

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC19-1858**

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**JERRY LEON HALIBURTON,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee**

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

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

**REPLY TO APPELLEE’S STATEMENT OF THE CASE AND  
FACTS.....1**

**ARGUMENT IN REPLY .....3**

**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. ....3**

**A. Clear and Convincing Evidence Burden of Proof.....4**

**1. Eighth Amendment Challenge.....4**

**2. Fourteenth Amendment Challenge .....7**

**3. Remand is Appropriate .....9**

**B. Mr. Haliburton is Intellectually Disabled .....11**

**1. Lack of Holistic Analysis .....11**

**2. Prong One .....15**

**3. Prong Two.....19**

**4. Prong Three .....23**

**CONCLUSION AND RELIEF SOUGHT.....23**

**CERTIFICATE OF FONT .....24**

**CERTIFICATE OF SERVICE .....24**

## TABLE OF AUTHORITIES

### Cases

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	2, 7
<i>Burns v. State</i> , 944 So. 2d 234 (Fla. 2006) .....	9
<i>Cannady v. State</i> , 620 So. 2d 165 (Fla. 1993) .....	23
<i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996) .....	7, 8
<i>Dufour v. State</i> , 69 So. 3d 235 (Fla. 2011) .....	9
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986).....	7
<i>Glover v. State</i> , 226 So. 3d 795 (Fla. 2017).....	5
<i>Hall v. Florida</i> , 572 U.S. 701 (2014).....	2, 5, 11
<i>Hardwick v. Sec'y, Fla. Dep't of Corr.</i> , 803 F.3d 541 (11 <sup>th</sup> Cir. 2015) .....	4
<i>Jones v. State</i> , 966 So. 2d 319 (Fla. 2007).....	10
<i>M.H. &amp; A.H. v. Dep't of Children and Family Services</i> , 977 So. 2d 755 (Fla. 2d DCA 2008) .....	5
<i>Moore v. Texas</i> , 137 S. Ct. 1039 (2017) .....	5, 12, 18
<i>Nixon v. State</i> , 2 So. 3d 137 (Fla. 2009) .....	10
<i>Oats v. State</i> , 181 So. 3d 457 (Fla. 2015) .....	11, 12, 13, 15
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	7
<i>Phillips v. State</i> , 984 So. 2d 503 (Fla. 2008) .....	10
<i>Pruitt v. State</i> , 834 N.E.2d 90 (Ind. 2005) .....	8
<i>Quince v. State</i> , 241 So. 3d 58 (Fla. 2018) .....	10
<i>Raulerson v. Warden</i> , 928 F.3d 987 (11 <sup>th</sup> Cir. 2019) .....	6
<i>State v Herring</i> , 76 So. 3d 891 (Fla. 2011).....	3
<i>Trotter v. State</i> , 932 So. 2d 1045 (Fla. 2006) .....	9

*Webster v. Watson*, 2020 WL 5638691 (7<sup>th</sup> Cir. Sept. 22, 2020) ..... 21, 22

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

**Statutes**

§921.137 (4) Fla. Stat. (2013).....4

**Other Authorities**

AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL  
OF MENTAL DISORDERS 38 (5th ed. Text Rev. 2013) (1952) .....20

**United States Code**

28 U.S.C. §2254 (e) (1).....6

## **REPLY TO APPELLEE’S STATEMENT OF THE CASE AND FACTS**

Mr. Haliburton takes issue with some of the statements made in the Appellee’s Brief [hereinafter AB] purporting to be “factual” statements. Mr. Haliburton’s disagreements are explained below.

**First:** in the section of its brief about the 2019 evidentiary hearing and the lower court’s order, the Appellee addresses the second prong of the test for intellectual disability [hereinafter ID] and includes a heading entitled “NO FINDING OF ADAPTIVE DEFICITS” (AB at 14) (capitalization in original). This is a factually false statement. Neither of the experts testified that Mr. Haliburton had presented evidence of “no adaptive deficits,” nor did the lower court make any such finding. In fact, the opposite is true; notwithstanding the claim heading in its brief, the Appellee recognizes that the lower court noted “there was an *abundance of evidence* derived from a variety of sources *regarding Haliburton’s adaptive deficits*” (AB at 15) (emphasis added); *see also* 2019-R 936 (“the Court finds that Defendant has demonstrated a significant deficit in the area of math reasoning”); 2019-R 940 (court noting that Mr. Haliburton “demonstrated a significant deficit in the area of math reasoning” and several other “remaining deficits—of which there appear to be several”). The State’s expert agreed that Mr. Haliburton has adaptive deficits. *See* 2019-R 730 (testimony of Dr. Brannon) (“I do think he has deficits, I don’t think he’s in the average IQ range”); 2019-R 734-35 (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”).

**Second**, the Appellee writes that the lower court found that “Dr. Brannon’s testimony and reasoning was more credible than that of Dr. Frumkin” (AB at 12). This is a sweepingly misleading representation of the lower court’s findings. In actuality the lower court determined that “the witnesses [were] generally credible” with some exceptions as noted in the order (2019-R 931). The principal exception was limited to Dr. Frumkin’s testimony about—and Dr. Brannon’s rejection of—the Flynn Effect on Mr. Haliburton’s IQ test scores (2019-R 934).<sup>1</sup> Contrary to the representation made by the State, there was no “finding” by the lower court that “Dr. Brannon’s testimony was more credible” on the issue of the social domain adaptive functioning prong (AB at 17) (citing PCR 938). All the lower court did was express agreement with Dr. Brannon’s “assessment” that “[o]n balance, while the Court finds Defendant’s remaining deficits—of which there appear to be several—to be of such magnitude as to say that one or more of the adaptive function domains ‘is

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<sup>1</sup> The lower court’s determination that Dr. Brannon was more “credible and persuasive” on the issue of the Flynn Effect is a bit confusing given that the court ultimately determined that both Drs. Frumkin and Brannon testified that the “Flynn Effect is something to consider” but that this Court had ruled that “*Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases” (2019-R 934). See *Hall v. Florida*, 572 U.S. 701 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002).

sufficiently impaired that ongoing support is needed” (2019-R 940) (citing *Wright v. State*, 256 So. 3d 766, 773 (Fla. 2018)). In other words, the lower court agreed with Dr. Brannon’s *legal conclusion* that, in order to meet the adaptive deficit prong, a defendant must establish that his deficits must be of such severity as to require “ongoing support.” This Court owes no deference to legal conclusions,<sup>2</sup> much less wrong legal conclusions given that the lower court misread this Court’s opinion in *Wright*. See Initial Brief at 65 n.42.

Given that there is an overall lack of citation to the record for much of the purported “facts” as set forth in the Answer Brief, and that most of the “Statement of Facts” consists of large blurbs reproducing portions of the lower court’s order, it is difficult for Mr. Haliburton to provide more specificity with respect to additional areas of disagreement about the record. To the extent possible Mr. Haliburton will address any remaining disagreements with the State in the argument section below.

### **ARGUMENT IN REPLY**

**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**

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<sup>2</sup> See *State v Herring*, 76 So. 3d 891, 894 (Fla. 2011) (whether defendant has established the three prongs of the ID test is a legal issue subject to de novo review on appeal).

**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. Clear and Convincing Evidence Burden of Proof**

As the Appellee acknowledges, Mr. Haliburton challenged below the constitutionality of the clear and convincing burden of proof for ID claims found in Florida Statutes §921.137(4) (AB at 24).<sup>3</sup> Appellee avoids directly addressing his Fourteenth Amendment challenge, focusing only on the Eighth Amendment challenge to the extent that it appears to even understand it.

**1. Eighth Amendment Challenge**

The Appellee sets up strawmen and plays fast and loose with case holdings, but reality controls these proceedings, and “the State cannot dictate reality by fiat.” *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 555 (11<sup>th</sup> Cir. 2015). Mr. Haliburton is not arguing that the clear and convincing burden “diminishes the force

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<sup>3</sup> Although it raises no actual procedural bar or timeliness argument about Mr. Haliburton's challenge to the burden of proof, the Appellee complains that Mr. Haliburton did not “raise” this challenge “during the actual evidentiary hearing” (AB at 24). Of course, he *did* raise his challenge in his pleadings, as the Appellee concedes (AB at 24). He reiterated his challenge in his post-hearing memorandum (2019-R 895-900). The purpose of the evidentiary hearing was to present the evidence; the parties made no legal arguments during the hearing, agreeing to make them in their post-hearing memoranda as ordered by the lower court (2019-R 798).

of the medical community’s consensus in *Moore* and *Hall*” (AB at 24).<sup>4</sup> Nor is he arguing that *Moore* and *Hall* somehow alter this Court’s appellate standard of review (AB at 24).<sup>5</sup> The Appellee is confusing evidentiary burdens of proof with appellate standards of review. *See M.H. & A.H. v. Dep’t of Children and Family Services*, 977 So. 2d 755, 762 (Fla. 2d DCA 2008) (a court employing the “competent and substantial evidence” standard as a burden of proof exhibits “a fundamental misapprehension of the entirely distinct functions of evidentiary standards of proof and appellate standards of review”).

What Mr. Haliburton *is* arguing is that a State imposing a clear and convincing burden “risks executing a person who suffers from” ID just as does a State “that ignores the inherent imprecision of [IQ] tests.” *Hall*, 572 U.S. at 723; *see also id.* at 712 (manner in which this Court defined ID “disregards establishes medical practice” and thus “creates an unacceptable risk that persons with intellectual disability will be executed”); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (striking factors used in Texas to determine ID because they “creat[e] an unacceptable risk that persons with intellectual disability will be executed”).

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<sup>4</sup> *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014).

<sup>5</sup> Appellee writes that in *Glover v. State*, 226 So. 3d 795, 809 (Fla. 2017), this Court “reiterated” that “clear and convincing evidence is the standard,” implying that the Court had ruled it constitutional (AB at 24). **This is made up of whole cloth.** *Glover* had **nothing** to do with the clear and convincing burden of proof; in fact, the term “clear and convincing” does not even appear in the opinion.

Citing to *Raulerson v. Warden*, 928 F.3d 987 (11<sup>th</sup> Cir. 2019), the Appellee contends that the Eleventh Circuit “approve[d] of the clear and convincing evidence standard” for establishing ID (AB at 24-25). This is a flagrant misrepresentation of *Raulerson*. In his appeal from the denial of his §2254 petition, Raulerson, a death row inmate, raised a Fourteenth Amendment challenge to Georgia’s law requiring a defendant, at a jury trial, to prove ID under a beyond-a-reasonable doubt standard, as well as a claim that he was “actually innocent” of the death penalty because he is ID. *Id.* at 996, 1004. After rejecting the challenge to the burden of proof,<sup>6</sup> the court determined that Raulerson could only prevail on his substantive ID claim if he successfully rebutted, by clear and convincing evidence, the presumption of correctness attached to the jury’s rejection of his ID claim. *Id.* at 1006 (citing 28 U.S.C. §2254(e)(1)).<sup>7</sup> In other words, *Raulerson* is a straightforward application of the federal habeas statute’s limitation on overcoming a finding of fact by a state court. **In no way** did *Raulerson* “approve” a clear and convincing burden like Florida’s (AB at 24).

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<sup>6</sup> Applying the deferential standards of 28 U.S.C. §2254(d)(1), the *Raulerson* court held that because “[n]o decision of the Supreme Court *clearly establishes* that Georgia’s burden of proof for intellectual disability violates the Due Process Clause,” relief was not available to Raulerson. *Raulerson*, 928 F.3d at 1004 (emphasis added). However, this Court’s review is *de novo* and not restricted by §2254(d)(1).

<sup>7</sup> 28 U.S.C. §2254(e)(1) provides that a federal court must presume correct any factual finding made by a state court, a presumption which can only be rebutted by clear and convincing evidence.

## 2. Fourteenth Amendment Challenge

Relying principally on *Cooper v. Oklahoma*, 517 U.S. 348 (1996), Mr. Haliburton argued that the clear and convincing burden violated due process (IB at 48 *et seq.*). Largely dodging the issue, Appellee insists that states are only required to develop “appropriate ways to implement *Atkins*’s constitutional restriction” (AB at 25), seemingly implying that the clear and convincing burden was not only an appropriate legislative response to *Atkins* with no attendant due process implications, but the State is allowed to impose a burden that is impervious to due process concerns.

*Atkins* did not authorize a State to fashion procedures untethered to the Due Process Clause. For example, when the Supreme Court banned the execution of the insane in *Ford v. Wainwright*, 477 U.S. 399 (1986), leaving to the States the development of “appropriate ways to enforce the constitutional restriction,” it made clear that due process limited the states’ options in executing that task. *Ford*, 477 U.S. at 413-16 (plurality op.) (applying 28 U.S.C. §2254(d)(2)’s “full and fair hearing” requirement to state procedures); *id.* at 424 (Powell, J., concurring in part and concurring in judgment) (noting that §2254(d)(2)’s protection “is no different from the protection afforded by procedural due process”).<sup>8</sup>

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<sup>8</sup> *Accord Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (Justice Powell’s concurring opinion in *Ford* “clearly established” that “a prisoner must be accorded an ‘opportunity to be heard’” and a “fair hearing” on the question of sanity to be

Only by eschewing *Cooper* can the Appellee avoid its indisputable application to Mr. Haliburton’s challenge to the clear and convincing burden. *See Pruitt v. State*, 834 N.E.2d 90, 101 (Ind. 2005) (finding clear and convincing standard for proving ID inconsistent with *Cooper*; “[t]he reasoning of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation”). *Cooper* directly addressed the burdens of proof a State may acceptably use to protect a fundamental constitutional right, holding that evidentiary burdens used to “guarantee[]s a fundamental constitutional right” violate due process when they “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Cooper*, 517 U.S. at 355 (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)). Applying this standard, the *Cooper* Court struck Oklahoma’s requirement that a defendant show by clear and convincing evidence that he is incompetent to stand trial. *Id.* at 356-69.

Relying on historical and contemporaneous practice, along with fundamental fairness, the Court first determined Oklahoma’s standard lacked “any roots in prior practice.” *Cooper*, 517 U.S. at 356. Second, the standard was also rare in contemporaneous practice; only four states used it. *Id.* at 360-61. Finally, Oklahoma’s rule did not exhibit “‘fundamental fairness’ in operation” because it

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executed).

“impose[d] a significant risk” that the defendant may be required to face trial and conviction despite being incompetent. *Id.* at 362-63. On the other hand, the risk to the State of an erroneous determination of incompetency was small, “subject to correction in a subsequent proceeding,” and “the State [could] detain the incompetent defendant” for the time necessary to ensure this occurred. *Id.* at 365. Because the rule did not have historical support and was unfair in practice, the Supreme Court held it insufficiently protected the fundamental right not to be tried while incompetent. This same analysis establishes that Florida’s burden on proving ID is unconstitutional.

### **3. Remand is Appropriate**

This case is unlike others raising, but not resolving, challenges to the clear and convincing standard. For example, in *Dufour v. State*, 69 So. 3d 235 (Fla. 2011), the Court rejected constitutional challenges to the clear and convincing burden because the trial court, analyzing the evidence under *both* the clear and convincing *and* preponderance standards, determined that Dufour failed to meet *either* test, and this Court decided that competent and substantial evidence supported the lower court’s conclusions *under the lower standard*.<sup>9</sup> But here, the lower court reached no

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<sup>9</sup> *Accord Trotter v. State*, 932 So. 2d 1045, 1049 n.5 (Fla. 2006) (finding it unnecessary to address challenge to clear and convincing standard “because the trial court concluded that Trotter was not mentally retarded [under] *either*” standard); *Burns v. State*, 944 So. 2d 234, 249 n.13 (Fla. 2006) (“We do not need to address claims of unconstitutionality, however, because the circuit court noted that Burns

conclusions under a lower standard or made any factual determinations that would be dispositive under a lower burden of proof;<sup>10</sup> this Court should not substitute its own judgment for that of the lower court about whether Mr. Haliburton can meet a lower burden without first allowing the circuit court to re-assess the facts under the appropriate burden.

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failed to establish mental retardation by either clear and convincing evidence *or* by a preponderance of the evidence.”) (emphasis added); *Nixon v. State*, 2 So. 3d 137, 145 (Fla. 2009) (“We need not address this claim because the circuit court held that Nixon could not establish his mental retardation under *either* the clear and convincing evidence standard *or* the preponderance of the evidence standard”) (emphasis added); *Jones v. State*, 966 So. 2d 319, 329-30 (Fla. 2007) (Court did not need to address the claim because the trial court found that “Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence”).

<sup>10</sup> For example, in *Quince v. State*, 241 So. 3d 58 (Fla. 2018), the Court rejected a challenge to the clear and convincing burden by concluding independently that Quince’s ID claim failed even under a preponderance standard. *Id.* at 63. However, in *Quince*, the lower court had made a finding, upheld by this Court, that Quince’s three scores (79, 79, 77), did not meet even the first prong. *Id.* at 60-61. *Accord Phillips v. State*, 984 So. 2d 503, 509 n.11 (Fla. 2008). Here, the lower court made no such finding; the scores on Mr. Haliburton’s testing are qualitatively different than those at issue in *Quince* and prevents the Court from reaching any conclusion under a lower standard without first affording the lower court an opportunity to re-evaluate all of the evidence with full knowledge of the proper burden of proof. Furthermore, the lower court here, unlike in *Quince*, did find that Mr. Haliburton had met the third prong of the ID test and the Appellee has acknowledged that the lower court had found “there was an *abundance of evidence* derived from a variety of sources *regarding Haliburton’s adaptive deficits*” (AB at 15) (emphasis added).

## **B. Mr. Haliburton is Intellectually Disabled**

### **1. Lack of Holistic Analysis**

The Appellee insists that the lower court conducted a proper holistic analysis (AB at 27), but the circular reasoning it employs reveals that Appellee also does not understand what a holistic evaluation is. A court does not, as Appellee argues, “review[] *each prong under a holistic approach*” (AB at 27). This is oxymoronic. By definition, a holistic evaluation requires an *interdependent* assessment of each of the three prongs of the ID test, not an *independent* review “of each prong.” Merriam-Webster defines “holistic” as “relating to or concerned with wholes or with complete systems rather than with the analysis of, treatment of, or dissection into parts.” *See* <https://www.merriam-webster.com/dictionary/holistic>. As the Supreme Court has explained that “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.” *Hall*, 572 U.S. at 712. *See also id.* at 722 (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”); *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015) (citing, *inter alia*, *Hall* and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (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’’)).

The Appellee swats away this precedent, suggesting that the Supreme Court in *Hall* did not mean what it said because the requirement of an interdependent holistic evaluation as this Court defined it in *Oats* is merely “instructive” and has been later “clarified” by later decisions of this Court (AB at 34). This Court’s understanding of a holistic evaluation in *Oats* was not something created out of whole cloth; rather, the Court was following the holdings of the Supreme Court in *Hall* and *Brumfield*, as well as those cases’ references to the Diagnostic and Statistical Manual-V (DSM-5). *See Oats*, 181 So. 3d at 467 (“[T]he Supreme Court has stressed that a single factor should not be considered dispositive because the three factors must be considered together in an interrelated assessment”) (citing *Hall*, which in turn cited the DSM-5, for the proposition that “a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person’s actual functioning is comparable to that of individuals with a lower IQ score”). *Accord Moore*, 137 S. Ct. at 1050 (“Here, by contrast, we do not end the intellectual-disability inquiry, one way or the other, based on Moore’s IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits”).

It is true, as Mr. Haliburton noted in his Initial Brief, pages 54-56, that there are decisions from this Court (some cited in the Appellee’s brief) which have deviated from *Hall*, *Brumfield*, *Moore*, *Oats*, and the DSM-5 insofar as they suggest that while a court must permit a defendant to present evidence on all three prongs it can nonetheless reject a finding of ID if one prong—independent of the others—is not satisfied.<sup>11</sup> But this view of a holistic evaluation of ID discounts to irrelevance the letter and spirit of *Hall*, the DSM-5, and this Court’s opinion in *Oats*. To be clear, Mr. Haliburton is not arguing that a court may not, after considering all three of the prongs for ID, determine that a defendant did not meet the test on any—or even all—of the prongs. What Mr. Haliburton *is* saying is that in order to do that, the law requires that the court evaluate all of the prongs in *an interrelated manner*, and not, as did the lower court here, make a prong-by-prong ruling notwithstanding Mr. Haliburton having the opportunity to present evidence on all three prongs. This is so because if “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.” *Oats*, 181 So. 3d at 467-68.

It could not be clearer that the lower court—perhaps confused by the conflicting opinions from this Court defining a holistic evaluation—did not engage

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<sup>11</sup> Of course, to make matters worse, a Florida defendant must prove ID by a clear and convincing burden of proof. *See* Section A, *supra*.

in the requisite holistic analysis Mr. Haliburton's case. The court found that Mr. Haliburton **had satisfied the third prong of the ID test** even under the exacting clear and convincing evidence standard:

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

(2019-R 941) (emphasis added).

Yet despite so finding, the lower court did not undertake an analysis of this prong *in tandem with* the other two prongs, prongs which the court rejected independently not only from each other but also from the favorable finding as to prong three. *See* 2019-R 934 (rejecting prong one without consideration of prongs

two or three, concluding that “while the Court does believe Defendant’s IQ is below average, the Court finds that Defendant has failed to demonstrate that his IQ is two or more standard deviations from the mean”); 2019-R 940 (rejecting prong two under clear and convincing evidence standard without consideration of prongs one or three and despite finding that Mr. Haliburton “does suffer significant deficits” in mathematics and has several “remaining deficits” in other areas).

In other words, while the lower court allowed Mr. Haliburton to present evidence as to all three prongs, and while the lower court did “consider” each of the prongs in its order, the court did not do a holistic evaluation—it did not examine the three prongs in tandem in order to see if the strength of the favorable finding as to prong three might be so weighty as warrant a finding of ID notwithstanding that the court did not determine that prongs one and two were independently met under the clear and convincing evidence standard. This, of course, is the whole point of the medical community’s protocol requiring a holistic evaluation of all three prongs in tandem: “a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person’s actual functioning is comparable to that of individuals with a lower IQ score.” *Oats*, 181 So. 3d at 467. The Court should remand for a proper holistic evaluation.

## **2. Prong One**

The Appellee takes significant liberty with the factual record and with the

lower court's order when addressing the intellectual functioning prong. Most glaringly, the Appellee argues that the IQ test result of a 74 obtained by Mr. Haliburton on the WAIS-IV testing instrument administered by Dr. Frumkin in 2010 "appears to be result driven" and is thus somehow "rendered unreliable" (AB at 32). The Appellee even goes so far as to accuse Dr. Frumkin of "manipulation" of Mr. Haliburton's test scores (AB at 33) ("In any event the 'manipulation' of Haliburton's IQ scores by Dr. Frumkin are enough to call into question the accuracy of the results"). This is a baseless ad hominem attack on Dr. Frumkin's testimony. Not surprisingly, there is **not one record citation** for the Appellee's "arguments" because there is absolutely nothing in the record to support such a warped version of the actual facts.

Perhaps in an attempt to mitigate its outrageous argument because it realizes the importance of a 74 IQ score, the Appellee suggests that the lower court, too, "tacitly recognized" Dr. Frumkin's score "manipulation" when it found Dr. Brannon's testimony to be "reliable, thereby rejecting that of Dr. Frumkin" (AB at 33). This is a simply remarkable thing to write on this record. First, the lower court said nothing about "score manipulation" or that the result of the 2010 WAIS-IV was "result driven"; neither did the State's expert, Dr. Brannon, who in fact testified that he had "great respect" for Dr. Frumkin, had no issue with Dr. Frumkin's testing, and declined to conduct additional adaptive deficit testing on Mr. Haliburton in reliance

on the results obtained in Dr. Frumkin’s testing (2019-R 784-85). The lower court’s “credibility” determination regarding the two experts involved their testimony about the Flynn Effect; the lower court chose to credit Dr. Brannon’s views over those of Dr. Frumkin’s and declined to apply a Flynn Effect reduction (2019-R 934). This is hardly a determination—“tacit” or otherwise—that there was score “manipulation” going on, or that there was a “result driven” reason for the 74 result on the WAIS-IV. The Appellee’s zeal to misstate the record also overlooks that Mr. Haliburton also achieved an IQ score of 74 by Dr. Barry Crown in 2009 (2019-R 932-33), and a 75 on a WAIS-R administered by Dr. Susan LaFehr Hession in 1988 in connection with Mr. Haliburton’s resentencing. In other words, the Appellee’s statement that “[i]t was not until this current evidentiary hearing that Appellant’s scores fell into the lower levels, between 74 and 74.5” is false (AB at 33).<sup>12</sup>

The Appellee devotes much of the remainder of its discussion of the first prong to relying on, for example, repugnant stereotypes and tropes to avoid addressing the actual IQ scores. *See, e.g.* AB at 36 (“Arguably, the information regarding Haliburton’s work history equally supports the fact that Haliburton was like many who are employed in the field of manual labor and was simply

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<sup>12</sup> The Appellee’s penchant for misrepresenting Mr. Haliburton’s scores is rather ironic given that it did not present an expert witness at the hearing who performed his own IQ testing despite the fact it spent *years* telling a series of lower court judges that it was securing a mental health expert to evaluate Mr. Haliburton and conduct testing. *See* Initial Brief at 9, n.7.

unmotivated and not a go-getter).<sup>13</sup> The Appellee does not want to address Mr. Haliburton's arguments concerning Dr. Brannon's exclusive reliance on scores without consideration of the standard error of measure (SEM) or on obsolete decades-old testing administered in prison. *See* Initial Brief at 59-60. The Appellee does not want to address the fact that, even without a Flynn Effect adjustment, all of the scores obtained by Mr. Haliburton over the years were consistent. He obtained a full-scale score of 80 on two WAIS-R tests administered in 1992, scores which, when applying the SEM, would be approximately 75 at the lower end of the range, as the Dr. Brannon conceded (2019-R 742-43). Mr. Haliburton obtained a full-scale score of 75 on another WAIS-R administered by Dr. LaFehr Hesson in 1988, a score which, applying the SEM, would be approximately 70 at the low end of the range,<sup>14</sup> a full-sale score of 79 on a WAIS-III administered by Dr. Eisenstein, a score which, when applying the SEM, would be approximately 74 on the low end of the range, and a full scale score of 74 on the WAIS-R administered by Dr. Crown in 2009, a score which, when applying the SEM, would be approximately 69 or 70 at the low

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<sup>13</sup> This is precisely the sort of argument the Supreme Court has cautioned against making in analyzing ID cases. *See Moore*, 137 S. Ct. at 1051-52 (“[t]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled . . . Those stereotypes much more than medical and clinical appraisals, should spark skepticism”).

<sup>14</sup> The State below did not bother to inform Dr. Brannon of the score obtained during Dr. LaFehr Hesson's testing despite the fact that there was testimony about such testing during Mr. Haliburton's prior collateral challenges.

end of the range.<sup>15</sup>

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 other cases where relief has been granted. 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 constitutes a failure to heed the proper analysis mandated by the Supreme Court and this Court.

### **3. Prong Two**

Contrary to the Appellee's histrionic portrayal of Mr. Haliburton's arguments regarding the adaptive deficit prong as "attacking" the lower court "credibility determinations" and of "misrepresenting key evidence" (AB at 39), Mr. Haliburton submits that the challenges he asserted to the lower court's analysis were based on the record and the law. In fact, Mr. Haliburton noted that the lower court did find he

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<sup>15</sup> As with the testing of Dr. LaFehr Hession, the State also did not bother to inform Dr. Brannon of the 74-score obtained by Mr. Haliburton on the WAIS-IV in 2009 (2019-R 740).

had established a number of adaptive deficits, including a “significant deficit in the areas of math reasoning” (2019-R 936). The principal challenge made by Mr. Haliburton to the lower court’s analysis of prong two, in addition to what Mr. Haliburton believes to be an improper application of an unconstitutional standard of proof, was that the court misapplied the proper analysis when it engaged in efforts to find evidence in the record to offset the deficits that it did find Mr. Haliburton had proven.

The DSM-5, which is the current manual guiding the psychological and medical community, requires that a person show adaptive deficits in only one domain. AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. Text Rev. 2013) (1952). Mr. Haliburton has established that he meets this criterion given the lower court’s findings without even resorting to discussion of all of the other evidence adduced at the evidentiary hearing. The lower court found that Mr. Haliburton “has demonstrated a significant deficit in the area of math reasoning” along with several other “remaining deficits—of which there appear to be several” (2019-R 940). As the Seventh Circuit Court of Appeals recently reaffirmed, “[a] deficit in adaptive functioning requires showing sufficient impairment in ‘at least one domain’ – but not all three.” *Webster v. Watson*,

2020 WL 5638691 at \*14 (7<sup>th</sup> Cir. Sept. 22, 2020) (quoting DSM-5 at 8; AAIDD-11 at 27).<sup>16</sup>

The recent decision by the Seventh Circuit also addresses Mr. Haliburton’s concerns about the lower court’s analysis of the adaptive deficit prong, notably its attempt to search for putative “strengths” that Mr. Haliburton may possess—as well as prison behavior—in order to offset the deficits it determined him to have by clear and convincing evidence. The Court explained:

The DSM-5 and AAIDD-11 provide additional guidance for assessing adaptive functioning. The AAIDD-11 emphasizes that demonstrating strengths in one area does not preclude a finding of intellectual disability. *See* AAIDD-11 at 47. . . . The AAIDD puts the point even more directly, explaining that ‘significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills.’ AAIDD at 47.

The DSM-5 and AAIDD-11 likewise emphasize that adaptive skills are best measured not within the structured prison environment but ‘within the context of ordinary community environments typical of the person’s age peers and tied to the person’s individualized needs for support.’ AAIDD at 16; *see also* DSM-5 at 38 (‘Adaptive functioning maybe difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained’). And the operative focus should be on ‘what the person typically does, rather

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<sup>16</sup> SCHALOCK, R. L., ET AL., USER'S GUIDE TO INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS (11th ed. American Association on Intellectual and Developmental Disabilities 2012).

than what the individual can do or could do.’ AAIDD at 47.

*Webster*, 2020 WL 5638691 at \*14-\*15. And when there is a deficit in one of the areas in the conceptual domain, such as mathematics,<sup>17</sup> “there is meaningful overlap between the evidence of intellectual deficits (measured by intelligence tests) and the evidence of deficits in the conceptual domain.” *Id.* at \*16 (quoting DSM-5 at 37).

Most of the Appellee’s brief is a reproduction of the arguments it made to the lower court in its closing memorandum; given the lower court’s ultimate conclusion on the second prong and its findings in favor of Mr. Haliburton in the area of math reasoning, the Appellee’s brief reads more as a complaint about the lower court’s analysis than does Mr. Haliburton’s brief. While the Appellee’s brief addresses a number of alleged contradictions in testimony, the lower court evaluated the information and concluded that Mr. Haliburton “does suffer significant deficits in mathematical reasoning skills” and several “remaining deficits” but those just not of sufficient magnitude to warrant a conclusion that he had met the clear and convincing burden. Under the DSM-5, the arguments above and those in the Initial Brief, Mr. Haliburton submits that the lower court erred in declining to find prong two, particularly due to its failure to conduct the proper requisite holistic evaluation.

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<sup>17</sup> The lower court in Mr. Haliburton’s case found that he had met his burden of establishing a “significant deficit in the areas of math reasoning” (2019-R 936).

#### **4. Prong Three**

The Appellee argues that Mr. Haliburton did not prove prong three (AB at 54). It does not seem to acknowledge that the lower court found prong three in Mr. Haliburton's favor, choosing instead to argue why Mr. Haliburton did not meet his burden. However, the State did not appeal the lower court's ruling on prong 3 and is thus barred from challenging it on appeal. *Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State").

#### **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 (l).

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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 24<sup>th</sup> of September, 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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