

IN THE SUPREME COURT OF FLORIDA

Freddie L. Haliburton,  
Petitioner/Appellant,

v.

CASE NO. SC09-1026  
DCA CASE No. 4D09-417

State of Florida,  
Respondent/Appellee

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PETITIONER'S BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW FROM THE  
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

Freddie L. Haliburton, Doc# 594270  
Pro Se Petitioner/Appellant

Century Correctional Institution  
400 Tedder Road  
Century, Florida 32535

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## STATEMENT OF THE CASE AND FACTS

The petitioner was charged by information with Armed Kidnapping (Count one), Aggravated Battery with a Firearm (Count two), Aggravated Assault with a Firearm (Count three), Felon in Possession of a Firearm (Count four), Resisting an Officer without Violence (Count five).

A jury trial was held on October 7, 2002, the petitioner was found not guilty on the Kidnapping and resisting charge, and because of the jury Silence on the inclusion of reference to a firearm in identifying the specific offense and separate interrogatory on count two, the petitioner was impliedly acquitted of the aggravated battery with a firearm charge, except the jury found petitioner guilty on aggravated battery causing great bodily harm as a lesser included offense on Count two, and was convicted as charged on counts three and four. The Court entered judgments in accordance to the jury's verdict.

The Court Sentence the petitioner on October 23, 2002 on the lesser included offense as a Prison Releasee Reoffender to 15 years mandatory minimum, Count 2, 5 years Count 3, 15 years Count 4, all Counts to run Concurrent. The petitioner appeal his judgment of conviction, and on January 9, 2004, the appellate Court affirmed without comment and issue its mandate.



The facts as found by the Fourth District Court below, is contained in appendix (A-1). Of particular importance to Petitioner case is the following excerpt:

No Court has held that the ruling in Sanders<sup>1</sup> applies retroactive, to cases that were final when Sanders was decided. We do not believe that the evolutionary refinement announced in Sanders, regarding how to order offenses on verdict forms, applies retroactive to disturb the finality of Haliburton's Conviction. See State v. Barnum, 921 So. 2d 513 (Fla. 2005).

<sup>1</sup> We agree with the Second District Court of Appeal that even after Sanders the question of how enhancements and reclassifications affect whether an offense is truly a "lesser" offense is still problematic. See Chambers v. State, 975 So. 2d 444 (Fla. 2d DCA 2007). The difficulty is magnified if potential recidivist Sentencing enhancements, such as the PRR Statute, must also be taken into account when fashioning a verdict form. We do not believe that recidivist sentencing enhancements that are applied by a judge after the jury enters verdicts can reasonably be factors into the determination of how offenses should be presented on a verdict form.

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<sup>1</sup> Sanders v. State, 944 So. 2d 203 (Fla. 2006),

## SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction because the District Court's decision below conflicts with a decision of the Florida Supreme Court, Ray v. State, 403 So.2d 956 (Fla. 1981), as adopted in Standard Jury Instructions in Criminal Cases, (97-2) 723 So.2d 123, 124 (1998); Acensio v. State, 497 So.2d 640 (Fla. 1986).

In Ray, this Court concluded that it is not fundamental error to convict a defendant under erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so [FN8] if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge, or relied on that charge as evidence by argument to the jury or other affirmative action. Failure to timely object precludes relief from such a conviction. While the Fourth District in its opinion acknowledges that although it now seems more clear, after the refinement of Sanders, that the great bodily harm theory should not have been listed as a "lesser" included offense, it failed to characterize the error as fundamental, such a holding overlooks the specific authority of the Schedule of Lesser Included offenses in Criminal Cases.

In the Schedule, battery is listed as a Category 1 (necessary included) lesser included offense, and the Category

2 (permissive) offenses are attempt and improper exhibition of a dangerous weapon or firearm.

The Second District Court in Chambers v. State, 975 So. 2d 444 (Fla. 2007), held; it is important to note that Ray's specific holding was that fundamental error did not occur in a case where the complained of lesser included offense was lesser in degree and lesser in penalty. Although Ray anticipated a case in which an improper instruction was listed as a lesser when it required a greater punishment, as a result, Ray did not address the specific question presented here. Is An Improper Instruction On A Lesser Included Offense Fundamental Error When The Offense With or Without Reclassification is "Lesser In Degree" But The Verdict Form Will Allow The Jury To Make The Finding That Will Permit The Court To Impose A Penalty Equal To The Most Severe Penalty Available For The Greater Offense? In this case, the Prison Releasee Reoffender Act makes no distinction between aggravated battery causing great bodily harm or deadly weapon. Because the offenses are second degree felonies, the potential sentence for the lesser included offense is equal to the potential sentence for the charged crime subject to the same enhanced sentence. The Fourth District Court's opinion failed to shed any light on applicable law which has required a splitting of the offenses in the statutory provision, aggravated battery, which are not intended by legislature to provide for separate or distinct degrees of the crime, as found in S. 782.051, Fla. Stat.

## ARGUMENT

THE DECISION OF THE DISTRICT COURT OF  
APPEAL IN THIS CASE EXPRESSLY AND  
DIRECTLY CONFLICT WITH DECISION OF  
THIS COURT ON THE SAME ISSUE OF LAW

The decision conflicts with Ray v. State, 403 So.2d 956 (Fla. 1981). Although the District Court below, concluded that: Although it now seems more clear, after the refinement of Sanders, that the great bodily harm theory should not have been listed as a "lesser" included offense, any error in this case is not fundamental error that can be raised at anytime. Cf. Ray v. State, 403 So.2d 956 (Fla. 1981) (Setting out the test for determining whether an instruction on a permissive lesser-included offense that is improperly submitted to the jury without objection can be raised as "fundamental error" on direct appeal),

Petitioner respectfully disagree for the reasons set out below. First, in Braham v. State, 766 So.2d 297 (Fla. 4th DCA 2000), the court held that according to Black's Law Dictionary, "degree of crimes" is a term used to refer to conduct that is punished to a greater or lesser extent depending upon the existence of one or more factors. See BLACK'S LAW DICTIONARY 424 (6th ed. 1990). The legislature created the crime of felony causing bodily injury and enacted Section 782.051. Because the conduct

prohibited in Section 782.051 is punished to a greater or lesser extent depending upon the existing of one or more factors, it follows that Subsections (1), (2) and (3) provide for separate or distinct degrees of the crime of felony causing bodily injury. In addition, 'degree crimes, or degree variant' are oftentimes denoted in the same Statutory Chapter, but such is not always the case." State v. Anderson, 695 So.2d 309, 311 (Fla. 1997) (Footnote omitted). Furthermore, "[d]egrees of the same offense" is limited to 'third degree,' 'second degree' or 'first degree.' It appears to mean the scope or extent of the crimes identified anywhere in Florida Statute that are essentially varieties of the same core offense. These are 'degree factors' and they are different from 'degrees of crime.'" Anderson v. State, 669 So.2d 262, 264 (Fla. 5th DCA 1995), decision approved by State v. Anderson, 695 So.2d 309 (Fla. 1997).

The highlighted text of this opinion is extremely significant by summarizing the conflict of the Fourth District Court's opinion in this case.

In Ray, this Court held that if the instant complained-of instruction had been a permissive lesser included offense, i.e., a crime of lesser degree or one subject to a lesser penalty or had been includable under Category 3 or 4 of Brown, [FN8] the district court would have been correct in affirming the conviction. Id. 403 So.2d 956 at 960.

Second, unlike Ray, in this case, the Statutory provision defining aggravated battery provides in pertinent part:

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.

Therefore, because the law requires it, battery is the only Category 1 (necessarily included) lesser offense listed for aggravated battery, under both great bodily harm and deadly weapon. The only Category 2 (permissive) offenses are attempt and improper exhibition of a dangerous weapon or firearm.

Because aggravated battery causing great bodily harm is degree variant of the same core offense by the Statutory provision, the instruction to the jury that it was a lesser offense is contrary to the Conditions of Ray as adopted in Standard Jury Instructions in Criminal Cases. Id. 723 So.2d 123, 124 (1998).

It is clear from the Fourth District Court's opinion on summarizing the facts and conclusion of law in this case that the erroneous lesser included offense, the great bodily theory should not have been listed as such on the verdict form.

However, of these facts, the Fourth District Court did not include recognition of the Ray decision, irrespective of the retroactive effect of subsequent refinement of law in Sanders v. State, 944 So.2d 203 (Fla. 2006). In fact, Ray was clearly established and controlling law at the time of petitioner's direct

appeal. The issue was properly preserved and actually argued on appeal. Had the error been reviewed under the analysis of Ray, the complained of error was fundamental under due process consideration and reversible error in accord to *Acevedo*, *Supra*. The error cannot be harmless under *Abreau*, because it is impossible to determine whether the jury would have pardoned the petitioner to the extent convicting him of battery.

The jury may have been unwilling to make the two-steps downward. More importantly, because aggravated battery causing great bodily harm are degrees of the same offense to the main charge, aggravated battery causing great bodily harm as the next immediate lesser offense did not provide the required intervening step between the second degree felony aggravated battery deadly weapon and battery. Thus, the juries mistakenly assuming that the descending verdict choices corresponded to descending sentencing severity implicated the concerns as emphasized in *Abreau*, that the jury be given a "fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime". *Id.* 363 So.2d at 1064.

The *Abreau* harmless error test does not apply to these facts.

Therefore, the district court erroneous affirmance on direct appeal denied to petitioner due process and equal protection of law under the Florida and United States Constitutions.

Notwithstanding that affirmance on direct appeal have become the law of the case, reliance on the previous decision to enforce a procedural bar on this claim would result in manifest injustice.

See Preston v. State, 444 So.2d 939 (Fla.1984).

### CONCLUSION

Based on the argument presented and authorities cited, this Honorable Court should exercise its discretionary jurisdiction and accept this case for review.

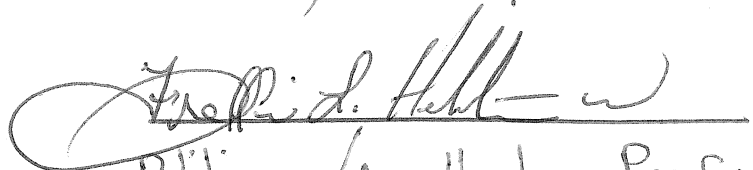
Respectfully Submitted,



Freddie L. Haliburton, Doc# 594270  
Century Correctional Institution  
400 Tedder Road  
Century, Florida 32535

### CERTIFICATE OF SERVICE

I CERTIFY that a copy of this Petitioner's Brief on Jurisdiction with Appendix has been furnished to OFFICE OF ATTORNEY GENERAL, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432 this \_\_\_\_\_ day of MAY 28 2009, 2009.



Petitioner/Appellant - Pro Se



IN THE SUPREME COURT OF FLORIDA

Freddie W. Haliburton,  
Petitioner/Appellant,

vs.

Case no.

DCA Case no. 4D09-417

State of Florida,  
Respondent/Appellee.

APPENDIX

PETITIONER'S BRIEF ON JURISDICTION

- A1 Haliburton v. State, 34 Fla. L. Weekly D682 (Fla. 4DA April 11, 2009)
- A2 Order Denying motion for rehearing filed April 13, 2009

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT  
*January Term 2009*

**FREDDIE L. HALIBURTON,**  
Appellant,

v.

**STATE OF FLORIDA,**  
Appellee.

No. 4D09-417

[April 1, 2009]

PER CURIAM.

Freddie Lee Haliburton appeals the trial court's summary denial of his Florida Rule of Criminal Procedure 3.800(a) and 3.850 motions. The motions raised variants of the same claim, and the trial court denied them in a single order ruling that the claim was impermissibly successive. We affirm. The claim is barred by the law of the case and collateral estoppel doctrines and no manifest injustice results. *See State v. McBride*, 848 So.2d 287, 291-92 (Fla. 2003).

The issue Haliburton raises was preserved and argued on direct appeal and was rejected on the merits. *Haliburton v. State*, 861 So.2d 1165 (Fla. 4th DCA 2003). Haliburton then raised this same claim in a Rule 3.800(a) motion to correct illegal sentence which was denied on the merits and affirmed. *Haliburton v. State*, 919 So.2d 457 (Fla. 4th DCA 2006). He raised the same and similar variants of the same claim again in a motion for postconviction relief. That motion was also denied and affirmed on the merits. *Haliburton v. State*, 939 So.2d 110 (Fla. 4th DCA 2006). The instant motions again raised variants of the same issue that has been repeatedly denied and rejected on appeal.

***The Offense***

Authorities received a 911 call which reported that a man was outside beating a woman with a gun and threatening to kill her. Police arrived and observed Haliburton in the street standing over the victim. He was covered in blood and holding a chrome handgun. Haliburton fled but was apprehended after a short foot chase. Police recovered the chrome

handgun which they saw Haliburton throw into the bushes as he was fleeing.

Haliburton was the victim's ex-boyfriend and, in the presence of several witnesses, abducted her from the front yard of the home of her current boyfriend's aunt. He placed her in a headlock and then forced her into his van. The victim yelled, "It's Freddie, call the police!" The victim's boyfriend attempted to stop Haliburton but was unable to do so. According to the victim's statements to police, once inside the van, Haliburton held her at gun point with a handgun he retrieved from inside the van. Haliburton struck the victim with the gun several times as he drove her to his residence and told her that he was going to kill her and commit suicide. He attempted to force her inside his home and began beating her with the handgun and pointed it at her, threatening to shoot her, after she resisted. Police arrived while Haliburton was still beating the victim.

After Haliburton was arrested, he made several incriminating statements while at the police station such as: "I told her to quit fucking with me"; "I should have shot her;" and "in six months, eight months, whenever this comes to trial, the only thing I'll be facing is the firearm charge because the rest of this is going away." Staples were required to close the 4-inch long laceration to the victim's head. Photographs of the victim's injuries were introduced at trial.

### ***The Claim***

Haliburton was convicted after a jury trial in 2002 of several offenses related to this incident, but the instant claim relates solely to his aggravated battery conviction. The information in this case charged Haliburton with aggravated battery based on alternative theories that Haliburton used a deadly weapon (i.e. the firearm) or that he intentionally caused great bodily harm to the victim. § 784.045(1)(a), Fla. Stat. (2001). At trial, the judge instructed the jury, over defense objection, that aggravated battery based on the great bodily harm theory was a lesser-included offense of aggravated battery *with a firearm*. The judge agreed with the State that the applicability of the 10-20-LIFE statute made the aggravated battery with a firearm offense a "greater" offense because the jury's finding that Haliburton possessed a firearm would call for a ten-year mandatory minimum penalty. § 775.087(2), Fla. Stat. (2001).

On direct appeal, Haliburton argued that the trial court erred in instructing the jury in the above-described manner over his objection.

He argued that, because the offenses were the same degree and carried the same maximum penalty, the jury may have been misled into believing it was convicting of a crime with a lesser penalty. We affirmed. Haliburton then raised similar claims in his initial Rule 3.800(a) and Rule 3.850 motions.

In the instant successive motions, Haliburton notes that, as a prison releasee reoffender (PRR), a conviction for a second degree felony was subject to a 15-year mandatory minimum sentence. See § 775.082(9)(a)3c, Fla. Stat. (2001). Haliburton argues that because aggravated battery carries the same 15-year PRR mandatory minimum penalty, regardless of whether a firearm is used or not, the judge did not have discretion to impose a lesser punishment. He contends that he was deprived a fair opportunity to have the jury exercise its “pardon power” and that the jury may have been misled into believing that it was convicting Haliburton of an offense that carried a lesser penalty when in fact the lesser offense called for the same punishment.

### ***Subsequent Refinements in Law***

At the time we affirmed on direct appeal, and affirmed the denial of his prior motions, the Florida Supreme Court had yet to decide *Sanders v. State*, 944 So.2d 203 (Fla. 2006). In that case, the Florida Supreme Court recognized that a lesser-included offense need not “be lesser both in degree and in penalty” in order to be listed as a lesser offense. *Id.* at 207. Nevertheless, the Court clarified that lesser offenses should be determined based “primarily and ultimately upon the applicable statutory provisions for the charged crime” and in descending order based on the degree of the offense without regard to reclassification or enhancement statutes. *Id.* Any facts that need to be determined by a jury for an enhancement or reclassification to apply should be alleged in a separate interrogatory on the verdict form. *Id.*

In this case, the trial court attempted to account for the firearm enhancement by instructing the jury that aggravated battery *with a firearm* was a greater offense. After *Sanders*, it is now apparent that “[l]esser included offenses are determined based on the elements of the offenses, not on the penalties attached.” *Carle v. State*, 983 So.2d 693, 695 (Fla. 1st DCA 2008). Under the *Sanders* procedure, the jury should have determined whether Haliburton committed the offense of aggravated battery by using a deadly weapon, by intentionally causing great bodily harm, or both. The state had alleged both theories in the information, and the jury was properly instructed that the state could prove aggravated battery under these alternative theories. The jury could have

decided whether Haliburton possessed a firearm during the aggravated battery offense in a special interrogatory. Before *Sanders*, however, the law regarding how lesser included offenses should be listed on a verdict form was less clear.<sup>1</sup>

No court has held that the ruling in *Sanders* applies retroactively to cases that were final when *Sanders* was decided. We do not believe that the evolutionary refinement announced in *Sanders*, regarding how to order offenses on a verdict form, applies retroactively to disturb the finality of Haliburton's conviction. See *State v. Barnum*, 921 So.2d 513 (Fla.2005)

### ***The Motions are Procedurally Barred***

Haliburton's untimely claim is barred by the law of the case and collateral estoppel doctrines and application of a procedural bar does not result in a manifest injustice. *McBride*, 848 So.2d at 291-92. The jury in this case was permitted to exercise its pardon power but refused to convict Haliburton of simple battery which was listed as the next lesser-included offense on the verdict form. The jury determined that the state proved beyond a reasonable doubt that Haliburton committed an aggravated battery by intentionally causing the victim great bodily harm.

Although it now seems more clear, after the refinement of *Sanders*, that the great bodily harm theory should not have been listed as a "lesser" included offense, any error in this case is not a fundamental error that can be raised *at any time*. Cf. *Ray v. State*, 403 So.2d 956 (Fla. 1981) (setting out the test for determining whether an instruction on a permissive lesser-included offense that is improperly submitted to the jury without objection can be raised as a "fundamental error" on direct appeal). See also *Bedford v. State*, 970 So.2d 935 (Fla. 4th DCA 2008) (finding that neither a fundamental error nor a manifest injustice occurred where counsel objected to the improper instruction on a

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<sup>1</sup> We agree with the Second District Court of Appeal that even after *Sanders* the question of how enhancements and reclassifications affect whether an offense is truly a "lesser" offense is still problematic. See *Chambers v. State*, 975 So.2d 444 (Fla. 2d DCA 2007). The difficulty is magnified if potential recidivist sentencing enhancements, such as the PRR statute, must also be taken into account when fashioning a verdict form. We do not believe that recidivist sentencing enhancements that are applied by a judge after the jury enters its verdict can reasonably be factored into the determination of how offenses should be presented on a verdict form.

permissive lesser-included offense but the issue was not raised on direct appeal).

Unlike the situation in *Ray* and *Bedford*, Haliburton's trial counsel objected to the instruction, and the issue was preserved and actually argued on appeal. The law at the time of the direct appeal was less clear, and this court affirmed. The subsequent refinement in the law of *Sanders* does not mean that the potential error in this case can be raised at any time, even long after the conviction has become final. See *Sanders v. State*, 946 So.2d 953 (Fla. 2006) (holding that, although the failure to instruct the jury on a necessarily lesser-included offense (one step removed) can be *per se* reversible error on direct appeal, the mere possibility that a jury might have exercised its "pardon power" cannot support an ineffective assistance of counsel claim in a postconviction motion).

In addition to being barred as successive, none of the exceptions to the two-year time limitation of the postconviction rule are satisfied in this case. Fla. R. Crim. P. 3.850(b). The collateral attack against the conviction in this case is untimely and barred as successive.

### ***Not All "Fundamental Errors" May Be Raised at Any Time***

A fundamental error has been described as "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Gudinas v. State*, 693 So.2d 953, 961 (Fla. 1997). Also, a fundamental error is described as one "where the interests of justice present a compelling demand for its application." *Sochor v. State*, 619 So.2d 285, 290 (Fla. 1993). Or, "error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970).

The "fundamental error" terminology is typically used in determining whether an error can be raised for the first time on direct appeal despite the lack of an objection at trial. See *Maddox v. State*, 760 So.2d 89, 95-96 (Fla. 2000). Nevertheless, some errors, which have also been referred to as "fundamental errors," are so serious that they amount to a denial of substantive due process and may be raised *at any time* including for the first time in a postconviction motion. *Hipp v. State*, 650 So.2d 91, 92 (Fla. 4th DCA 1995). See, e.g., *Moore v. State*, 924 So.2d 840, 841 (Fla. 4th DCA 2006) (conviction for a non-existent crime); *Pass v. State*, 922 So.2d 279, 281 (Fla. 2d DCA 2006) (application of facially

unconstitutional statute); *Smith v. State*, 741 So.2d 576, 577 (Fla. 1st DCA 1999) (violation of the prohibition against double jeopardy).

In this postconviction context, the inquiry focuses on whether a manifest injustice will occur if the error is not corrected. See, e.g., *Silverstein v. State*, 985 So.2d 635 (Fla. 4th DCA 2008); *Miller v. State*, 988 So.2d 138, 139 (Fla. 1st DCA 2008) (explaining that fundamental error and a manifest injustice result when a defendant is convicted of an offense for which the defendant could not have been convicted as a matter of law).

### **Conclusion**

The alleged error in this case is not the type of error that can be raised at any time and which calls for disturbing the finality of this conviction. The evidence that Haliburton committed an aggravated battery by intentionally causing the victim great bodily harm was strong if not overwhelming. The jury had an opportunity to exercise its “pardon power” by convicting of simple battery but refused to do so. The instruction’s potential effect on the jury’s “pardon power” is speculative and not grounds for relief in a postconviction motion. “The possibility of a jury pardon cannot form the basis for a finding of prejudice.” *Sanders*, 946 So.2d at 960. Haliburton’s claim is based on his speculation that the jury may have been misled into believing it was exercising its pardon power. The jury, however, found him guilty of aggravated battery beyond a reasonable doubt.

The instruction that the great bodily harm theory was a “lesser offense” in this case, although potentially erroneous, does not reach down into the validity of the trial such that the conviction on this count could not have been obtained without the error. Further, it did not become apparent that the instruction in this case might be in error until *Sanders v. State*, 944 So.2d 203 (Fla. 2006), was decided which was *after the conviction in this case was already final*. This refinement in the law does not apply retroactively to cases that were final on appeal.

In addition to the above circumstances, Haliburton is serving a concurrent term of fifteen years in prison on one of the other counts for which he was convicted in this case. All of the above circumstances lead us to conclude that a manifest injustice does not result in this case, and we affirm the trial court’s order denying petitioner’s successive motions.

WARNER, POLEN and STEVENSON, JJ., concur.

\* \* \*

Appeal of order denying rule 3.850 motion from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Sandra K. Mcsorley, Judge; L.T. Case No. 2002CF003729AXX.

Freddie L. Haliburton, Century, pro se.

No appearance required for appellee.

***Not final until disposition of timely filed motion for rehearing.***



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

May 20, 2009

**CASE NO.: 4D09-417**

L.T. No. : 2002CF003729AXX

FREDDIE L. HALIBURTON

v.

STATE OF FLORIDA

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Appellant / Petitioner(s),

Appellee / Respondent(s).

**BY ORDER OF THE COURT:**

ORDERED that appellant's motion filed April 13, 2009, for rehearing/rehearing en banc/clarification and certification is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Freddie Haliburton

Attorney General-W.P.B.

ct

*Marilyn Beutenmuller*  
MARILYN BEUTENMULLER, Clerk  
Fourth District Court of Appeal

