

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

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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.

THE APPLICABLE BURDEN OF PROOF

“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.

THE APPELLANT DID NOT SHOW SIGNIFICANTLY SUB-AVERAGE INTELLECTUAL FUNCTIONING

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 it 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 his IQ is two or more standard deviations from the mean. PCR 934.

- ii. Appellant failed to establish that he had concurrent significant deficits in his adaptive functioning.

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. See *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 data 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. 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.

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 UNITED 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.

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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.