CASE NO. 22-5093

IN THE UNITED STATES SUPREME COURT

October 2021, Term

JERRY LEON HALIBURTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

I - Whether certiorari review should be denied where the Florida Supreme Court did not pass on the Eighth Amendment challenge to the defendant's burden of proof needed to establish intellectual disability and Florida law does not conflict with this Court's Eighth Amendment or Due Process jurisprudence?

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The decision of which Petitioner seeks discretionary review is reported as *Haliburton v. State*, 331 So. 3d 640 (Fla. 2021).

JURISDICTION

Petitioner, Jerry Leon Haliburton ("Haliburton"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida ("State"), accepts as accurate Petitioner's recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

The instant capital case is before this Court upon the Florida Supreme Court's affirmance of Petitioner's, Jerry Leon Haliburton's ("Haliburton"), capital postconviction litigation. Haliburton's Petition for Writ of Certiorari followed.

Haliburton is in custody and under a sentence of death pursuant to a valid judgment of guilt entered on April 11, 1988[1] for the 1981 first-degree murder of Donald Bohannon. The Florida Supreme Court affirmed Haliburton's conviction and death sentence on direct appeal. *Haliburton v. State*, 561 So. 2d 248, 249-50 (Fla. 1990). There the Florida Supreme Court found that on August 9, 1981, Haliburton burglarized Donald Bohannon's ("Bohannon") home and stabbed Bohannon in his neck, chest, arms, and scrotum with a knife 31 times, killing him. *Id.* Later, Haliburton told his brother, Freddy Haliburton, that he killed Bohannon just to see if he could do it. *Id.* Haliburton was found guilty, and the jury recommended death by a nine to three vote. *Id.* The death sentence was imposed upon the trial court finding four aggravating factors and no statutory mitigation.[2] *Id.* Thereafter, the

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[1] Previously, Haliburton was convicted and sentenced to death for this murder, however, the Florida Supreme Court, reversed upon finding his police statement should have been suppressed. *Haliburton v. State*, 476 So. 2d 192, (Fla. 1985). The State petitioned the Supreme Court which remanded for reconsideration in light of *Moran v. Burbine*, 475 U.S. 412 (1986). *Haliburton v. State*, 514 So. 2d 1088, 1089 (Fla. 1987). That Court held "as a matter of state law" Haliburton's "statements [were] obtained in violation of due process of law" and again reversed and remanded for a new trial. *Id.* at 1090.

[2] The Florida Supreme Court found:

> The capital felony was committed by a person under sentence of imprisonment; the defendant was twice

Florida Supreme Court affirmed the denial of relief on Haliburton's original postconviction relief motion and denied his state habeas petition. *See Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). That court also affirmed the denial of Haliburton's first successive motion for postconviction relief, *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006) (table).

Following his state court litigation, Haliburton sought federal habeas corpus relief from the United States District Court. *Haliburton v. Sec'y for the Dep't of Corr.*, 160 F. Supp. 2d 1382, 1384, 1387, 1390 (S.D. Fla. 2001). After an evidentiary hearing, relief was denied, and that denial was affirmed on appeal. *Haliburton v. Sec'y For Dept. Of Corr.*, 342 F. 3d 1233 (11th Cir. 2003), *cert denied*, 541 U.S. 1087 (2004).

In 2002, this Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002) prompting Haliburton to file a second successive postconviction relief motion.[3] As the Florida

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> previously convicted of violent felonies; the capital felony was committed while engaged in a burglary; and the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. § 921.141(5)(a), (b), (d), (i), Fla. Stat. (1987).

Haliburton, 561 So. 2d at 249–50.

[3] Following *Atkins*, the Florida Supreme Court, in October 2004, promulgated Rule 3.203, Fla. R. Crim. P., and gave defendants who had completed their state postconviction litigation until November 30, 2004, to file an *Atkins* claim asserting intellectual disability barred execution. Haliburton filed this claim which the trial court summarily denied without prejudice, and the Florida Supreme Court affirmed. *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006). Haliburton returned to the circuit court and on "September 19, 2006, relying on *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), Haliburton filed his second successive postconviction motion under Florida Rules of Criminal Procedure 3.851 and 3.203, seeking to vacate his death sentence on the ground that he is [intellectually disabled]. On March 13, 2012, the trial court summarily denied Haliburton's motion because he

Supreme Court explained the procedural history:

> Haliburton filed a second successive motion for postconviction relief, under Florida Rules of Criminal Procedure 3.851 and 3.203, seeking to vacate his death sentence on the ground that he was intellectually disabled. We affirmed the summary denial of that motion because Haliburton failed to demonstrate that his IQ was 70 or below and thus failed to establish that he is intellectually disabled under our interpretation of the law at that time. *Haliburton v. State*, 123 So. 3d 1146 (Fla. 2013), *vacated*, 574 U.S. 801, 135 S. Ct. 178, 190 L.Ed.2d 8 (2014), *order vacated on reconsideration*, 163 So. 3d 509 (Fla. 2015). Upon this Court's affirmance of the denial of his intellectual disability claim in 2013, Haliburton petitioned the United States Supreme Court for a writ of certiorari. Shortly thereafter, the Supreme Court issued its decision in *Hall v. Florida*, 572 U.S. 701, 704, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014), holding that Florida's "rigid rule" interpreting section 921.137(1), Florida Statutes,FN1 as establishing a strict IQ test score cutoff of 70 or less in order to present additional evidence of intellectual disability "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." The Supreme Court granted Haliburton's petition for certiorari and remanded to this Court for further consideration in light of *Hall. Haliburton*, 574 U.S. 801, 135 S. Ct. 178. On remand from the Supreme Court, this Court vacated its prior decision and remanded this case to the trial court for an evidentiary hearing on Haliburton's intellectual disability claim. *Haliburton*, 163 So. 3d 509.
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> FN1 Section 921.137 prohibits the imposition of the death penalty upon the intellectually disabled and defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."

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failed to demonstrate that his IQ was 70 or below." *Haliburton v. State*, 123 So. 3d 1146 (Fla. 2013).

Haliburton v. State, 331 So. 3d 640, 642–43 (Fla. 2021).

The evidentiary hearing to address the intellectual disability claim was conducted on May 13, 2019, during which Haliburton presented his youngest brother, John Haliburton, Jr. ("John Jr.") and a mental health expert, Dr. Bruce Frumkin. The State called Dr. Michael Brannon. The mental health expert testimonies relied on documents and recorded or personal interviews. Following the evidentiary hearing on Haliburton's intellectual disability claim, the postconviction court weighed the evidence and using "the criteria set forth in the DSM-5" on September 27, 2019, ruled that Haliburton had not proven an intellectual disability under the clear and convincing standard of proof.

On appeal of the denial of his intellectual disability claim, the Florida Supreme Court identified Haliburton's claims as: "the trial court erred in failing to find that he is intellectually disabled; [and] that section 921.137(4), Florida Statutes, which requires a defendant to prove his intellectual disability by clear and convincing evidence, is unconstitutional...." *Haliburton*, 331 So. 3d at 645. With respect to Haliburton's constitutional challenge to the standard of review employed in the intellectual disability claim, the Florida Supreme Court found it did not need to reach the issue. It stated:

> Haliburton also argues that he is entitled to relief because section 921.137(4), Florida Statutes (2019), which requires that defendants establish their intellectual disability by clear and convincing evidence, is unconstitutional under *Atkins* and the Eighth and Fourteenth Amendments to the United States Constitution, and that his claim of intellectual disability should have been analyzed under the more lenient preponderance of the evidence standard

> instead. But the trial court discredited Haliburton's own expert, without whose testimony the preponderance of the evidence standard clearly could not be met. ***Thus, because we conclude that Haliburton's claim would have failed even under the preponderance of the evidence standard, we need not address the constitutionality of the clear and convincing evidence standard in section 921.137(4).*** See *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.").

Haliburton, 331 So. 3d at 652 (emphasis supplied).

Addressing the intellectual disability claim, the Florida Supreme Court set out that:

> . . .under Florida law, " 'intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2019). "Significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." *Id.* "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." *Id.* Thus, to establish intellectual disability as a bar to execution, a defendant must demonstrate (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen.

Haliburton, 331 So. 3d at 645–46 (footnote omitted). It noted "'[i]n reviewing determinations of [intellectual disability], this Court examines the record for whether competent, substantial evidence supports the determination of the trial court.' . . . 'This Court 'does not reweigh the evidence or second-guess the circuit court's findings

as to the credibility of witnesses.' " *Haliburton*, 331 So. 3d at 646 (citations omitted).

In discussing the facts, the Florida Supreme Court found in relevant part that Haliburton's IQ scores ranged from 74 to 80 and according to Dr. Frumkin, Haliburton's expert, applying the standard error of measurement to his highest score, reveals a true IQ as high as 85. *Haliburton*, 331 So. 3d at 646–47. The Florida Supreme Court agreed with the trial court that the testimony of the State's expert, Dr. Brannon was credible, persuasive, and "thoroughly explained why the totality of the evidence in this case supports the conclusion that Haliburton's true IQ is in the 79-80 range" and did not satisfy the first prong of an intellectual disability of establishing "significantly subaverage intellectual functioning." *Id.* at 647. Dr. Brannon found Haliburton's IQ score range consistent with his vocabulary, reading, television interests, abstract thinking ability to give accurate, detailed personal history as discovered during his evaluation. *Id.* The Florida Supreme Court recognized Dr. Brannon's testimony "that 'you can't fake good,' 'meaning a person's higher IQ scores will more accurately reflect a person's capacity, while lower IQ scores achieved on other test administrations might be attributable to a variety of potential factors.'" *Id.* The Florida Supreme Court would not disturb the trial court's finding that Dr. Brannon was the more credible expert. *Id.*

After explaining the meaning of "deficits in adaptive behavior,"[4] the Florida

[4] The Florida Supreme Court noted: "section 921.137(1) defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." *Haliburton*, 331 So. 3d at 648. Citing to *Wright v. State*, 256 So. 3d 766, 773 (Fla. 2018) and referencing the American Psychiatric Association,

Supreme Court conducted a thorough review of the adaptive deficit prong, credited Dr. Brannon's testimony and rejected that of Dr. Frumkin stating:

> Here, Dr. Frumkin's testimony and written evaluation both lack clarity as to the domains in which he found Haliburton to have impairment sufficient to satisfy the second prong of the intellectual disability standard. Dr. Frumkin never explained why he found these domains "sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings" or in which "life setting" ongoing support was needed. Having "little doubt" that Haliburton has concurrent deficits in adaptive functioning in at least two areas and "seem[ing] deficient" in a domain do not rise to the level of clear and convincing evidence.

Haliburton, 331 So. 3d at 649–50.

Turning to the third intellectual disability prong, the Florida Supreme Court concluded:

> Because competent, substantial evidence supports the trial court's findings that Haliburton failed to establish that he has significantly subaverage intellectual functioning or concurrent deficits in adaptive behavior sufficient to meet the second prong of the intellectual disability standard, Haliburton necessarily cannot meet the third prong. Thus, the trial court did not err in failing to find that Haliburton meets the third prong.

Haliburton, 331 So. 3d at 651.

In its final analysis addressed to a "holistic review," the Florida Supreme Court considered Haliburton's reference to *Hall v. Florida*, 572 U.S. 701, 723 (2014) and

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Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DMS-5"), the Florida Supreme Court elaborated that "... 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.' "*Haliburton*, 331 So. 3d at 648.

statement 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." That court concluded that the quoted language had no application in the instant cases because "we have three prongs that were not established." *Haliburton*, 331 So. 3d at 651–52. None the less, the Florida Supreme Court concluded:

> Moreover, the trial court did conduct a "holistic review." It did not reach its conclusion that Haliburton failed to establish that he is intellectually disabled based solely on his failure to meet the first prong of the intellectual disability standard but instead proceeded to conduct a detailed analysis of the testimony concerning the adaptive deficits prong and the "conjunctive and interrelated assessment" of all three prongs of the standard as completed by *Hall*, 572 U.S. at 723, 134 S. Ct. 1986, and *Oats*. Thus, we conclude that the trial court did not err in failing to conduct a "holistic review."

Haliburton, 331 So. 3d at 652.

The Florida Supreme Court affirmed the denial of Haliburton's claim of intellectual disability and chose not to reach his constitutional challenge to the burden of proof imposed upon defendants claiming intellectual disability. Haliburton's sole challenge here is to the constitutionality of that burden of proof.

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT DECLINED TO PASS ON THE EIGHTH AMENDMENT CHALLENGE TO THE DEFENDANT'S CLEAR AND CONVINCING STANDARD OF PROOF NEEDED TO ESTABLISH INTELLECTUAL DISABILITY AND FLORIDA LAW DOES NOT CONFLICT DIRECTLY WITH ANY DECISION OF THIS COURT (RESTATED)

Under Florida law, defendant's seeking to prove they are intellectually disabled as a bar to the death penalty have the burden to prove this by "clear and convincing" evidence. Haliburton asserts that this Court should find Florida's "clear and convincing" burden of proof violative of the Eighth Amendment. The Florida Supreme Court did not pass on the constitutionality of that burden, but instead found that Haliburton had not even met the lower, preponderance of the evidence standard. *Haliburton*, 331 So. 3d at 652. As such, a federal question was not addressed below, and this Court should not take certiorari. However, if this Court reaches the merits of the constitutional challenge, Florida's burden of proof does not violate the Eighth Amendment and again certiorari should be denied.

A. The Florida Supreme Court Declined to Reach Haliburton's Constitutional Challenge to Florida's Clear and Convincing Burden of Proof

Below, the Florida Supreme Court acknowledged that Haliburton was asserting that the clear and convincing burden of proof was violative of the Eighth Amendment. *Haliburton*, 331 So. 3d at 652. However, that court chose not to reach the constitutional claim reasoning instead:

> ***Thus, because we conclude that Haliburton's claim would have failed even under the preponderance of the evidence standard, we need not address the constitutionality of the clear and convincing evidence standard in section 921.137(4).*** See *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.").

Haliburton, 331 So. 3d at 652 (emphasis supplied).

It is well settled that this Court will not grant certiorari where the federal constitutional claim was not passed upon by the state court or where the state decision rests on an adequate foundation of state law. In *Hemphill v. New York*, this Court stated that it:

> "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.' "*Howell v. Mississippi*, 543 U.S. 440, 443, 125 S. Ct. 856, 160 L.Ed.2d 873 (2005) (per curiam) (*quoting Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam)). " 'No particular form of words or phrases is essential' " for satisfying the presentation requirement, so long as the claim is " 'brought to the attention of the state court with fair precision and in due time.' " *Street v. New York*, 394 U.S. 576, 584, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969) (*quoting New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S. Ct. 61, 73 L. Ed. 184 (1928)).

Hemphill v. New York, 142 S. Ct. 681, 689 (2022). *See also, Adams v. Robertson*, 520 U.S. 83, 90 (1997) (concluding this Court should not "disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider."); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*,

462 U.S. 213, 218–220 (1983). *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875). Furthermore, the Florida Supreme Court considered the evidence Haliburton presented below and determined that he did not establish the intellectual disability claim even under a lower burden of proof. As such, even if this Court were to remand the matter for further review, the same judgment would be entered by the Florida Supreme Court. Hence, certiorari should be denied. *See Herb v. Pitcairn*, 324 U.S. 117, 125–126, 65 S. Ct. 459, 462–464, 89 L. Ed. 789 (1945) (stating "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion"). *See also, Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (noting principal that a state decision resting on adequate state substantive law is immune from federal review.) Certiorari should be denied because the Florida Supreme Court determined that it did not need to reach the constitutional challenge to the burden of proof because Haliburton had not met his burden even under a lower preponderance of the evidence standard.

B. Petitioner's Challenge to Florida's Burden of Proof for Intellectual Disability Does Not Warrant Review

Even if this Court considers the Eighth Amendment claim not passed on by the Florida Supreme Court, certiorari should be denied as Florida's law does not run afoul of the Eighth Amendment. The ruling below does not conflict with a decision of this Court and likewise, it does not address an important or unsettled question of federal law. *See* Rule 10, Rules of the Supreme Court of the United States. This Court has

recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue,* 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same).

Haliburton contends that Florida's requirement that defendants prove their intellectual disability by clear and convincing evidence violates the Due Process Clause and the Eighth Amendment. Pet. at 22–26. This question does not warrant review. In fact, this Court recently denied certiorari on a materially similar question. *See Nixon v. Florida*, No. 21-1173, 2022 WL 2203355 (June 21, 2022); *Young v. Georgia*, 142 S. Ct. 1206 (2022).[5] This Court, likewise, should deny certiorari here.

First, the shallow split of authority on this issue does not merit review. Most courts have held that a heightened burden for proving intellectual disability is constitutional. *See, e.g., Arizona v. Grell*, 135 P. 3d 696, 702 (Ariz. 2006) (clear and convincing evidence burden was constitutional); *People v. Vasquez*, 84 P.3 d 1019,

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[5] *See, e.g., Young v. Georgia*, 142 S. Ct. 1206 (2022); *Raulerson v. Warden*, 140 S. Ct. 2568 (2020); *Hill v. Humphrey*, 566 U.S. 1041 (2012); *Burgess v. Scofield*, 546 U.S. 944 (2005); *Stripling v. Head*, 541 U.S. 1070 (2004).

1022 (Colo. 2004) (same); *Young v. State*, 860 S.E. 2d 746, 768–77 (Ga. 2021) (plurality op.) (same for a beyond a reasonable doubt burden). The only federal courts to decide the issue on AEDPA review have held that these holdings are reasonable. *See Raulerson v. Warden,* 928 F. 3d 987, 992 (11th Cir. 2019) (state court holding that beyond a reasonable doubt burden was constitutional was reasonable); *Hill v. Humphrey*, 662 F. 3d 1335, 1347 (11th Cir. 2011) (en banc) (same). And the only two courts to hold otherwise, *Pruitt v. State*, 834 N.E. 2d 90, 100–03 (Ind. 2005) (preponderance standard is required); *Howell v. State*, 151 S.W. 3d 450, 464–65 (Tenn. 2004) (similar), misunderstood the historical analysis mandated by *Medina v. California*, 505 U.S. 437 (1992) and *Cooper v. Oklahoma*, 517 U.S. 348 (1996). See infra 14-16.

Second, Florida's clear and convincing evidence standard does not violate the Due Process Clause. To prove a due process violation, a petitioner "must show that the principle of procedure violated by the rule (and allegedly required by due process) is so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996) (plurality op.) (cleaned up); *see also Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (applying this test). The "primary guide" in this analysis is "historical practice." *Egelhoff*, 518 U.S. at 43 (plurality op.) (*citing Medina*, 505 U.S. at 446). Also relevant is whether the State's rule has "considerable justification," which "casts doubt upon the proposition that the opposite rule is" fundamental. *Id.* at 49 (quotation omitted). And so is whether the allegedly fundamental rule has "received sufficiently uniform and permanent

allegiance" nationwide. *Id.* at 51.

Under those standards, a clear and convincing evidence burden for proving intellectual disability is not unconstitutional. *Cf. Young*, 860 S.E. 2d at 772–73 (plurality op.). As an initial point, "there is no historical right of an intellectually disabled person not to be executed," and thus "no historical tradition regarding the burden of proof as to that right." *Raulerson*, 928 F.3d at 1002 (citation omitted); *cf. Egelhoff*, 518 U.S. at 51 (plurality op.) (finding voluntary intoxication defense was not fundamental when it was "of too recent vintage" and there was no "lengthy common-law tradition" of permitting defense). The clear and convincing evidence burden also has "considerable justification." *Egelhoff*, 518 U.S. at 48 (plurality op.). Indeed, a "robust burden of proof" is necessary to offset the "substantial" risk of "malingering" by a defendant who is in fact not intellectually disabled. *Hill*, 662 F.3d at 1354; *see also Young*, 860 S.E. 2d at 776 n.17 (plurality op.) (same).

Furthermore, the preponderance standard has not "received sufficiently uniform and permanent allegiance" nationwide. *Egelhoff*, 518 U.S. at 51 (plurality op.). In *Egelhoff*, this Court held that the defense of voluntary intoxication fell short of this standard when "one-fifth of the States" had not adopted it. *Id.* at 48. Here, the preponderance standard is even less accepted. Contrary to Haliburton's suggestion that anything more than the preponderance of the evidence burden violates the Eighth Amendment (pet. At 24-25), of the 29 jurisdictions[6] that impose the death

[6] Twenty-seven states along with the United States military and the United States impose the death penalty. Of those jurisdictions, at least Georgia, Florida, Kansas, Montana, Wyoming, the military, and the United States have not adopted the

penalty, almost one quarter have not adopted the preponderance of the evidence standard.

The instant case is quite different from *Cooper*, in which this Court held that due process prohibits the government from using a standard of proof more demanding than a preponderance in demonstrating competency to stand trial. There, unlike here, the preponderance standard for proving incompetency had "deep roots in our common-law heritage." *Raulerson*, 928 F.3d at 1002; *see also Young*, 860 S.E. 2d at 772 (plurality op.). There, unlike here, the preponderance standard had "near-uniform application" among the states. *Cooper*, 517 U.S. at 362. In Cooper, unlike the instant situation, the preponderance standard implicated a defendant's fitness to stand trial, not a defendant's "moral culpability." *Atkins*, 536 U.S. at 306. That distinction makes intellectual disability much more like the insanity defense, *see Kahler v. Kansas*, 140 S. Ct. 1021, 1025 (2020), defense for which states may require a burden of proof even beyond a reasonable doubt without violating the Due Process clause. *Leland v. Oregon*, 343 U.S. 790, 798-800 (1952).

Haliburton's argument based on *Commonwealth of Pennsylvania v. Sanchez*, 36 A. 3d 24, 70 (Pa. 2011)[7]; *Howell* and *State v. Williams*, 831 So. 3d 835, 859-60 (La.

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preponderance standard. *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 553, 560–61 & n.23–25 (2017).

[7] There, the Supreme Court of Pennsylvania was required to address when an *Atkins* hearing was to be held once the capital defendant had raised the claim. In *Sanchez*, the defendant raised the issue just before jury selection was to start and complained on appeal that it was error for the trial court to have left it up to the jury to decide the matter and failed to instruct the jury on the applicable standards for an *Atkins*

2002)[8] about the "risk of error" (Pet. 22–24) does not demonstrate otherwise nor does it establish a direct conflict with the Florida Supreme Court's opinion in *Haliburton* under review. The lower courts have widely rejected this claim, *e.g., Hill*, 662 F.3d at 1354–56; *Young*, 860 S.E. 2d at 776 n.18 (plurality op.), and petitioner cites no "empirical . . . evidence in the record" showing that the risk of an erroneous execution is exceedingly high under Florida's standard. *See Hill*, 662 F.3d at 1356. Indeed, under even Georgia's beyond a reasonable doubt standard, "judges and juries do find defendants guilty but [intellectually disabled]," *Id.* at 1357 (collecting examples)—a good indicator that a heightened standard does not prevent those truly disabled from proving as much. Also, Haliburton "ignores all of the many other procedures in

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claim. *Sanchez*, 36 A. 3d at 36. Noting that the Pennsylvania Legislature had not enacted laws implementing the restriction of *Atkins*, it took it upon itself to establish appropriate procedures, including placing the burden on the defendant to prove his claim by a preponderance of the evidence. *Id* at 62-63. However, it took pains to explain that the Legislature was not bound by the procedures and proof announced in *Sanchez*, and that the Legislature may "choose, to allocate the burden of proof differently, and to affix a different level of proof...." *Id.* at 77.

[8] In the immediate wake of *Akins* and while Williams' case was on direct appeal, the Louisiana Supreme Court was asked to address a claim of intellectual disability. *Williams*, 831 So. 2d at 839, 851-60. Recognizing that the Louisiana Legislature had yet to mandate how *Atkins* claims were to be adjudicated, and "[i]n the absence of any guidance from the Supreme Court" in *Atkins*, the Louisiana Supreme Court announced the definition of intellectual disability, the respective burdens to be applied, and the procedure for addressing such claims. *Williams*, 831 So. 2d at 854. It elected to set the burden on the defendant to prove his case of intellectual disability. After surveying other state statutes and noting some required the defendant to carry his burden by clear and convincing evidence while others employed a preponderance of the evidence standard, the Louisiana Supreme Court relied on *Cooper* and elected to utilize the preponderance of the evidence standard. *Id.* at 860. Subsequently, the Legislature adopted that standard. That Court made no finding that a higher standard violated the Eighth Amendment nor the Due Process clause. *Haliburton* is not in conflict with *Williams*.

[Florida] law" that protect against erroneous executions, *Id.* at 1354, including the jury's right to consider intellectual capacity as a mitigator in deciding whether to recommend a death sentence. *See* Fla. Stat. § 921.141(7).

As the third and final basis for denial of certiorari, Haliburton's alleged claim is "governed by norms of procedural due process," not the Eighth Amendment. *Hill*, 662 F.3d at 1362 (Tjoflat, J. concurring); *see also Medina*, 505 U.S. at 443 (analyzing challenge to burden of proof under the Due Process Clause); *Cooper*, 517 U.S. at 350 (same). None the less, for the reasons provided above, there also is no Eighth Amendment violation. Indeed, in the "[230] year history of our nation's Bill of Rights, no Supreme Court decision has ever held, or even implied, that a burden of proof standard on its own can so wholly burden an Eighth Amendment right as to eviscerate or deny that right." *Hill*, 662 F.3d at 1351 (emphasis omitted).

CONCLUSION

Based on the foregoing arguments and authorities, and because the question presented here holds neither widespread nor case specific importance, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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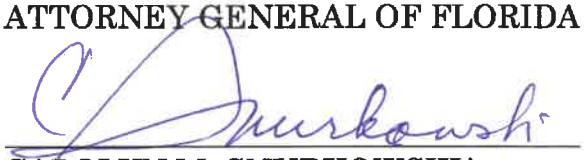
ATTORNEY GENERAL OF FLORIDA



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