards or inmates; and on cross, he conceded that he does not know if Haliburton has ever won or even played an actual game of chess in his life (2019-R 716; 773)

When explaining Haliburton could not cook, Dr. Brannon assumed it was because the sisters took care of this task. He did not ask why Haliburton could not cook or ask if his own assumptions were true. None of the siblings ever said as much.

Dr. Brannon concluded that Haliburton does not suffer from severe adaptive deficits because he "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." At the time of the interview, Haliburton had been on death row nearly 30 years. Death row does not offer or provide access to programming or courses. Dr. Brannon agreed that in this time, Haliburton is in solitary confinement and is provided approximately one hour of yard time a week. While he does have access to books, Haliburton primarily sits in his cell watching TV and praying. Haliburton does not have control over his own care (2019-R 777–79).

Notably, Dr. Brannon found that Haliburton's laughter when asked whether he had ever slapped a duck indicated he doesn't have severe adaptive deficits (2019-R 720–21).

Dr. Brannon did, however, acknowledge that Haliburton meets the criteria for prong three, 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).

In September 2019, the circuit court rendered a decision denying Haliburton's motion on the basis that he failed to meet the first and second prong of intellectual disability[5] (App. 2–24). The court concluded that although Haliburton's IQ is below average, he "failed to demonstrate that his IQ is two or more standard deviations from the mean." (App. 12).

With respect to adaptive deficits, the circuit court found,

> 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.

(App. 15) (emphasis added).

While it acknowledged other states follow a preponderance of the evidence standard, the court noted that "Florida has yet to follow suit;" and it found that "under the current state of [Florida] law, it remains bound to apply the clear-and-convincing-evidence standard." (App. 8).

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[5] While Haliburton's intellectual disability as a bar to execution claim was pending, this Court decided *Hurst v. Florida*, 572 U.S. 92 (2016). Haliburton time filed a successive postconviction motion to vacate his death sentence under Rule 3.851, an amendment thereto, and a supplement to the amendment in light of a serious of decisions issued by this Court and the Florida Supreme Court. As amended, the motion included six claims asserting that his non-unanimous death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments as described in *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The circuit court denied these claims (in conjunction with Haliburton's intellectual disability claim) on September 27, 2019, on authority of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), and cognate cases. The Florida Supreme Court affirmed. *Haliburton v. State*, 331 So. 3d 640 (Fla, 2021).

C. The Florida Supreme Court Opinion at Issue

Haliburton appealed, setting forth a number of reasons how the lower court erred in concluding that he is not intellectually disabled, and is therefore categorically protected by the Constitution from the death sentence he is serving; and that the lower court's application of the clear and convincing burden of proof was unconstitutional (App. 47–134). Relying on principally on *Cooper v. Oklahoma*, Haliburton asserted that Florida's use of the clear and convincing burden in intellectual disability determinations violated due process (App. 102–10).

Affirming the decision below, the Florida Supreme Court held that both "the trial court's finding that Haliburton failed to establish that he has significantly subaverage general intellectual functioning," and the finding "that Haliburton 'has failed to demonstrate by clear and convincing evidence that he satisfies the second prong of the intellectual disability analysis'" are both "supported by competent, substantial evidence." *Haliburton*, 331 So. 3d at 647, 650. Notwithstanding the record below, the Florida Supreme Court found that, "[h]aving '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." *Id.* at 650.

The Florida Supreme Court concluded that because Haliburton would not meet the preponderance of the evidence standard, it was unnecessary to address the constitutionality of the clear and convincing evidence standard. However, in support of this conclusion, the court noted that the lower court had discredited Defense

Expert Dr. Frumkin. Although the court relied heavily on the testimony of Dr. Brannon, it did not discredit Dr. Frumkin. The circuit court made findings that "the witnesses [were] generally credible" (2019-R 931).

REASONS FOR GRANTING THE WRIT

The Decision Below Unconstitutionally Imposed on Haliburton the Burden of Proving his Intellectual Disability by Clear and Convincing Evidence

The Eighth Amendment to the United States Constitution prohibits the execution of an individual, like Haliburton, who suffers from intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002). In determining whether someone meets the criteria and is constitutionally protected from execution, the court must implore a "holistic" assessment. *See Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S.Ct. 1039 (2017) ("*Moore I*"); *Moore v. Texas*, 139 S.Ct. 666 (2019) ("*Moore II*"); *Brumfield v. Cain*, 576 U.S. 305, 315–21 (2015). In *Hall*, this Court reasoned that a "holistic" analysis requires a "conjunctive and interrelated assessment" of all three prongs of the intellectual disability test, noting that "it is not sound to view a single factor as dispositive. . . ." 572 U.S., at 723. It is against prevailing norms in the medical and scientific communities to view the prongs separate and distinct because "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." *Id.* ("[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.")

However, in performing this analysis, the Court in *Atkins*, and again in *Hall*, left it to the states to determine the appropriate burden of proof. Enumerated in Fla. Stat. Ann. § 921.137(4), the Florida standard dictates that intellectual disability determinations be subject to the clear and convincing standard. This

impermissibly high burden creates an unacceptable risk that capital defendants will be executed despite a diagnosis of intellectual disability.

Due process requires that states' rules respecting burdens of proof "allocate the risk of error between the litigants . . . [in light of] the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979); *see, e.g., Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) ("Before a State may [terminate] the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence"). The burden of proof is not an inconsequential feature of a fact finder's determination as it "often drives 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). The "standard of proof, as . . . embodied in the Due Process Clause . . . is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions." *Id.*, at 362 (*citing Addington*).

In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), this Court determined that when criminal defendants assert their incompetence to stand trial, the states cannot require them to prove it by any more demanding burden than a preponderance of the evidence. Because "consequences of erroneous determination of competence are dire," the requirement of a clear and convincing standard is "incompatible with the dictates of due process." *Id.*, at 364, 369.

Trying the incompetent defendant and one with intellectual disability encompass the same risks: limited ability to consult with counsel, capacity to testify relevantly, and ability to fully understand the proceedings. Intellectually disabled defendants "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S., at 321. Because of the reduced capacity of intellectually disabled 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)).

Whether an individual may constitutionally be executed is a question whose importance requires it to be made with as little room for error as the decision whether an individual may constitutionally be put on trial. Certainly, that is so where the determinative issue is the presence of intellectual disability.

The potential consequences of such error are grave. These risks inform one of the explicit bases for the holding in *Atkins*— concerns of wrongful conviction. "[I]n recent years a disturbing number of inmates on death row have been exonerated," *Id.*, at 321 n.25. Notably, since 1973 Florida has sent more innocent defendants to death row than any other State. *See* Death Penalty Information Center, *Death Row Exonerations*, https://deathpenaltyinfo.org/policy-issues/innocence (last visited June 25, 2022).

The Court has long invalidated as denials of due process state burden-shifting rules whose effect is to deny the substance of the underlying right. *See, e.g.,*

Morrison v. California, 291 U.S. 82, 93, 96 (1934) (reversing a conviction because "the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance"). When federal constitutional rights are at issue, as they are here, the state has an affirmative obligation to "provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Speiser*, 357 U.S., at 521.

Indeed, this is not the first time Florida has come under scrutiny for its failure to ensure the constitutional protections enumerated in *Atkins*. Following this Court's recognition of intellectual disability as a bar to execution in 2002, Florida established a now-unconstitutional requirement that only IQ scores which fell under a bright-line cut off could meet the test for intellectual disability. *See Cherry v. State*, 959 So. 2d 702 (Fla. 2007) *abrogated by Hall v. Florida*, 572 U.S. 701 (2014). By 2013, Florida courts had denied every single *Atkins* claim presented. John H. Blume et. al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 412 (2014) (of the 24 intellectual disability cases identified, every single case had been denied on the merits).

Here again, Florida's heightened burden of proof speaks to the very concerns this Court addressed in *Hall*:

> If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not

become a reality.

572 U.S., at 720–21.

Violative of due process and the Eighth Amendment, the use of the clear and convincing standard is antithetical to the very heart of *Atkins*. It appears as though the circuit court has confused the underlying right all together— rejecting evidence of mild intellectual disability. The protection against execution is not reserved only for those with severe disability; the protections enumerated in *Atkins* apply to all intellectually disabled defendants. And in these cases, the factual issue is almost always a matter of degree: whether the defendant has mild intellectual disability or no intellectual disability. The answer to that question frequently depends on evidence which is less than clear and convincing. Again, the Florida standard will frequently and predictably cause a factfinder to incorrectly determine that an individual is not intellectually disabled when they are.

Time and time again the Court has recognized that because death is different, "fact-finding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). As *Ford* held, with respect to insanity determinations, "the stakes are high, and the 'evidence' will always be imprecise." *Id.*, at 417. Such is the same here. Intellectual disability "is a multifaceted and complex condition that comes in a wide range of clinical presentations," MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 1 (Praeger) (2018). The three diagnostic criteria required to establish intellectual disability involve fact-bound inquiries and necessarily imprecise measurements. Because of this, there is a unanimous

professional recognition of the need to allow for the standard error of measurement in assessing IQ tests, for clinicians' use of the preponderance standard in making intellectual disability diagnoses, and— as this Court insisted in *Hall*— a "conjunctive and interrelated assessment," 572 U.S., at 723–24. By employing a higher standard of proof, Florida's outlier rule imposing a clear and convincing burden of proof on capital litigants asserting intellectual disability decreases reliability in sentencing and creates an unacceptable risk that intellectually disabled persons will be executed in violation of the Eighth Amendment holdings of *Moore II and Moore I, Hall,* and *Atkins.*

The circuit court here acknowledged that while many states have adopted a preponderance of the evidence standard, "Florida has yet to follow suit." (App. 8). The Florida standard, which the Florida Supreme Court recently reiterated in *Wright v. State,* 256 So. 3d 766, 771 (Fla. 2018), is unique both within Florida's own legal framework and among the remaining states with the death penalty. *Cf. Coker v. Georgia,* 433 U.S. 584, 595–96 (1977) (holding a State could not authorize capital punishment for the rape of an adult woman, as only Georgia did). This Court's decisions in *Ford* and *Cooper* have served the catalysts for many states to reject the clear and convincing standard in intellectual disability cases, determining that there is no state interest justified in the higher burden. *See Pennsylvania v. Sanchez,* 36 A.3d 24, 70 (Pa. 2011) ("[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 v. State*, 834 N.E. 2d 90, 1203 (Ind. 2005) ("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"); *State v. Williams*, 831 So. 3d 835, 859–60 (La. 2002) ("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").

States overwhelmingly recognize that the Eighth Amendment does not permit them to require proof of intellectual disability by a standard that is inconsistent with the nature of the condition itself. They have taken to heart this Court's teachings of both *Cooper* and *Ford*, invalidating Florida's procedure for

determining the sanity of a prisoner about to be executed. In *Ford* this Court wrote:

> [I]f the Constitution renders [an] execution contingent upon . . . a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscientious." *Solesbee v. Balkcom*, 339 U.S. [9, 23 (1949)] (Frankfurter, J., dissenting). That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations.

Ford, 477 U.S., at 411–12.

Despite *Ford*, in *Wright, supra*, the Florida Supreme Court explicitly reaffirmed its clear and convincing standard in the face of a renewed attack based on *Moore I*. Citing *Wright*, the circuit court here explicitly relied on the clear and convincing standard to reject Haliburton's intellectual disability claim. On appeal, Haliburton directly assailed that standard as unconstitutional. Ignoring the grave concerns of executing an intellectually disabled person, the Florida Supreme Court affirmed the circuit court ruling, finding that having "little doubt that Haliburton has, and had, 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. *Haliburton*, 331 So. 3d at, 649.

According to the circuit court, Haliburton failed because he didn't establish that his deficits were severe enough to warrant ongoing support. It is unclear how a death row defendant can establish a need of ongoing support when he is unable to

make decisions or take control of his general care. Union Correctional Institution does not permit Haliburton to shave himself or to wash and iron his state-issued uniform. He is not able to apply for or have a job. Haliburton does not have access to a kitchen and does not have to provide his own meals.

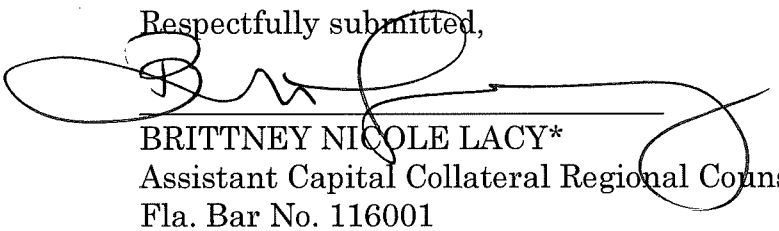
Haliburton was denied both the protections contemplated in *Atkins* and the assessment of his intellectual disability articulated in *Hall* when the circuit court relied on the clear and convincing burden of proof. Haliburton presented the data for six IQ tests he was administered on recognized testing instruments, all of which put him in the range of intellectual disability. He has presented evidence via testimony and school records of his adaptive deficits beginning in childhood. And, the State's expert conceded that Haliburton has deficits in adaptive functioning; his only quibble is with the degree (2019-R 735). What fact would have put Haliburton over the threshold for Dr. Brannon and the lower court? If only Dr. Brannon had asked follow up questions he could have seen beyond Haliburton's basic attempts at masking a lifetime of limitations.

In capital cases, the standard of proof serves as a critical component in ensuring the requirements of *Atkins* are met. The consequences of Florida's use of the clear and convincing standard in intellectual disability determinations are grave.

CONCLUSION

The petition for certiorari should be granted, and the Florida Supreme Court judgment should be reversed.

Respectfully submitted,



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