No. _____

IN THE

Supreme Court of the United States

GARY RAY BOWLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, AUGUST 22, 2019, AT 6:00 P.M.

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CAPITAL CASE

QUESTIONS PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that intellectually disabled individuals are categorically exempt from the death penalty under the Eighth Amendment. In *Hall v. Florida*, 572 U.S. 701 (2014), the Court invalidated a rule created by the Florida Supreme Court that unacceptably risked execution of individuals within that categorical exemption, based on an IQ score cutoff.

Two years after *Hall*, the Florida Supreme Court held in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), that certain intellectual disability claims filed after *Hall* were time-barred, and no evidence of the individual's intellectual disability would be considered. This petition seeks review of whether the Florida Supreme Court's *Rodriguez* rule, like the rule this Court invalidated in *Hall*, unacceptably risks execution of intellectually disabled individuals, based on the timing of their claims.

Petitioner Gary Ray Bowles is scheduled to be executed by the State of Florida on August 22, 2019, at 6:00 p.m. The merits of his intellectual disability claim, which he filed two years before the Governor signed his death warrant and the Florida Supreme Court applied the *Rodriguez* time-bar, have never been reviewed.

The questions presented are:

1. Can a state procedural bar override the Eighth Amendment prohibition against executing the intellectually disabled?

2. Does the *Rodriguez* procedural bar created by the Florida Supreme Court violate the Eighth Amendment by creating an unacceptable risk of executing the intellectually disabled?

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Petitioner Gary Ray Bowles, a death-sentenced Florida prisoner scheduled for execution on August 22, 2019, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at __ So. 3d __, 2019 WL 3789971, and is reprinted in the Appendix (App.) at 1-11.

JURISDICTION

The judgment of the Florida Supreme Court was entered on August 13, 2019. App. at 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Introduction

Petitioner Gary Bowles is an intellectually disabled man who is scheduled to be executed by the State of Florida on August 22, 2019, at 6:00 p.m. If the Florida Supreme Court's decision below stands, Mr. Bowles will be executed without any court having considered the strong evidence that he is intellectually disabled, despite his continuous efforts to present that evidence to the state courts for almost two years.

Mr. Bowles was sentenced to death in 1999, prior to this Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), recognizing the Eighth Amendment's

[1] Petitioner requests that the Court expedite consideration of this petition in order to ensure that it is circulated together with the accompanying stay application.

prohibition of executing individuals with intellectual disabilities. At the time that *Atkins* was decided, this Court "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall v. Florida*, 572 U.S. 701, 719 (2014) (quoting *Atkins*, 536 U.S. at 317)).

Because *Atkins* left to the states how to implement the constitutional restriction, and thus what constituted intellectual disability as a matter of state law, Florida litigants were constrained by Florida's statutory definition of intellectual disability in pursuing their claims. After *Atkins*, Florida's statutory definition of intellectual disability required an IQ score of "two or more standard deviations from the mean score on a standardized intelligence test," for a litigant to qualify as intellectually disabled. *See, e.g., Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007) (quoting Fla. Stat. § 921.137(1) (2002)); *see also Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) ("Under Florida law, one of the criteria to determine if a person is [intellectually disabled] is that he or she has an IQ of 70 or below."); *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting testimony that only an IQ of 70 or below qualified to establish intellectual disability).

Florida courts applied this statutory definition as a hard IQ score cutoff of 70, failing to account for the Standard Error of Measurement (SEM) and interpreting IQ scores between 70 and 75 as a "failure to produce such evidence [that] was fatal to the entire claim," *Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018). Under Florida's statutory scheme, Mr. Bowles did not have a viable intellectual disability claim.

In *Hall v. Florida*, this Court invalidated Florida's IQ-score cutoff because it unacceptably risked execution of individuals within the Eighth Amendment's categorical exemption, given the SEM. *See* 572 U.S. at 724. The Florida Supreme Court subsequently held, in *Walls v. State,* 213 So. 340 (Fla. 2016), that *Hall* was retroactive in Florida.

Following *Hall* and *Walls*, in October 2017, Mr. Bowles filed his intellectual disability claim in state court. Mr. Bowles thereafter proffered a qualifying IQ score of 74, expert reports of three mental health professionals diagnosing or finding evidence of intellectual disability, more than a dozen sworn statements evidencing Mr. Bowles's significant adaptive deficits throughout his childhood, adolescence, and adulthood, and the declarations of the only two mental health professionals that had previously evaluated Mr. Bowles, attesting that they had not evaluated him for intellectual disability, and did not dispute his present diagnosis.

In June 2019, after Mr. Bowles's intellectual disability claim had been pending for nearly two years, the Governor signed a warrant for his execution, setting it for August 22, 2019.[2] After the warrant was signed, Mr. Bowles's intellectual disability litigation was expedited, truncated, and summarily dismissed, based on a rule

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[2] Some Members of this Court have recently expressed reservations with "last-minute" litigation by death row prisoners under warrant. *See, e.g., Price v. Dunn*, 139 S. Ct. 1533 (2019) (Thomas, Alito, and Gorsuch, JJ., concurring in the denial of certiorari). Mr. Bowles does not fall into that category. As the petition describes, Mr. Bowles's intellectual disability claim had been pending for nearly two years when the Governor signed his death warrant. The expedited nature of this litigation was not the result of Mr. Bowles filing a claim in response to a death warrant, but the Governor signing a death warrant in the middle of Mr. Bowles's intellectual disability litigation.

announced by the Florida Supreme Court in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), which provides that certain intellectual disability claims filed after *Hall* are time-barred, and no evidence supporting the claim can be considered.

Mr. Bowles argued to the Florida Supreme Court that its *Rodriguez* time-bar rule, like the rule this Court invalidated in *Hall*, unacceptably risks execution of the intellectually disabled and should not be applied to his case. But the Florida Supreme Court, applying *Rodriguez*, refused to address Mr. Bowles's federal constitutional arguments, and ruled that it would not consider whether he is in fact intellectually disabled before his scheduled execution on August 22, 2019.

This Court's intervention is urgently needed to prevent the imminent execution of Mr. Bowles, who the evidence strongly suggests is intellectually disabled and therefore categorically exempt from the death penalty. Because the Florida Supreme Court refuses to consider the evidence of Mr. Bowles's intellectual disability, or even address Mr. Bowles's argument that the *Rodriguez* time bar is unconstitutional, this Court should grant a stay of execution, grant a writ of certiorari, and remand to the state courts for a hearing on Mr. Bowles's evidence and a merits determination of whether he is in fact intellectually disabled.

II. Procedural History

A. Mr. Bowles's Death Sentence and Prior Litigation

In 1996, Mr. Bowles pleaded guilty to first-degree murder in the Circuit Court, Fourth Judicial Circuit, Duval County. Following the guilty plea, the State sought

the death penalty. After the penalty phase, the pre-*Hurst*[3] advisory jury recommended death by a vote of 10 to 2. *See Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998). Pursuant to Florida's pre-*Hurst* sentencing scheme, the judge made the findings of fact and imposed a death sentence. *Id.* at 770. On direct appeal, the Florida Supreme Court vacated Mr. Bowles's death sentence based on the introduction of prejudicial evidence at trial. *Id.* at 773.

A new penalty phase was held in 1999, and the advisory jury recommended death by a vote of 12 to 0. *See Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2001). The judge imposed a death sentence after finding five aggravating factors. The judge also found six mitigating factors, but concluded they did not sufficiently outweigh the aggravation. *Id*. The Florida Supreme Court affirmed, *id*. at 1184, and this Court denied a writ of certiorari on June 17, 2002, *Bowles v. Florida*, 536 U.S. 930 (2002).

In 2002, the state court appointed private registry counsel to represent Mr. Bowles in state postconviction proceedings. Mr. Bowles's state-appointed counsel raised three claims of ineffective assistance of trial counsel, and claims concerning jury instructions and Florida's pre-*Hurst* sentencing scheme, all of which were denied by the state court in 2005. The Florida Supreme Court affirmed in February 2008. *Bowles v. State*, 979 So. 2d 182 (Fla. 2008).

In August 2008, Mr. Bowles's state-appointed counsel petitioned for a federal writ of habeas corpus in the United States District Court for the Middle District of Florida, which the district court denied in December 2009. In 2010, the Eleventh

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[3] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

Circuit affirmed. *Bowles v. Sec'y for Dep't of Corrs.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert. denied*, 562 U.S. 1068 (2010).

In March 2013, Mr. Bowles's state-appointed counsel filed a successive motion for state postconviction relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and related cases, which was summarily denied. Mr. Bowles's attorney did not appeal.

In September 2015, the state circuit court granted Mr. Bowles's appointed attorney's request to withdraw, and appointed another registry attorney, Francis Jerome ("Jerry") Shea, to represent Mr. Bowles in any subsequent state litigation.

On June 14, 2017, Mr. Shea filed a second successive motion for state postconviction relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The state court denied *Hurst* relief, based on the Florida Supreme Court's rule barring *Hurst* relief for individuals whose death sentences became final prior to 2002, and the Florida Supreme Court affirmed. *Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (2018).

B. Mr. Bowles's Intellectual Disability Litigation

On October 19, 2017, Mr. Bowles, through attorney Shea, filed a successive state motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, arguing that he is intellectually disabled and his execution would violate the Eighth Amendment in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 572 U.S. 701 (2014), and *Atkins*, 536 U.S. 304. *See* App. at 188-212 (amended motion).[4]

[4] Mr. Shea was assisted in the intellectual disability filing by Mr. Bowles's federal appointed counsel, the Capital Habeas Unit of the Office (CHU) of the Federal

On March 12, 2019, while his motion was pending, Mr. Bowles's state postconviction counsel, Mr. Shea, unexpectedly moved to withdraw from the case. PCR-ID at 62. The State did not oppose the motion.[5] On March 25, 2019, the state court granted Mr. Shea's motion and appointed a lawyer from the Office of the Capital Collateral Regional Counsel—North (CCRC-N), Florida's state-funded organization for representation of postconviction capital defendants, as Mr. Bowles's new state-appointed counsel. On March 26, 2019, CCRC-N attorney Karin Moore entered an appearance. On April 11, 2019, Ms. Moore filed a motion for additional time to either reply to the State's recently filed answer memorandum, or amend the postconviction motion that had been filed by Mr. Shea, who had not been qualified to file the motion.

On April 15, 2019, the state circuit court granted Ms. Moore an additional 90 days to either file a reply to the State's answer or move to amend Mr. Bowles's intellectual disability claim, should she determine that an amendment was necessary. Under the state court's order, Ms. Moore's reply or motion to amend was due July 14, 2019. But on June 11, 2019—less than 80 days after Ms. Moore first entered an appearance in the case, and more than a month before the state court's deadline for her to review the case and decide whether to file a reply or motion to amend—the Governor of Florida signed Mr. Bowles's death warrant, scheduling the

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Public Defender for the Northern District of Florida, who were authorized by the Middle District of Florida to assist in the state litigation under 18 U.S.C. § 3599.

[5] In two other capital postconviction cases, the Florida Attorney General moved to remove Mr. Shea for his lack of qualifications under Fla. R. Crim. P. 3.112, which provides for the minimum qualifications of capital postconviction attorneys. *See, e.g.*, State's Motion to Determine Postconviction Counsel's Qualifications, *State v. John Freeman*, No. 16-1986-CFO 11599 (Fla. Cir. Ct. Feb. 4, 2019).

execution for August 22, 2019. The Florida Supreme Court thereafter ordered Mr. Bowles's intellectual disability proceedings expedited, and required the circuit court to decide Mr. Bowles's intellectual disability claim *in total* by July 17, 2019. Ms. Moore, Mr. Bowles's new state counsel, had never litigated a case under warrant previously. Ms. Moore and Mr. Bowles's federally appointed co-counsel were then tasked with amending his postconviction motion containing his intellectual disability claim, and investigating and pleading any and all other potential bases for relief, under the exigencies of his death warrant, in effectively 20 days.

Beginning in 2017, and up until his final amended postconviction motion was filed on July 1, 2019, Mr. Bowles developed and proffered evidence of his intellectual disability.[6] Regarding significantly subaverage intellectual functioning, Mr. Bowles provided evidence that every mental health professional who is known to have evaluated Mr. Bowles's intellectual functioning—including Dr. McMahon (1995, pretrial); Dr. Krop (2003, initial state postconviction); Dr. Toomer (2017); Dr. Crown (2018); and Dr. Kessel (2018-19)—admits either that they did not assess Mr. Bowles for intellectual disability (Dr. McMahon, *see* App. at 291, PCR-ID at 835, and Dr. Krop, App. at 245-46, PCR-ID at 789-790), or that Mr. Bowles is intellectually disabled or has intellectual functioning consistent with an intellectually disabled

[6] Since *Hall*, Florida courts have held a definition of intellectual disability that includes: "'(1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3) manifestation of the condition before age eighteen.'" *Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) (quoting *Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016)).

person (Dr. Toomer, App. at 264-39; 242-44, PCR-ID at 778-83; 786-88, Dr. Crown, App. at 240-41; PCR-ID at 784-85, Dr. Kessel, App. at 247-57; PCR-ID at 791-801).

Mr. Bowles has only two full scale IQ scores: a score of 80 on the Wechsler Adult Intelligence Scale, Revised (WAIS-R) as given by Dr. McMahon in 1995, and a score of 74 on the Wechsler Adult Intelligence Scale, 4th Edition (WAIS-IV) as given by Dr. Toomer in 2017. When the WAIS-R score of 80 is corrected for norm obsolescence,[7] it falls within the SEM for an intellectual disability diagnosis (between 70-75). Mr. Bowles's most recent score of 74 on the WAIS-IV is within the SEM, and is a qualifying score for such a diagnosis. *See, e.g.*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (finding that an IQ score of 75 is "squarely in the range of potential intellectual disability."). Mr. Bowles also has neuropsychological testing results that indicate he has brain damage consistent with an intellectual disability. *See* App. at 240-41, PCR-ID at 784-85 (Dr. Crown's report).

Regarding adaptive deficits, Mr. Bowles proffered sworn statements from a dozen individuals establishing that Mr. Bowles had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. *See* App. at 258-90, PCR-ID at 802-34 (sworn statements of lay witnesses);

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[7] Norm obsolescence is the psychometric observation that IQ scores of the population increases over time, which is also known as the Flynn Effect. *See, e.g.,* James W. Ellis, Carolina Everington & Anna M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 HOFSTRA L. REV. 1305, 1363-66 (2018) (discussing the Norm Obsolesce ("Flynn") Effect); American Psychiatric Association (APA) Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5), p. 37 (discussing the Flynn Effect); American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual (11th ed. 2010) (AAIDD-11), p. 37 (same).

App. at 197-203, PCR-ID at 741-45 (discussing how sworn lay witness observations establish significant adaptive deficits in each domain).

Mr. Bowles also proffered evidence that his intellectual disability manifested before the age of 18—nearly half of the lay witnesses knew Mr. Bowles in his childhood or teenaged years, and neuropsychological testing revealed that Mr. Bowles's brain damage was consistent with an "earlier origin, including a possibly perinatal origin." App. at 241, PCR-ID at 785 (Dr. Crown's report). No mental health professional who has conducted an evaluation on Mr. Bowles currently disputes Mr. Bowles's intellectual disability diagnosis.

On July 8, 2019, a case management conference was held regarding Mr. Bowles's claim, after which the circuit court determined that no evidentiary hearing was necessary. App. at 12-21. Instead, the circuit court summarily denied Mr. Bowles's claim as time-barred under the Florida Supreme Court's rulings in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), and two opinions issued after the filing of Mr. Bowles's claim, in *Blanco v. State*, 249 So.3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018). *See* App. at 14-15. In those rulings, the Florida Supreme Court held that individuals who did not previously raise an intellectual disability claim pursuant to Fla. R. Crim. P. 3.203 (2004), which delineated specific time frames by which litigants in varying postures may raise intellectual disability claims, were time-barred from doing so.[8] Specifically, the circuit court found that Mr.

[8] As a historical note, Fla. R. Crim. P. 3.203 was amended in 2009 to delete references to these time frames. *See In re Amendments to the Florida Rules of Criminal Procedure,* 26 So.3d 534, 536 (Fla. 2009) ("Subdivision (d) is amended to

Bowles was required to raise his intellectual disability claim, per Fla. R. Crim. P. 3.203(d)(4)(C), within 60 days of October 1, 2004, or merits review of his intellectual disability was barred. App. at 14-15.

Although Mr. Bowles argued that his intellectual disability was a categorical prohibition to his execution under the Eighth Amendment that could not be barred, and that even if it could, the Florida Supreme Court's *Rodriguez* time-bar did not pass Eighth Amendment scrutiny because it unacceptably risked the execution of the intellectually disabled, the state circuit court did not address any of those federal arguments in its order. App. at 12-21.

C. The Florida Supreme Court's Decision Below

On appeal, Mr. Bowles renewed his argument, unaddressed by the circuit court, that the *Rodriguez* time bar created by the Florida Supreme Court violated the Eighth Amendment. Mr. Bowles argued that his intellectual disability was a categorical prohibition to his execution that could not be barred, and that the *Rodriguez* time-bar did not pass Eighth Amendment scrutiny because it unacceptably risked the execution of the intellectually disabled.

The Florida Supreme Court declined to address Mr. Bowles's federal constitutional arguments. The court did not address Mr. Bowles's explicit argument that the *Rodriguez* time-bar violated the Eighth Amendment. Instead, the Florida

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remove obsolete references to time periods in 2004, while leaving intact the requirement that a motion for a determination of mental retardation as a bar to imposition of the death penalty shall be filed not later than ninety days prior to trial or as ordered by the court.").

Supreme Court simply applied the bar, citing its previous application of the same rule in other cases where intellectual disability claims were summarily dismissed:

> This Court has previously held that similarly situated defendants were not entitled to relief based on intellectual disability claims because they failed to raise timely intellectual disability claims under Atkins. *See Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018) ("Harvey, who had never before raised an intellectual disability claim, argues that his claim was timely because he filed two months after this Court decided *Walls v. State*, 213 So. 3d 340 (Fla. 2016). We have previously held that a similarly situated defendant's claim was untimely because he failed to raise a timely intellectual disability claim under *Atkins*[.]"); *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018) ("We conclude that Blanco's intellectual disability claim is foreclosed by the reasoning of this Court's decision in *Rodriguez* [*v. State*, 250 So. 3d 616 (Fla. 2016)]. In *Rodriguez*, this Court applied the time-bar contained within [Florida Rule of Criminal Procedure] 3.203 to a defendant who sought to raise an intellectual disability claim under *Atkins* for the first time in light of *Hall*."); *Rodriguez*, 250 So. 3d at 616 ("Rodriguez, who had never before raised an intellectual disability claim, asserted that there was 'good cause' pursuant to [Florida Rule of Criminal Procedure] 3.203(f) for his failure to assert a previous claim of intellectual disability [because] only after the United States Supreme Court decided [*Hall*] did he have the basis for asserting an intellectual disability claim. The trial court rejected [and this Court affirmed] the motion as time barred, concluding there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins*[.]").
>
> Bowles waited until October 19, 2017 to raise an intellectual disability claim for the first time. Therefore, the record conclusively shows that Bowles' intellectual disability claim is untimely under our precedent.

Bowles v. State, No. SC19-1184, 2019 WL 3789971, at *2 (Fla. Aug. 13, 2019); App. at 1-11. The Florida Supreme Court also denied Mr. Bowles's motion for a stay of execution. App. at 10.

REASONS FOR GRANTING THE WRIT

I. A State Procedural Bar Cannot Override the Eighth Amendment's Categorical Prohibition Against Executing the Intellectually Disabled

At the heart of the *Rodriguez* time-bar applied by the Florida Supreme Court is the assumption that state procedural rules can overcome the Eighth Amendment's categorical prohibition against executing the intellectually disabled. That assumption is wrong and deserves clarification by this Court. As with other categorical constitutional prohibitions, state procedural bars cannot overcome the Eighth Amendment's categorical prohibition against the execution of intellectually disabled individuals like Mr. Bowles.

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court explained its Eighth Amendment jurisprudence, which includes categorical exclusions from the death penalty, noting:

> The Court's cases addressing the [Eighth Amendment] proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.
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> In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.
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> * * *
>
> The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551 [] (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 [] (2002).

Graham, 560 U.S. at 59-61. The categorical prohibition against the execution of the intellectually disabled emanates from the Eighth Amendment because, as this Court has explained, to execute the intellectually disabled "violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708.

Unlike the majority of Eighth Amendment restrictions, categorical prohibitions focus only on the characteristics of the offender, regardless of the nature of the crime of conviction, guilt or innocence, or culpability. *See, e.g., Roper*, 543 U.S. at 568 ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime."). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham*, 560 U.S. at 58.

The focus in these inquiries producing categorical prohibitions is the specific traits of the category of offender that makes them ineligible for execution for any crime. Unlike, even arguably, the factually innocent, an individual who is in a category that makes them constitutionally immune from execution need not even prove that there was any error at all in their trial or sentencing proceedings. *Cf. Schlup v. Delo*, 513 U.S. 298, 315-16 (1995) ("[I]f a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial *unless the court is also satisfied that the trial was free of nonharmless constitutional error*, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.") (emphasis added). This Court has held

that such a categorical prohibition concerning the offender exists on rare occasion, and includes only the execution of juveniles (*Roper v. Simmons*), the execution of the insane (*Ford v. Wainwright*, 477 U.S. 399 (1986)), and the execution of the intellectually disabled (*Atkins v. Virginia*).

The first question presented by this petition is not whether this categorical bar exists—that is well-settled by this Court's precedent following *Atkins*—but what the *effect* of this categorical prohibition is, and whether or not a state-created procedural rule can supersede even the review of evidence necessary to determine if a certain individual resides within the categorical exemption. This Court's Eighth Amendment analysis in categorical-prohibition cases does not support such a possible reading, and this Court's specific jurisprudence in *Atkins* cases does not suggest that possibility.

A. A State Procedural Rule That Supersedes a Categorical Prohibition on Executing a Certain Kind of Offender Violates This Court's Eighth Amendment Jurisprudence

The Eighth Amendment analysis of the decisions creating categorical prohibitions on the execution of certain kinds of offenders—*Ford*, *Atkins*, and *Roper*—cannot be squared with a state-created procedural rule, like the Florida Supreme Court's *Rodriguez* rule, that bars even the review of evidence regarding whether an individual falls in a category that that is constitutionally immune from execution.

In *Ford*, *Atkins*, and *Roper*, this Court held that categorical exemptions from the death penalty existed based on the Eighth Amendment's proscription: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," which is applicable to the States through the Fourteenth

Amendment. *See Ford*, 477 U.S. at 410-11; *Atkins*, 536 U.S. at 311-12; *Roper*, 543 U.S. at 560-61. In each of these cases, this Court found that the execution of individuals in relevant categories, under the evolving standards of decency, would constitute a disproportional and excessive sanction in violation of the Constitution due to the unique vulnerabilities and characteristics of the offenders.

Ford found the execution of the "insane" tainted with a "natural abhorrence" because it would mean "killing one who has no capacity to come to grips with his own conscience or deity." *Ford*, 477 U.S. at 409.

Atkins found that the execution of the intellectually disabled offended the Eighth Amendment in part because intellectually disabled individuals have "diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," and "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders," thus reducing their "personal culpability." *Atkins*, 536 U.S. at 318. These characteristics of intellectually disabled offenders thus contribute to reducing the efficacy any of the alleged goals of capital punishment, including retribution or deterrence. *Id*. at 319-20.

Roper found that the execution of juveniles was disproportional in part due to their "lack of maturity and [] underdeveloped sense of responsibility," "impetuous and ill-considered actions and decisions," their vulnerability to "negative influences and outside pressures," and their lack of well-formed character. *Roper*, 543 U.S. at 569-

70. Like the *Atkins* Court, the *Roper* Court noted that these characteristics of juveniles undermined the penological justifications for imposing the death penalty on them, diminishing any deterrent or retributive function. *Id*. at 571-72.

These individual characteristics of the insane, intellectually disabled, and juveniles, underscore the offensiveness of putting them to death, both to the individual and society, making it disproportional as a result of immutable characteristics. The constitutional prohibition "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Roper*, 543 U.S. at 560 (quoting *Atkins*, 536 U.S. at 311) (internal quotation omitted).

Because the proportionality concerns of the Eighth Amendment in these categorical-prohibition-on-execution analyses are so intimately tied to the characteristics of the category of offender—which are present regardless of the crime committed, the culpability in that crime, or any legal process (or lack thereof) flowing from those events—this Court's underlying reasoning in these cases does not support any mechanism that undermines this constitutional protection.

A judicially or legislatively created rule that bars all consideration of any evidence a death-sentenced individual may provide to establish inclusion in the category of offenders who may not be executed—that they, too, have the characteristics that make their execution abhorrent to society and disproportionately cruel and unusual—cannot be reconciled with the goals of this jurisprudence. The Eighth Amendment's categorical prohibition on executing intellectually disabled individuals must not give way to a state procedural rule—rather, the procedure must

give way to the constitutional prohibition. The United States Constitution prohibits the execution of the intellectually disabled, and by virtue of the Supremacy Clause, that substantive federal prohibition cannot be frustrated by a state procedural rule that blocks any assessment of Mr. Bowles's condition on the merits. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

B. This Court's Intellectual Disability Jurisprudence Has Never Suggested that an Intellectual Disability Claim Can be Barred

This Court emphasized in *Atkins* that it was announcing "a *categorical rule* making such [intellectually disabled] offenders ineligible for the death penalty." *Atkins,* 536 U.S. at 320 (emphasis added). Although the *Atkins* Court noted, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," it did not expressly note whether states could create rules that denied individuals meaningful—or in this case, any—consideration of their diagnosis. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 405).

However, this Court's post-*Atkins* jurisprudence indicates that the categorical prohibition on the execution of the intellectually disabled is not subject to such state-created frustration. This Court's decisions in intellectual disability cases following *Atkins* are replete with analogies (and citations) to its proper corollary: the execution of juveniles, as prohibited in *Roper v. Simmons*. For example, in *Hall v. Florida*, this Court stated:

> The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized. *Ibid.* No person may be sentenced to death for a crime committed as a juvenile. *Roper*,

> *supra*, at 572, [] And, as relevant for this case, persons with intellectual disability may not be executed. *Atkins*, 536 U.S., at 321[].

Hall, 572 U.S. at 708. Likewise, in *Moore v. Texas* this Court again stated: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper*, 543 U.S. at 553-564) (emphasis in original).

This Court's continual comparison of the prohibition of the intellectually disabled to that of the execution of juveniles is not accidental. Just as it would be illegal to execute a person who was convicted of committing a murder as a fifteen-year-old and who failed to raise an Eighth Amendment challenge at the appropriate time, *see Roper*, 543 U.S. at 568-69, so too should it be illegal to execute an intellectually disabled person who failed to raise his claim at the appropriate procedural time.

The Florida Supreme Court's refusal in Mr. Bowles's case to even consider whether the evidence that has been pending in state court for nearly two years shows that Mr. Bowles is in fact intellectually disabled is akin to a state court refusing to examine documentation showing that an individual was a juvenile at the time of a capital offense, but could not prove it for lack of proper identification or documentation until years later. A constitutional categorical prohibition should not be subject to such absurd results, in *Atkins* claims or in *Roper* claims.

II. Even if the Eighth Amendment Prohibition Against the Execution of the Intellectually Disabled Can be Overcome By Some State Procedural Rules, the *Rodriguez* Time-Bar Created by the Florida Supreme Court Violates the Eighth Amendment by Creating an Unacceptable Risk of Executing the Intellectually Disabled

Even if there are some scenarios where a state procedural bar to an intellectual disability claim can comport with the Eighth Amendment, the specific *Rodriguez* time-bar applied by the Florida Supreme Court in this case violates the Eighth Amendment by creating an unacceptable risk of executing intellectually disabled individuals. The Florida Supreme Court's refusal to even consider detailed evidence of Mr. Bowles's intellectual disability, which was filed well in advance of the signing of his death warrant, should not be allowed to stand under the Eighth Amendment. Further fact-finding is required. *See, e.g., Ford*, 477 U.S. at 411 ("[I]f the Constitution renders *the fact* or timing of his execution *contingent upon establishment of a further fact*, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.") (emphasis added).

Allowing the Florida Supreme Court's *Rodriguez* bar to stand in Mr. Bowles's case and similarly situated cases would be particularly unjust because individuals in Mr. Bowles's position had no notice prior to this Court's ruling in *Hall*, and the Florida Supreme Court's ruling that *Hall* was retroactive in *Walls*, that he was eligible for relief on the basis of intellectual disability.

A. The Florida Supreme Court's Unjust Procedural Rule and Faulty Theory of Timeliness

Mr. Bowles's conviction and death sentence became final when the United States Supreme Court denied his petition for certiorari review on June 17, 2002. *See*

Bowles v. Florida, 536 U.S. 930 (2002). In 2001, the Florida Legislature enacted Fla. Stat. § 921.137, which barred the execution of the intellectually disabled. *See Kilgore v. State*, 55 So. 3d 487, 507 (Fla. 2010) (quoting *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009)). In 2002, the following year, this Court decided *Atkins*, which "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall*, 572 U.S. at 719 (quoting *Atkins*, 536 U.S. at 317)).

Because *Atkins* left to states how to implement the constitutional restriction, and thus how to define a successful *Atkins*-based claim, litigants were constrained by the statutory definition in Florida of what intellectual disability was in pursuing their claims. At that time, Florida's statutory definition of intellectual disability required that an IQ score be "two or more standard deviations from the mean score on a standardized intelligence test," to qualify as intellectually disabled. *See Cherry*, 959 So. at 712. Two standard deviations from the mean is an IQ score of 70. *See Hall*, 572 U.S. at 711 ("The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, i.e., a score of approximately 70 points.") (quoting Fla. Stat. § 921.127(1)). This interpretation was in effect between the 2001 enactment of the statute and until this Court struck down the resulting bright-line IQ cutoff in *Hall*. In this time frame, regardless of any other evidence of intellectual disability, failure to produce an IQ score of 70 or below was fatal to the entire claim. *See Foster*, 260 So. 3d at 178 ("[T]his state formerly required proof of an IQ score of 70 or below

to establish the first prong, and failure to produce such evidence was fatal to the entire claim."); *see also Zack*, 911 So. 2d at 1201 ("Under Florida law, one of the criteria to determine if a person is [intellectually disabled] is that he or she has an IQ of 70 or below."); *Cherry*, 781 So. 2d at 1041 (accepting testimony that only an IQ of 70 or below qualified to establish intellectual disability).

Mr. Bowles filed his state postconviction motion on the basis of his intellectual disability in 2017, including his qualifying IQ score of 74 on the WAIS-IV—the only qualifying IQ score that Mr. Bowles has ever received under Florida law, which Florida only recognized after *Hall*. At the time Mr. Bowles filed this motion, the Florida Supreme Court decided in an unpublished ruling in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), and later confirmed in its subsequent rulings in *Blanco v. State*, 249 So.3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), that individuals who had not raised intellectual disability claims within the time constraints of Fla. R. Crim. P. 3.203(d) (2004), were forever barred from doing so.

Mr. Bowles has an IQ score that is between 70-75, and his counsel did not raise the issue of Mr. Bowles's intellectual disability within the time frame established by Rule 3.203(d). This does not mean, however, that Mr. Bowles or his counsel should have known to raise this claim based on *Atkins* prior to *Hall*, or during the time after Fla. R. Crim. P. 3.203 went into effect in 2004.

Atkins explicitly left to the states the task of implementing its constitutional restriction, and Florida's statute defined intellectual disability to only include IQ scores of 70 and below. This was clear to the Florida Supreme Court in *Cherry*, whose

holding was based on the language of Fla. Stat. § 921.137, not the medical definition of intellectual disability, which the Supreme Court would require adherence to in *Hall*. *Cherry* held that the "plain meaning" of the statute defining intellectual disability required a finding of a hard-IQ cutoff of 70, which did not take into account the Standard Error of Measurement (SEM). *Cherry*, 959 So. 2d. at 713 ("[T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear.").

While *Rodriguez*, and those cases like *Blanco* and *Harvey* citing to *Rodriguez* and holding in accordance, ruled that those litigants should have raised their *Atkins*-based claims within the timeframe of Rule 3.203, they ignore that those claims would have been subject to the statutory language invalidated by *Hall*. Mr. Bowles, like Blanco and Harvey, had a claim in 2004 that was foreclosed by the statute, not by *Cherry*; *Cherry* merely later confirmed the interpretation of the statute. That even prior to the Florida Supreme Court's 2007 ruling in *Cherry* it was clear that an IQ score between 70-75 was fatal to an intellectual disability claim is borne out in the rulings of Florida courts prior to and subsequent to the promulgation of Rule 3.203. *See, e.g., Cherry*, 781 So. 2d at 1045-46; *Zack*, 911 So. 2d at 1201 (holding in 2005 that "[u]nder Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.").

Mr. Bowles relied on this "plain meaning" interpretation of the Florida statute defining intellectual disability, later formally recognized in *Cherry*, until this Court rejected it in *Hall*. Because that statute defined intellectual disability for the

purposes of Rule 3.203, and defined it in a manner that Mr. Bowles could not meet—requiring an IQ score of 70 or below—Mr. Bowles could not have known that he should have filed an intellectual disability claim through Rule 3.203 in 2004. Until the statutory definition changed as a result of *Hall,* and *Hall* was made retroactive in Florida by *Walls*, Mr. Bowles could not be reasonably expected to file a claim.

B. This Court's Rulings in *Hall* and *Moore* Recognize That State or Judicially Created Rules Cannot Create an Unacceptable Risk of Executing the Intellectually Disabled

Since *Atkins*, this Court has twice rejected state or court-created standards for the determination of intellectual disability that were contrary to or in conflict with clinical definitions guided by medical authorities. *See Hall*, 572 U.S. at 719 ("*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."); *Moore*, 137 S. Ct. at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus.") (internal citation omitted).

In *Hall*, this Court rejected Florida's use of a hard IQ cutoff score of 70 to determine intellectual disability. *Hall*, 572 U.S. at 724. *Hall* rejected Florida's legislative and judicial restrictions of taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and by relying on an IQ score as dispositive without recognizing that the score itself has a margin of error or standard error of measurement (SEM). *Id.* at 702. Under *Hall*, all three prongs of an intellectual

disability assessment—intellectual functioning, adaptive deficits, and age of onset—should be considered, consistent with the standards of the medical community. *Id.*

Likewise, in *Moore v. Texas*, this Court struck down judicially created factors that frustrated *Atkins*' protections. Moore, a death-sentenced man on Texas's death row, asserted his ineligibility for execution due to intellectual disability in state postconviction proceedings. *Moore*, 137 S. Ct. at 1045-46. After a state postconviction court granted him relief on the basis of his intellectual disability, pursuant to its finding that Moore fit the criteria for intellectual disability as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual (11th ed. 2010) (AAIDD-11) and the American Psychiatric Association (APA) Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5), the appellate court reversed that decision, holding that the state habeas court had used the wrong standards in determining whether Moore was intellectually disabled, instead holding that its court-created factors in *Ex parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004), were binding on the determination. *Id*. at 1046. The *Briseno* Court adopted the 1992 definition of intellectual disability by the AAIDD, which included the requirement that an individual's "adaptive deficits be 'related' to intellectual-functioning deficits." *Id*. at 1046 (citations omitted). To be sufficiently "related," and thus determined to have adaptive deficits consistent with being intellectually disabled, *Briseno* articulated "seven evidentiary factors" (*Briseno* factors) that were judicially created, and not otherwise found in medical or clinical authority. *Id*.

This Court in *Moore* rejected the *Briseno* factors, and reaffirmed that the Eighth Amendment required that courts be guided by the medical community's "current manuals [which] offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id*. at 1053. Thus, *Moore* emphasized guidance from the medical community on the presence and interpretation of adaptive deficits. *See, e.g., Moore*, 137 S. Ct. at 1052 n. 9 (noting skepticism of the *Briseno* factors, because they "placed undue emphasis on adaptive strengths, and regarded risk factors for intellectual disability as evidence of the absence of intellectual disability.") (internal citations omitted).

Although *Hall* and *Moore* both concerned how states and courts were operating to define *who is* intellectually disabled—requiring the guidance of the medical community—the critical principle from both cases is applicable here. This guiding principle is that although states are tasked with implementing the constitutional restriction, they may not fashion legislative (as in *Hall*) or judicial (as in *Moore*) rules that "create[] an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704. This restricting principle should not be limited to defining who is in the category of those intellectually disabled offenders ineligible for execution under medical community guidance; here a state-created rule of timeliness threatens to wholly prevent even the presentation of evidence of Mr. Bowles's intellectual disability based on a theory of timeliness that is fundamentally unfair.

Although *Hall* and *Moore* addressed state-created rules that frustrated the inclusion of potentially intellectually disabled individuals within the categorical

exemption, there is no conceptual reason to treat that principle differently in the case of a procedural rule of timeliness like the Florida Supreme Court's *Rodriguez* rule.

C. Like in *Hall* and *Moore*, the *Rodriguez* Time-Bar Created by the Florida Supreme Court Is Irreconcilable with the Eighth Amendment

When this Court left the states to decide how to implement the constitutional restrictions in cases like *Ford* and *Atkins*, it did not give them unrestricted license to disregard or frustrate the Eighth Amendment's protections. *See, e.g., Moore*, 137 S.Ct. at 1053 (quoting *Hall*, 572 U.S. at 720-21) ("'If the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.'").

Although *Atkins* and *Roper* claims are conceptually similar, and their jurisprudence constantly references each other, the prohibition on the execution of juveniles has been relatively easy to implement, due to the ease in determining who falls into the protected class (juveniles), compared with the implementation of the prohibition against executing the intellectually disabled. *See, e.g.,* Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia*: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 57 DEPAUL L. REV. 721, 723-24 (2008) ("The implementation of the juvenile ban involves no difficult cases, and there has been virtually no litigation surrounding it: offenders who committed the crime before turning eighteen have had their sentences commuted via judicial or clemency

proceedings . . . The ban on executing persons with [intellectual disability], on the other hand, has spawned extensive, intricate, and bitterly contested litigation.").

The Eighth Amendment cannot tolerate state or court-created rules that impermissibly risk the execution of the intellectually disabled. *See, e.g., Hall*, 572 U.S. at 720 (finding that a legislatively created fixed IQ score cutoff of 70 "conflicts with the logic of *Atkins* and the Eighth Amendment."); *Moore*, 137 S. Ct. at 1051 (finding, in concluding that the judicially created *Briseno* factors violated the Eighth Amendment, "[b]y design and in operation, the *Briseno* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed.") (internal citation omitted). Additionally, "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). These principles are critical to the "fundamental fairness" required by the Due Process Clause. *See Ford*, 477 U.S. at 424 (1986) (Powell, J., concurring in part and concurring in the judgment).

Even if Mr. Bowles, theoretically, could have been reasonably expected to file an *Atkins*-based claim following the promulgation of Rule 3.203 in 2004, this Court should consider the circumstances during that time. Florida courts were routinely holding that under the relevant statute the only qualifying IQ scores for intellectual disability diagnoses under Florida law were those of 70 or below. *Cherry,* 781 So. 2d at 1044-45; *Zack*, 911 So. 2d at 1201. The very rule that the Florida Supreme Court has held required Mr. Bowles file under or forever default a merits review of his claim,

Fla. R. Crim. P. 3.203, required that trial counsel certify that they had a "good faith basis" to file the motion and grounds to believe the individual was intellectually disabled. *See* Fla. R. Crim. P. 3.203(d)(4)(A) (2004). These circumstances changed the calculus for litigants like Mr. Bowles, and made it such that he did not have adequate notice that he either had a qualifying IQ score as later held by *Hall*, or that he had a "good faith basis" to believe he could file a claim of intellectual disability.

The Florida Supreme Court's procedural bar preventing individuals like Mr. Bowles from obtaining even *review* of their intellectual disability claims in Florida courts violates this Court's proscription that in *Atkins* cases that require such individuals at least have an "opportunity to present evidence of [their] intellectual disability." *Hall*, 572 U.S. at 724 ("Freddie Lee Hall may or may not be intellectually disabled, but *the law requires that he have the opportunity* to present evidence of his intellectual disability[.]") (emphasis added). Individuals who are categorically ineligible for execution like Mr. Bowles cannot be left by states without a forum to at least receive a single merits review of such claims. Such a holding contravenes *Atkins*, *Hall*, and progeny because they "create[] an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704.

As this Court in *Hall* recognized, while states are left with the task of implementing the constitutional restriction in *Atkins*, they are only free to do so in compliance with the Eighth Amendment. *Hall*, 572 U.S. at 718; *see also Montgomery*, 136 S. Ct. 718. They are not free to create rules or procedural bars that are "rigid"

and risk the execution of an intellectually disabled person. The Florida Supreme Court's *Rodriguez* time-bar violates the Eighth Amendment because it does just that.

The Florida Supreme Court's unconstitutional *Rodriguez* time-bar is not just a matter of life and death for Mr. Bowles, an intellectually disabled man who is scheduled to be executed on August 22, 2019, without any court having reviewed the compelling evidence of intellectual disability that he has been trying to present for two years. The Florida Supreme Court will continue to apply the bar to foreclose merits review in other cases, resulting in an unacceptable risk that individuals who are intellectually disabled in fact will nevertheless be denied the Eighth Amendment protections this Court recognized in *Atkins*, *Hall*, and *Moore*.

CONCLUSION

The Court should grant Mr. Bowles's application for a stay of execution and grant a writ of certiorari to review the decision below.

Respectfully submitted,

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