

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1858

JERRY LEON HALIBURTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

CITATIONS TO THE RECORD

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

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

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

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

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

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

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

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

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

STATEMENT OF THE CASE

a. Trial and Retrial

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

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

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

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

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

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

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

After deliberating for a mere 45 minutes, the jury returned an advisory death recommendation by a vote of nine to three (PCR 3275). The jury had been instructed on only one mitigating circumstance—the “catchall” mitigating factor (PCR 3263). On April 11, 1988, the judge alone found four aggravators¹ and no mitigators. On appeal, this Court affirmed Mr. Haliburton's convictions and sentence. *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990).

b. Collateral Proceedings

In January 1992, then-Governor Lawton Chiles signed a death warrant scheduling Mr. Haliburton's execution for March 1992. Mr. Haliburton filed a Florida Rule of Criminal Procedure 3.851 motion² and a request for a stay of execution; the stay was granted and the trial court ordered an evidentiary hearing on Mr. Haliburton's claims of ineffective assistance of counsel and that the State had

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

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

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

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

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

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

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

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

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

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

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

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

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

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

prejudice to Haliburton's right to file a motion that complies with Rule 3.203(c)(2).
Haliburton v. State, SC05-1811 (Fla. July 10, 2006).

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

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

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

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

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

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

Haliburton also contends that this Court should overrule its decision in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), because it is unconstitutional. This Court has repeatedly rejected Haliburton’s argument that imposing a bright-line cutoff IQ score of 70 for finding a defendant to be [ID] and ineligible to be executed is unconstitutional. *See, e.g. Herring*, 76 So.3d at 895; *Franqui v. State*, 59 So.3d 82, 94 (Fla. 2011); *Nixon v. State*, 2 So.3d 137, 142-43 (Fla. 2009). Therefore, Haliburton is not entitled to relief. (2019-R 153-54); *Haliburton v. State*, SC12-893, 123 So. 3d 1146 (Fla. 2013) (unpublished table opinion).

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Brannon met with Mr. Haliburton at Union Correctional Institution on June 3, 2018. Defense counsel Nicole Noel and Assistant State Attorney Aleathea McRoberts both attended. Dr. Brannon administered some testing instruments but did no IQ testing. Six months later, Mr. Haliburton's counsel received Dr. Brannon's report⁹ and subsequently deposed Dr. Brannon on February 14, 2019.

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

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

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

c. 2019 Evidentiary Hearing

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

i. Defense Witnesses

A. John Henry Haliburton, Jr.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Dr. Bruce Frumkin

Dr. Frumkin is licensed to practice psychology in four states and has obtained a diplomate in forensic psychology from the American Board of Professional Psychology. Dr. Frumkin has dozens of publications in the area of psychology, including a publication in the American Judges Association (2019-R 570-72). Dr. Frumkin has published on the topic of ID, and his work on evaluating intelligence has been cited by Dr. James Flynn¹¹ (2019-R 572). Dr. Frumkin has administered thousands of IQ tests over the span of his career and has testified nearly five hundred times as an expert in psychology (2019-R 575-76).

Mr. Haliburton's collateral counsel initially hired Dr. Frumkin in 1992¹² to evaluate Mr. Haliburton to potentially be used to support allegations in a Rule 3.850 motion (2019-R 580). Following the U.S. Supreme Court decision in *Atkins v. Virginia*, collateral counsel re-contacted Dr. Frumkin to specifically assess whether Mr. Haliburton met the criteria for ID (2019-R 582). In conjunction with his two clinical interviews and forensic evaluations of Mr. Haliburton himself, Dr. Frumkin interviewed several lay witnesses and reviewed extensive records including: Florida

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IQ is somewhere between 70 and 79?

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

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

A Yes.

(2019-R 657) (emphasis added).¹⁴

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

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

A I believe he does meet the criteria.

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

A That he does have significantly subaverage intelligence.

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

Q And what is your opinion based on?

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

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

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

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

A Yes.

Q -- of significantly subaverage intellectual functioning?

A Yes.

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

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

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

He was in special education class—exceptional child education classes, a record from November 8 of 1968 from the Palm Beach County schools—I’m quoting, difficulty functioning in a regular academic class, end of quotes.

There’s another entry that talked about him having, quote, a mental handicap, end of quotes.

In 1968, 769, note from the school record says, “Jerry needs help in all salient areas,” end of quotes.

So there’s certainly documentation that he’s having problems in school because of intelligence.

(2019-R 611).

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

Adaptive functioning is basically a collection of conceptual social and practical skills that are learned by people to be able to do in their everyday life. So it’s how well someone is able to function adaptively in society.

So with conceptual skills, what I’m talking about are, their language, their functional academics, their literacy, managing money, time management, being able to manage a number of concepts, self-direction, you know, that sort of thing.

With social, it has to do with, you know, their interpersonal skills, their social responsibility, their self-esteem, their gullibility, their naivety, their social problem-solving, their ability to follow rules and not to be victimized, those sorts of things.

And then the practical has to do with -- practical skills have to do with activities of daily living, their personal care; are they able to dress themselves; are they able to brush their teeth; are there occupational skills; are they able to meet their healthcare needs; their travel, how are they able to travel; are they able to follow schedules and routines; their use of safety issues, and things like that -- their use of money; telephoning, being able to use telephones, that sort of thing.

So those are the -- you know there are three main areas; conceptual, social and practical, but there's a number of different subcategories in these different areas.

(2019-R 622).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. State Witnesses

A. Dr. Michael Brannon

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

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

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

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

¹⁷ *See supra* note 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

his notes were a better memorialization of what happened.

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

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

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

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

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

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

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

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

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

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

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

(2019-R 730) (emphasis added).

SUMMARY OF THE ARGUMENTS

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

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

ARGUMENT I

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

a. Introduction

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

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

b. Standard of Review

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

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

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

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

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

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

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

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

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

The clear and convincing evidence standard found in section 921.137(4) is impermissibly high and unconstitutional not only under the Eighth Amendment²³ but under the Due Process Clause of the Fourteenth Amendment. As the United States Supreme Court has explained: “[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ‘instruct the factfinder concerning the degree of confidence our society thinks [s]he should have in the correctness of factual conclusions for a particular type of adjudication.’” *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). “The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington*, 441 U.S. at 423. Burdens of proof “often drive[] the result,” *Raulerson v. Warden*, 928 F.3d 987, 1013 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part), and can be “decisive of the outcome.” *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

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

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

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

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

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

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

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

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

constitutional right are sufficiently protective of that right”).²⁴

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

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

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

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

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

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

unconstitutionally exclude Mr. Haliburton from proving his case.

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

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

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

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

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

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

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

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

1. First prong

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

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

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

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

scale score of 74. *Id.* Even adjusting the scores for the Flynn Effect, the Court rejected Herring’s ID claim because “the scores do not fall below 70.” *Id.* However, in light of *Hall v. Florida*, the Court reversed itself and vacated Herring’s death sentence because he “has IQ scores *under 75* from tests administered both before and after age 18 and he has previously established deficits in adaptive functioning and significantly subaverage intellectual functioning.” *Herring v. State*, SC15-1562, 2017 WL 1192999 (Fla. March 31, 2017) (emphasis added). There were no new scores at issue in *Herring*; the lowest score he obtained on an authorized test (the WAIS-III from 2004) was a 74.²⁸

Mr. Haliburton’s test scores are in line with—and in some cases are lower than—those at issue in *Hall*, *Herring*, and *Cherry*. At the outset, it is important to note the lack of disagreement between Dr. Frumkin and Dr. Brannon on one important fact as to the first prong: both agreed that Mr. Haliburton has intellectual deficits. The lower court also agreed that Mr. Haliburton has intellectual deficits (2019-R 934). Dr. Brannon’s only meaningful disagreement with Dr. Frumkin²⁹

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

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

rested on the degree of those deficits (2019-R 730;³⁰ 734-35³¹), and the degree is what this first prong comes down to.³² However, as a matter of medical standards and the law, Dr. Brannon’s decision to rely *exclusively* on (1) a score of 80 obtained on a WAIS-R administered by Dr. Frumkin in 1992 without consideration of the SEM, or the Flynn Effect, or the practice effect, as to that score of 80,³³ (2) a decades-old score of 100 on a BETA test administered by the Department of Corrections notwithstanding Dr. Brannon’s own acknowledgment of the inefficacy and unreliability of the BETA test as a valid instrument for intelligence testing,³⁴ and (3)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Second Prong

In Florida, “adaptive behavior” means “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” Fla. R. Crim. P. 3.203(b). A defendant must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. This is consistent with clinical standards and with Dr. Frumkin’s testimony (2019-R 583-85).⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Third Prong

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

e. Conclusion

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

ARGUMENT II

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION AND RELIEF SOUGHT

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

Respectfully Submitted,

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CERTIFICATE OF FONT

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

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CERTIFICATE OF SERVICE

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

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