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

PETITIONER'S APPENDIX

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

KARIN L. MOORE
ELIZABETH SPIAGGI
Office of the Capital Collateral
Regional Counsel—North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
karin.moore@ccrc-north.org
elizabeth.spiaggi@ccrc-north.org

TERRI L. BACKHUS
Counsel of Record
KELSEY PEREGOY
SEAN GUNN
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
terri_backhus@fd.org
kelsey_peregoy@fd.org
sean_gunn@fd.org

INDEX TO APPENDIX

Supreme Court of Florida

No. SC19-1184

GARY RAY BOWLES,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC19-1264

GARY RAY BOWLES,
Petitioner,

vs.

MARK S. INCH, etc.,
Respondent.

August 13, 2019

PER CURIAM.

Gary Ray Bowles, a prisoner under sentence of death and an active death warrant, appeals the postconviction court's order summarily denying his successive motion for postconviction relief filed under Florida Rule of Criminal

Procedure 3.851. We affirm the denial of relief, and we also deny the petition for a writ of habeas corpus and the motions to stay his execution that Bowles filed in this Court.[1]

I. BACKGROUND

Bowles confessed and pleaded guilty to the 1994 murder of Walter Hinton, who had allowed Bowles to move into his home in exchange for Bowles' help in moving personal items. *Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998). Specifically, Bowles dropped a concrete block on Hinton's head while Hinton was sleeping, then manually strangled a conscious Hinton, and subsequently "stuffed toilet paper into Hinton's throat and placed a rag into his mouth." *Id.* On direct appeal, this Court affirmed the first-degree murder conviction but remanded for a new penalty phase. *Id.* On direct appeal of the resentencing (where the jury unanimously recommended death), this Court upheld Bowles' death sentence. *Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2002). The resentencing trial court based the prior violent felony aggravator on "two prior similar murders for which the defendant was convicted after the first sentencing hearing" as well as two other prior violent felony convictions. *Id.* at 1176.

1. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

In 2008, this Court upheld the denial of postconviction relief and denied habeas relief. *Bowles v. State*, 979 So. 2d 182, 184, 194 (Fla. 2008). In so doing, this Court ruled that trial counsel was not ineffective for failing to call an expert to testify regarding mitigation, where the expert had informed counsel that she would have to discuss the "three additional murders that Bowles had committed, which the State was not going to introduce unless the defense opened the door to them." *Id.* at 187-88. And in 2018, this Court affirmed the denial of Bowles' successive postconviction motion, which he had filed in June 2017, ruling that *Hurst*[2] does not apply retroactively to Bowles' death sentence. *See Bowles v. State*, 235 So. 3d 292, 292 (Fla. 2018).

On October 19, 2017, Bowles filed another successive postconviction motion, raising an intellectual disability claim for the first time. Bowles filed the final version of this motion after the governor signed his death warrant on June 11, 2019. Bowles' final motion (entitled "Amended Rule 3.851 Motion for Postconviction Relief in Light of *Moore v. Texas*,[3] *Hall v. Florida*,[4] and *Atkins v.*

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2. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

3. *Moore v. Texas*, 137 S. Ct. 1039 (2017).

4. *Hall v. Florida*, 572 U.S. 701 (2014). *Hall* has been retroactively applied by this Court to timely filed intellectual disability claims. *See Walls v. State*, 213 So. 3d 340 (Fla. 2016). We do not address here the continued validity of that holding.

Virginia[5]") and its appendix noted an IQ test score of 74 as well as prior IQ test scores of 80 and 83. After holding a case management conference, the postconviction court summarily denied Bowles' intellectual disability claim as untimely.

II. ANALYSIS

In this Court, Bowles challenges the summary denial of his intellectual disability claim and the denial of certain records requests filed after the governor signed his death warrant. Bowles also filed a habeas petition in this Court, alleging that national death penalty trends demonstrate that his execution would constitute cruel and unusual punishment. We affirm the postconviction court's denial of relief and deny his habeas petition.

(1) Intellectual Disability

Bowles first challenges the postconviction court's summary denial of his intellectual disability claim, but we affirm the postconviction court.

A postconviction court's decision regarding whether to grant an evidentiary hearing is a pure question of law and is reviewed de novo. *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013). "If the motion, files, and records in the case

5. *Atkins v. Virginia*, 536 U.S. 304 (2002).

conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R. Crim. P. 3.851(f)(5)(B).

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**.**

To the extent Bowles relies on rule 3.203(f), Bowles has not established good cause for failing to seek a determination of his intellectual disability within 60 days of October 1, 2004. At that time, the Supreme Court had held that the Eighth Amendment prohibits the execution of an intellectually disabled offender, and it is reasonable to expect Bowles then to have raised any argument that Florida's standards for determining intellectual disability were constitutionally deficient. Bowles' inaction should not be ignored on the basis of the perceived futility of his claim.

Accordingly, he is not entitled to relief.

(2) Records Requests

Next, Bowles challenges the postconviction court's denial of his requests for certain public records pursuant to Florida Rule of Criminal Procedure 3.852(h)(3) and (i). "We review rulings on public records requests pursuant to Florida Rule of

Criminal Procedure 3.852 for abuse of discretion," *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017), and find none here.

This Court has explained the following regarding records requests under rule 3.852:

> Rule 3.852 is "not intended to be a procedure authorizing a fishing expedition for records." *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). For this reason, records requests under Rule 3.852(h) are limited to "persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey," *id.*; whereas, records requests under Rule 3.852(i) must "show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed." *Asay* [*v. State*, 224 So. 3d 695, 700 (Fla. 2017)] (quoting *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003)).

Hannon, 228 So. 3d at 511. "Accordingly, where a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a records request." *Asay*, 224 So. 3d at 700.

The disputed records in this case involve inmate classification records from the Florida Department of Corrections (DOC),[6] any records of communication

6. The postconviction court ordered DOC to produce all medical, dental, psychological, and psychiatric records received or produced since Bowles' previous records request but denied Bowles' request for all records pertaining to his disciplinary proceedings, movement, housing, and visitation. The parties stipulated that the State would not rely on or use any records not previously turned over by DOC without first disclosing those records to Bowles.

between the State Attorney's Office and the victim's friends or family, and records relating to the lethal injection procedure from DOC, the Florida Department of Law Enforcement (FDLE), and the Medical Examiner's Office (ME). Because Bowles cannot demonstrate that he is entitled to relief on claims related to these records, and because Bowles' contention that his inmate classification records and any State Attorney Office communication with the victim's family or friends may reflect his behavior is too attenuated to reasonably lead to admissible evidence relevant to a colorable claim of relief, the postconviction court did not abuse its discretion in denying Bowles' requests for these records. *See Jimenez v. State*, 265 So. 3d 462, 473-74 (Fla. 2018) (finding no abuse of discretion in the denial of records requests in support of challenges to Florida's current lethal injection protocol, explaining that "production of records relating to lethal injection are 'unlikely to lead to a colorable claim for relief [when] the challenge to the constitutionality of lethal injection as currently administered in Florida has been fully considered and rejected by the Court' " (quoting *Hannon*, 228 So. 3d at 511-12 (quoting *Walton v. State*, 3 So. 3d 1000, 1014 (Fla. 2009))); *Sims v. State* 753 So. 2d 66, 70 (Fla. 2000) (explaining that rule 3.852(h)(3) is "not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief").

(3) Habeas Petition

In his habeas petition, Bowles claims that, given national trends in the death penalty, his execution would constitute cruel and unusual punishment. However, as we have explained, "this Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court." *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015); *see* art. I, § 17, Fla. Const. ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."). Accordingly, because the United States Supreme Court has made clear that capital punishment does not constitute cruel and unusual punishment under the Eighth Amendment of the federal constitution, we cannot invalidate Bowles' death sentence as cruel and unusual. *See Glossip v. Gross*, 135 S. Ct. 2726, 2732-33 (2015) ("[B]ecause it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.' " (second and third alterations in original) (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008))); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (rejecting an Eighth Amendment as-applied challenge to the death penalty based

on a study); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (holding the punishment of death for the crime of murder does not violate the Eighth Amendment).

III. CONCLUSION

For the reasons expressed above, we affirm the postconviction court's summary denial of Bowles' successive postconviction motion. We also deny Bowles' habeas petition and his motions to stay his execution. No rehearing will be entertained by this Court, and the mandate shall issue immediately.

It is so ordered.

POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.
CANADY, C.J., concurs in part and concurs in result in part with an opinion.

CANADY, C.J., concurring in part and concurring in result in part.

I agree that the postconviction court's summary denial of Bowles' motion should be affirmed, that the habeas petition should be denied and that no stay should be entered. I join in the result as well as the portions of the majority opinion addressing Bowles' claim regarding public records and his habeas petition. But I would reject Bowles' intellectual disability claim on the ground that *Hall v. Florida*, 572 U.S. 701 (2014), should not be given retroactive application. *See Walls v. State*, 213 So. 3d 340, 350-52 (Fla. 2016) (Canady, J., dissenting). To the extent that Bowles presents a claim under rule 3.203(f) independent of the retroactive application of *Hall*, I agree with the majority opinion regarding the rejection of that claim.

An Appeal from the Circuit Court in and for Duval County,
Bruce Rutledge Anderson, Jr., Judge - Case No.
161994CF012188AXXXMA

And an Original Proceeding – Habeas Corpus

Robert Friedman, Capital Collateral Regional Counsel, and Karin Moore and Elizabeth Spiaggi, Assistant Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida; and Terri Backhus, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida,

for Appellant/Petitioner

Ashley Moody, Attorney General, and Charmaine M. Millsaps, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-1994-CF-012188-AXXX

DIVISION: CR-A

STATE OF FLORIDA

v.

DEATH WARRANT SIGNED EXECUTION SCHEDULED FOR THURSDAY, AUGUST 22, 2019

GARY RAY BOWLES,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

This matter came before the Court on Defendant's "Amended Rule 3.851 Motion for Postconviction Relief in Light of Moore v. Texas, Hall v. Florida, and Atkins v. Virginia" ("Motion"), pursuant to Florida Rule of Criminal Procedure 3.851, filed on July 1, 2019. The State filed its answer to Defendant's Motion on July 3, 2019. On July 8, 2019, a Case Management Conference was held on Defendant's Motion.

PROCEDURAL HISTORY

Defendant entered a plea of guilty on May 17, 1996, to one count of First-Degree Murder. After a penalty proceeding, a jury recommended a sentence of death by a vote of ten-two and the Court sentenced Defendant to death on September 6, 1996. On appeal, the Florida Supreme Court affirmed Defendant's conviction, but reversed his sentence and remanded for a new penalty phase. Bowles v. State, 716 So. 2d 769 (Fla. 1998). Following a second penalty

proceeding, a jury unanimously recommended a sentence of death. The Mandate affirming Defendant's conviction and sentence was issued by the Florida Supreme Court on June 14, 2002.

Defendant filed his initial motion for postconviction relief on December 9, 2002, which was amended on June 25, 2003. A hearing on Defendant's initial motion for postconviction relief was held on February 8, 2005, and the Court denied the motion on August 12, 2005. On February 14, 2008, the Florida Supreme Court affirmed the order denying the initial motion for postconviction relief. Bowles v. State, 979 So. 2d 182 (Fla. 2008).

On March 19, 2013, Defendant filed a successive motion for postconviction relief, which was denied by the Court on July 17, 2013. Defendant did not appeal the denial of this successive motion for postconviction relief. On June 14, 2017, Defendant filed his third motion for postconviction relief in light of Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). The Court denied this motion on August 22, 2017, and the Florida Supreme Court affirmed the denial on January 29, 2018. Bowles v. State, 235 So. 3d 292 (Fla. 2018).

On October 19, 2017, Defendant filed his fourth motion for postconviction relief. Defendant amended this motion on March 13, 2019. On June 11, 2019, Governor DeSantis signed the death warrant in this case. Following the signing of the death warrant, the Florida Supreme Court ordered this Court to complete all postconviction proceedings by July 17, 2019.

On July 2, 2019, Defendant filed the final version of his fourth motion for postconviction relief in which he claimed the State was barred from executing him based on his intellectual disability. On July 8, 2019, a Case Management Conference was held to determine whether an evidentiary hearing was necessary to address Defendant's claim of intellectual disability.

RULE 3.203 TIME LIMITATION

In response to the passing of Section 921.137, Florida Statutes, barring the imposition of death sentences on intellectually disabled persons, and the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304 (2002), holding the execution of the intellectually disabled constitutes excessive punishment under the Eighth Amendment, the Florida Supreme Court promulgated Florida Rule of Criminal Procedure 3.203 to establish the methods for determining which offenders are intellectually disabled. In Re Amends. To Fla. R. Crim. P. & Fla. R. App. P., 875 So. 2d 563 (Fla. 2004). The Florida Supreme Court set forth specific time limitations in Rule 3.203 for filing a motion for determination of intellectual disability as a bar to execution. Relevant to the instant case, Florida Rule of Criminal Procedure 3.203(d) states in part:

> (4) Cases in which the direct appeal is final; contents of motion; conformity with Florida Rule of Criminal Procedure 3.851
>
> . . .
>
> (C) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(C) (2004). A claim of intellectual disability is waived if not filed by the deadlines set forth in subsection (d)(4). Fla. R. Crim. P. 3.203(f) (2004).

Defendant filed his initial motion for postconviction relief on December 9, 2002, and the Court did not rule on the motion until August 12, 2005. Thus, the time limit in Rule 3.203(d)(4)(C) is applicable to Defendant and beginning October 1, 2004, Defendant had sixty days to amend his pending Rule 3.851 motion to include a claim of intellectual disability. Defendant failed to amend and, instead, raised his claim of intellectual disability for the first time

on October 19, 2017. Thus, Defendant's claim of intellectual disability is untimely and is waived.

RULE 3.203(f) GOOD CAUSE EXCEPTION

Defendant alleges his waiver should be excused because he had good cause for failing to previously file a claim of intellectual disability. Defendant's alleged good causes are: (1) Defendant and postconviction counsel could not have known Defendant's IQ score of 74 did not bar Defendant from raising a claim of intellectual disability prior to Hall v. Florida, 572 U.S. 701 (2014) being found retroactive; and (2) postconviction counsel was grossly negligent in failing to investigate, discover, and file an Atkins claim.

Retroactivity of Hall

Defendant argues there is good cause for failing to timely file his claim of intellectual disability because he believed he was prohibited from bringing a claim with an IQ score above 70. Defendant contends that he was not on notice he could bring an intellectual disability claim based on his IQ score of 74 until the Florida Supreme Court in Walls v. State, 213 So. 3d 340 (Fla. 2016) found the Hall decision, overturning the bright-line cut off IQ score of 70 established in Cherry v. State, 959 So. 2d 702 (Fla. 2007), applied retroactively.

In Rodriguez v. State, 250 So. 3d 616 (Fla. 2016), the defendant made a similar argument as the basis for good cause to excuse his waiver under Rule 3.203. Rodriguez argued he could not raise his intellectual disability claim earlier because his claim was procedurally barred until the decision in Hall. Id. The trial court rejected this argument because by failing to timely raise an Atkins claim there is no way he could have relied on the ruling in Cherry. Id.; See Harvey v. State, 260 So. 3d 906-07 (Fla. 2018). This Court agrees with the reasoning stated in Rodriguez

and rejects Defendant's argument that Hall being held retroactive is a basis for good cause because Defendant failed to previously raise an Atkins claim.

Postconviction Counsel's Negligence

Defendant claims postconviction counsel was grossly negligent for failing to investigate and file an Atkins claim prior to the deadline set forth in Rule 3.203. Defendant argues it was clear that attorneys representing defendants sentenced to death should investigate intellectual disability claims following the Atkins decision. Defendant contends this was especially true in cases like his where there were multiple pieces of evidence indicating limited intellectual functioning.

While Defendant has framed postconviction counsel as grossly negligent, he is effectively arguing good cause exists because postconviction counsel was *ineffective* for failing to file an Atkins claim. The Florida Supreme Court has repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable. See Kokal v. State, 901 So. 2d 766, 777 (Fla. 2005); Foster v. State, 810 So. 2d 910, 917 (Fla. 2002); King v. State, 808 So. 2d 1237, 1245 (Fla. 2002); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001); Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996). Instead, the Florida Supreme Court has held that a capital defendant is only entitled to meaningful access to judicial process during postconviction proceedings. Kokal, 901 So. 2d at 777. Considering this is Defendant's *fourth* Rule 3.851 motion adjudicated by the Court, it is clear that Defendant has had ample meaningful access to judicial process during the postconviction stage of his case.

Additionally, it is not the intent of the Rule 3.203 good cause exception to serve as a backdoor for claims of ineffective assistance of postconviction counsel. To interpret otherwise would nullify the procedural bar in its entirety because any defendant, at any time, could claim

counsel was ineffective for failing to file the claim. Without the procedural bar, defendants sentenced to death would be encouraged to bring claims of intellectual disability at the eleventh hour, such as when a death warrant is signed, in order to create delay. Therefore, Defendant's claim that postconviction counsel was ineffective for failing to timely investigate and file his claim of intellectual disability is not a basis for good cause under Rule 3.203.

DISPOSITION OF WAIVED INTELLECTUAL DISABILITY CLAIM

The Florida Supreme Court first affirmed the summary denial of a defendant's post-Hall Atkins claim as time barred in Rodriguez, 250 So. 3d at 616. In Blanco v. State, 249 So. 3d 536 (Fla. 2018), the Florida Supreme Court applied its reasoning in Rodriguez when it affirmed the denial of Blanco's Atkins claim as untimely under the time-bar contained within Rule 3.203. Most recently in Harvey, the Florida Supreme Court again affirmed the summary denial of a defendant who failed to raise a claim of intellectual disability by the deadline imposed by Rule 3.203. Harvey, 260 So. 3d at 906-07. When Rule 3.203 went into effect on October 1, 2004, Harvey's initial postconviction motion was on appeal and, thus, he had sixty days to file a motion with the Florida Supreme Court to relinquish jurisdiction for a determination of his intellectual disability. Fla. R. Crim. P. 3.203(d)(4)(E) (2004); See Harvey v. State, 946 So. 2d 937 (Fla. 2006). Harvey failed to meet this deadline, instead, waiting until 2016 to raise his claim of intellectual disability for the first time. Harvey, 260 So. 3d at 906-07. The court held the record conclusively showed Harvey's claim was untimely and he was not entitled to relief. Id.

Similar to the defendants in those cases, Defendant waived his claim of intellectual disability by failing to file by the Rule 3.203 deadline and has not sufficiently alleged good cause to excuse this waiver. "Where an issue has been decided in the Supreme Court of the state, the

lower courts are bound to adhere to the Court's ruling when considering similar issues." State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1970). Lower courts are similarly bound to the rules of criminal procedure promulgated by the Florida Supreme Court. State v. Lott, 286 So. 2d 565, 566-67 (Fla. 1973). When there is controlling Florida Supreme Court precedent disposing of a claim, the trial court should summarily deny the postconviction claim. Mann v. State, 112 So. 3d 1158, 1162-63 (Fla. 2013).

For this Court to rule differently, effectively ignoring the plain language of Rule 3.203(f) and failing to follow Florida Supreme Court precedents in Rodriguez, Blanco, and Harvey, would violate the obligation lower courts have to adhere to the higher court's authority. Therefore, an evidentiary hearing is not necessary and Defendant's untimely intellectual disability claim is summarily denied.

RULE 3.851(d)(2)(B) TIME LIMIT EXCEPTION

As an alternative to the time bar in Rule 3.203, Defendant argues his intellectual disability claim is timely filed pursuant to Rule 3.851 and the timeliness exception found in subsection (d)(2)(B). When a claim for postconviction relief is filed beyond the time limitation provided for in Florida Rule of Criminal Procedure 3.851(d)(1), the claim must rely upon one of the following enumerated exceptions:

> (A) The facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) The fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) Postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). Specifically, Defendant claims his Motion was timely filed within the one year time limit when calculated from the date the Walls court found the Hall decision applied retroactively. Defendant's argument is without merit because he never filed an Atkins claim, and Hall is not applicable to defendants who did not previously file a claim of intellectual disability under Atkins. Harvey, 260 So. 3d at 907. Therefore, Defendant cannot rely upon Rule 3.851(d)(2)(B) because he was not part of a class of defendants who had a fundamental constitutional right to file a retroactive intellectual disability claim. Accordingly, it is:

ORDERED AND ADJUDGED that Defendant's "Amended Rule 3.851 Motion for Postconviction Relief in Light of Moore v. Texas, Hall v. Florida, and Atkins v. Virginia," pursuant to Florida Rule of Criminal Procedure 3.851, filed on July 1, 2019, is **DENIED.** In accordance with the Florida Supreme Court's June 12, 2019 scheduling order, Defendant shall have until 3:00 p.m. Thursday, July 18, 2019, to file his Notice of Appeal with the Clerk of Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 11th day of July, 2019.

BRUCE ANDERSON
Circuit Judge

Copies to:

Supreme Court of Florida
Warrant@flcourts.org

Bernie de la Rionda, Esquire
Office of the State Attorney
220 East Bay Street
Jacksonville, Florida 32202
Bdelarionda2@gmail.com

Jennifer Ann Donahue, Esquire
Associate Attorney General
Department of Legal Affairs
PL-01, The Capital
Tallahassee, Florida 32399
jennifer.donahue@myfloridalegal.com

Charmaine M. Millsaps, Esquire
Senior Assistant Attorney General
Office of the Attorney General
PL-01, The Capital
Tallahassee, Florida 32399
charmaine.millsaps@myfloridalegal.com

Karin Moore, Esquire
Counsel for Defendant
Assistant Capital Collateral Regional Counsel - North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
karin.moore@ccrc-north.org

Terri Backhus, Esquire
Counsel for Defendant
Office of the Federal Public Defender
Capital Habeas Unit
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
terri_backhaus@fd.org

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to all legal counsel for both parties via address listed above and/or Defendant by U.S. Mail this _____ day of _____, 2019.

_____,
Deputy Clerk

Case No.: 16-1994-CF-012188-AXXX-MA
Division: CR-A
/jlb

IN THE SUPREME COURT OF FLORIDA

GARY RAY BOWLES,

Appellant,

Case No. SC19-1184

v.

STATE OF FLORIDA,

EXECUTION SCHEDULED FOR AUGUST 22, 2019, At 6:00 P.M.

Appellee.
_____/

APPELLANT'S MOTION FOR STAY OF EXECUTION

Appellant Gary Ray Bowles moves for a stay of his scheduled August 22, 2019, execution of sentence of death.

On July 26, 2019, Mr. Bowles filed an initial brief in this Court on appeal from the Duval County Circuit Court's July 8, 2019, order summarily denying his motion for postconviction relief based on intellectual disability.

As detailed in Mr. Bowles's brief, the circuit court refused to consider on the merits whether Mr. Bowles is in fact intellectually disabled and therefore ineligible for execution under the Eighth Amendment. Instead, the circuit court ruled that Mr. Bowles's claim was time-barred under this Court's decisions in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), which hold that intellectually disabled individuals *can* be executed, consistent with the Eighth Amendment, if those individuals did not file their claim by a certain date. In his initial brief, Mr. Bowles

argues, among other things, that this Court's state procedural rule allowing for the execution of certain intellectually disabled individuals like Mr. Bowles violates the Eighth Amendment in light of the United States Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), which make clear that intellectual disability is a categorical, non-waivable bar to execution. The United States Constitution does not permit this Court to apply a state procedural rule barring any merits inquiry into whether an individual scheduled for execution is in fact intellectually disabled, particularly where the is a strong evidentiary proffer made.[1]

It is appropriate for a capital defendant to request a stay pending the orderly resolution of his claims before the "irremediable act of execution is taken." *Shaw v. Martin*, 613 F.2d 487, 492 (4th Cir. 1980). This Court has granted stays of execution on numerous occasions. A stay of execution is appropriate in this case so that a proper evidentiary hearing, denied by the circuit court, can be ordered by this Court

[1] Also on July 26, 2019, Mr. Bowles filed in this Court an original petition for a writ of habeas corpus challenging the death sentence imposed against him as cruel and unusual, and contrary to the evolving standards of decency, in violation of the Eighth Amendment and the corresponding provisions of the Florida Constitution. In the circuit court, Mr. Bowles has also made numerous, narrowly tailored demands for public records pursuant to Fla. R. Crim. P. 3.852 pertaining to records from state agencies, including the Florida Department of Corrections as well as prosecution and law enforcement agencies. The circuit court denied the public records requests, and these rulings are addressed in Mr. Bowles's initial brief in this Court. These issues also make a stay of execution appropriate.

and conducted accordingly. The nature of the issues in this litigation require appellate review that is not truncated by the exigencies of an execution. A stay should be granted now, prior to this Court's ruling on Mr. Bowles's appellate and habeas claims.

Alternatively, if this Court denies a stay pending this appeal and affirms the judgment of the circuit court, Mr. Bowles requests that a stay be entered pending the filing and disposition of a petition for certiorari on the question of whether this Court's decisions in *Rodriguez*, *Blanco*, and *Harvey*, violate the Eighth Amendment in light of the United States Supreme Court's intellectual disability jurisprudence. Whether the state-created procedural rule here—the foreclosure of any merits review created by *Rodriguez*, *Blanco*, and *Harvey*—creates such an unacceptable risk of the execution of the intellectually disabled has not yet but should be addressed by the United States Supreme Court. Just as Florida's prior bright-line rule for qualifying IQ scores has been addressed by the Supreme Court in *Hall v. Florida*, so too should the Supreme Court be allowed time to resolve the important constitutional concerns created by Florida's recent procedural bar application in intellectual disability cases, without the exigencies of an imminent execution.

A stay of execution should be granted.

Respectfully submitted,

/s/ Terri Backhus
Terri Backhus
Florida Bar No. 946427
Chief, Capital Habeas Unit
Office of the Federal Public Defender
For the Northern District of Florida
227 N. Bronough St. Suite 4200
Tallahassee, FL 32301
(850) 942-8818
Terri_Backhus@fd.org

/s/ Karin Moore
Karin Moore
Florida Bar No. 351652
Elizabeth Spiaggi
Florida Bar No. 1002602
Assistant CCRC-North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin_Moore@ccrc-north.org
Elizabeth_Spiaggi@ccrc-north.org

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Terri Backhus, Chief, Capital Habeas Unit, Federal Public Defender for the Northern District of Florida (terri_backhus@fd.org); Bernie de la Rionda (bdelarionda2@gmail.com); Assistant State Attorney Sheila Ann Loizos (sloizos@coj.net); Assistant Attorney General Jennifer A. Donahue (jennifer.donahue@myfloridalegal.com), Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com), (capapp@myfloridalegal.com), the Circuit Court of the Fourth Judicial Circuit (pfields@coj.net), and the Florida Supreme Court (warrant@flcourts.org) this 26th day of July, 2019.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

No. SC19-1184

IN THE

Supreme Court of Florida

GARY RAY BOWLES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

EXECUTION SCHEDULED FOR AUGUST 22, 2019 at 6:00 P.M.

Terri Backhus
Florida Bar No. 946427
Chief, Capital Habeas Unit
Office of the Federal Public Defender
For the Northern District of Florida
227 N. Bronough St. Suite 4200
Tallahassee, FL 32301
(850) 942-8818
Terri_Backhus@fd.org

Karin Moore
Florida Bar No. 351652
Elizabeth Spiaggi
Florida Bar No. 1002602
Assistant CCRC-North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin_Moore@ccrc-north.org
Elizabeth_Spiaggi@ccrc-north.org

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

OTHER

PRELIMINARY STATEMENT

On June 11, 2019, the Governor signed a warrant for the execution of Mr. Gary Bowles, who had been trying to litigate his intellectual disability—a categorical bar to his execution— in the circuit court of Duval County for nearly two years. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002); Fla. Stat. § 921. 137. Less than 80 days before the signing of the warrant, Mr. Bowles had obtained entirely new state postconviction counsel because his prior counsel was not qualified to represent him under Florida law. After the signing of the warrant, this Court ordered Mr. Bowles's entire circuit court litigation to be concluded in the span of 36 days with his newly appointed state counsel, who had never before litigated under warrant, before a judge who had never before presided over capital case warrant litigation.

Mr. Bowles's intellectual disability claim, which had been filed since 2017, had never been raised previously. As a result of this 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), the circuit court found that Mr. Bowles was time-barred from obtaining any merits review of his intellectual disability. Although Mr. Bowles raised several constitutional arguments, as well as distinguishing factual bases, for the timeliness of his filing, the circuit court failed to address any of Mr. Bowles's

constitutional challenges or make any fact-specific inquiry about timeliness in this case. Mr. Bowles, whose execution is imminent, has a valid claim that his execution is categorically barred by the Eighth Amendment, and no court has ever reviewed the merits of this claim. For the following reasons, this Court should reverse the findings of the circuit court and remand this proceeding for an evidentiary hearing on the merits of Mr. Bowles's claim.

REQUEST FOR ORAL ARGUMENT

Mr. Bowles respectfully requests oral argument pursuant to Fla. R. App. P. 9.320, and also files a separate motion for oral argument with this brief.

CITATIONS TO THE RECORD

Citations to the Record on Appeal compiled in Mr. Bowles's second direct appeal, *see Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), will be in the format "R. at [page]." Citations to the Record on Appeal compiled in Mr. Bowles's appeal from the denial of his initial postconviction motion, *see Bowles v. State*, 979 So. 2d 182 (Fla. 2008), will be "PCR. [Volume Number] at [page]." Citations to the Record on Appeal compiled for this appeal will be "PCR-ID. at [page]."

STANDARD OF REVIEW

When the circuit court denies postconviction relief without an evidentiary hearing, this Court accepts the defendant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla.

2009). The Court "review[s] the trial court's application of the law to the facts de novo." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008).

A postconviction court's decision regarding whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence, and the ruling as to whether a hearing is appropriate is subject to de novo review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

STATEMENT OF THE CASE AND FACTS

A. Trial and Direct Appeal

In 1996, Mr. Bowles pleaded guilty to first-degree murder in the Circuit Court, Fourth Judicial Circuit, Duval County, and following a penalty phase, the 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*[1] sentencing scheme, the judge imposed a death sentence. *Bowles*, 716 So. 2d at 770. On appeal, the Florida Supreme Court found that Mr. Bowles's death sentence was unreliable because the trial court erred in allowing the State to introduce prejudicial evidence, and thus vacated Mr. Bowles's death sentence and remanded for a new sentencing. *Id.* at 773.

On remand, a new penalty phase was held in 1999, and the jury recommended death by a vote of 12 to 0. *See Bowles*, 804 So. 2d at 1175. The judge again imposed

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

a death sentence after finding five aggravating factors had been proven beyond a reasonable doubt.[2] The judge also found six mitigating factors, but determined they did not sufficiently outweigh the aggravation in the case.[3] *Id*. The Florida Supreme Court affirmed, *id*. at 1184, and the United States Supreme Court denied certiorari on June 17, 2002, *Bowles v. Florida*, 536 U.S. 930 (2002).

B. Initial State Postconviction

In January 2002, the trial court appointed the Capital Collateral Counsel—Northern Region (CCR) to represent Mr. Bowles in state postconviction proceedings. Shortly thereafter, CCR moved to withdraw from his case, and on February 28, 2002, this Court appointed private attorney Frank J. Tassone, Jr. to represent Mr. Bowles. Mr. Tassone filed an initial motion for postconviction relief,

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[2] The trial court found the following aggravating factors: (1) Defendant was convicted of two other capital felonies and two other violent felonies; (2) Defendant was on probation when he committed the murder; (3) Defendant committed the murder during a robbery or an attempted robbery, and the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). *Id*. at 1175.

[3] In mitigation, the trial court found: (1) Defendant had an abusive childhood; (2) Defendant had a history of alcoholism and absence of a father figure; (3) Defendant's lack of education; (4) Defendant's guilty plea and cooperation with police in this and other cases; (5) Defendant's use of intoxicants at the time of the murder; and (6) the circumstances that caused Defendant to leave home and his circumstances after he left home. *Id*.

pursuant to Fla. R. Crim. P. 3.850 and 3.851, on December 9, 2002. Mr. Tassone filed an amended motion on August 29, 2003, raising nine claims. PCR at 21-101.[4]

On February 8, 2005, an evidentiary hearing was held on two claims: that Mr. Bowles's counsel was ineffective for failing to (1) investigate and present mitigating evidence, and (2) discover and present evidence rebutting the State's assertion of the HAC aggravating factor. *See* PCR III. Mr. Tassone presented the testimony of three witnesses: Ronald K. Wright, a medical examiner, Harry Krop, a psychologist, and Bill White, Mr. Bowles's trial attorney. *Id*. On August 12, 2005, the Court denied postconviction relief. On February 14, 2008, the Florida Supreme Court affirmed. *Bowles*, 979 So. 2d at 193.

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[4] The amended postconviction motion raised the following claims: "(1) trial counsel were ineffective for failing to present statutory and nonstatutory mental mitigation, and the trial court erred in finding the two statutory mental mitigators were not proven; (2) the trial court erred in refusing to give the defense's requested jury instructions defining mitigation; (3) the trial court erred in instructing the jury that it could consider victim impact evidence; (4) and (5) Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); (6) *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* required the elements of the offense necessary to establish capital murder be charged in the indictment; (7) *Apprendi* and *Ring* required the jury recommendation of death be unanimous; (8) trial counsel were ineffective for failing to adequately investigate and present mitigating evidence; and (9) trial counsel were ineffective for failing to discover and present evidence rebutting the State's proof of the HAC aggravating factor." *Bowles*, 979 So. 2d at 186 n. 2.

C. Federal Habeas Proceedings

On August 8, 2008, Mr. Bowles filed an initial petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. *Bowles v. Sec'y, Fla. Dep't of Corrs.*, No. 3:08-cv-791-HLA, ECF No. 1 (M.D. Fla. Aug. 8, 2008).[5] The federal district court denied his petition on December 23, 2009. *Id*. (ECF No. 18). The United States Court of Appeals for the Eleventh 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).

D. Successive State Postconviction Motions

In March 2013, Mr. Tassone filed a successive motion for state postconviction relief on Mr. Bowles's behalf, arguing for relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), and the ineffectiveness of trial

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[5] In his federal petition, Mr. Bowles raised 10 claims, including: (1) the State used peremptory strikes to improperly remove jurors who expressed reservations about the death penalty; (2) the trial court erred in permitting evidence of two homicides at the resentencing hearing that were not presented at the original sentencing; (3) the court erred in finding the HAC aggravator; (4) the court erred in giving the HAC jury instruction; (5) Florida's death penalty scheme was unconstitutional; (6) direct appeal counsel was ineffective for failing to appeal the introduction of prejudicial and gruesome photographs; (7) the court erred in finding that Mr. Bowles committed the murder during the course of an attempted robbery or for pecuniary gain; (8) the Florida Supreme Court's finding that Mr. Bowles did not prove the two proposed statutory mitigating circumstances of Extreme Emotional Disturbance (EED) and Diminished Capacity was erroneous; (9) Mr. Bowles's death sentence is disproportionate; and (10) the Florida Supreme Court's holding that Mr. Bowles's trial counsel was not ineffective by failing to introduce Dr. McMahon's testimony regarding mental health mitigation was erroneous.

and appellate counsel. The circuit court summarily denied this motion, and Mr. Tassone did not appeal on Mr. Bowles's behalf.

On August 31, 2015, Mr. Tassone filed a motion to withdraw as Mr. Bowles's counsel, citing medical issues and the fact that he was winding down his practice and intended only to work limited hours in the future. The circuit court granted this request on September 3, 2015, and appointed attorney Francis Jerome ("Jerry") Shea to represent Mr. Bowles.

On June 14, 2017, Mr. Bowles filed a successive motion for postconviction relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The circuit court denied *Hurst* relief, and this Court affirmed. *Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (2018).[6]

[6] Mr. Bowles's case is frequently cited as an example of the arbitrariness of Florida's *Hurst*-related retroactivity. On the same day that Mr. Bowles's direct appeal was affirmed in this Court, in a separate decision, this Court affirmed the unrelated death sentence of James Card. *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in the United States Supreme Court. The Supreme Court denied Mr. Bowles's and Mr. Card's certiorari petitions in orders issued 10 days apart. Those are the sole facts—that Mr. Bowles' death sentence became final on June 17, 2002, and Mr. Card's became final on June 28, 2002—that led this Court to hold, more than fifteen years later, that Mr. Bowles must remain on Florida's death row while Mr. Card's death sentence should be vacated under *Hurst*, 136 S. Ct. 616, and his case remanded for a new sentencing proceeding.

E. Mr. Bowles's Intellectual Disability Litigation

On October 19, 2017, Mr. Bowles, through attorney Shea, filed a successive motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, arguing that he is intellectually disabled and that his execution would therefore 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. PCR-ID at 1-13.

On March 12, 2019, while the 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.[7] 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) as Mr. Bowles's new state-appointed counsel. PCR-ID at 108-09. On March 26, 2019, CCRC-N attorney Karin Moore entered an appearance in the case. PCR-ID at 110. 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. *See* PCR-ID at 131-35.

[7] In two other capital postconviction cases, the Attorney General moved to remove Mr. Shea for his lack of qualifications under Fla. R. Crim. P. 3.112. *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).

On April 15, 2019, the 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. PCR-ID at 136. 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 signed Mr. Bowles's death warrant, scheduling the execution for August 22, 2019. This 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. Death Warrant Scheduling Order, *Bowles v. State*, Nos. SC89-261, SC96-732 (Fla. June 12, 2019).

When Mr. Bowles's intellectual disability claim was originally filed in 2017, it was assigned to Duval County Circuit Court Judge Bruce Anderson. *See, e.g.*, PCR-ID at 19. In March 2019, it was reassigned to Judge Jack Schemer, who had been Mr. Bowles's original trial judge. *See* PCR-ID at 58-59. After the death warrant was signed, however, it was reassigned back to Judge Anderson. *See* PCR-ID at 168-69. The first proceeding that Judge Anderson had in this case was under warrant, *see* PCR-ID at 520, and he had only been serving as a judge since January 2017 and

had never presided over a capital case under warrant previously.[8] Mr. Bowles's new state counsel had never litigated a case under warrant previously. *See* PCR-ID at 522.

On July 8, 2019, a *Huff* hearing[9] was held regarding Mr. Bowles's intellectual disability claim, after which the circuit court determined that no evidentiary hearing was necessary. Instead, the circuit court summarily denied Mr. Bowles's claim as time-barred as a result of this Court's rulings in *Rodriguez*, 250 So. 3d 616, *Blanco*, 249 So. 3d 536, and *Harvey*, 260 So. 3d 906. *See* PCR-ID at 1344-53. In those rulings, this Court held that individuals who did not previously raise an intellectual disability claim pursuant to Fla. R. Crim. P. 3.203 (2004) were time-barred from doing, regardless of the United States Supreme Court's ruling in *Hall*, 572 U.S. 701, which was held retroactively applicable to Florida litigants by this Court in *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

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[8] *See* Biography of Bruce R. Anderson, available at https://www.jud4.org/Duval-County-Judges-Biographies (last visited July 24, 2019).

[9] Pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (holding that a defendant should have the opportunity to raise objections and alternative suggestions prior to the denial of a postconviction motion).

SUMMARY OF THE ARGUMENT

Mr. Bowles appeals herein the circuit court's order with respect to his intellectual disability claim, as well as its prior rulings denying his access to public records pursuant to Fla. R. Crim. P. 3.852.

With respect to his first claim, Mr. Bowles argues that the circuit court erred in finding his intellectual disability claim time-barred based on this Court's rulings in *Rodriguez*, *Blanco*, and *Harvey* without addressing his important constitutional arguments, and without making any fact-specific inquiry or holding an evidentiary hearing on the timeliness of his filing. Because Mr. Bowles's claim is a categorical bar to his execution, and thus not waivable, and additionally because the circuit court's ruling relied on cases that were wrongly decided or factually distinguishable from Mr. Bowles's case, this Court should reverse the circuit court's ruling and remand for an evidentiary hearing in this case.

With respect to his second claim, Mr. Bowles argues that the circuit court erred in sustaining the objections of the following agencies: the Florida Department of Corrections, the Florida Commission on Offender Review, the State Attorney's Office of the Fourth Judicial Circuit, the Florida Department of Law Enforcement, and the Medical Examiner of the Eighth District.

ARGUMENT

I. The Circuit Court's Ruling that Mr. Bowles was Time-Barred from the Categorical Exemption from Executing the Intellectually Disabled Violates the United States and Florida Constitutions

A. Background of Mr. Bowles's Claim in the Context of Florida's Intellectual Disability History and Jurisprudence

Mr. Bowles pleaded guilty to murder in Duval County Circuit Court in 1996. In his pre-*Atkins* mitigation investigation, in 1995, he was evaluated by psychologist Dr. Elizabeth McMahon, who administered to Mr. Bowles the Wechsler Adult Intelligence Scale, Revised (WAIS-R), *see* PCR-II at 199, on which he received a full-scale score of 80, *see* PCR-II at 239. While evidence of his juvenile inhalant usage, R. at 833, and his failure to complete the eighth grade, R. at 879, were presented at his first penalty phase, Dr. McMahon did not testify, no intellectual disability investigation was conducted, and no evidence about his poor intellectual functioning and lifetime adaptive deficits was presented to his penalty phase jury or judge. *See* PCR-ID at 835 (Dr. McMahon: "When I evaluated Mr. Bowles in the 1990s, I was not asked to evaluate Mr. Bowles for intellectual disability . . . I would not have looked any further into intellectual disability unless I had been specifically asked to."). When the well-known psychometric principle of Norm Obsolescence,

also known as the Flynn Effect, is applied to Mr. Bowles's 1995 WAIS-R score of 80, it adjusted to be properly in the IQ score range of 70-75. *See* PCR-ID at 780.[10]

Following this Court's reversal of Mr. Bowles's initial death sentence, *Bowles*, 716 So. 2d at 773, Mr. Bowles was again sentenced to death in 1999. While his death sentence was on appeal, 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)). By its express terms, Fla. Stat. § 921.137 was not applicable to individuals who were sentenced prior to its enactment, such as Mr. Bowles. *See* Fla. Stat. § 921.137(8) ("This section does not apply to a defendant who was sentenced to death before June 12, 2001.").

On June 20, 2002, less than a week later after his death sentence became final on direct appeal, the United States Supreme Court decided *Atkins*. Although the Supreme Court was explicit in *Atkins* about the prohibition on execution of the intellectually disabled, the Supreme Court's decision "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

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[10] By the time of Mr. Bowles's initial state postconviction stage, the Flynn Effect was an observed principle applied in the death penalty context to claims of intellectual disability. *See, e.g., In re Hick*, 375 F. 3d 1237, 1242-43 (11th Cir. 2004) (J. Birch, dissenting) (noting the Flynn Effect discussion in the petitioner's motion).

implement the constitutional restriction, and thus how to define how to raise a meritorious *Atkins*-based claim, litigants were constrained by the statutory definition in Florida of what intellectual disability meant in pursuing their claims.

At that time, Florida's statutory definition of intellectual disability in Fla. Stat. § 921.137 required that an individual's IQ score be "two or more standard deviations from the mean score on a standardized intelligence test," to qualify him as intellectually disabled. *See Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007) (interpreting the "clear" language of the 2001 statute). 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. § 921.137(1)). Thus, as this Court later confirmed in *Cherry*, 959 So. 2d at 712, a plain reading of the statute between its enactment in 2001, and *Cherry*'s formal holding in 2007, still required individuals asserting an intellectual disability claim to have an IQ score of 70 or below.

Mr. Bowles's initial state postconviction motion under Fla. R. Crim. P. 3.851 was filed on December 9, 2002, and did not assert a claim based on intellectual disability. In 2004, while his initial state postconviction motion was pending, this

Court promulgated Fla. R. Crim. P. 3.203. *See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Mem) (Fla. 2004) (hereinafter "*Amendments*"). With respect to timeliness, in its initial iteration, Rule 3.203(d)(4)(C) provided:

> If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(C).

After the promulgation of Rule 3.203, and the expiration of the time frame in subsection (d)(4)(C), Mr. Bowles's counsel did not amend his Rule 3.851 motion to include a claim of intellectual disability. Following an evidentiary hearing on his postconviction motion in February 2005, during which voluminous information about Mr. Bowles's brain damage, low intellectual functioning, and poor life skills was presented, Mr. Bowles's initial state postconviction motion was formally denied on August 12, 2005.

In 2014, the United States Supreme Court decided *Hall v. Florida*, which invalidated Florida's bright-line IQ score cutoff of 70, and found Florida's statutory scheme for the determination of intellectual disability unconstitutional. *See Hall*, 572 U.S. at 724. Thereafter, on October 20, 2016, this Court decided *Walls*, 213 So. 3d 340. In *Walls*, this Court noted that "[p]rior to the decision in *Hall*, a Florida defendant with an IQ score above 70 could not be deemed intellectually disabled."

Walls, 213 So. 3d at 345. As a result, the *Walls* Court held that under state law, "*Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Id*. at 346. Nowhere in the *Walls* opinion did the Court condition retroactive application of *Hall* to individuals who had previously raised an intellectual disability claim.

Between 2005 and 2017, no investigation into Mr. Bowles's intellectual disability was ever conducted. In September 2017, the Federal Public Defender for the Northern District of Florida, Capital Habeas Unit (CHU), was appointed to represent Mr. Bowles as federal counsel. On October 19, 2017, Mr. Bowles filed an intellectual disability claim in the Duval County Circuit Court, which included an IQ score of 74 on the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which Mr. Bowles had received earlier in 2017.

After his initial filing of his intellectual disability claim, in March 2019, Mr. Bowles amended his motion to include the reports of two psychologists and a neuropsychologist, all of whom diagnosed Mr. Bowles with or found evidence of impaired intellectual functioning consistent with intellectual disability. Mr. Bowles's intellectual disability claim remained pending until the signing of his death warrant, nearly two years later, on June 11, 2019.

B. The Circuit Court's Procedural Ruling

In his amended Fla. R. Crim. P. 3.851 motion, Mr. Bowles asserted four separate arguments as to timeliness, one of which was argued in the alternative, and any one of which would have been sufficient to establish that Mr. Bowles's motion was timely. *See* PCR-ID at 747-55. The circuit court, in its written order denying Mr. Bowles's R. 3.851 motion, found that Mr. Bowles's motion was time-barred because he failed to file his intellectual disability claim within 60 days of the promulgation of Fla. R. Crim. P. 3.203 (2004), and under this Court's rulings in *Rodriguez*, 250 So. 3d 616, *Blanco*, 249 So.3d 536, and *Harvey*, 260 So. 3d 906.

The circuit court made no ruling as to Mr. Bowles's first two arguments on the timeliness of his motion, which argued first that intellectual disability was a categorical bar to execution that could not be waived, and second that to the extent that the Florida Supreme Court's rulings in *Rodriguez* and *Blanco* foreclosed relief to Mr. Bowles, they were unconstitutional under the Eighth Amendment and the Due Process Clause. With respect to Mr. Bowles's third argument for timeliness, the circuit court ruled that Mr. Bowles did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B) because he was not part of the "class" eligible for the retroactive benefit of *Hall v. Florida*, as applied to cases on collateral review in *Walls*, 213 So. 3d 340. Regarding the fourth timeliness argument made by Mr. Bowles, the circuit court found that Mr. Bowles had not established "good cause" under Fla. R. Crim.

P. 3.203(f), either due to his ineligibility for intellectual disability based relief prior to *Walls* or his attorney's gross neglect in failing to previously file an intellectual disability claim.

These rulings were legally erroneous, both as to the timeliness of Mr. Bowles's motion generally as well as because factual issues related to timeliness should have been resolved through an evidentiary hearing. Procedural bar findings are reviewed by this Court de novo.

C. Intellectually Disabled Individuals are Categorically Ineligible for Execution Under the Eighth Amendment, and Such Claims Cannot Be Summarily Barred by State Procedural Rules

With respect to this argument for the timeliness of Mr. Bowles's motion, the circuit court erred in two ways: first, it erred in failing to discuss or rule on this important constitutional argument, and second, it erred in alternatively finding Mr. Bowles's motion procedurally barred on state law grounds.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court delineated 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.

> In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.
>
> * * *
>
> 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. This categorical prohibition, of which there are few, emanates from the Eighth Amendment because to execute the intellectual disabled "violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708.

The Supreme Court's post-*Atkins* jurisprudence affirms this categorical ban time and time again, analogizing the execution of the intellectually disabled to the execution of juveniles (and citing to *Roper v. Simmons* in doing so). For example, in 2014 in *Hall v. Florida*, the 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. In 2017 in *Moore v. Texas* the Court again clearly stated: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 553-564 (2005)) (emphasis in original).

The United States Supreme Court has never held that the Eighth Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver, procedural bar or default. The Supreme 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 it would be illegal to execute an intellectually disabled person who failed to raise his claim at the appropriate procedural time. *See, e.g.*, *State ex re. Clayton v. Griffith*, 457 S.W. 3d 735, 757 (Mo. 2015) (Stith, J., dissenting) ("[I]f [petitioner] is intellectually disabled, then the Eighth Amendment makes him ineligible for execution . . . [I]f a 14–year–old had failed to raise his age at trial or in post-trial proceedings then [] would [it] be permissible to execute him for a crime he committed while he was a minor? Of course not; his age would make him ineligible for execution. So too, here, if [petitioner] is intellectually disabled, then he is ineligible for execution.").

This Court has, at times, correctly endorsed this reading of the Supreme Court's precedent, noting: "It is unconstitutional to impose a death sentence upon any defendant with [intellectual disability]. *Moore*, 137 S. Ct. at 1048; *Atkins*, 536

U.S. at 321; *see also* § 921.137(2), Fla. Stat. (2017)." *Wright v. State*, 256 So. 3d 766, 770 (Fla. 2018) (internal citation omitted).

The Eighth Amendment's categorical bar on executing intellectually disabled individuals does 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). Because Mr. Bowles is categorically ineligible for execution, his claim cannot be defaulted or waived.

"[C]ircuit courts have the power, in all circumstances, to consider constitutional issues." *Fla. Dept. of Agriculture & Consumer Services v. City of Pompano Beach*, 792 So. 2d 539, 547 (Fla. Dist. Ct. App. 2001). The circuit court erred when it did not consider Mr. Bowles's constitutional argument herein, and when it found his motion procedurally barred as a result. This Court should reverse the circuit court's summary denial, and order a hearing on the merits of Mr. Bowles's intellectual disability claim.

D. To the Extent that *Rodriguez*, *Blanco*, and *Harvey* Foreclose Relief to Intellectually Disabled Individuals like Mr. Bowles, They Violate the Eighth Amendment and the Due Process Clause

In its written order, the circuit court found that this Court's decisions in *Rodriguez*, *Blanco*, and *Harvey* foreclosed any review of Mr. Bowles's intellectual disability claim. *See* PCR-ID at 1349-50. The circuit court did not rule on Mr. Bowles's constitutional arguments that these rulings were wrongly decided and could not be constitutionally applied to him.

A brief review of this Court's rulings in *Rodriguez*, *Blanco*, and *Harvey* is warranted. In an unpublished decision in *Rodriguez*, this Court held that the defendant was barred from bringing an intellectual disability claim based on *Hall* because he had not previously raised one pursuant to *Atkins* and within the time frames in Rule 3.203. *Rodriguez*, 250 So. 3d at 616. The circuit court, in its underlying order, also found that Rodriguez's claim was conclusory and "improperly pled." *See* Order Denying Motion for Determination of Intellectual Disability and Successive Motion to Vacate Death Sentences, *State v. Rodriguez*, No. F93-25817B (Miami-Dade Cir. Ct. June 10, 2015). Importantly, while Rodriguez filed his intellectual disability claim relying on a full scale IQ score of 73 on the WAIS-IV, he had prior scores that dated before *Atkins* on the WAIS of 62, and 58, but failed to raise a claim under Rule 3.203 after *Atkins* was decided. *See, e.g.*, Initial Brief of

Appellant at 6-7, *State v. Rodriguez*, No. SC15-1278, 2015 WL 7076431 (Fla. Nov. 4, 2015).

Likewise, this Court's 2018 decision in *Blanco* relied on *Rodriguez* to find again that individuals who failed to raise their intellectual disability claim within the time frames of Rule 3.203 under *Atkins* could have their claims time barred. *See Blanco*, 249 So. 3d at 537. Later in 2018, this Court decided *Harvey*, and again relying on *Rodriguez*, affirmed the lower court's ruling that Harvey's never before raised intellectual disability claim was untimely, and found that this Court's ruling in *Walls*, making *Hall* retroactive to Florida litigants, did not make his claim timely. *Harvey*, 260 So. 3d at 907.

i. *Rodriguez*, *Blanco*, and *Harvey* Violate the Eighth Amendment and *Atkins*, *Hall* and Progeny as Applied in Mr. Bowles's Case Because They Foreclose Any Opportunity for His Intellectual Disability Claim to be Reviewed on the Merits

As with Mr. Bowles's other constitutional claims, the circuit court did not rule on Mr. Bowles's arguments that if *Rodriguez, Blanco,* and *Harvey* foreclosed any merits review of Mr. Bowles's intellectual disability, they violated his rights to due process and created an unacceptable risk under the Eighth Amendment.

As the Supreme 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. They are not free

to create rules, or in this case, procedural bars, that are "rigid" and risk the execution of an intellectually disabled person. The Supreme Court clearly stated that "[i]n *Atkins v. Virginia*, we held that the Constitution 'restrict[s] ... the State's power to take the life of' *any* intellectually disabled individual," not individuals who meet an arbitrary, later-created procedural requirement. *Moore*, 137 S. Ct. at 1048 (citation omitted) (emphasis in original). The execution of the intellectually disabled is inherently risked when they are left without a forum for a merits review of their claims.

Notwithstanding any waiver or provision of Florida law, the Eighth Amendment requires that persons "facing that most severe sanction . . . have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724; *see also Walls*, 213 So. 3d at 348 (Pariente, J., concurring) ("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied."). Thus, to the extent that *Rodriguez*, *Blanco*, and *Harvey* foreclose individuals like Mr. Bowles from obtaining even *review* of their intellectual disability claims in Florida courts, this violates the Supreme Court's proscription in *Atkins* cases, which requires such individuals to 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); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (explaining that the holding of *Hall* was "that it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an I.Q. above 70.") (internal citation omitted).

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 holdings contravene *Atkins*, *Hall*, and progeny because they "create[] an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S. at 704, in violation of the Eighth Amendment. *Rodriguez*, *Blanco*, and *Harvey*, by creating for the first time a procedural impediment that an individual have previously raised an *Atkins* claim, with an IQ score that would have been fatal to the claim, before they can have their intellectual disability claim reviewed on the merits or seek the benefit of *Hall* (available to Florida litigants after *Walls*), creates such an arbitrary and unacceptable risk by depriving such litigants of any forum for review of their intellectual disability claim. Thus, their application in cases like Mr. Bowles's violates the Eighth Amendment.

ii. *Rodriguez*, *Blanco*, and *Harvey* Violate the Due Process Rights to Notice and Opportunity to be Heard of Intellectually Disabled Individuals like Mr. Bowles

Mr. Bowles filed his intellectual disability claim in 2017, after this Court's unpublished ruling in *Rodriguez*, but before it announced *Blanco* or *Harvey*. Like Blanco, 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. 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. *Atkins* explicitly left to states to implement its constitutional restriction, and Florida's statute defined intellectual disability, in essence, 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 still 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 that interpretation of the statute that Mr. Bowles was subject to. That even prior to this 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 v. State*, 781 So. 2d 1040, 1045-46 (Fla. 2000) (finding that IQ score of above 70 did not demonstrate intellectual disability for mitigation purposes); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) ("Under 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 was entitled to rely on this "plain meaning" interpretation of the Florida statute defining intellectual disability, which *Cherry* later formally recognized, until the Supreme 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 was not previously on notice that he should have filed an intellectual disability claim

through Rule 3.203 in 2004. Until that statutory definition changed as a result of *Hall,* and *Hall* was made retroactive to Florida litigants in *Walls,* Mr. Bowles could not have been on notice that he should file such a claim. This Court's rulings in *Rodriguez*, *Blanco*, and *Harvey*, which hold effectively to the contrary, thus violate the due process rights of Mr. Bowles to notice and an opportunity to be heard.

"An 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 v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment).

This case presents similar due process concerns as those the Supreme Court grappled with in *Lankford v. Idaho,* 500 U.S. 110 (1991). In *Lankford*, the Court considered whether Mr. Lankford's due process rights had been violated when he was sentenced to death by the trial court after the prosecutor "had formally advised the trial judge and [Lankford] that the State would not recommend the death penalty." *Lankford,* 500 U.S. at 111-12. Lankford was convicted of first-degree murder following a jury trial. *Id*. at 113. Death was a possible punishment for the conviction of first-degree murder, *see id*. at 128 (Scalia, J., dissenting), but prior to his sentencing, the prosecutor gave written notice that the State would not be seeking

the death penalty. *Id*. at 115-16. Thereafter, for the remainder of the proceedings against Lankford—including presentencing motions and proceedings and his sentencing hearing—there was no mention of death as a possible punishment. *Id*. Neither the prosecutor nor Lankford's attorney made any reference to a possible death sentence at his sentencing hearing itself. *Id*. However, following Lankford's sentencing proceeding, and the sentencing proceeding of his co-defendant and brother, Lankford's trial judge reconvened his case and sentenced him to death. *Id*. at 117.

Although death was a possible punishment for his conviction, the Supreme Court observed that the issue was more nuanced than that: "The question, however, is whether it can be said that counsel had adequate notice of the critical issue that the judge *was actually debating*." *Lankford*, 500 U.S. at 120 (emphasis added). After recognizing that the *actual* notice that Lankford had was affected by the specific circumstances in his case—i.e., the prosecutor's notice he would not seek death—the Court observed: "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Without such notice, the Court is denied the benefit of the adversary process." *Id*. at 126-27. The Court ultimately concluded:

> If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error . . . and with that, the possibility of an incorrect result . . . [Lankford's] lack of adequate notice that the judge was contemplating the imposition of the

> death sentence created an impermissible risk that the adversary process may have malfunctioned in this case.

Id. at 127.

While Mr. Bowles, theoretically, could have been on notice to file an *Atkins*-based claim following the promulgation of Rule 3.203 in 2004, this Court cannot ignore 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. Moreover, the very rule that this 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). Like in *Lankford*, these actual 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.[11]

[11] It is also worth noting that Mr. Bowles, unlike Rodriguez, had no IQ scores of 70 or below prior to the promulgation of Fla. R. Crim. P. 3.203 in 2004. This, too, materially affected the notice that Mr. Bowles had to his eligibility for *Atkins* relief in a way that is distinguishable from the notice that Rodriguez had, which *Blanco* and *Harvey* cite without acknowledging this distinction.

Here, as in *Lankford*, the inadequate notice that Mr. Bowles had under the specific circumstances of his case and under Florida law created an "increased chance of error" in the continued death sentence of a person who was intellectually disabled. *Lankford*, 500 U.S. at 127. This "impermissible risk," *id*., violated Mr. Bowles's due process rights to notice and an opportunity to be heard. *See also Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

E. The Circuit Court's Finding that Mr. Bowles's Motion was Not Timely Under Fla. R. Crim. P. 3.851(d)(2)(B) in Light of *Harvey* is Incorrect

The circuit court erred when it found Mr. Bowles's motion was not timely under Fla. R. Crim. P. 3.851(d)(2)(B), as a result of *Harvey*, *see* PCR-ID at 1350-51, because *Harvey* was wrongly decided. Fla. R. Crim. P. 3.851(d)(2)(B) provides for the timeliness of a successive R. 3.851 motion where "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

Mr. Bowles files the instant motion with a diagnosis of intellectual disability from two psychologists that relies, in part, on his IQ score of 74 on the WAIS-IV. *See* PCR-ID at 780, 783; 799-801. Only after the Supreme Court's decision in *Hall*

would this IQ score legally qualify to establish his intellectual disability—prior to that, such a score would have been fatal to the entire claim. *See Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) ("[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.").

There is no question that when the Supreme Court decided *Atkins*, it announced a new, substantive rule of constitutional law that was necessarily retroactive. *See, e.g., In re Holladay*, 331 F. 3d 1169, 1172-73 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in *Atkins* is retroactively applicable to cases on collateral review."). However, because the law in Florida indicated that only IQ scores of 70 or below were qualifying, *see Cherry*, 959 So. 2d 702, it was not until the Supreme Court decided *Hall v. Florida* that individuals like Mr. Bowles with IQ scores between 70-75 had a viable legal claim for intellectual disability. *See Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017) ("Instead, the language [in *Hall*] justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70.").

Thus, although *Hall* expanded the range of IQ scores that could establish than an individual was ineligible for execution, it was not until the Florida Supreme Court made *Hall* retroactive in *Walls*, 213 So. 3d 340, that Mr. Bowles could file his R.

3.851 motion. The Florida Supreme Court issued its opinion in *Walls* on October 20, 2016, and Mr. Bowles filed his R. 3.851 motion on October 19, 2017, within one year of *Walls*. *See, e.g.*, *Foster*, 260 So. 3d at 179 (noting a renewed *Atkins* claim was "timely" filed because it was within the *Walls* deadline). Because Mr. Bowles could not have filed this motion before the decisions in *Hall* and *Walls*, and he timely filed within one year of *Walls*, his motion should have been deemed timely pursuant to Fla. R. Crim. P. 3.851(d)(2)(B).

This Court should find Mr. Bowles's motion timely pursuant to R. 3.851(d)(2)(B), and should depart from its ruling to the contrary in *Harvey*. In *Harvey*, this Court held that Harvey's intellectual disability claim was not timely although he filed within one year of *Walls*, calling him a "similarly situated" litigant to *Rodriguez*, and denying him the retroactive benefit of *Hall* as a result. *Harvey*, 260 So. 3d at 907. *Harvey* contained no more reasoning than that.

Harvey was wrongly decided for two reasons: first, the retroactivity of *Hall* as delineated in *Walls* was not conditioned on any procedural requirement, let alone a requirement found in an unpublished order from the prior year; and second, *Harvey*'s reliance on *Rodriguez* was misplaced, because they were not similarly situated. With respect to the first reason that *Harvey* was wrongly decided, a plain reading of the *Walls* opinion, in which this Court analyzed retroactivity pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), reveals that it does not contain any

requirement that an individual previously have raised an intellectual disability claim to get the benefit of *Hall* retroactivity. With respect to the second reason *Harvey* was wrongly decided, as Mr. Bowles has argued elsewhere in this brief, Rodriguez was in a materially different circumstance than litigants like Mr. Bowles and those who should be eligible for *Hall*-based relief: Rodriguez had pre-2004 (and pre-*Atkins*) IQ scores that were below 70, and would have arguably qualified him for *Atkins* relief or at the very least, put him on notice that such relief was a possibility for him. *See, e.g.*, Initial Brief of Appellant at 6-7, *State v. Rodriguez*, No. SC15-1278, 2015 WL 7076431 (Fla. Nov. 4, 2015) (noting prior WAIS scores of 62 and 58). Mr. Bowles and litigants like him had no such notice.

This Court's reliance on *Rodriguez*, a case that was decided prior to *Walls* and with materially different facts than those that are present in the cases of individuals raising their intellectual disability for the first time with IQ scores between 70-75, was misplaced. As *Walls* recognized, the category of individuals who had potentially meritorious intellectual disability claims changed with *Hall*, and those litigants should not be deprived of their opportunity to present such evidence based on a case that is critically distinguishable. This Court should thus depart from its ruling in *Harvey*, and find Mr. Bowles's postconviction motion timely pursuant to *Walls* and Fla. R. Crim. P. 3.851(d)(2)(B). Moreover, *Harvey* was wrongly decided to the extent that it forecloses merits review and creates an unacceptable risk of the

execution of the intellectually disabled in violation of the Eighth and Fourteenth Amendments of the United States Constitution, *see supra* section (I)(D).

F. The Circuit Court Erred in Finding that Good Cause Under Fla. R. Crim. P. 3.203(f) Did Not Exist

Mr. Bowles maintains that both the refusal to obtain a merits review of his intellectual disability claim violates his federal constitutional rights, *see supra* section (I)(D), as well as that his eligibility for relief was not foreseeable to him or his counsel until after *Hall* (and the retroactivity ruling in *Walls*) due to his IQ score being between 70-75, which is a qualifying IQ score for an intellectual disability diagnosis that Florida courts did not recognize until after *Hall*, *see supra* section (I)(E).

However, Fla. R. Crim. P. 3.203(f) provides that "[a] claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." To the extent that litigants who have never raised an intellectual disability claim previously can get any merits review under Florida law, it seems that this provision is the only vehicle for timeliness. Additionally, there can be only two scenarios under this Court's rulings in *Rodriguez*, *Blanco*, and *Harvey*: either litigants like Mr. Bowles should have known to file their intellectual disability claims—even with then-non-qualifying IQ scores between 70-75—or they could not have known due to the state of the law in Florida. If the former, this Court erred in

seemingly deciding to the contrary in *Rodriguez*, *Blanco*, and *Harvey*. If the latter, then Mr. Bowles's postconviction counsel was grossly negligent in failing to even investigate the possibility that his brain-damaged client with known poor intellectual functioning was intellectually disabled, and this could and should form the basis of good cause under Rule 3.203(f). Thus, Mr. Bowles argues that good cause exists either due to the unforeseeability of Mr. Bowles's eligibility for relief, *see infra* section (I)(F)(ii), or negligent representation by his counsel if his claim was foreseeable, *infra* section (I)(F)(i).

i. The Circuit Court Misconstrued Mr. Bowles as Raising an Ineffective Assistance of Counsel Claim and Erred in Finding that Attorney Neglect Could Not Form the Basis of Good Cause

In finding Mr. Bowles's motion untimely, the circuit court found that attorney neglect could not form the basis for "good cause" under Fla. R. Crim. P. 3.203(f). *See* PCR-ID at 1348-49. Specifically, the circuit court erroneously found that Mr. Bowles was "effectively arguing good cause exist because postconviction counsel was *ineffective* for failing to file an *Atkins* claim" and "claims of ineffective assistance of postconviction counsel are not cognizable." PCR-ID at 1348 (emphasis in original). The circuit court suggested Mr. Bowles was arguing for "a backdoor for claims of ineffective assistance of postconviction counsel" on this basis. *Id*. This finding mischaracterizes both Mr. Bowles's argument as well as the proper interpretation of the Rule 3.203(f) good cause exception.

This Court has not defined "good cause" within Rule 3.203(f). However, interpretation of the Florida Rules of Criminal Procedure is bound by the rules of statutory construction. *See Rowe v. State*, 394 So. 2d 1059, 1059 (Fla. Dist. Ct. App. 1981) ("When construing court rules, the principles of statutory construction apply.") (citations omitted). Thus, while "good cause" is not defined by R. 3.203, the interpretation of "good cause" in other parts of the Florida Rules of Criminal Procedure which affect motions such as this one, are instructive. *Cf. Ferguson v. State*, 377 So. 2d 709 (Fla. 1979) ("At the outset we note the basic rule of statutory construction that statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and should be construed together and compared with each other.") (citation omitted). Florida courts regularly adopt "good cause" standards as discussed in interpretations from other portions for the Florida Rules of Criminal Procedure. *See, e.g.*, *Davis v. State*, 162 So. 3d 91, 92 (Fla. Dist. Ct. App. 2014) (analogizing good cause as discussed in the R. 3.050 enlargement of time context to good cause for R. 3.134 time for filing formal charges purposes).

What constitutes "good cause" within other provisions of the Florida Rules of Criminal Procedure has been discussed many times by this Court and several district courts of appeals, and these decisions are instructive. Good cause is a "substantial reason, one that affords a legal excuse," *State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003), and can be the result of "excusable neglect," *Parker v. State*, 907 So. 2d 694,

695 (Fla. Dist. Ct. App. 2005) (internal citation omitted). Additionally, an attorney's "mistaken advice can be a valid basis for finding good cause." *Johnson v. State*, 971 So. 2d 212, 215 (Fla. Dist. Ct. App. 2008) (citing *Nicol v. State*, 892 So.2d 1169, 1171 (Fla. Dist. Ct. App. 2005) and *Graham v. State*, 779 So.2d 604 (Fla. Dist. Ct. App. 2001)).

When Mr. Bowles's postconviction counsel, attorney Frank Tassone, undertook representation of Mr. Bowles in February 2002, it was already the law in Florida that the intellectually disabled could not be executed. *See Kilgore*, 55 So. 3d at 507. Then, in June 2002, the Supreme Court announced its decision in *Atkins v. Virginia*, creating a categorical bar against the execution of the intellectually disabled. In June 2002, Mr. Tassone had not yet filed a Mr. Bowles's initial motion for postconviction relief, and would not do so until December 2002. Thereafter, Mr. Tassone even amended the postconviction motion in August 2003. PCR I at 21-101. Mr. Bowles's *Huff* hearing occurred in February 2004, and an evidentiary hearing did not occur until February 2005. *See* PCR III.

In 2004, while Mr. Bowles's initial state postconviction motion was still pending, Rule 3.203 was promulgated. The first iteration of Rule 3.203 specifically divided its application into three categories of defendants: pretrial defendants, defendants for which direct appeal was not complete and convictions were thus not yet final, and defendants whose convictions were final. *See Amendments*, 875 So. 2d

at 565-566. Subsection (d) of the original Rule 3.203 specified procedures for filing intellectual disability claims in conformity with Rule 3.851 for individuals in postconviction postures such as Mr. Bowles. *See* Fla. R. Crim. P. Rule 3.203(d)(4)(A-F) (2004).

If the state of the law is as this Court has held in *Rodriguez*, *Blanco*, and *Harvey*, then there was no question that in 2001, when Florida law barred the execution of the intellectually disabled, and in 2002, when *Atkins* held that execution of such individuals violated the Eighth Amendment, and in 2004, when the Florida Rules of Criminal Procedure laid out the process by which a death-sentenced individual whose conviction was final could get review of their sentence, that it was clear to attorneys practicing in Florida that intellectual disability claims should be investigated for death-sentenced clients. Mr. Tassone failed to do so in Mr. Bowles's case, despite multiple pieces of record evidence indicating Mr. Bowles had limited intellectual functioning. That Mr. Tassone did not investigate the potential viability of an *Atkins* claim, Mr. Bowles specifically pled, is supported by Dr. Harry Krop, who was retained by Mr. Tassone in state postconviction to conduct neuropsychological testing of Mr. Bowles, and recalled:

> I did not administer a full-scale I.Q. test to Mr. Bowles, as I was not then asked to evaluate Mr. Bowles for intellectual disability, and I have never been asked to do so. I, therefore, did not undertake an intellectual disability assessment which would have included the administration of the full I.Q. test being used at that time as well as a comprehensive assessment of adaptive functioning.

PCR-ID at 789.

Moreover, it is not that an intellectual disability assessment as Dr. Krop describes would not have been warranted; when presented with much of the same information that is presented in this motion, Dr. Krop agreed:

> Based on materials I have reviewed, it is likely that Mr. Bowles is an intellectually disabled person. These materials are consistent with my prior opinion that Mr. Bowles has neuropsychological and cognitive impairments, which have pervaded Mr. Bowles's life. Additionally, the materials I reviewed are consistent with my prior opinion that Mr. Bowles's impairments would have had an origin as early as birth.

PCR-ID at 790.

Mr. Bowles acknowledges that there is no right to effective assistance of postconviction counsel for the purposes of the Sixth Amendment, *see Kokal v. State*, 901 So. 2d 766, 778 (Fla. 2005), but attorney misconduct or neglect could form the basis of "good cause" under R. 3.203(f). If a death-sentenced individual should have known to file an intellectual disability claim immediately after *Atkins* was decided and within the time frames announced in R. 3.203 in 2004, as the Florida Supreme Court has held in *Rodriguez* and *Blanco*, Mr. Tassone's failure to even investigate that possibility, when his client specifically had documented limited intellectual functioning and neuropsychological problems consistent with brain damage, *see* PCR. II at 240, 260, 267-70, constitutes at least "excusable neglect" sufficient for

"good cause" under R. 3.203(f). *Cf. Parker*, 907 So. 2d at 695 (quoting *Boyd*, 846 So. 2d at 460).

"The Florida Rules of Criminal Procedure are designed to promote justice and equity while also allowing for the efficient operation of the judicial system." *Abreu v. State*, 660 So. 2d 703, 704 (Fla. 1995). Rule 3.203(f), and the "good cause" standard, is no different. As this rule has been consistently applied to postconviction litigants, so should its "good cause" standard. This means that, as with other portions of the Florida Rules of Criminal Procedure, Mr. Bowles was entitled to a fact-specific inquiry into his good cause allegations.

This is not a "backdoor" ineffectiveness claim, as the circuit court incorrectly found, but a reasoned interpretation of the good cause standard as elucidated by its use in other contexts. If attorney misadvice can constitute good cause for other portions of the rules, and "excusable neglect" meets the good cause standard, Mr. Bowles should have been at least able to offer proof that his attorney's gross neglect in failing to even investigate the possibility of an intellectual disability claim, when he had known intellectual limitations and brain damage, constituted "good cause" for the circuit court to reach the merits of his important claim that would, if successful, categorically bar him from execution.

ii. The Circuit Court Erred in Finding that Good Cause Could Not Be Established By the Retroactivity Ruling of *Walls v. State*

The circuit court erred in finding that good cause for Fla. R. Crim. P. 3.203(f) purposes could not be established by this Court's retroactivity holding in *Walls*. PCR-ID at 1347-48. The circuit court made this finding only on the basis of this Court's ruling in *Rodriguez*, without an analysis of good cause. PCR-ID at 1347. However, the circuit court's reliance on *Rodriguez* in disposing of Mr. Bowles's claim was misplaced.

First, the circuit court's reliance on *Rodriguez* was misplaced because it is distinguishable from Mr. Bowles's case on the applicable law. Under R. 3.203(f), Rodriguez argued for good cause on the basis of *Hall* alone—not on the basis of the extraordinary retroactivity ruling in *Walls*. There is certainly good reason why this Court might find good cause in a scenario where a law was found to be retroactively applicable to a litigant, as compared with a scenario where no court has held that a new ruling is applicable to individuals whose convictions and sentences are final. Further, a "change in law" has met the "good cause" standard in other contexts for purposes of the Florida Rules of Criminal Procedure. *See, e.g.*, *Moraes v. State*, 967 So. 2d 1100, 1101 (Fla. Dist. Ct. App. 2007) ("We think a change in law . . . constitutes good cause for withdrawal of the plea.").

Second, the circuit court's reliance on *Rodriguez* was misplaced because it failed to account for the specific circumstances in Mr. Bowles's case that made his claim factually distinguishable from Rodriguez's claim. Unlike in other portions of the rules, such as R. 3.851(d)(2)(B) as argued above, R. 3.203 employs the "good cause" standard, which must account for the "peculiar facts and circumstances of each case." *Boyd*, 846 So. 2d at 460. Additionally, good cause for timeliness can be met when "the failure to act was the result of excusable neglect." *Parker v. State*, 907 So. 2d 694, 695 (Fla. Dist. Ct. App. 2005) (quoting *Boyd*, 846 So. 2d at 460).

As Mr. Bowles has previously noted, because his IQ score is between 70-75, and has never been qualifying or below 70, he was not on notice in the same way of his potential eligibility for relief as Rodriguez was until *Hall* was made retroactive to him in *Walls*. The circuit court failed to analyze or make any findings about these particularities that could have established good cause for Mr. Bowles, because his "failure to act" arguably fit the "excusable neglect" standard more easily than in *Rodriguez*. Thus, the circuit court erred in this ruling**.**

G. The Circuit Court Erred in Denying Mr. Bowles an Evidentiary Hearing

i. Mr. Bowles Is Entitled to an Evidentiary Hearing on Timeliness and Good Cause

Whether or not to grant an evidentiary hearing is a "pure question of law, subject to de novo review." *Kelley v. State*, 3 So. 3d 970, 973 (Fla. 2009) (citing *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003)).

Timeliness can be a factual issue requiring an evidentiary hearing. In this case, Mr. Bowles alleged a factual circumstance—that his attorney was grossly neglectful in failing to investigate or file an intellectual disability claim under Rule 3.203 given his known intellectual impairments—that he should have been entitled to develop at an evidentiary hearing. Because this Court has not spoken on good cause within Rule 3.203(f), or a scenario as Mr. Bowles has pleaded, it should look to its prior ruling in *State v. Boyd*, 846 So. 2d 458 (Fla. 2003), which considered whether "good cause" existed for an extension of time under Fla. R. Crim. P. 3.050 for Boyd to file an otherwise untimely R. 3.850 postconviction motion.

As this Court has observed, "[t]he determination of good cause is based on the peculiar facts and circumstances of each case." *Id*. at 460. In *Boyd*, this Court considered the argument that good cause existed because Boyd "was transferred to another prison and his legal files had not arrived." *Boyd*, 846 So. 2d at 460. Reversing a trial court's summary denial of Boyd's R. 3.850 motion as untimely,

Boyd said of these factual circumstances, "[s]uch allegations, if true, may constitute good cause under the rule," for an extension of time, making the postconviction motion timely. *Id*. *Boyd* also specifically instructed that on remand, the lower court proceedings "may include an inquiry into whether the facts alleged in the motion for extension are true." *Id*. (internal quotation omitted).

The *Boyd* instructions on good cause support the principle that the circuit court should have conducted an inquiry into whether the facts underlying his good cause argument "are true." *Id*. This necessarily supported Mr. Bowles's request for an evidentiary hearing, which is the proper forum for the resolution of factual disputes.

In other contexts, Florida courts have regularly held that "good cause," requires specific inquiries into the "circumstances surrounding" the compliance with the Florida Rules of Criminal Procedure, and found circuit courts in error where they did not conduct such an inquiry. *See*, *e.g.*, *Small v. State*, 608 So. 2d 829, 829 (Fla. Dist. Ct. App. 1992) (reversing trial court's ruling that good cause had not been shown for failure to comply with Fla. R. Crim. P. 3.200, and remanding with instructions to hold a hearing "to determine whether or not good cause existed."). The importance of a hearing for good cause purposes is paramount, as courts have observed: "Even when presented with a motion asserting good cause, a trial court still cannot find good cause without providing *a full and fair opportunity to be heard* and serious consideration of the party's opposition." *State v. Moss*, 194 So. 3d 402,

405 (Fla. Dist. Ct. App. 2016) (citing *Demings v. Brendmoen*, 158 So. 3d 622 (Fla. Dist. Ct. App. 2014)) (emphasis added). Likewise, this Court should vacate the circuit court's order and remand Mr. Bowles's case for an evidentiary hearing on the timeliness issue related to good cause.

ii. Mr. Bowles Is Entitled to an Evidentiary Hearing on the Merits of his Intellectual Disability Claim

Mr. Bowles was entitled to an evidentiary hearing on the merits of his intellectual disability claim. "When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the [trial] court must look at the entire record." *Kelley*, 3 So. 3d at 973 (quoting *Wright v. State*, 995 So. 2d 324, 328 (Fla. 2008)) (internal quotations omitted). "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the [appellant's] allegations as true to the extent they are not conclusively refuted by the record." *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008).

Mr. Bowles proffered voluminous evidence that he is intellectually disabled, including the reports of two experts diagnosing him with intellectual disability, a third expert opining that he had impaired intellectual functioning consistent with intellectual disability and brain damage from a pre-18 origin, and the sworn declarations of a dozen lay witnesses from Mr. Bowles's childhood through his adulthood detailing his lifelong history of adaptive deficits. Moreover, Mr. Bowles presented the sworn statements of the prior experts in his case, Dr. McMahon from

his pre-*Atkins* trial, and Dr. Krop from his initial state postconviction, both of whom acknowledge they had never previously assessed Mr. Bowles for intellectual disability. *See* PCR-ID at 732-835.

In "turn[ing] to the record" in this case, this Court should find that "[Mr. Bowles] has presented sufficient evidence to establish that he meets the statutory definition of intellectual disability." *Hall*, 201 So. 3d at 635. Just as in *Hall*, "[t]he record evidence in this case overwhelmingly supports the conclusion that '[Mr. Bowles] has been [intellectually disabled] his entire life.'" *Hall v. State*, 201 So. 3d 628, 638 (Fla. 2016) (quoting *Hall v. State*, 109 So. 3d 704, 712-14 (Fla. 2012) (Pariente, J., concurring) (first alteration added)).

Mr. Bowles has never had a hearing on his *Atkins*/*Hall* claim and the circuit court's incorrect application of a procedural bar should not preclude Mr. Bowles's constitutional and due process rights. This Court should remand to the circuit court to allow Mr. Bowles to present his evidence at an evidentiary hearing.

II. The Circuit Court Erred by Refusing to Grant Mr. Bowles Access to Public Records Pursuant to Fla. R. Crim. P. 3.852

In 1996, this Court proposed Rule 3.852 to govern the procedure for capital defendants in postconviction proceedings to obtain public records. *See In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production*, 673 So. 2d 483 (Fla. 1996). The Court invited comments to the proposed rule and addressed objections to it when it formally adopted the rule. It

specifically addressed the comments of those who were concerned that the new rule would limit a capital defendant's right to public records, and stated:

> We specifically address the comments of those who are concerned that the rule will unconstitutionally limit a capital postconviction defendant's right to production of public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995). We conclude that the rule does not invade those constitutional and statutory rights.

In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475-76 (Fla. 1996). Justice Anstead, joined by Justices Grimes and Kogan, specially concurred, and explained:

> As a practical matter, and for this rule to work as we hope, capital Defendants should utilize this rule to conduct all discovery, including the discovery that was previously conducted pursuant to chapter 119, and the State and its agencies should respond to their obligations to provide discovery in accord with the spirit of Florida's open records policy. As noted in the majority opinion, **this rule in no way diminishes the right of an individual Florida citizen, including a capital defendant, to access public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995).**

Id. at 477 (emphasis added).

In 1998, after the legislature established a repository for records in capital cases and repealed Rule 3.852, this Court adopted a revised Rule 3.852, and wrote:

> We intend for this rule to serve as a basis for providing to the postconviction process all public records that are relevant or would reasonably lead to documents that are relevant to postconviction issues. We emphasize that it our strong intent that there be efficient and diligent production of all of the records without objection and without conflict. . . .

Amendments to the Florida Rules of Criminal Procedure -- Rule 3.852 (capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 754 So. 2d 640, 642-43 (Fla. 1999).

And in *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000), Justice Anstead further cautioned, "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000).

The spirit of an open records policy in capital postconviction proceedings did not prevail in Mr. Bowles's case.

The death warrant for Mr. Bowles was issued on June 11, 2019. On June 18, 2019, Mr. Bowles filed public records demands pursuant to Fla. R. Crim. P. 3.852 (h) (3) and 3.852 (i) to state, county, and local agencies, including: the Department of Corrections (DOC); the Justice Administration Commission; the State Attorney's Office for the Fourth Judicial Circuit (SAO); the Jacksonville Sheriff's Office (JSO); the Nassau County Sheriff's Office (NCSO); the Volusia County Sheriff's Office (VCSO); the Daytona Beach Police Department (DBPD); the Medical Examiner's Office for the Eighth District (ME); the Florida Department of Law Enforcement (FDLE); and the Florida Commission on Offender Review (FCOR). PCR-ID at 196-337.

Only the Nassau County Sheriff's Office, the Justice Administration Commission, and the Daytona Beach Police Department complied with the demands. PCR-ID at 406-410. The Volusia County Sheriff's Office and the Jacksonville Sheriff's Office filed affidavits that they had no additional records to disclose. PCR-ID at 399-400, 453-456. All other agencies filed objections to the demands that the circuit court sustained at the hearing held on June 21, 2019. PCR-ID at 415-428.

A. The Circuit Court Erred in Denying Mr. Bowles's Request for His Classification Records from the Department of Corrections

The circuit court erred in denying Mr. Bowles's demand for his own inmate classification records from the DOC. This was a denial of due process in that without these records Mr. Bowles was denied the opportunity to gather additional evidence to present at an evidentiary hearing on his intellectual disability claim.

DOC agreed to produce Mr. Bowles's medical and mental health records, but objected to production of any other inmate records on the grounds that Mr. Bowles's request was "overbroad and unduly burdensome" and that he had not alleged how the records requested "would be relevant to a colorable claim for post-conviction relief or lead to the discovery of relevant evidence." PCR-ID at 375.

In his demand, Mr. Bowles's specifically sought his records related to any disciplinary proceedings, movement and housing logs, and visitation logs and

explained that the records might contain reports from DOC employees describing conduct by Mr. Bowles that might be indicative of adaptive deficits or of risk factors for intellectual disability. PCR-ID at 244-245. Had Mr. Bowles been granted an evidentiary hearing on his intellectual disability claim, he could have offered any evidence of adaptive deficits gleaned from the DOC records. The American Association on Intellectual Disability and Development actually instructs lawyers to review their client's prison records for evidence of their intellectual disability in its manual on the death penalty. *See* American Association on Intellectual and Developmental Disabilities, *The Death Penalty and Intellectual Disability* 196 (Edward A. Polloway ed., 2015).

Indeed, recently in *Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015), this Court considered DOC records that indicated that the Defendant might be intellectually disabled, among other evidence, and reversed the circuit court's denial of the Defendant's intellectual disability claim and remanded the matter for reconsideration of the issue.

Moreover, this Court previously found an abuse of discretion where a defendant was denied his own inmate and medical records, which had been requested under 3.852(h)(3) in *Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013). In *Muhammad*, the records demanded under 3.852(h)(3) were both medical and inmate records. Initial Brief of Appellant at 38, *Muhammad v. State*, No. SC13-2105

(Fla. Nov. 8, 2013). Postconviction counsel had previously requested from DOC personnel files of department employees as the crime in *Muhammad* had occurred within a correctional facility. *Id*. After the issuance of the death warrant the defendant in *Muhammad* requested his own medical and inmate records from DOC. *Id*. The circuit court denied *Muhammad's* request. This Court found that the circuit court abused its discretion in denying Muhammad's request for his own inmate and medical records. *Muhammad*, 132 So. 3d at 201.

Under Rule 3.852(h)(3), a defendant under death warrant may request records from "a person or agency from which collateral counsel has previously requested public records." Fla. R. Crim. P. 3.852(h)(3). Under 3.852(h)(3) there is no requirement that the records currently demanded be the same type of records that were previously demanded.

Mr. Bowles had previously requested medical records from DOC before the death warrant was issued. After the death warrant was issued in this cause, Mr. Bowles filed a demand with the Florida Department of Corrections for public records under both 3.852(h)(3) and 3.852(i). In the demand Mr. Bowles stated that the classification records requested, including movement and disciplinary records, were related to or could relate to his claim of intellectual disability. He further alleged that the records could describe interactions between agency employees and Mr. Bowles,

which could relate, or lead to discovery of evidence supporting Mr. Bowles's claim of intellectual disability.

In sustaining the objection filed by the Department of Corrections as to the inmate records, the circuit court attempted to distinguish *Muhammad*, saying that the defendant in Muhammad had previously requested records and therefore the request was not as burdensome. PCR-ID at 421. However, like the defendant in *Muhammad*, Mr. Bowles had also previously requested records from the DOC, so the post-warrant demand for medical and classification records was in fact an "update" and is analogous to *Muhammad.* PCR-ID at 421.

B. The Circuit Court Erred in Denying Mr. Bowles's Request for Records from the State Attorney's Office

The circuit court erred in sustaining the objection to Mr. Bowles's demand for correspondence between the State Attorney's Office and family or friends of the victim.[12] This was a denial of due process in that without these records Mr. Bowles was denied the opportunity to gather additional evidence to present at an evidentiary hearing on his intellectual disability claim. There is record evidence that the victim's brother-in-law, the victim's sister and the victim's neighbor had met Mr. Bowles

[12] In the circuit court's order this is mistakenly referred to as JSO correspondence. The demand to the State Attorney did not include any mention of JSO. Rather, paragraph (7b) refers to correspondence between "any State Attorney employee (including, but not limited to, victim advocates) and the victim's friends/family regarding Gary Bowles, DOB 1/25/1962."

through the victim and may have shared their impressions of Mr. Bowles with the prosecutors. R at 488-499, 499-508, 565-572. It is also violates Mr. Bowles's right to Equal Protection as any other citizen would be able to obtain these records through a public records request where Mr. Bowles, who is facing imminent execution, may not.

Under 3.852(i) records need to be "*relevant* to the subject matter of the post-conviction proceeding" or be "reasonably calculated to lead to the discovery of admissible evidence" Fla. R. Crim. P. 3.852 (emphasis added). For an agency that has already produced records, the relevance is immaterial as the demand falls under 3.852(h)(3). The provisions of 3.852(h)(3) require that the records were not previously objected to, were received or produced since the previous request, and were not produced previously. Fla. R. Crim. P. 3.852.

Mr. Bowles's demand stated that the correspondence between SAO employees and the victim's friends and family could "lead to the discovery of admissible evidence related to the intellectual disability claim filed by predecessor postconviction counsel." PCR-ID at 208. Furthermore, the demand explained that the records may contain descriptions of Mr. Bowles's behavior, consistent with adaptive deficits and/or risk factors for intellectual disability. PCR-ID at 209.

In sustaining the State Attorney's objection, the circuit court articulated that the "stated basis for these records is too attenuated to reasonably lead to a colorable

claim of relief." PCR-ID at 417. As the State Attorney's Office had previously produced records, the demand falls under 3.852(h)(3), which makes relevance a non-issue. Nevertheless, the demanded records do meet the criteria of 3.852(i) in that they are "*relevant* to the subject matter of the postconviction proceeding" and "reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i). The second requirement of proving a claim of intellectual disability requires proof of adaptive deficits that are typically proved through anecdotal observations of Mr. Bowles by others. Since the initial disclosure from the State Attorney's Office in 2002, it is reasonable that the victim's family and acquaintances would still be in contact with the State Attorney's Office about the case. The perceptions of Mr. Bowles by the victim's friends and family are "reasonably calculated to lead to the discovery of admissible evidence" and the circuit court erred in concluding otherwise.

C. The Circuit Court Erred in Denying Mr. Bowles Request for Materials Relating to the Lethal Injection Process from the Medical Examiner's Office, the Department of Corrections, and the Florida Department of Law Enforcement

Mr. Bowles has been denied his rights under due process and equal protection as guaranteed by the Eighth and Fourteenth Amendments. After the signing of the warrant, Mr. Bowles made public records requests pertaining to lethal injection materials to the Medical Examiner of the Eighth District, the Department of Corrections, and the Florida Department of Law Enforcement. The trial court

sustained the objections of the ME, FDLE, and the DOC as to the lethal injection materials. It was Mr. Bowles's position that the record requests were not overbroad and would lead to evidence supporting a colorable claim. In *Bucklew*, Mr. Bucklew was provided with the very discovery that Mr. Bowles was denied. *See Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). While Mr. Bucklew's claim was ultimately denied, he was at least afforded his rights under due process in being given access to materials to substantiate his claim.

Here, Mr. Bowles has been denied access to public records that would be available to any person excluding those required to utilize the 3.852 process. In *Sims v. State*, Justice Anstead cautioned, "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000). Mr. Bowles has a need for these records, unlike many others. The records would be relevant to a constitutional challenge to Florida's lethal injection protocol by Mr. Bowles. The records relate to the matters Mr. Bowles must show under *Glossip v. Gross*, 135 S. Ct. 1885 (2015) and *Bucklew*. Mr. Bowles must be given a fair opportunity to show his execution will violate the Fourteenth Amendment. *Hall*, 572 U.S. at 724 ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair

opportunity to show that the Constitution prohibits their execution."). The trial court's refusal to safeguard Mr. Bowles's constitutional rights was error.

CONCLUSION

The Court should stay Mr. Bowles's scheduled August 22, 2019, execution, reverse the circuit court's decisions procedurally barring his intellectual disability claim and denying his access to records, and remand for a hearing on the merits.

Respectfully submitted,

/s/ Terri Backhus
Terri Backhus
Florida Bar No. 946427
Chief, Capital Habeas Unit
Office of the Federal Public Defender
For the Northern District of Florida
227 N. Bronough St. Suite 4200
Tallahassee, FL 32301
(850) 942-8818
Terri_Backhus@fd.org

/s/ Karin Moore
Karin Moore
Florida Bar No. 351652
Elizabeth Spiaggi
Florida Bar No. 1002602
Assistant CCRC-North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin_Moore@ccrc-north.org
Elizabeth_Spiaggi@ccrc-north.org

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Terri Backhus, Chief, Capital Habeas Unit, Federal Public Defender for the Northern District of Florida (terri_backhus@fd.org); Bernie de la Rionda (bdelarionda2@gmail.com); Assistant State Attorney Sheila Ann Loizos (sloizos@coj.net); Assistant Attorney General Jennifer A. Donahue (jennifer.donahue@myfloridalegal.com), Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com), (capapp@myfloridalegal.com), the Circuit Court of the Fourth Judicial Circuit (pfields@coj.net), and the Florida Supreme Court (warrant@flcourts.org) this 26th day of July, 2019.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

CERTIFICATION OF FONT

WE HEREBY CERTIFY this petition complies with the font and formatting requirements of Fla. R. App. 9.210(a)(2). A Times New Roman 14 font was used.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

In the Supreme Court of Florida

EXECUTION SCHEDULED FOR
THURSDAY, AUGUST 22, 2019 @ 6:00 p.m.

GARY RAY BOWLES,

Petitioner,

v.

CASE NO.: SC19-1184
CAPITAL CASE

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASES PAGE(S)

FLORIDA CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from the trial court's summary denial of a successive postconviction motion in an active death warrant capital case.

Gary Ray Bowles was on probation for robbery when he met the victim, Walter Hinton, at Jacksonville Beach. Hinton allowed Bowles to move into his mobile home in exchange for Bowles helping him move. On November 16, 1994, Hinton, Bowles, and a friend smoked some marijuana and drank some beers. After dropping the friend off at the train station, Hinton went to sleep in his bedroom. Bowles went outside the mobile home and picked up a 40 pound concrete stepping stone. Shortly thereafter went into Hinton's bedroom and dropped the concrete stone on Hilton's head, fracturing Hinton's face from cheek to jaw. Bowles then strangled Hinton. Bowles stuffed toilet paper down Hinton's throat and shoved a rag into Hinton's mouth, smothering Hilton. Hilton died of asphyxiation. Bowles confessed to the murder both orally and in writing. *See generally Bowles v. State*, 716 So.2d 769, 770 (Fla.1998); *Bowles v. State*, 979 So.2d 182, 184 (Fla. 2008).

Bowles entered a guilty plea to first-degree murder. *Bowles v. State*, 716 So.2d 769, 770 (Fla.1998). Following the penalty phase, the first jury recommended a death sentence and the trial court imposed a death sentence.

On direct appeal to the Florida Supreme Court, Bowles raised ten issues. *Bowles*, 716 So.2d at 770, n.2 (listing issues raised in the direct appeal).[1] The

[1] The ten issues were: 1) the trial court erred in admitting evidence of the victim's homosexuality and Bowles' hatred of homosexuals; 2) the trial court erred in denying the motion for a mistrial after witnesses testified that Bowles was "rolling faggots" in Daytona Beach and that he "drank to make it easier to kill"; 3) the trial court erred in failing to find statutory mental mitigators; 4) the trial court erred in finding that the murder was committed during the course of an attempted robbery and for pecuniary gain; 5) the trial court erred in finding the heinous,

Florida Supreme Court affirmed Bowles' conviction for premeditated first-degree murder but remanded for a second sentencing proceeding because the prosecution had made Bowles' hatred of homosexuals a feature of the first penalty phase. *Bowles*, 716 So.2d at 773.

At the second penalty phase in May 1999, Bowles was again represented by Chief Assistant Public Defender Bill White and new co-counsel Assistant Public Defender Brian Morrisey. Following the second penalty phase, the second jury recommended a death sentence unanimously. *Bowles v. State*, 804 So.2d 1173,1175 (Fla. 2001). The trial court found five aggravating circumstances: 1) Bowles was convicted of two other capital felonies and two other violent felonies; 2) Bowles was on felony probation when he committed the murder due to a 1991 Volusia County conviction; 3) the murder was committed during a robbery or an attempted robbery, and the murder was committed for pecuniary gain (merged into one factor); 4) the murder was heinous, atrocious, or cruel (HAC); and 5) themurder was cold, calculated, and premeditated (CCP). *Id.* at 1175. The trial court assigned "tremendous weight" to the prior violent capital felony convictions. *Id.* Indeed, the trial court found the March 15, 1994 prior murder of John Roberts to be "eerily similar" to the facts of the Hinton murder (sentencing order at 106). In the prior Roberts murder, a few days after moving into the victim's home, Bowles approached the victim from behind and hit him with a lamp. *Id.* at 1176. A struggle ensued during which Bowles strangled the victim and stuffed a rag into

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atrocious, and cruel aggravating factor (HAC); 6) the trial court erred in failing to instruct the jury it could consider Bowles defective mental condition to diminish the weight given to HAC; 7) the death sentence is disproportionate; 8) the trial court erred in giving the standard jury instruction on HAC; 9) the trial court erred in instructing the jury on the cold, calculated, and premeditated aggravating factor (CCP) using an unconstitutionally vague instruction; and 10) the felony murder aggravator is unconstitutional facially and as-applied.

his mouth. Bowles then emptied the victim's pockets, took his credit cards, money, keys, and wallet. *Id.* Bowles also murdered Albert Morris in May of 1994 in Nassau County. In the prior Morris murder, the victim befriended Bowles and allowed Bowles to stay at his home. *Id.* Bowles and the victim got into a fight in which Bowles hit the victim over the head with a candy dish and then shot the victim in the chest. Bowles also strangled the victim and tied a towel over his mouth. *Id.* Regarding the remaining aggravators, the trial court assigned great weight to the HAC and CCP aggravators, significant weight to the robbery-pecuniary gain aggravator, and some weight to the "on probation" aggravator. *Id.*

The trial court rejected both statutory mental mitigators. *Bowles*, 804 So.2d at 1176. The trial court found the following nonstatutory mitigating factors: significant weight to Bowles' abusive childhood; some weight to Bowles' history ofalcoholism and absence of a father figure; little weight to Bowles' lack ofeducation; little weight to Bowles' guilty plea and cooperation with police in thisand other cases; and little weight to Bowles' use of intoxicants at the time of the murder. *Id.* The trial court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances and imposed a death sentence. *Id.*

On appeal to the Florida Supreme Court from the resentencing, Bowles was again represented by Assistant Appellate Public Defender David Davis, who raised

12 issues. *Bowles v. State*, 804 So.2d 1173, 1175 (Fla. 2001).[2] The Florida Supreme Court affirmed the death sentence concluding that the death sentence was proportionate. *Id.* at 1184.

Bowles then filed a petition for writ of certiorari in the United States Supreme Court raising three issues: 1) the prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty; 2) the trial court erred in refusing to give a special jury instruction defining mitigation; and 3) the trial court erred in refusing to give a special jury instruction informing the jury to consider mental mitigation in weighing the HAC aggravator. On June 17, 2002, the United States Supreme Court denied the petition. *Bowles v. Florida*, 536 U.S. 930 (2002) (No. 01-9716). So, Bowles' conviction and death sentence became final on June 17, 2002.

On December 9, 2002, Bowles, represented by registry counsel Frank Tassone, filed an initial postconviction motion in state court. On August 29, 2003, Bowles filed an amended postconviction motion asserting nine claims. *Bowles v. State*,

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[2] The 12 issues were: 1) the trial court erred in allowing the prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty; 2) the trial court erred in allowing the introduction of two prior murders for which the defendant was convicted after the first sentencing hearing; 3) the trial court erred in finding the HAC aggravator; 4) the trial court erred in rejecting the proposed HAC jury instruction; 5) the CCP instruction to the jury was unconstitutionally vague; 6) the trial court erred in finding the robbery-pecuniary gain aggravator; 7) the trial court erred by giving little or no weight to nonstatutory mitigators; 8) the trial court erred in rejecting the proposed victim impact evidence jury instruction; 9) the trial court erred by rejecting the statutory mental mitigators of extreme emotional disturbance and substantially diminished capacity; 10) the trial court erred in giving the standard jury instruction on mitigation instead of the requested special instructions; 11) the trial court erred by rejecting the requested jury instructions defining mitigation; and 12) the trialcourt erred by allowing impermissible hearsay. *Bowles*, 804 So.2d at 1176 (listingissues); *see also Bowles v. State*, 979 So.2d 182, 185, n.1 (Fla. 2008) (listing issues on appeal from the new penalty phase).

979 So.2d 182, 186, n.2 (Fla. 2008) (listing the 3.851 claims in a footnote).[3] Bowles also filed a "Motion to Reopen Testimony," arguing that *Crawford v. Washington*, 541 U.S. 36 (2004), required reversal because he was denied the opportunity to confront his accusers. *Bowles*, 979 So.2d at 186.

The Honorable Jack Marvin Schemer presided at the original penalty phase, the second penalty phase, and the postconviction proceedings in state court. On February 8, 2005, the trial court held an evidentiary hearing. During the postconviction evidentiary hearing in state court, among the defense witness wasDr. Harry Krop, a licensed clinical psychologist, with a specialization in forensic psychology. Dr. Krop evaluated Bowles on three separate occasions between 2003 and 2004 (Vol III 89). Dr. Krop had administered a comprehensive neuropsychological examination to Bowles which revealed among other things, that Bowles' IQ was in the "low 80's." (Vol. III 118). Dr. Krop acknowledged that he had diagnosed Bowles with both anti-social personality disorder as well as conduct disorder. (Vol. III 137-38, 139).

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[3] The nine claims were: 1) trial counsel were ineffective for failing to present statutory and nonstatutory mental mitigation, and the trial court erred in finding the two statutory mental mitigators were not proven; 2) the trial court erred in refusing to give the defense's requested jury instructions defining mitigation; 3) the trial court erred in instructing the jury that it could consider victim impact evidence; 4) Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002) and 5) a similar claim regarding Florida's death penalty scheme being unconstitutional under *Ring*; 6) *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* required the elements of the offense necessary to establish capital murder be charged in the indictment; 7) *Apprendi* and *Ring* required the jury recommendation of death be unanimous; 8) trial counsel were ineffective for failing to adequately investigate and present mitigating evidence; and 9) trial counsel were ineffective for failing to discover and present evidence rebutting the State's proof of the HAC aggravating factor.

On August 15, 2005, the state postconviction court trial court denied postconviction relief following the evidentiary hearing. The postconviction court rejected the first three claims as procedurally barred, either because they were raised or should have been raised on direct appeal. *Bowles*, 979 So.2d at 186. The postconviction court also denied claims four through seven as well as the motion to reopen testimony. *Id.*

In the postconviction appeal to the Florida Supreme Court, Bowles represented by Frank Tassone and Rick Sichta, raised five issues. *Bowles*, 979 So.2d at 186.[4] The Florida Supreme Court affirmed the trial court's denial of postconviction relief. Bowles also filed a writ of habeas corpus in the Florida Supreme Court raising two claims of ineffective assistance of appellate counsel. *Bowles*, 979 So.2d at at 193-94.[5] The Florida Supreme Court rejected the two claims of ineffective assistance of appellate counsel.

On August 8, 2008, Bowles, represented by Frank Tassone, filed a federal

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[4] The five issues were: 1) trial counsel were ineffective for failing to present an expert to testify to mental mitigation including the effects of Bowles' lifelong alcohol and drug abuse; his low IQ; abusive childhood; and neuropsychological impairment; 2) trial counsel were ineffective for failing to refute the State's expert, Medical Examiner Dr. Margarita Arruza, on applicability of the HAC aggravator; 3) the trial court improperly summarily denied the claim of ineffectiveness for failing to present mental mitigation; 4) Florida's death penalty statute violates *Ring* and *Apprendi*; 5) the testimony of Officer Jan Edenfield as to Bowles' 1982 sexual battery and aggravated sexual battery convictions violated his Confrontation Clause rights under *Crawford*.

[5] The two claims of ineffective assistance of appellate counsel were: 1) failing to raise the issue of the prosecutor's comments in closing argument of the penalty phase regarding the mitigators and 2) failing to raise the issue of the admission of seven photographs.

habeas petition in the Middle District of Florida. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla. 2008). The federal habeas petition raised 10 claims.[6] On December 23, 2009, the federal district court denied the habeas petition but granted a certificate of appealability (COA) on ground 1 regarding whether a prosecutor is prohibited from peremptorily striking jurors who express reservations about the death penalty. (Doc. #18).

Bowles then appealed to the Eleventh Circuit arguing the prosecutor's use of peremptory challenges to remove prospective jurors who express reservations about the death penalty violates the Sixth Amendment right to a jury; Due Process; and Equal Protection. On June 18, 2010, the Eleventh Circuit affirmed

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[6] The 10 claims were: 1) a claim that a prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty violated the Sixth Amendment right to a jury as well as Due Process and Equal Protection; 2) a claim that the Florida Supreme Court's decision allowing the introduction of subsequentconvictions at the second penalty phase violated the federal mandate statue, 28 U.S.C. § 2106; 3) the Florida Supreme Court's affirming the HAC aggravator was a violation of the Eighth Amendment and *Lewis v. Jeffers*, 497 U.S. 764 (1990); 4) the Florida Supreme Court's decision finding the HAC jury instruction was proper, was contrary to, or an unreasonable application of, *Bell v. Cone*, 543 U.S. 447 (2005); 5) Florida's penalty phase evidence statute, § 921.141(1), Florida Statutes (1999), violates the due process and the Eighth Amendment's heightened reliability standards for capital cases; 6) ineffective assistance of appellate counsel for failing to raise the issue of gruesome photographs depicting the decomposing victim; 7) the trial court improperly found the during the course of a robbery and pecuniary gain aggravators because Bowles' taking of the victim's car and watch were an afterthought, not the motive for the murders, in violation of *Lewis v. Jeffers*, 497 U.S. 764 (1990); 8) Florida Supreme Court's decision affirming the trial court rejection of the two statutory mental mitigating circumstance, was contrary to, or an unreasonable application of an unidentified Supreme Court case; 9) Florida Supreme Court's decision finding the death sentence to be proportionate violated the Eighth Amendment; and 10) Florida Supreme Court's decision concluding that counsel was not effective for not presenting a mental health expert, Dr. McMahon, at the *Spencer v. State*, 615 So.2d 688 (Fla.1993), hearing was contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984).

the district court's denial of the habeas petition. *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010).

Bowles then filed a petition for writ of certiorari in the United States Supreme Court raising the peremptory challenge claim. On November 29, 2010, the United States Supreme Court denied the petition. *Bowles v. McNeil*, 562 U.S. 1068 (2010) (No. 10-6587).

On April 10, 2013, Bowles, represented by registry counsel Frank Tassone, filed a successive 3.851 postconviction motion raising two claims of ineffective assistance of appellate counsel relying on *Martinez v. Ryan*, 566 U.S. 1 (2012). On July 17, 2013, the trial court denied the successive postconviction motion. Bowles did not appeal the denial of the successive motion to the Florida Supreme Court.[7]

On June 14, 2017, Bowles, now represented by registry counsel Francis Shea[8], filed a second successive postconviction motion in the state trial court raising a claim that his death sentence violated *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S.Ct. 2161 (2017) (No. 16-998). On August 22, 2017, the trial court denied the successive postconviction motion concluding that *Hurst* did not apply

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[7] This Court has held repeatedly and consistently that *Martinez v. Ryan* is limited to federal habeas litigation and does not apply to Florida postconviction proceedings. *Banks v. State*, 150 So.3d 797, 800 (Fla. 2014) ("We have held that *Martinez* applies only to federal habeas proceedings and does not provide an independent basis for relief in state court proceedings" citing *Howell v. State*, 109 So.3d 763, 774 (Fla. 2013), and *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012)). So, there was little point to an appeal.

[8] On September 3, 2015, the state trial court permitted Frank Tassone, who had represented Bowles since 2002, to withdraw as state postconviction counsel and then appointed Francis Shea to represent Bowles as state postconviction counsel.

retroactively to Bowles relying on *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, *Asay v. Florida*, 138 S.Ct. 41 (2017) (No. 16-9033), and *Gaskin v. State*, 218 So.3d 399, 401 (Fla. 2017), *cert. denied*, *Gaskin v. Florida*, 138 S.Ct. 471 (2017) (No. 17-5669).

Bowles appealed the summary denial of successive *Hurst* claim to the Florida Supreme Court. On January 29, 2018, the Florida Supreme Court affirmed the trial court's denial of the *Hurst* claim. *Bowles v. State*, 235 So.3d 292 (Fla. 2018) (SC17-1754), *cert. denied*, *Bowles v. Florida*, 139 S.Ct. 157 (2018) (SC 17-1754). The Florida Supreme Court concluded that *Hurst* did not apply retroactively to Bowles relying on *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017) (No. 17-6180).

On October 19, 2017, Bowles, represented by registry counsel Francis Shea, filed another successive postconviction motion raising a claim of intellectually disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014).

Warrant litigation

On June 11, 2019, Governor DeSantis signed a death warrant setting the execution for Thursday, August 22, 2019 @ 6:00 p.m. (Succ. PCR 2019 at 404-405). On June 12, 2019, the Florida Supreme Court issued a scheduling order directing that all proceedings in the trial court be completed by July 17, 2019.

On June 17, 2019, the trial court held a case management conference. On June 17, 2019, the trial court also entered a scheduling order. (Succ. PCR 2019 at 189-192).

On July 1, 2019, Bowles, now represented by Capital Collateral Regional Counsel - North (CCRC-N) and the Capital Habeas Unit of the Federal Public

Defender Office of the Northern District of Florida (CHU-N), filed a successive 3.851 postconviction motion raising a single claim of intellectually disability based on *Atkins* and *Hall v. Florida*. (PCR 2019 at 732-835).[9]

On July 3, 2019, the State filed an answer to the successive postconviction motion. (PCR 2019 at 899-923). The State asserted that the intellectual disability claim was untimely under *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). Alternatively, the State asserted that the claim was meritless because it was conclusively rebutted by the existing record.

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[9] On March 25, 2019, the state trial court allowed Francis Shea to withdraw and appointed Collateral Regional Counsel-North (CCRC-N) as state postconviction counsel. On March 26, 2019, Karin Moore of CCRC-N entered a notice of appearance.

On September 27, 2017, the federal district court permitted Frank Tassone and Rick Sichta to withdraw as federal habeas counsel and appointed the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N) as federal habeas counsel. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla) (Doc. #33). On December 6, 2017, the federal district court also authorized the CHU-N to appear in state court as state postconviction co-counsel. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla) (Doc. #36). On October 24, 2018, the current chief of the CHU-N, Terri Backhus, entered a notice of appearance as federal habeas counsel. Bowles, 3:08-cv-791 (Doc. #37). On October 26, 2018, Sean Gunn of the CHU-N also entered a notice of appearance as federal habeas counsel. *Bowles*, 3:08-cv-791 (Doc. #38). On June 13, 2019, the State of Florida filed a motion in federal district court to disqualify the CHU-N from appearing in state court. *Bowles*, 3:08-cv-791 (Doc. #39). On June 25, 2019, the federal district court denied the State's motion to disqualify the CHU-N as state postconviction co-counsel. *Bowles*, 3:08-cv-791 (Doc. #47). So, Bowles is currently represented in state court by CCRC-N and the CHU-N and in federal court by the CHU-N.

On July 8, 2019, the trial court held a case management conference, commonly referred to as a *Huff* hearing,[10] to hear the arguments of counsel regarding whether an evidentiary hearing should be held. (PCR 2019 at 1276-1343). The State asserted that the claim was untimely as well as conclusively rebutted by the existing record. (PCR 2019 at 1313-1332).

On July 11, 2019, the trial court entered an written order summarily denying the intellectual disability claim. (PCR 2019 at 1344-53). The trial court concluded that the claim of intellectual disability was untimely under this Court's precedent and waived under rule 3.203(f).

This successive postconviction appeal follows.

[10] *Huff v. State*, 622 So.2d 982 (Fla. 1993)

SUMMARY OF THE ARGUMENT

ISSUE I

Bowles asserts the trial court erred in summarily denying his claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), as untimely. IB at 12-47. He argues that certain types of claims, such as an *Atkins* claims, are so fundamental they may not be time barred, procedurally barred, or waived. But the intellectual disability claim is time barred under this Court's precedent of *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). And the claim was waived under the applicable rule of court, Florida Rule of Criminal Procedure 3.203(f). Alternatively, the trial court could have properly summarily denied the claim both because it is conclusively rebutted by the record and because it was based solely on conclusory allegations. The trial court properly summarily denied the successive postconviction motion.

ISSUE II

Bowles asserts that the trial court abused its discretion by denying his first time public record requests of the Department of Corrections for his disciplinary reports and visitation logs. Additionally, he asserts that the trial court abused its discretion by denying his public record request of the State Attorney's Office for updates of any correspondence between the victim's family and friends and the prosecutor's office. He also asserts that the trial court abused its discretion by denying his public record request of the Medical Examiner, the Department of Corrections, and the Florida Department of Law Enforcement for lethal injection

information. As to the disciplinary reports, housing and movement records, and visitation logs, the trial court properly found the request to be "overbroad and overly burdensome" because they amounted to "any and all" requests. The trial court also properly concluded that these updates which were sought in support of the claim of intellectual disability would not lead to a colorable claim. Furthermore, any error regarding these updates was harmless because the request was made to support the adaptive deficits prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the correspondence between the victim's family and friends and the prosecutor, the trial court properly concluded that there was no "reasonable connection" between the correspondence and the claim of intellectual disability and that the basis for the request was "too attenuated" to lead to a colorable claim. The brother-in-law, sister, and neighbor had only a passing acquaintance with Bowles for a short period of time, so they simply could not have known Bowles well enough to provide any meaningful information on Bowles' adaptive functioning. Furthermore, any error was harmless because the request was made to support the adaptive deficit prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the lethal injection requests, this Court recently rejected the same argument regarding similar public records requests in *Long v. State*, 271 So.3d 938, 947-48 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). Therefore, the trial court did not abuse its discretion by denying three of the ten public records requests.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF INTELLECTUAL DISABILITY? (Restated)

Bowles asserts the trial court erred in summarily denying his claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), as untimely. IB at 12-47. He argues that certain types of claims, such as an *Atkins* claim, are so fundamental they may not be time barred, procedurally barred, or waived. But the intellectual disability claim is time barred under this Court's precedent of *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). And the claim was waived under the applicable rule of court, Florida Rule of Criminal Procedure 3.203(f). Alternatively, the trial court could have properly summarily denied the claim both because it is conclusively rebutted by the record and because it was based solely on conclusory allegations. The trial court properly summarily denied the successive postconviction motion.

Standard of review

The standard of review of a trial court's order summarily denying a postconviction claim is *de novo*. *Zack v. State*, 43 Fla. L. Weekly S429 (Fla. Oct. 4, 2018) (explaining that because a postconviction court's decision "whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review" citing *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009)); *Duckett v. State*, 148 So.3d 1163, 1168 (Fla. 2014) (explaining that this Court

reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*).

The trial court's ruling

The trial court concluded that the claim of intellectual disability was untimely under this Court's precedent and waived under rule 3.203(f). (PCR 2019 at 1344-53). The trial court relied this Court's decisions in *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019), to find the claim untimely. (PCR 2019 at 1349-50). The trial court noted its obligation to follow Florida Supreme Court precedent. (PCR 2019 at 1350 citing *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976)).

The trial court explained that, in the wake of the legislature enacting § 921.137, Florida Statutes and the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Florida Supreme Court enacted a rule of criminal procedure, rule 3.203, which required capital defendants, like Bowles, whose initial postconviction motions were still pending in October of 2004, to file an amendment raising an intellectual disability claim within 60 days. Fla. R. Crim. P. 3.203(d)(4)(C); (PCR 2019 at 1349 citing 3.203(d)(4)(E)). But, as the trial court noted, Bowles did not file any such amendment. Instead, Bowles raised this intellectual disability claim for the first time in 2017. Therefore, the trial court concluded that Bowles' claim was untimely.

Additionally, the trial court also concluded that the intellectual disability claim was waived under rule 3.203(f). The trial court rejected two arguments that the good cause exception in rule 3.203(f) applied. (PCR 2019 at 1347-49). The trial court rejected *Walls v. State*, 213 So.3d 340 (Fla. 2016), as a basis for finding good

cause based on this Court rejecting that same argument in *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016). The trial court also reasoned that Bowles could not have actually relied on *Cherry v. State*, 959 So.2d 702 (Fla. 2007), as a basis for not filing an amendment in 2004. The trial court also rejected ineffective assistance of postconviction counsel as an alternative basis for a finding of good cause, reasoning that claims of ineffectiveness of postconviction counsel are not cognizable. (PCR 2019 at 1348-49). The trial court reasoned that the good cause exception could not be permitted "to serve as a backdoor for claims of ineffective assistance of postconviction counsel." (PCR 2019 at 1348). The trial court also noted that without time and procedural bars, capital defendants would bring claims of intellectual disability "at the eleventh hour, such as when a death warrant is signed, in order to create delay." (PCR 2019 at 1349).

The trial court concluded that no evidentiary hearing was necessary because there was controlling precedent regarding the timeliness issue. When "there is controlling Florida Supreme Court precedent disposing of a claim, the trial court should summarily deny the postconviction claim." (PCR 2019 at 1350 citing *Mann v. State*, 112 So.3d 1158, 1162-63 (Fla. 2013)).

Summary denials of postconviction claims

Postconviction claims that are untimely should be summarily denied. *Lukehart v. State*, 103 So.3d 134, 136 (Fla. 2012) (affirming the summary denial of a successive postconviction motion because it was untimely); *Reed v. State*, 116 So.3d 260, 263-64 (Fla. 2013) (affirming the summary denial of a successive postconviction motion, in part, because it was untimely); *Archer v. State*, 151 So.3d 1223 (Fla. 2014) (unpublished) (affirming the summary denial of a successive postconviction motion because it was facially insufficient and

untimely). And when there is controlling Florida Supreme Court precedent disposing of the claim, the trial court should also summarily deny the postconviction claim. *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (explaining that because Mann "raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief"). Furthermore, this Court affirmed summary denials of intellectual disability claims as untimely in both *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018).

A court must accept the defendant's factual allegations in the postconviction motion but only "to the extent that they are not conclusively refuted by the record." *Jimenez v. State*, 265 So.3d 462, 480 (Fla. 2018) (citing *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008)), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018); *Duckett v. State*, 148 So.3d 1163, 1168 (Fla. 2014) (explaining that this Court accepts the movant's factual allegations as true to the extent they are not refuted by the record). But when those allegations are refuted by the record, the claim should be summarily denied. Fla. R. Crim. P. 3.851(f)(5)(B) (governing successive motions) (providing: "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing."); Fla. R. Crim. P. 3.851(h)(6) (governing warrant successive postconviction motions) (providing: "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing"). Additionally, conclusory allegations are not sufficient to warrant an evidentiary hearing. *Jimenez*, 265 So.3d at 480-81 ("mere conclusory allegations do not warrant an evidentiary hearing").

Untimely

The intellectual disability claim is untimely under this Court's precedent. *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018) (applying the time bar contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim for the first time in light of *Hall*), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019); *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018) (affirming a trial court's summary denial of an intellectual disability claim because the claim was untimely because it was raised for the first time in 2016 citing *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016), and rejecting an assertion that the motion was timely based on restarting the clock from the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016)), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019).[11] The Florida Supreme Court noted in *Harvey* that "the record conclusively" showed that Harvey's intellectual disability claim was "untimely" and therefore, he was "not entitled to relief." *Harvey*, 260 So.3d at 907. Both *Blanco* and *Harvey* are published opinions without dissents.

Bowles, like Blanco and Harvey, did not raise an intellectual disability claim in the wake of *Atkins*. Bowles did not raise an intellectual disability claim in his initial postconviction motion, that was filed on August 29, 2003, which was after *Atkins* was decided in 2002. Bowles also could have amended his then pending initial postconviction motion when rule 3.203 was adopted in 2004, as permitted by the then new rule. *Franqui v. State*, 14 So.3d 238, 239 (Fla. 2009) (Canady, J.,

[11] The untimeliness of the intellectual disability claim is *not* being raised in the petition filed in the United States Supreme Court in *Harvey*; the sole issue being raised is the retroactivity of *Hurst v. State*, 202 So.3d 40 (Fla. 2016). So, this Court's decision regarding timeliness will not be reviewed by the High Court in the *Harvey* case.

dissenting) (noting, under the prior version of rule 3.203, a defendant, whose initial postconviction motion was pending when the original version of rule 3.203 was adopted on October 1, 2004, had 60 days to amend the pending postconviction motion to include an intellectual disability claim). But Bowles did not amend his initial postconviction motion as he was entitled to do under the new rule governing claims of intellectual disability. Rather, Bowles raised this claim for the first time in 2017.

Opposing counsel insists that some claims, such as an *Atkins* claim, are so fundamental, they cannot be time barred. IB at 17-25. But the United States Supreme Court disagrees. The High Court has held that even a claim of actual factual innocence may be rejected based on delay. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Perkins was convicted of first-degree murder in Michigan and sentenced to life without parole. *Id.* at 388. Perkins missed the one-year deadline to timely file his federal habeas petition. He filed the federal habeas petition 11 years late. *Id.* at 389. He asserted a claim of newly discovered evidence of actual innocence to overcome the time bar. *Id.* But the federal district court dismissed the petition as untimely, reasoning that even applying an actual innocence exception to the statute of limitations, Perkins had waited five years after discovering the new evidence to file the petition. *Id.* at 390. The United States Supreme Court held that there was an actual innocence exception to the habeas statute of limitations but the Court explained that an unjustifiable delay in bringing a claim of actual innocence, while not an absolute barrier to relief, is a factor that may be considered in evaluating the reliability of a petitioner's claim of innocence. *Id.* at 399. An unexplained delay would "seriously undermine the credibility of the actual-innocence claim." *Id.* at 400. The Supreme Court

determined that Perkins' claim of innocence was not adequate to establish his actual innocence. *Id.*

Additionally, the United States Supreme Court recently observed that claims in capital cases that are raised "in a dilatory fashion," as this claim was, should be dismissed. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories.").

If an actual innocence claim may be rejected due to unexplained delay, as in *Perkins*, or dismissed altogether due to be pursued in a dilatory fashion, as in *Bucklew*, then an intellectual disability claim certainly can be time barred. And, as in *Perkins*, Bowles' many years of delay in bringing his intellectual disability claim "seriously" undermines the credibility of his *Atkins* claim.

Both *Blanco* and *Harvey* were unanimous opinions on the issue of timeliness. No Justice of the Florida Supreme Court dissented in either opinion regarding timeliness. At the *Huff* hearing regarding this claim, opposing counsel quoted Justice Pariente's statement in her concurring opinion that more "than fundamental fairness and a clear manifest injustice," is "the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations." (Succ. PCR 2019 at 2017 quoting *Walls v. State*, 213 So.3d 340, 348 (Fla. 2016) (Pariente, J., concurring)). And opposing counsel again quotes Justice Pariente's statement in *Walls* in the initial brief. IB at 24. But this is not Justice Pariente's position regarding untimely intellectual disability claims. Justice Pariente agreed that the *Atkins* claim was untimely in *Harvey*. Specifically, she wrote: "I agree that Harvey is not entitled to relief on his

intellectual disability claim because he failed to raise a timely claim under *Atkins*." *Harvey*, 260 So.3d at 907 (Fla. 2018) (Pariente, J., concurring).

Furthermore, the Eleventh Circuit takes much the same position as the Florida Supreme Court regarding the importance of raising intellectual disability claims in a proper and timely manner. Federal habeas petitioners were permitted to file successive habeas petitions raising intellectual disability claims in the wake of *Atkins*, but are not permitted to file successive habeas petitions raising intellectual disability claims in the wake of *Hall v. Florida*. *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003) (concluding that *Atkins* was retroactive and therefore, a proper basis for filing a successive habeas petition); *In re Henry*, 757 F.3d 1151 (11th Cir. 2014) (concluding that *Hall v. Florida* was not retroactive and therefore, not a proper basis for filing a successive habeas petition).

Intellectual disability claims, like most other constitutional claims, can be time barred, procedurally barred, and waived. *Cf. Class v. United States*, 138 S.Ct. 798, 808 (2018) ("We have held that most personal constitutional rights may be waived" citing *Peretz v. United States*, 501 U.S. 923, 936 (1991)); *Peretz v. United States*, 501 U.S. 923, 936 (1991) (observing that the "most basic rights of criminal defendants are similarly subject to waiver" citing cases).[12]

Opposing counsel's reliance on dicta from the dissenting opinion in *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 757 (Mo. 2015) (Stith, J., dissenting), that a claim of intellectual disability is not waiveable, is misplaced. IB at 20. The

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[12] It may be more accurate to refer to the operation of rule 3.203(f) as a forfeiture rather than as a waiver but, regardless of the correct terminology, intellectual disability claims must be raised in a timely manner. *Cf. Peretz*, 501 U.S. at 936-37 (citing *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.").

majority opinion of the Missouri Supreme Court rejected the *Atkins* claim because while an injury had damaged the capital defendant's mental abilities, the defendant was of average intelligence as a child and therefore, he "cannot be intellectually disabled." *Id.* at 753. The majority concluded that the claim of brain damage was properly classified as a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), not as an *Atkins* intellectual disability claim. *Id.* at 753-54.[13] It is the United States Supreme Court's view in *Perkins* that this Court should be guided by, not a dissenting opinion from the Missouri Supreme Court. The *Hall v. Florida* claim can be, and is, time barred.

Opposing counsel also insists that this Court's holdings in *Blanco* and *Harvey* violate due process by denying him an opportunity to be heard. IB at 26. Following this logic, all time bars of any sort violate due process. Due process simply does not prohibit timely filing requirements. *Vining v. State*, 827 So.2d 201, 215 (Fla. 2002) (rejecting a claim that the one-year filing requirement for postconviction motions in capital cases violated due process or suspended the right of habeas corpus citing *Arbelaez v. State*, 775 So.2d 909, 919 (Fla. 2000),

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[13] The State agrees that such a claim is properly litigated as a *Ford* claim, not as an *Atkins* claim. If a capital defendant's intellectual functioning deteriorates to the point he does not understand why he is being executed, for whatever reason, as an adult, while he is, by definition, not intellectually disabled, he certainly would have a valid claim that the Eighth Amendment prohibits his execution under *Ford*. *Cf. Dunn v. Madison*, 138 S.Ct. 9 (2017) (analyzing a claim that strokes had rendered a capital defendant too mentally infirm to be executed under *Ford* but concluding the defendant did not meet the *Ford* standard). Because *Ford* claims are not ripe until an execution is set, they may be raised in successive habeas petitions under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and are not time barred for that same reason. But that is not true of *Atkins* claims. *Atkins* intellectual disability claims are ripe when a death sentence is imposed and should be raised in the direct appeal in cases where the death sentence was imposed after 2002 when *Atkins* was decided.

and *Koon v. Dugger*, 619 So.2d 246, 251 (Fla. 1993)); *cf. Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001) (holding that the federal habeas statute one-year limitation period does not, as a general matter, violate the Suspension Clause citing other circuit cases including *Wyzykowski v. Dept. of Corr.*, 226 F.3d 1213, 1217-18 (11th Cir. 2000), and *Turner v. Johnson*, 177 F.3d 390, 392-93 (5th Cir. 1999)). This Court's holdings in *Blanco* and *Harvey* do not violate the Eighth Amendment or due process.

No exception based on *Hall v. Florida* or *Walls v. State*

Opposing counsel attempts to evade this time bar by invoking the exception for new fundamental constitutional decisions that are retroactive in rule 3.851(d)(2)(B). IB at 31. But even using that exception as an alternative starting date, the claim remains untimely. *Hall v. Florida* was decided on May 27, 2014. To be timely, any intellectual disability claim had to be filed within one year of the date *Hall* was decided which would be by Wednesday, May 27, 2015. But this intellectual disability claim was not filed until October 19, 2017, which was over two years late. The intellectual disability claim is years late even applying an exception based on *Hall v. Florida*.

Opposing counsel additionally attempts to evade this time bar by invoking the exception for new fundamental constitutional decisions that are retroactive in rule 3.851(d)(2)(B), based on *Walls v. State*, 213 So.3d 340 (Fla. 2016). IB at 32. In *Walls*, this Court held that *Hall v. Florida* was retroactive. *Walls*, 213 So.3d at 345-46 (applying *Witt v. State*, 387 So.2d 922 (Fla. 1980), and determining *Hall v. Florida* was retroactive). But this is the exact argument this Court rejected in *Harvey*, when it determined that the prior decision in *Walls* did not restart the clock to timely file an intellectual disability claim. *Harvey*, 260 So.3d at 907. And,

in *Harvey*, the capital defendant filed the intellectual disability claim two months after *Walls* was decided; whereas, here, Bowles did not file this claim until nearly a year after *Walls* was decided. *Harvey*, 260 So.3d at 907 (noting that Harvey's motion was filed two months after *Walls* was decided). So, this intellectual disability claim is even more untimely than the intellectual disability claim in *Harvey*. The intellectual disability claim remains untimely regardless of the exception for new retroactive constitutional decisions in rule 3.851.[14]

Rule 3.203(f) and good cause

Additionally, the intellectual disability claim is waived or forfeited under the rules of court. Fla. R. Crim. P. 3.203(f) (noting a claim of intellectual disability is

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[14] This Court used the current state test for retroactivity, *Witt v. State*, to determine that *Hall v. Florida* was retroactive in *Walls*. This Court should adopt *Teague v. Lane*, 489 U.S. 288 (1989), as the state test for retroactivity in place of *Witt*. This Court should do as many other state supreme courts have done and adopt *Teague* as the state test for retroactivity. *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829 (Conn. 2015) (adopting *Teague* as the state test for retroactivity and noting that thirty-three other states and the District of Columbia use *Teague* in deciding state law claims); *Windom v. State*, 886 So.2d 915, 942-50 (Fla. 2004) (Cantero, J., concurring) (advocating that Florida courts adopt *Teague*). *Witt* does not give finality its paramount place in retroactivity analysis. Nor does *Witt* account for the distinction between substantive and procedural or the importance of statutory interpretation decisions. *See also Reed v. State*, SC19-714 at 2-7 (State's reply advocating the adoption of *Teague*); *Owen v. State*, SC18-810 at 30-45 (State's answer brief advocating the adoption of *Teague*).

Under *Teague*, *Hall v. Florida* is not retroactive. *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015) (explaining that *Hall v. Florida* is not retroactive citing *In re Henry*, 757 F.3d 1151 (11th Cir. 2014)); *see also Smith v. Comm'r, Ala. Dept, of Corr.*, 924 F.3d 1330, 1337-40 (11th Cir. 2019) (holding *Moore v. Texas*, 137 S.Ct. 1039 (2017), was not retroactive under *Teague* because it is procedural, not substantive). This Court should not follow *Walls*, much less allow it to serve as a basis to restart the clock in rule 3.851 or as a basis for good cause in rule 3.203(f).

deemed to have been waived if not timely filed). Bowles attempts to invoke the good cause exception in subsection (f), which provides: "A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." IB at 35.

Opposing counsel argues two different bases for a finding of good cause: 1) the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016), and 2) a claim of ineffective assistance of postconviction counsel. IB at 36. But neither is a basis for a finding of good cause under rule 3.203(f).

Walls v. State is not good cause

First, opposing counsel asserts that the decision in *Walls v. State*, 213 So.3d 340 (Fla. 2016), as a basis for a finding of good cause. IB at 42. This is the same argument that this Court rejected in *Harvey* merely wrapped in a different color cloth. If a decision does not restart the clock for purposes of rule 3.851, then it should not provide a basis for good cause for purposes of rule 3.203. And opposing counsel provides no reason or explanation why *Walls v. State* is insufficient under one rule of court to restart the clock but should be considered sufficient under another rule of court. The decision in *Walls v. State* does not provide a basis for a finding of good cause under rule 3.203(f).

Ineffectiveness of postconviction counsel is not good cause

Second, opposing counsel asserts a claim of ineffective assistance of postconviction counsel as a basis for a finding of good cause. IB at 36. Opposing counsel asserts that Bowles' state postconviction counsel, Frank Tassone, was ineffective for not raising an *Atkins* claim during the initial postconviction motion

proceedings and for not having the defense postconviction mental health expert, Dr. Harry Krop, administer a full IQ test or assess Mr. Bowles for intellectual disability.

While opposing counsel uses the phrases "attorney misconduct" and "attorney neglect" instead of the phrase ineffective assistance of postconviction counsel, like a rose, a claim of ineffective assistance of postconviction counsel is still a claim of ineffective assistance of postconviction counsel even when referred to by another name. IB at 40. And claims of ineffective assistance of postconviction counsel are not cognizable in Florida. *Zack v. State*, 911 So.2d 1190, 1203 (Fla. 2005) (observing that under Florida and federal law, a defendant has no constitutional right to effective collateral counsel and therefore, claims of ineffective assistance of postconviction counsel are not a valid basis for relief citing *Lambrix v. State*, 698 So.2d 247, 248 (Fla. 1996); *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002); and *Pennsylvania v. Finley*, 481 U.S. 551 (1987)); *see also* § 27.711(10), Fla. Stat. (2018) (providing: "An action taken by an attorney who represents a capital defendant in postconviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel."). A claim that is not cognizable, cannot be a basis for "good" cause.

And, even if ineffectiveness of postconviction counsel was cognizable or a proper basis for a claim of good cause, postconviction counsel was not ineffective. Postconviction counsel had two IQ scores from two different mental health experts — an IQ score of 80 from Dr. McMahon and an IQ score of 83 from Dr. Krop. There is no reason to investigate intellectual disability any further once two defense experts provide postconviction counsel with IQ scores that were much higher than the cut-off score of 70 under the statute and *Cherry v. State*, 959 So.2d 702 (Fla. 2007), and which are higher than the 75 cut-off to this day under

Hall v. Florida. Postconviction counsel cannot be ineffective for not foreseeing that *Cherry* would be overruled by the United States Supreme Court years later. *Lynch v. State*, 254 So.3d 312, 323 (Fla. 2018) ("We have repeatedly held that trial counsel is not required to anticipate changes in the law in order to provide effective legal representation" citing *Lebron v. State*, 135 So.3d 1040, 1054 (Fla. 2014)), *cert. denied*, *Lynch v. Florida*, 139 S.Ct. 1266 (2019); *Smith v. State*, 213 So.3d 722, 746 (Fla. 2017) (noting that appellate counsel cannot be deemed ineffective for failing to anticipate the change in law citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992)).[15] Additionally, postconviction counsel focused on brain damage instead of intellectual disability during the initial postconviction proceedings, which given the two IQ scores from the two defense experts being in the 80s, was understandable and certainly not ineffective. Stacking postconviction theories is no more wise than stacking trial defenses. *Fuston v. Kentucky*, 217 S.W.3d 892, 896 (Ky. Ct. App. 2007) ("Stacking defenses can hurt a case."); *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000) (en banc) ("Good advocacy requires winnowing out some arguments, witnesses, evidence" to "stress others."); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994)

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[15] While *Cherry* had not been decided at the time of initial postconviction proceedings in this case, the holding in *Cherry* was based on the statutory language, the text of the rule, and prior caselaw. *Cherry*, 959 So.2d at 711, 713 (quoting expert testimony that "the two standard deviations language in the rule would place the mental retardation cutoff score at 70" and stating that the "Legislature set the IQ cutoff score at two standard deviations from the mean, and this Court has enforced this cutoff" citing *Zack v. State*, 911 So.2d 1190, 1201 (Fla. 2005)), *abrogated by Hall v. Florida*, 572 U.S. 701 (2014). Postconviction counsel in this case would have faced the same hurdle of the text of the statute and the case of *Zack*. Indeed, postconviction counsel in this case was in a worse position than postconviction counsel in *Cherry*, because both Bowles' IQ scores were in the 80s whereas Cherry's IQ score was 72. Cherry was within the statistical error of measurement but Bowles was not (and is not to this day).

(observing that a "multiplicity of arguments or defenses hints at the lack of confidence in any one"). Postconviction counsel was not ineffective for not investigating intellectual disability further given the state of the law and the two relatively high IQ scores.

Furthermore, the underlying allegation regarding the scope of Dr. Krop's examination is rebutted by the record. Dr. Krop testified during the 2005 evidentiary hearing that he performed a "comprehensive neurological examination." (PC 118). According to his report, Dr. Krop administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003 to Bowles and Bowles' score was 83. Dr. Krop testified at the evidentiary hearing that his assessment of Bowles' intellectual functioning was that it was "somewhere in the low 80's." (PC 118). Dr. Krop testified that his assessment of Bowles' intellectual functioning was "consistent" with Dr. McMahon's assessment. (PC 118). There is no basis for a finding of good cause based on either state postconviction counsel's conduct or the postconviction mental health expert's conduct.

Ineffective assistance of postconviction counsel does not provide a basis for a finding of good cause under rule 3.203(f).

The good cause exception does not apply and the claim remains waived or forfeited due to its untimeliness.

Under *Blanco* and *Harvey*, the intellectual disability claim was untimely and the trial court properly summarily denied it as untimely. On the basis of untimeliness alone, the trial court properly summarily denied the intellectual disability claim.

Merits

Alternatively, the claim would be properly summarily denied both because the claim is conclusively rebutted by the record and because the claim was based solely on conclusory allegations regarding intellectual disability. Bowles is not intellectually disabled based on the record.

IQ scores in the existing record

There are three IQ scores in the current record. Dr. Elizabeth McMahon, the defense expert hired by the Public Defender's Office prior to the first penalty phase, testified via depositions in the state postconviction proceedings. Dr. McMahon administered the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in 1995. According to Dr. McMahon, Bowles' full-scale IQ score was 80. (PCR 196, 239).

Dr. Harry Krop, the defense expert in the initial state postconviction proceedings, administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003. Dr. Krop, in his written report dated April 21, 2003, reported Bowles' IQ to be 83.

Dr. Jethro Toomer, the defense expert in the current successive postconviction motion, stated that he administered the WAIS-IV to Bowles in October of 2017. According to Dr. Toomer's report, Bowles' full scale IQ score was 74.

So, the three IQ scores in the existing record are 80, 83, and 74.

***Hall v. Florida* does not apply**

In *Hall v. Florida*, 572 U.S. 701 (2014), the United States Supreme Court held that Florida's interpretation of its statute prohibiting the imposition of the death sentence upon an intellectually disabled defendant establishing a strict IQ test

score cutoff of 70 was unconstitutional because the rigid rule created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 704. Instead of applying the strict cutoff when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement (SEM) of IQ tests. And, when a defendant's IQ test score falls within the SEM, the defendant must be allowed to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. *Id.* at 723.

But *Hall v. Florida* does not apply to any defendant whose full scale IQ score is above 75. As the United States Supreme Court clarified in *Moore v. Texas*, 137 S.Ct. 1039 (2017), it is only capital defendants whose IQ score is 75 or below that are entitled to an evidentiary hearing to explore the other two prongs. The *Moore* Court wrote that "*Hall* instructs that, where an IQ score is ***close*** to, but above, 70, courts must account for the test's standard error of measurement." *Id.* at 1049 (emphasis added). The High Court in *Moore* explained that "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls ***within*** the clinically established range for intellectual-functioning deficits." *Id.* at 1050 (emphasis added). The *Moore* majority explained that "***because*** the lower end of Moore's score range falls at or below 70," the Texas courts "had to move on to consider Moore's adaptive functioning." *Id.* at 1049 (emphasis added).

But, as is clear from the *Moore* decision, a defendant whose IQ is above 75 is not entitled to an evidentiary hearing under *Hall v. Florida*. As this Court has explained, it is only "when a defendant establishes an IQ score range — adjusted for the SEM — at or below 70," that "a court must move on to consider the defendant's adaptive functioning." *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018)

(citing *Moore*, 137 S.Ct. at 1049), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019) (No. 18-8653). *Hall v. Florida* does not apply at all to a defendant whose collective IQ score is above 75.

Considered collectively, Bowles' IQ is between 78 and 79. His collective score is above 75. So, *Hall v. Florida* does not apply to Bowles. The trial court did not violate the United States Supreme Court's directions in *Hall v. Florida*, as clarified in *Moore v. Texas*, or this Court's directions in *Wright* by refusing to conduct an evidentiary hearing on the claim of intellectual disability. *Hall v. Florida* does not apply and therefore, Bowles was not entitled to an evidentiary hearing.

Florida's statutory definition of intellectual disability

Florida has a statutory definition of intellectual disability for capital cases. The "[i]mposition of the death sentence upon an intellectually disabled defendant prohibited" statute, section 921.137(1), Florida Statute (2018), provides:

> As used in this section, the term "intellectually disabled" or "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. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means 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. The term "adaptive behavior," for the purpose of this definition, 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. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

See also Fla. R. Crim. P. 3.203(b). Florida's statutory definition of intellectual disability parallels the clinical definition of intellectual disability.[16] Under the

[16] Florida's statutory definition of intellectual disability was derived from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), which was a standard clinical definition in 2001 when the

statute, a capital defendant must show that he is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat. (2018); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) ("a defendant must make this showing by clear and convincing evidence" citing § 921.137(4), Fla. Stat.), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019) (No. 18-8653).

Under both the statute and Florida Supreme Court precedent, a defendant must establish three prongs to show intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016). The Florida Supreme Court has explained that, if a defendant fails to prove any one of these three prongs, "the defendant will not be found to be intellectually disabled." *Quince v. State*, 241 So.3d 58, 62 (Fla. 2018) (six Justice majority) (citing *Salazar*, 188 So.3d at 812; *Williams v. State*, 226 So.3d 758, 773 (Fla. 2017), *cert. denied*, *Williams v. Florida*, 138 S.Ct. 2574 (2018) (No. 17-7924); *Snelgrove v. State*, 217 So.3d 992, 1002 (Fla. 2017)); *see also Wright*, 256 So.3d at 778-79 (Labarga, J., concurring) (emphasizing that a trial court is not required to consider other prongs of the test for intellectual disability when the defendant fails other prong); *Wright*, 256 So.3d at 779-80 (Lawson, J., concurring) (observing that the "statute contains a three-prong test for intellectual disability" and if "the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled" and noting that Wright failed to prove the first prong and for "this reason alone, Wright does not qualify as intellectually disabled under Florida law"). The Florida Supreme Court has

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statute prohibiting the imposition of the death penalty on intellectually disabled defendants was first adopted by the Florida legislature, before *Atkins* had even been decided. *Atkins*, 536 U.S. at 308, n.3 (reciting the definition of intellectual disability in the DSM-IV published in 2000); § 921.137(1), Fla. Stat. (2001).

explained that a defendant must meet all three prongs of the test for intellectual disability and if he cannot, it is proper to summarily deny the intellectual disability claim. *Quince*, 241 So.3d at 62 (citing the summary denial case of *Zack v. State*, 228 So.3d 41, 47 (Fla. 2017), *cert. denied*, *Zack v. Florida*, 138 S.Ct. 2653 (2018) (No. 17-8134)).

The Florida Supreme Court has also rejected an argument that a trial court was required to make findings as to all three prongs. *Quince*, 241 So.3d at 62.

The three prongs of the intellectual disability test

Bowles is not intellectually disabled. He does not meet any of the three prongs of the statutory test for intellectual disability, much less all three prongs. And certainly not by clear and convincing evidence. The State will address each of the three prongs in turn.

Significant subaverage intellectual functioning

The first prong is significant subaverage intellectual functioning. Bowles' current intellectual functioning is not "significantly subaverage." When multiple IQ scores are present, they should be considered collectively. *Hall*, 572 U.S. at 714 (stating that the "analysis of multiple IQ scores jointly is a complicated endeavor" citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in The Oxford Handbook of Child Psychological Assessment 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013)); *Hall*, 572 U.S. at 742 (Alito, J., dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence"). In general, higher IQ scores are more reliable than lower scores. A. Frances, *Essentials of Psychiatric Diagnosis: Responding to the Challenge of DSM-5*, 31 (rev. ed. 2013) (explaining that there are

many reasons why a given score might underestimate a person's intelligence, but no reason why scores should overestimate it); *Forensic Psychology* 56 ("Although one cannot do better on an IQ test than one is capable of doing, one can certainly do worse.").

The three defense experts' IQ scores of 80, 83, and 74, considered collectively, do not establish by clear and convincing evidence significantly subaverage general intellectual functioning. Based on the three IQ scores, considered collectively, Bowles' IQ is between 78 and 79.[17] An IQ of 78 or 79 is not significantly subaverage intelligence. Bowles' factual allegations regarding his intellectual functioning are conclusively refuted by the record. *Zack*, 228 So.3d at 47 (affirming a postconviction court's summary denial of a *Hall* claim based solely on the first prong). Bowles fails the first prong.

Adaptive functioning

The second prong is significant deficits in adaptive functioning. Deficits in adaptive functioning are concurrent deficits in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure,

[17] The average of Bowles' three IQ scores is 79. The median of Bowles' three IQ scores is 78.5. Another means of considering IQ scores collectively, referred to by the *Hall* majority, is a "composite" score. *Hall v. Florida*, 572 U.S. at 714 (citing to Schneider, *Principles of Assessment of Aptitude and Achievement* at 289-91). Schneider has a complicated formula for determining the "composite" score. The author acknowledges that an average is a "rough approximation of a composite score," but he advocates the use of a "composite" score in cases of low and high scorers. *Id.* at 290. But he does not explain why using the median instead the mean does not accomplish much the same goal. But regardless of the method, the IQ scores should be considered collectively as is standard mathematical practice when measuring the same phenomena, such as IQ scores.

health, and safety. *Atkins*, 536 U.S. at 308 n.3 (quoting Am. Ass'n on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992)); *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (stating that a capital defendant must show "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety" citing *Rodriguez v. State*, 919 So.2d at 1252, 1266, n.8 (Fla. 2005) (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 41 (4th ed. 2000)). It is currently defined as deficits in one of three broad categories or "domains": conceptual, social, and practical. *Wright v. State*, 256 So.3d 766, 773 (Fla. 2018) (citing DSM-5), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019).

Bowles does not have significant deficits in adaptive functioning. Bowles obtained his General Education Development (GED) diploma. Dr. McMahon, the defense mental health expert hired pre-trial, testified in her deposition that Bowles obtained his GED diploma while incarcerated at DeSoto Correctional Institution. (Depo at 62). Dr. Krop also testified at the 2005 evidentiary hearing that Bowles had obtained his GED. (PCR Vol. II 148). This Court has observed that obtaining a GED is "***clear evidence***" and "***direct proof***" that the defendant does not suffer from adaptive deficits. *Dufour v. State*, 69 So.3d 235, 251 (Fla. 2011) (stating that obtaining a GED diploma, which involves "a battery of questions that generally emphasize the ability to read, write, think, and solve mathematical problems" is "clear evidence" and "direct proof" that "a deficit in adaptive behavior does not exist") (emphasis added); *see also Williams v. State*, 226 So.3d 758, 773 (Fla. 2017) (stating the "fact that Williams successfully obtained his GED diploma supports

the conclusion that he does not suffer from adaptive deficits" citing *Dufour*, 69 So.3d at 250), *cert. denied*, *Williams v. Florida*, 138 S.Ct. 2574 (2018). This Court in *Williams* recounted Dr. Prichard's testimony that he "has not encountered an intellectually disabled person who can pass even a single section of the GED test, let alone the entire examination." *Williams*, 226 So.3d at 771.

Bowles made many statements in his confession which contradict any claim of adaptive deficits. Bowles talked about making phone calls and driving victims' cars. (TR 581, 636-38, 748, 776-77). Though Bowles had his own driver's license, he procured fake identification with his picture under the name of Timothy Whitfield by using a social security card and birth certificate found at one of his victim's homes. (TR 605, 699). A driver's licence is evidence of adaptive functioning, not adaptive deficits. *State v. Rodriguez*, 814 S.E.2d 11, 20 (N.C. 2018) (recounting the testimony of the State's expert, Stephen Kramer, M.D., a forensic neuropsychiatrist and professor of psychiatry at Wake Forest Baptist Medical Center, who testified that the ability to pay taxes and to obtain a driver's license showed that defendant had a level of adaptive functioning beyond that expected of those with intellectual disability and the testimony of one of the defense experts, Dr. John Olley, a professor at the University of North Carolina at Chapel Hill and a psychologist at the Carolina Institute for Developmental Disabilities, who testified that only one-third of mildly intellectually disabled persons are able to obtain a driver's license or learner's permit); *Oats v. State*, 181 So.3d 457, 464 (Fla. 2015) (noting that "Oats was never able to obtain a driver's license" which could be evidence of deficits in adaptive functioning).

Bowles admitted in the confession that he was planning to drive the victim's car from Florida to his mother's in Branson, Missouri but ran out of money in Tennessee, so he left the car and got a bus ticket to travel the rest of the way. (TR

783). So, Bowles know how to travel and use the national bus system. *Wright v. State*, 256 So.3d 766, 778 (Fla. 2018) (explaining that the testimony that he "knew how to use the city bus system" which cuts "against a finding of adaptive deficits in the conceptual domain" and affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits); *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits, noting Hodges was capable of traveling independently to and from work and from Ohio to Alabama and Florida and was capable of driving without anyone instructing him on how to get to his destination and of arranging travel by bus).

Furthermore, Bowles can read and write which also cuts against a finding of adaptive deficits. Bowles reads at a high school level and is at a sixth or seventh grade level "in terms of spelling and arithmetic." (PCR VOL II 148). As part of the confession, Bowles was also required to understand and sign rights forms, fill out written statements, and read his statements before signing them. (TR 634, 700, 703-04, 755, 764). One of the defense experts, Dr. Kessel, noted in her report that Bowles "would write letters to his mother constantly" and that he can "write and read a sentence." Bowles' ability to read and write rebuts any claim of adaptive deficits. *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's ability to read and write).

Additionally, Bowles' employment history negates the claim of adaptive deficits. *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's jobs as a short-order cook, a garbage collector, and a dishwasher which are job skills that people with mental retardation

normally lack and recounting that the defense expert admitted that a position "as a short-order cook was an 'unusually high level job'" for someone who is intellectually disabled). Bowles had various jobs including working on an oil rig for two years. (Record at 754-60; Depo at 62). Bowles was also employed as a machinist and a roofer. (PCR 2019 at 796).

Moreover, any deficits that Bowles may have, could be due to his anti-social personality disorder and not a function of his intellectual ability at all. In the initial postconvition proceedings, the defense expert, Dr. Krop, diagnosed Bowles with anti-social personality disorder. (PCR Vol. II at 110, 137). Poor impulse control is also one of the symptoms of anti-social personality disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 706 (rev. 4th ed. 2000) (DSM-IV) (detailing the seven criteria for antisocial personality disorder including impulsivity).

Bowles' factual allegations regarding his adaptive functioning are conclusively refuted by the record. Bowles fails the second prong as well.[18]

Onset as a minor

The third prong is onset of the condition prior to age 18. Bowles was not intellectually disabled as a child. Parts of Bowles' school records from Kankakee Illinois School District 111 were discussed during the 2005 postconviction evidentiary hearing. Bowles made As and Bs in first grade. His grades in first grade were an A, a B, another B, and another A. Bowles made As and B+s in

[18] Dr. Kessel's affidavit is inherently incredible because she describes how Bowles fended for himself at home and had jobs as a machinist and roofer. *Nordelo v. State*, 93 So.3d 178, 185 (Fla. 2012) (stating that if an affidavit supporting a claim is inherently incredible, the claim of may be summarily denied).

math in regular classes in the early grades of elementary school. A child who is intellectually disabled does not make As in math in grade school. Furthermore, one of the handwritten notations on his achievement tests in his school records is "high normal." A child with intellectual disability cannot make "high normal" scores on achievement tests.

The school records show that Bowles' grades declined over the years with his declining attendance. Indeed, one comment in the school records regarding the extent of his absences was that Bowles was "never present!!" The defense mental health expert, Dr. McMahon, testified that in sixth or seventh grade, Bowles' "grades went from A's, B's, and C's to D's and F's as he started skipping school." (Depo at 66, 72, 74). Bowles' grades dropping coincides with the start of his drug use around ten years old. (Depo 66). Bowles also fails the third prong.

Bowles fails all three prongs of the test. Bowles is not intellectually disabled.

Conclusively rebutted by the record

A trial court may properly summarily deny a claim that is conclusively rebutted. Fla. R. Crim. P. 3.851(h)(6) ("If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing."). Bowles' factual allegations regarding intellectual disability are conclusively refuted by the record. Again, the record need not establish that the defendant fails all three prongs. Conclusively rebutting one prong, conclusively rebuts the entire claim. If the record conclusively rebuts one prong, the claim of intellectual disability is properly summarily denied, as it was in *Zack*.

At the *Huff* hearing, opposing counsel never addressed any of the three prongs; she merely stated that the claim was not conclusively rebutted without

any explanation why the State was incorrect that the claim was conclusively rebutted or any attempt to highlight any factual disputes. (PCR 2019 at 1312). Nor does the initial brief explain why the claim is not conclusively rebutted by the record. IB at 46-47. The initial brief improperly limits its analysis to new facts developed by current counsel without accounting for the facts in the existing record developed in all the previous litigation. There is no prong by prong analysis. The claim of intellectual disability is conclusively rebutted by the record and therefore, the claim would be properly denied on the merits without an evidentiary hearing under the rules.

Conclusory allegations

Alternatively, the claim would be properly summarily denied because it was based on conclusory allegations. *Jimenez*, 265 So.3d at 480-81 (stating that conclusory allegations are not sufficient to warrant an evidentiary hearing). Bowles' claim was based solely on conclusory allegations regarding intellectual disability. The 2017 successive postconviction motion, as well as the 2019 successive postconviction motion, contained only conclusory allegations. For example, Dr. Toomer report was conclusory. (PCR 2019 at 778-783). Dr. Toomer, was the defense mental health expert who administered the IQ test to Bowles in 2017 and who was named in the motion. Dr. Toomer's report regarding the onset prong merely stated: Bowles' "deficits had their onset during the developmental, pre-18 period" based on his "record of school failure" and his grades dropping. (PCR 2019 at 782). Dr. Crown's 1½ page report was even more conclusory. (PCR 2019 at 784-785). After discussing his finding that Bowles had mild to moderate brain impairment, Dr. Crown concluded that Bowles' "brain damage supports the finding that he is intellectually disabled with adaptive deficits." (PCR 2019 at

785). There was no discussion of any of the three prongs or any facts to given to support any adaptive deficits. Dr. Kessel's report is also conclusory regarding the onset prong, merely stating: "Bowles' intellectual disability and adaptive deficits were clearly present prior to the age of 18, beginning in his early childhood." (PCR 2019 at 801).

Even after the State filed a motion to compel more detailed expert reports, opposing counsel did not file amended reports from the defense experts addressing each prong in sufficient detail to move beyond mere conclusions. (PCR 2019 429-440). Opposing counsel's failure to provide detailed expert reports, in the end, means this claim was based solely on conclusory allegations.

Bowles was required to provide non-conclusory allegations on each of the three prongs and at a burden higher than the normal preponderance standard of proof, but he did not do so. Experts' reports that contain conclusory statements regarding any of the prongs or that do not address any one of the three prongs fail to meet this burden. Bowles was not entitled to an evidentiary hearing due to his inadequate and conclusory allegations in both the motion itself and in the defense experts' reports attached to the motion.[19]

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[19] The current rule of criminal procedure governing "Defendant's Intellectual Disability as a Bar to Imposition of the Death Penalty," rule 3.203(c)(2), provides:

> The motion shall state that the defendant is intellectually disabled and, if the defendant has been tested, evaluated, or examined by 1 or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

The rule of criminal procedure governing intellectual disability claims currently requires "reports containing the opinions of any experts named in the motion" to be attached to the motion and that the expert file a "written report of any findings" which means all findings of all experts who will be testifying. And, while the State believes the current rule requires just that, the trial court did not grant the State's motion to compel more detailed reports due to the lack of caselaw. (PCR 2019 at 840-842; 864-865). Opposing counsel during the hearing on the State's motion to compel argued that the phrase in the rule: "The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court" is limited to the State's expert. (PCR 2019 at 875876). This Court should clarify that that phrase applies to all experts. This Court should also clarify that the rule requires full reports of all mental health experts. The rule should be clarified to explicitly require a detailed report on all three prongs of intellectual disability. *Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019) (observing in federal court, an expert witness must produce all data she has considered in reaching her conclusions citing Fed. R. Civ. P. 26(a)(2)(B)); Fed. R. Civ. P. 26(a)(2)(b)(i) (providing that the expert report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them"); *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008) (explaining the purpose of the expert disclosure rule is to provide opposing parties an opportunity to prepare for effective cross-examination and to hire their own experts to rebut the expert's testimony); *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) (noting that an expert witness may not testify to subject matter beyond the scope of his report). And the rule should not be limited to named experts. Because many mental health experts destroy their files after a certain number of years, as do many schools, the State often does not have access to older defense experts' reports or the defendant's school records but the defense often does have these documents. As part of the good faith requirement that was originally required in rule 3.203, all records and defense mental health experts' reports should be required to be disclosed in postconviction litigation where the defendant is seeking to overturn a death sentence. There should be no confidentiality in the postconviction setting. This Court should refer the rule to the appropriate committee with directions to clarify and correct the rule regarding these matters.

The "tipsy coachman" doctrine

Alternatively to the time bar, the claim of intellectual disability would have been properly summarily denied because it is conclusively rebutted by the record and because it was based solely on conclusory allegations.

The "tipsy coachman" doctrine is a long-established appellate principle in both state and federal appellate courts. *Lee v. Porter*, 63 Ga. 345 (1879) (observing the "human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it" and quoting lines from Oliver Goldsmith's poem "Retaliation," "His conduct still right, with his argument wrong" and though the "coachman was tipsy, the chariot drove home."); *Carraway v. Armour & Co.*, 156 So.2d 494, 497 (Fla. 1963) (quoting the same poem citing *Lee v. Porter*); *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1269 & n.6 (11th Cir. 2008) (explaining the origin of the name of the "tipsy coachman" doctrine is Oliver Goldsmith's poem "Retaliation"). The federal courts, including the United States Supreme Court, have also long-employed the doctrine, albeit under the less colorful expression of the "right for the wrong reason" principle. *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1269 (11th Cir. 2008) (explaining the "right for the wrong reasons" principle is the equivalent of the "tipsy coachman" doctrine); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (explaining in the review of judicial proceedings "the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason" citing numerous cases).

Under the "tipsy coachman" doctrine, an appellate court can, and should, affirm a trial court's order that reaches the right result on any alternative ground in the record. *Rolling v. State*, 218 So.3d 911, 912-13 & n.2 (Fla. 3d DCA 2016) (invoking the "tipsy coachman" doctrine which allows an appellate court to affirm

a trial court's order that reaches the right result on an alternative ground provided there is a basis for doing so in the record citing *Robertson v. State*, 829 So.2d 901 (Fla. 2002), and *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla.1999), and affirming the trial court's order denying a successive 3.800(a) motion, albeit "for reasons other than those stated by the trial court"); *Whisby v. State*, 262 So.3d 228, 232 (Fla. 1st DCA 2018) (affirming the admission of collateral-crime evidence based on different statute invoking the "tipsy coachman" doctrine citing *Radio Station WQBA* and *Robertson*, in the direct appeal of a criminal conviction for armed kidnapping and multiple counts of sexual battery).

The point of the "tipsy coachman" doctrine is judicial efficiency. *Sec. and Exch. Comm'n. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground . . ."). It serves no purpose for an appellate court to remand for a new trial for the trial court to yet again deny the same motion or again overrule the same objection or again exclude the same evidence at the new trial but this time repeat the appellate court's correct reasoning. What matters is the bottom line of the motion being denied or the objection being overruled or the evidence being excluded. The second trial in such a situation would be exactly the same in terms of the evidence and testimony.

In this case, there is no point in this Court remanding a case to the trial court to once again summarily deny the successive postconviction motion in a second order but just to mimic this Court's reasoning in the second order. It is the bottom line of the summary denial that matters. Either way, the motion will be denied without an evidentiary hearing and the end result will be the same.

Based on the "tipsy coachman" doctrine and the record, this Court may affirm the summary denial of the successive postconviction motion on the alternative basis that the claim of intellectual disability is conclusively rebutted by the record ***or*** that the claim of intellectual disability was based solely on conclusory allegations. On either of these alternative grounds, the claim of intellectual disability would be properly summarily denied as well.

Accordingly, the trial court properly summarily denied the intellectual disability claim as time barred under this Court's precedent.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THREE OF THE TEN PUBLIC RECORDS REQUESTS? (Restated)

Bowles asserts that the trial court abused its discretion by denying his first time public record requests of the Department of Corrections for his disciplinary reports and visitation logs. Additionally, he asserts that the trial court abused its discretion by denying his public record request of the State Attorney's Office for updates of any correspondence between the victim's family and friends and the prosecutor's office. He also asserts that the trial court abused its discretion by denying his public record request of the Medical Examiner, the Department of Corrections, and the Florida Department of Law Enforcement for lethal injection information. As to the disciplinary reports, housing and movement records, and visitation logs, the trial court properly found the request to be "overbroad and overly burdensome" because they amounted to "any and all" requests. The trial court also properly concluded that these updates which were sought in support of the claim of intellectual disability would not lead to a colorable claim. Furthermore, any error regarding these updates was harmless because the request was made to support the adaptive deficits prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the correspondence between the victim's family and friends and the prosecutor, the trial court properly concluded that there was no "reasonable connection" between the correspondence and the claim of intellectual disability and that the basis for the request was "too attenuated" to lead to a colorable claim. The brother-in-law, sister, and neighbor had only a passing acquaintance with Bowles for a short period of time, so they simply could not have known Bowles well enough to provide any meaningful information on Bowles' adaptive functioning. Furthermore, any error was harmless because the request was made to support

the adaptive deficit prong of the claim of intellectual disability at the evidentiary hearing but no evidentiary hearing was conducted. As to the lethal injection requests, this Court recently rejected the same argument regarding similar public records requests in *Long v. State*, 271 So.3d 938, 947-48 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). Therefore, the trial court did not abuse its discretion by denying three of the ten public records requests.

Standard of review

The standard of review of a trial court's ruling on a public records request is abuse of discretion. *Jimenez v. State*, 265 So.3d 462, 472 (Fla. 2018) ("We review rulings on public records requests pursuant to Florida Rule of Criminal Procedure 3.852 for abuse of discretion" citing *Hannon v. State*, 228 So.3d 505, 511 (Fla. 2017), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Hannon v. State*, 228 So.3d 505, 511 (Fla. 2017) (quoting *Parker v. State*, 904 So.2d 370, 379 (Fla. 2005)), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017). There was no abuse of discretion. The denial of three out of the ten public records requests was not arbitrary, fanciful, or unreasonable.

The trial court's ruling

On June 18, 2019, opposing counsel made ten demands on various state agencies. (PCR 2019 at 198-337). The Department of Corrections provided Bowles his medical and psychological files but filed an objection to the public records request regarding his disciplinary reports, housing and moving records, and

visitation logs stating that these were first-time requests for 17 years worth of different types of records. (PCR 2019 at 375-376). The State Attorney Office filed an objection to the request for correspondence from the victim's family and friends. (PCR 2019 at 362-372). The Medical Examiner's Office, the Department of Corrections, and the Florida Department of Law Enforcement all filed objections to the lethal injections requests. (PCR 2019 at 354-361; 377-383;344-353)

On June 21, 2019, the trial court held a hearing on the objections to the public records requests. (PCR 2019 at 556-691). The State Attorney argued that the correspondence from the victim's family and friends was not relevant to the intellectual disability claim . (PCR 2019 at 604). During the hearing on the public records, the trial court asked the State if they would agree that they would not use any of disciplinary reports or visitation logs against the defense at any evidentiary hearing on intellectual disability, if one was ultimately held. The State agreed not to use any of the disciplinary reports against the defense. (PCR 2019 at 658-659).

On June 24, 2019, the trial court entered a written order regarding the objections to the public records requests. (PCR 2019 at 415-426). The trial court sustained the objection of the Department of Corrections to the public records request for disciplinary reports and visitation logs. (PCR 2019 at 421). The trial court reasoned that request was "overbroad and overly burdensome" because they amounted to "any and all" requests. (PCR 2019 at 421). The trial court noted that these were not updates of prior requests but rather were first time requests (PCR 2019 at 421). The trial court explained that this made the records sought "exponentially more voluminous" than the records at issue in *Muhammad v. State*, 132 So.3d 176, 201 (Fla. 2013). The trial court distinguished the first-time requests under 3.852(i) from updates under 3.851(h)(3), just as this Court did in *Jimenez v. State*, 265 So.3d 462, 472 (Fla. 2018), *cert. denied*, *Jimenez v. Florida*,

139 S.Ct. 659 (2018). (PCR 2019 at 421). The trial court also concluded that disciplinary reports and visitation logs which were sought in support of the claim of intellectual disability would not lead to a colorable claim. (PCR 2019 at 422).

The trial court also sustained the objection of the State Attorney's Office to the public records request for correspondence from the victim's family and friends. (PCR 2019 at 417). The trial court reasoned that the request was "overbroad and unduly burdensome." (PCR 2019 at 417). The trial court found no "reasonable connection" between the correspondence and the claim of intellectual disability. The trial court ruled that the basis for the request was "too attenuated" to lead to a colorable claim. (PCR 2019 at 417).

The trial court additionally sustained the objection of the Medical Examiner; the Department of Corrections, and FDLE to the public records request for lethal injection information. (PCR 2019 at 419-420; 422). The trial court reasoned that the requests were overbroad and unduly burdensome as well unlikely to lead to a colorable claim because challenges to the current lethal injection protocol had been "rejected multiple times" citing cases. The trial court noted that the current protocol had been "extensively litigated and remains constitutional." (PCR 2019 at 422 citing *Jimenez v. State*, 265 So.3d 462, 473-74 (Fla. 2018)).

Merits

"Rule 3.852 is not intended to be a procedure authorizing a fishing expedition for records." *Hannon v. State*, 228 So.3d 505, 511 (Fla. 2017) (quoting *Sims v. State*, 753 So.2d 66, 70 (Fla. 2000)), *cert. denied*, *Hannon v. Florida*, 138 S.Ct. 441 (2017). For that reason, records requests under Rule 3.852(h) are limited to persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey; whereas, records

requests under Rule 3.852(i) must show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed." *Hannon*, 228 So.3d at 511.

Department of Corrections records[20]

Bowles asserts that the trial court abused its discretion in denying his public records request for updates of his disciplinary reports, housing and movement records, and visitation logs from the Department of Corrections (DOC). IB at 50.

The trial court properly concluded that the request was "overbroad and overly burdensome" because they amounted to "any and all" requests. (PCR 2019 at 421). This Court has repeatedly condemned such "any and all" public records requests as burdensome. *Geralds v. State*, 111 So.3d 778, 802 (Fla. 2010) (condemning "any and all" public records requests as overly broad and noting this Court has consistently held that a defendant must plead with specificity the outstanding public records he seeks citing *Rodriguez v. State*, 919 So.2d 1252, 1273 (Fla. 2005). And providing the defendant with 17 years worth of four different types of records is burdensome.

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[20] The trial court mistakenly thought these were first time requests rather than updates of prior requests. (PCR 2019 at 421). DOC stated in its objection, these were first-time requests for 17 years worth of four different types of records. (PCR 2019 at 375-376). DOC also stated that these were first time requests at the public records hearing. (PCR 2019 at 653-654). This is not completely accurate, however. DOC had previously provided many of these types of records including disciplinary reports to the repository during the initial postconviction proceedings circa 2002. For this reason the State does not rely on this Court's decision in *Jimenez v. State*, 265 So.3d 462, 472 (Fla. 2018), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018). The State discovered the mistake after the public records hearing. The State regrets the mistake.

The trial court also properly concluded that these updates which were sought in support of the claim of intellectual disability would not lead to a colorable claim. (PCR 2019 at 422). Providing the defendant with 17 years worth of four different types of records is particularly burdensome in light of their marginal relevance. Most of these types of records have little to no relevance to proving an intellectual disability claim. Most of these types of records, such as housing and movement records, have little to no value in establishing adaptive functioning. The updates were not relevant to the claim. The requests for housing and movement records and the visitation logs were an improper fishing expedition.

The only type of records that could be of some relevance to proving adaptive functioning would be disciplinary reports (DRs). But any disciplinary reports were just as likely to be used by the State against the defense to rebut adaptive functioning at any evidentiary hearing as they were likely to be used by the defense to establish adaptive functioning. For example, if Bowles had a DR for gambling, the State could have used that type of DR to establish that he knew how to keep accounting records in his head to rebut any claim of deficits in adaptive functioning.

This Court in *Muhammad v. State*, 132 So.3d 176, 201 (Fla. 2013), concluded that the trial court abused its discretion in denying a rule 3.852(h)(3) request to DOC for his own inmate and medical records because those records could potentially be relevant to an incompetency-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986).[21]

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[21] This Court has amended rule 3.852 to require DOC to provide a copy of the defendant's medical, psychological, substance abuse, and psychiatric records to the defendant's counsel of record, that amendment did not include disciplinary reports or housing and moving records or visitation logs . *In re Amendments to Florida Rule of Criminal Procedure 3.852,* 163 So.3d 476, 478 (Fla. 2015). Bowles'

But this is not a *Ford* claim; it is an *Atkins* claims. While DOC records are important to a *Ford* claim because *Ford* looks at the defendant's current mental state, that is not true of an *Atkins* claim which requires looking at the defendant's childhood development as one of the prongs. The records that are the most important in an *Atkins* claim are not prison records but earlier records, such as school records, and expert reports. Indeed, the High Court warned against too much emphasis being placed on the defendant's actions in prison when determining adaptive deficits. *Moore v. Texas*, 137 S.Ct. 1039, 1050 (2017) (criticizing the lower court for stressing the capital defendant's improved behavior in prison because clinicians caution against reliance on adaptive strengths developed in a controlled setting, "as a prison surely is"). For that reason, *Muhammad* is not directly on point.

Moreover, neither side had access to most of these records. The point of these records, according to the request itself, was to help establish Bowles' adaptive functioning at an evidentiary hearing on intellectual disability. The trial court denied the requests on the condition that the State agreed it would not use those types of records at any evidentiary hearing. The State agreed. (PCR 2019 at 658-659). So, neither side had access to the updates to the housing and movement records, or visitation logs. The State was limited in the same manner as the defense was regarding these records. Indeed, regarding the updates of any disciplinary reports, it was only the State that lacked access to the new disciplinary reports. Bowles had access to his own DRs after 2002 but the state did not. Under DOC rules governing the inmate discipline process, an inmate is provided hard copies of the documents associated with the inmate discipline

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medical, psychological, substance abuse, and psychiatric records were disclosed. The trial court's order complies with the amended rule.

process and is allowed to retain those files. DOC rule 33-601.301-33.-601.314. So, if Bowles kept his files, the defense would have had all disciplinary reports including those after the initial postconviction proceedings in 2002 but the State only has the disciplinary reports prior to 2002.

The error, if any, in denying the updates was harmless. Even if the updates should have been disclosed, the trial court's denial of those files was harmless. The point of these records, according to the requests themselves and the initial brief, was to help establish Bowles' adaptive functioning at an evidentiary hearing on intellectual disability. But there was no evidentiary hearing. The intellectual disability claim was summarily denied on timeliness grounds. So, any error was harmless. *Cf. Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997) (holding the trial court's failure to hold a case management hearing was harmless error because no evidentiary hearing was required).

The trial court did not abuse its discretion in denying the public records request of the Department of Corrections.

State Attorney's Office records

Bowles asserts that the trial court abused its discretion in denying his request for correspondence between the Fourth Judicial Circuit State Attorney's office and the victim's family and friends. IB at 53. He argues that because the victim's brother-in-law, sister, and neighbor had met Bowles and speculates that they may have shared their thoughts on Bowles' intellectual abilities with the prosecutor in the years after the first disclosure of public records circa 2002.

The trial court properly concluded that there was no "reasonable connection" between the correspondence and the claim of intellectual disability and that the basis for the request was "too attenuated" to lead to a colorable claim. (PCR 2019

at 417). The brother-in-law, sister, and neighbor had only a passing acquaintance with Bowles for a short period of time before Bowles murdered the victim. Indeed, the victim himself had not known Bowles for long. The victim met Bowles just a few weeks before Bowles murdered him on November 16, 1994. *Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998) (noting Bowles "met Walter Hinton, the victim in this case, at Jacksonville Beach in late October or early November 1994). Even if brother-in-law, sister, or neighbor had conveyed some impressions regarding Bowles' intellectual functioning to the prosecutor, which is itself highly unlikely, they simply could not have known Bowles well enough to provide any meaningful information on Bowles' adaptive functioning.

Contrary to opposing counsel's argument, relevance is material to a rule 3.852(h)(3) public records request. IB at 54. Relevance is a perquisite to every type of postconviction public records request. *Jimenez v. State*, 265 So.3d 462, 472-73 (Fla. 2018) (affirming the denial of a public records request under rule 3.852(h)(3) that did not "provide any context as to how those records were ***relevant*** to a potential, colorable claim") (emphasis added), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018).

The error, if any, in denying the public records request was harmless. Even if the updates to any correspondence between the State Attorney's office and the victim's family and friends should have been disclosed, the trial court' denial of the updates of those correspondence was harmless. The point of these records, according to the requests themselves and the initial brief, was to help establish Bowles' adaptive functioning at an evidentiary hearing on intellectual disability. But there was no evidentiary hearing. The intellectual disability claim was summarily denied on timeliness grounds. So, any error was harmless. *Cf. Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997) (holding the trial court's failure to hold

a case management hearing was harmless error because no evidentiary hearing was required).

The trial court did not abuse its discretion in denying the public records request of the State Attorney's Office.

Lethal injection records

Finally, Bowles asserts that the trial court abused its discretion in denying his request for lethal injections records from the Medical Examiner of the Eighth District, the Department of Corrections, and the Florida Department of Law Enforcement. IB at 55. Bowles argues that due process and equal protection require that he be allowed access to the minute details of Florida's lethal injection procedures.

But, under this Court's controlling precedent, the trial court properly denied these public records requests. This Court recently rejected this same due process and equal protection argument regarding similar public records requests on the ME, DOC, and FDLE in *Long v. State*, 271 So.3d 938, 947-48 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). This Court, in *Long*, concluded that the postconviction court acted within its discretion because the additional records that Long requested related to his challenges to the lethal injection protocol and were "unlikely to lead to a colorable claim given that the current protocol has been fully considered and approved." *Id.* at 948. This Court "fully considered and approved" Florida's current lethal injection protocol using etomidate after an evidentiary hearing in *Asay v. State*, 224 So.3d 695, 700-02 (Fla. 2017). And this Court again rejected challenges to the current protocol in *Jimenez v. State*, 265 So.3d 462, 474 (Fla. 2018), and *Hannon v. State*, 228 So.3d 505, 508-09 (Fla. 2017). Bowles' public records requests are no more to lead to

a colorable claim than Long's requests were. This Court's recent decision in *Long* controls.

This Court has also repeatedly explained that public record demands on the Medical Examiner regarding the autopsy of previously executed inmates are properly denied because those "autopsy records are not likely to lead to a colorable claim because they would not establish when the inmates became unconscious or whether they experienced pain during their executions." *Branch v. State*, 236 So.3d 981, 985 (Fla. 2018) (citing *Chavez v. State*, 132 So.3d 826, 830 (Fla. 2014)), *cert. denied*, *Branch v. Florida*, 138 S.Ct. 1164 (2018).

This Court has repeatedly rejected equal protection challenges to the rule of criminal procedure governing public records requests in capital cases, rule 3.852, on the basis that citizens willing to pay would have access to these records under Florida's public record law. *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001) (rejecting due process and equal protection challenges to rule 3.852(h)(3) and (i) because the requests were "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence"); *Long v. State*, 271 So.3d 938, 947 (Fla. 2019) (rejecting due process and equal protection challenges to rule 3.852(i) regarding requests made to the ME, DOC, and FDLE), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). Indeed, Long made the same argument as Bowles does, asserting that the denial of these records would deny him "a fair opportunity to show that his execution will violate the Eighth Amendment." *Id.* at 947.

Capital defendants are not similarly situated to Florida citizens for purposes of equal protection analysis. *Dawson v. Scott*, 50 F.3d 884, 892 (11th Cir. 1995) ("if the two groups are not similarly situated, then we need not proceed with the constitutional analysis because there is no equal protection violation."). Citizens are not only required to prepay for the records they request but they often wait

months to obtain the records. Capital defendants with an active warrant are not required to pay and get the records within a few days of the requests. Because they are not similarly situated groups, equal protection does not apply.

Alternatively, even if equal protection applied, requiring defendants to establish relevance before being provided free records at the very last minute is perfectly reasonable and has a rational basis. The legitimate governmental purpose is to prevent state employees working until late hours to produce records that are so voluminous that there is no possibility that they can be read by counsel and which have no connection to any possible claim is a perfectly valid purpose. *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (explaining a classification neither involving fundamental rights nor a suspect class does not run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."). There is no violation of equal protection.

Furthermore, regarding due process, Bowles does not lack information regarding Florida's current lethal injection protocol. On June 13, 2019, the Department of Corrections filed a copy of Florida's current lethal injection protocol using etomidate in the trial court in this case. (PCR 2019 at 143-159). Moreover, Florida's detailed lethal injection protocol is publicly available on the internet and has been since it was adopted years ago in 2017. *Long v. Sec'y, Dept. of Corr.*, 924 F.3d 1171, 1177 (11th Cir. 2019) (noting Florida adopted etomidate as the first drug in its three-drug protocol in January of 2017), *cert. denied*, *Long v. Inch*, 139 S.Ct. 2635 (2019).[22] There was no violation of due process.

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[22] The current protocol was certified by the current Secretary of the Department of Corrections on February 27, 2019, and is available at:

Opposing counsel's reliance on *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019), is misplaced. The United States Supreme Court in *Bucklew* did not hold, or even hint, that due process or equal protection requires a state to disclose the details of its lethal injection protocols. That discovery was permitted by the lower court in *Bucklew* was merely a procedural fact reported in the opinion. *Id.* at 1121. Furthermore, Bucklew was a § 1983 action filed in federal court arising from a Missouri conviction and sentence, not a successive postconviction motion filed in a Florida state court. And, while the federal district court allowed Bucklew "extensive discovery," this Court is not required to follow the federal rules of civil procedure in a Florida postconviction case governed by Florida Rule of Criminal Procedure, rule 3.851(h). *Bucklew*, 139 S.Ct. at 1121. *Bucklew* is not even persuasive precedent because a different set of rules apply. And it was clear from the tone of the United States Supreme Court's opinion in *Bucklew* that the majority of the Justices did not approve of the lower court's handling of the case, no doubt, including allowing such extensive discovery. *Id.* at 1121 ("despite this dispositive shortcoming, the court of appeals decided to give Mr. Bucklew another chance to plead his case"); *Id.* at 1133-34 (stating that the State's and the victims' "important interest in the timely enforcement of a sentence" had "been frustrated in this case" by Bucklew managing "to secure delay through lawsuit after lawsuit"); *Id.* at 1134 (characterizing Bucklew's § 1983 as amounting "to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment"); *Id.* at 1134(observing that the people of Missouri and the surviving victims and others like them "deserve better"); *Id.* at 1134 (directing courts to "police carefully against attempts to use such challenges as tools to

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http://www.dc.state.fl.us/ci/docs/Lethal%20Injection%20Certification%20Ltr%20and%20Procedure%202-27-19%20Final%20.pdf

interpose unjustified delay"). Indeed, the High Court thought Bucklew's § 1983 action should have been dismissed. *Bucklew*, 139 S.Ct. at 1134 (advocating courts invoke their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories). This Court certainly should not follow the actions of lower courts that were implicitly disapproved of by the Highest Court.

The trial court did not abuse its discretion in denying the lethal injection public records requests of the ME, DOC, and FDLE.

Accordingly, this Court should affirm the trial court's summary denial of the postconviction motion and the trial court's ruling on the public records requests.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the summary denial of the successive rule 3.851 motion for postconviction relief.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ *Charmaine Millsaps*
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to **KARIN LEE MOORE**, Capital Collateral Regional Counsel-North, 1004 Desota Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: karen.moore@ccrc-north.org; **ELIZABETH SPIAGGI**, Capital Collateral Regional Counsel-North, 1004 Desota Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: Elizabeth.Spiaggi@ccrc-north.org; **TERRI BACKHUS**, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org; **KIMBERLY L. SHARKEY**, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: kimberly_sharkey@fd.org this 2nd day of August, 2019.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was generated using Bookman Old Style 12 point font.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

No. SC19-1184

IN THE

Supreme Court of Florida

GARY RAY BOWLES,

Appellant,

v.

STATE OF FLORIDA,

State.

APPELLANT'S REPLY BRIEF

EXECUTION SCHEDULED FOR AUGUST 22, 2019 at 6:00 P.M.

Terri Backhus
Florida Bar No. 946427
Chief, Capital Habeas Unit
Office of the Federal Public Defender
For the Northern District of Florida
227 N. Bronough St. Suite 4200
Tallahassee, FL 32301
(850) 942-8818
Terri_Backhus@fd.org

Karin Moore
Florida Bar No. 351652
Elizabeth Spiaggi
Florida Bar No. 1002602
Assistant CCRC-North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin_Moore@ccrc-north.org
Elizabeth_Spiaggi@ccrc-north.org

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

AMENDMENTS

STATUTES AND COURT RULES

OTHER

I. The State's Arguments Regarding Timeliness are Incorrect

A. The State Misconstrues or Ignores Mr. Bowles's Federal Constitutional Arguments

In his postconviction motion and initial brief in this Court, Mr. Bowles made three distinct constitutional arguments about the validity of a state procedural bar allowing Florida's courts to refuse merits consideration of certain intellectual disability claims. First, Mr. Bowles argued that intellectual disability claims were not subject to procedural default or waiver, because such intellectually disabled individuals are categorically ineligible for execution under the Eighth Amendment. *See* PCR-ID at 748; Initial Brief (IB) at 18-21. Second, Mr. Bowles argued that to the extent that *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), foreclose any merits review to litigants like Mr. Bowles, those decisions violates due process, the Eighth Amendment, and *Atkins v. Virginia*, 536 U.S. 304 (2002), and progeny, by creating an unacceptable risk of the execution of the intellectually disabled. *See* PCR-ID at 750; IB at 23-25. Third, Mr. Bowles argued that to the extent that *Rodriguez*, *Blanco*, and *Harvey*, foreclose review to litigants like Mr. Bowles, they violated his due process right to notice and an opportunity to be heard. PCR-ID at 749-750; IB at 26-31. The State's arguments on these points are either cursory, legally inaccurate, or waived.

i. The State Misunderstands Mr. Bowles's Argument that the Eighth Amendment Prohibits the Execution of the Intellectually Disabled and Cannot be Waived or Defaulted

With regard to Mr. Bowles's first timeliness argument, the State seems to argue that the United States Supreme Court would agree that the execution of some intellectually disabled individuals is permissible because, in the State's view, the Court has even approved of the execution of the factually innocent based on procedural rules. *See* Answer Brief (AB) at 19 ("Opposing counsel insists that some claims, such as an *Atkins* clam, are so fundamental, they cannot be time barred . . . But the United States Supreme Court disagrees. The High Court has held that even a claim of actual factual innocence may be rejected based on delay."). These assertions misunderstand and mischaracterize Mr. Bowles's argument as well as the Supreme Court's precedent with regard to intellectual disability claims.

The State fails to recognize that legally intellectual disability claims are not like claims of factual innocence. Unlike actual innocence claims, with which the United States Supreme Court has a long and convoluted history,[1] the Court has been

[1] Additionally, the State's insistence on the constitutionality of the execution of the factually innocent is concerning for a number of reasons, but of relevance here it is important to note that it misstates the United States Supreme Court's precedent touching on this question. Significantly, the Supreme Court has never answered the question of whether it is independently permissible to execute the factually innocent, or whether a freestanding claim of actual innocence exists in habeas proceedings. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The

clear on the issue of executing the intellectually disabled: it is unconstitutional. *See Atkins*, 536 U.S. at 320; *Hall v. Florida*, 572 U.S. 701, 708 (2014); *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015); *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017). This categorical rule originates from the Eighth Amendment, and concerns "the characteristics of the offender" that make such persons ineligible for execution. *Graham v. Florida*, 560 U.S. 48, 60 (2010).

The State's attempts to analogize factual innocence with intellectual disability is ill-fitting—and with good reason. There is one appropriate analogy here, as the Supreme Court has clearly stated the Eighth Amendment only prohibits the execution of two types of offenders: juveniles and the intellectually disabled. *Id.* at 61. For individuals who were juveniles at the time of their offense, their *age*, an immutable and indisputable characteristic of said offender, renders them ineligible for execution. So too are the intellectually disabled ineligible for execution—intellectual disability is a lifelong and incurable characteristic. As Mr. Bowles argued in his initial brief, *see* IB at 20, the Supreme Court continually cites *Roper v. Simmons*, 543 U.S. 551 (2005), which first held the execution of juveniles to be

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quintessential miscarriage of justice is the execution of a person who is entirely innocent."). That the Court in *McQuiggin* found that a showing of actual innocence could serve as a procedural "gateway" for litigants who have filed untimely federal habeas petitions—a narrow issue—does not mean, as the State argues, that the Court finds it constitutionally permissible to execute the factually innocent or that dilatoriness justifies the execution of the factually innocent.

unconstitutional, in its *Atkins* jurisprudence. The State completely ignores this corollary, in favor of a convoluted argument about factual innocence, because it logically results in the conclusion that Mr. Bowles has been arguing all along: intellectual disability is a categorical bar to execution that cannot be waived or defaulted, just as is juvenile status at the time of a capital offense. Courts cannot refuse to consider the merits of an intellectual disability claim any more than courts may refuse to consider whether an individual had reached the age of eighteen at the time of a capital offense.

ii. The State Misunderstands Mr. Bowles's Argument that the Application of the Time Bar Violates his Due Process Rights

The State also misconstrues Mr. Bowles's due process argument that *Rodriguez*, *Harvey*, and *Blanco* denied him notice and an opportunity to be heard, and instead claims that "[f]ollowing this logic, all time bars of any sort violate due process." AB at 22. The State's reading of Mr. Bowles's claim fails to substantively engage with Mr. Bowles's argument. Mr. Bowles does not claim that because a time-bar exists that he was denied notice and an opportunity to be heard. The very concept of a time bar is that a litigant could have raised an issue and chose not to, forfeiting their right to raise it later; here, Mr. Bowles challenges the constitutionality of the time bar because he could not have raised this issue earlier than he did, under a plain reading of the statute that defined intellectual disability, Fla. Stat. § 921.137, which

was held unconstitutional as applied by the Supreme Court in *Hall v. Florida*, and was unavailable to him until it was retroactively applied in *Walls v. State*, 213 So. 340 (Fla. 2016).

Simply, Mr. Bowles could not have been on notice that any such time bar could apply to him if he did not raise an *Atkins*-based claim when Fla. R. Crim. P. 3.203 was promulgated in 2004, because he was not then eligible for relief under Florida law. The State agrees with this reading of the state of Florida law—in another portion of the State's brief, the State argues that Mr. Bowles's counsel could not have known to raise an *Atkins*-based claim for him in 2004 because Fla. Stat. § 921.137, as later confirmed by *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), did not account for the Standard Error of Measurement (SEM) and thus required an IQ score of 70 or below. *See* AB at 27 ("Postconviction counsel cannot be ineffective for not foreseeing that *Cherry* would be overruled by the United States Supreme Court years later."); *id*. at 27 n. 15 ("While *Cherry* had not been decided at the time of initial postconviction proceedings in this case, the holding in *Cherry* was based on the statutory language, the text of the rule, and prior caselaw."); *id*. at 28 ("Postconviction counsel was not ineffective for not investigating intellectual disability further given the state of the law . . .").

The State tacitly agrees that Mr. Bowles could not have been on notice of his eligibility for *Atkins*-based relief in 2004, which is exactly the basis for his argument that he was denied constitutionally required notice and an opportunity to be heard.

iii. The State Has Waived Any Arguments that the Time Bar Violates the Eighth Amendment and Due Process by Creating a Constitutionally Impermissible Risk of the Execution of the Intellectually Disabled

Significantly, the State does not address Mr. Bowles's argument that if *Rodriguez*, *Blanco*, and *Harvey* deny him even *review* of his intellectual disability claim, they violate the Eighth and Fourteenth Amendment. To reiterate, 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).

An unforeseeable and absolute time bar, as created by this Court in *Rodriguez*, *Blanco*, and *Harvey*, creates an unacceptable risk of the execution of the intellectually disabled. By ignoring this argument, the State has waived any arguments to the contrary. *See Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006) (holding that "any arguments not expressly included" in a brief were waived).

B. The State Ignores Mr. Bowles's Arguments Concerning Fla. R. Crim. P. 3.851(d)(2)(B) and that *Harvey* was Wrongly Decided

For the purposes of Fla. R. Crim. P. 3.851(d)(2)(B) analysis, the State argues that the operative date is the date *Hall v. Florida* was decided, and not this Court's decision in *Walls v. State*. *See* AB at 23. But that is not the rule; subsection (d)(2)(B) requires both that "the fundamental constitutional right asserted was not established within the period provided for [the initial postconviction motion] *and* has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B) (emphasis added). *Hall* was not held to be retroactive until *Walls*, and thus the operative deadline is the date of this Court's decision in *Walls*, because only then were both conditions of Fla. R. Crim. P. 3.851(d)(2)(B) met. As the State does not dispute, Mr. Bowles filed within one year of when *Walls* was decided.

Further, the State argues that *Harvey* forecloses review of Mr. Bowles's claim. But the State ignores Mr. Bowles's arguments that *Harvey* was wrongly decided because (1) *Walls* did not condition the retroactivity of *Hall* on any procedural requirement for timeliness, and (2) *Harvey* was wrongly decided because it found that he was "similarly situated" to the litigant in *Rodriguez,* when *Rodriguez* is factually distinguishable from litigants, like Mr. Bowles, who had IQ scores that were above 70 when R. 3.203 was promulgated. These litigants, unlike Rodriguez, who had IQ scores below 70 prior to 2004, were not on notice when R. 3.203 was promulgated because they only had scores that were fatal to intellectual disability

claims in Florida until *Hall*. *See, e.g., Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) ("[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."). Thus, Harvey and Mr. Bowles are not "similarly situated" to *Rodriguez*, and *Harvey* was wrongly decided on that basis. This Court should consider the State to have waived arguments to the contrary. *See Simmons*, 934 So. 2d at 1117 n.14.

C. The State's Arguments Concerning the Good Cause Exception Contained in Fla. R. Crim. P. 3.203(f) Are Not Persuasive

Mr. Bowles argued, in the alternative, that two separate reasons support that good cause under Fla. R. Crim. P. 3.203(f) exists in his case. As Mr. Bowles explained, courts cannot have it both ways—either Mr. Bowles could not have known to file his intellectual disability claim in the wake of R. 3.203 in 2004, as he did not have an IQ score that is below 70, or he should have known to do so, and his counsel was negligent for failing to file such a claim as well as failing to even investigate his intellectual disability. *See* IB at 35-43.

Likewise, the State cannot have it both ways. The State affirmatively argues that Mr. Bowles's counsel was not negligent or neglectful in failing to file an *Atkins*-based claim after the promulgation of R. 3.203 in 2004 because Florida law was clear that only individuals with IQ scores of 70 or below qualified for relief. *See* AB at 27, *id*. at 27 n. 15, *id*. at 28. Thus, the State concedes that Mr. Bowles's eligibility

for relief was not foreseeable—which can and should form the basis for good cause. Good cause is intended to be fact-dependent, and need only establish facts constituting "excusable neglect." *Parker v. State*, 907 So. 2d 694, 695 (Fla. Dist. Ct. App. 2005) (internal citation omitted). Mr. Bowles and the State are in agreement that in 2004, Mr. Bowles could not have known to file an intellectual disability claim. His neglect is excusable and supports a finding of good cause.

With respect to his second basis for good cause, the State argues that attorney misconduct or neglect cannot form the basis for good cause, *see* AB at 26, and that even if it could, Mr. Bowles's postconviction attorney was not neglectful in failing to file an intellectual disability claim because the state of the law precluded it, *see id.* at 26-27. But the State's argument about what can form the basis for good cause is not supported by Florida law—attorney misadvice or negligence has been held to establish good cause for other provisions of the Florida Rules of Criminal Procedure. *See, e.g.*, *Johnson v. State*, 971 So. 2d 212, 215 (Fla. Dist. Ct. App. 2008) (finding that an attorney's "mistaken advice can be a valid basis for finding good cause."); *Nicol v. State*, 892 So. 2d 1169, 1171 (Fla. Dist. Ct. App. 2005) (finding attorney's neglect in failing to advise client of potential suppression motion sufficient to establish good cause); *Graham v. State*, 779 So. 2d 604, 605 (Fla. Dist. Ct. App. 2001) (finding that even where counsel's advice is not required, if it is given and is "measurably deficient" it can form the basis for good cause).

The State—and the circuit court's—assessment that attorney neglect cannot form the basis of good cause is refuted by Florida courts' interpretation of good cause in analogous parts of the Florida Rules of Criminal Procedure. *See Rowe v. State*, 394 So. 2d 1059, 1059 (Fla. Dist. Ct. App. 1981) ("When construing court rules, the principles of statutory construction apply.") (citations omitted).[2]

II. The State's Arguments that Mr. Bowles is Not Entitled to an Evidentiary Hearing are Legally and Factually Inaccurate

A. Contrary to the State's Mischaracterization, Mr. Bowles's Factual Proffer Establishes that He Can Meet All Three Prongs of Intellectual Disability at an Evidentiary Hearing

Importantly, the circuit court's order in this case did not discuss or make any findings of fact concerning the merits of Mr. Bowles's intellectual disability claim. However, because the State has devoted substantial space in their brief to the merits

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[2] The State's argument that the "tipsy coachman" doctrine—otherwise known as the right-for-the-wrong-reason doctrine—applies to this case is misplaced. First, proper application of the tipsy coachman doctrine requires that the alternative basis for the "correct" ruling be found, uncontested, in the record before the trial court—not the arguments of opposing counsel in an appellate brief. *See Robertson v. State*, 829 So. 2d 901, 906-907 (Fla. 2002) ("The key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law *in the record before the trial court*.") (emphasis added). Second, the application of the tipsy coachman doctrine in this case would be constitutionally impermissible because it would violate the Eighth Amendment's proscription that states may not create rules that unconstitutionally risk the execution of the intellectually disabled, *see Hall*, 572 U.S. at 720, and because capital cases require "heightened reliability," *see, e.g., Arbelaez v. Butterworth*, 738 So. 2d 326, 331 n. 11 (Fla. 1999) ("The United States Supreme Court has stated repeatedly that the Eighth Amendment requires a heightened degree of reliability in capital cases.").

of this claim, Mr. Bowles responds to clarify both the merits of his intellectual disability claim as well as the relevant legal standard for an evidentiary hearing, which the State's arguments muddle.

To be clear, Mr. Bowles's challenge to the circuit court's procedural bar ruling is not academic: he has a strong intellectual disability claim that, if heard on the merits, would establish his entitlement to relief. Mr. Bowles proffered to the circuit court strong evidence of his intellectual disability on each of the three prongs required for such a diagnosis.

Regarding significantly subaverage intellectual functioning, Mr. Bowles presented 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 (2018-2019)—admits either that they did not assess Mr. Bowles for intellectual disability (Dr. McMahon, *see* PCR-ID at 835, and Dr. Krop, *id*. at 789-790), or that Mr. Bowles is intellectually disabled or has intellectual functioning consistent with an intellectually disabled person (Dr. Toomer, *id*. at 778-83; 786-88, Dr. Crown, *id*. at 784-85, Dr. Kessel, *id*. at 791-801).

Mr. Bowles has only two full scale IQ scores: a score of 80 on the WAIS-R as given by Dr. McMahon in 1995, and a score of 74 on the WAIS-IV as given by

Dr. Toomer in 2017.[3] When the WAIS-R score of 80 is corrected for norm obsolescence, 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 plainly within the SEM, and is a qualifying score for such a diagnosis. *See, e.g.*, *Brumfield*, 135 S. Ct. at 2278 (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* 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* PCR-ID at 802-34 (sworn statements of lay witnesses); *id*. at 741-45 (discussing how sworn lay witness observations establish significant adaptive deficits in each domain).

Mr. Bowles has 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.

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[3] The State's contention that Mr. Bowles has three IQ scores relevant to his intellectual disability diagnosis is not accurate—he has only two full scale IQ scores from appropriate tests for the assessment of intellectual disability. This point is expanded on in *infra* section (II)(A)(ii).

Bowles's brain damage was consistent with an "earlier origin, including a possibly perinatal origin." 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. The State's bare assertion that Mr. Bowles's intellectual disability is conclusively refuted by the record —a record which has never had the benefit of testimony from any expert who has evaluated Mr. Bowles for intellectual disability—is not supported by the reality of this case. Further, State's arguments against the merits of Mr. Bowles's claim, and the necessity of an evidentiary hearing, should be rejected because they are not supported by the scientific or medical community, and because they misconstrue the relevant legal standard.

i. The State's Arguments Disputing the Merits of Mr. Bowles's Intellectual Disability Diagnosis Are Not Supported by the Record or the Medical Community

The State's arguments regarding the merits of Mr. Bowles's intellectual disability claim are speculative and premature, as Mr. Bowles has never had the opportunity to fully and fairly present evidence of his intellectual disability. The State has consistently opposed any hearing in this case, and the circuit court refused to hold a hearing, under a state timeliness theory. Nevertheless, the State attempts to argue the merits of a claim that Mr. Bowles has never been allowed to present before

any court. These premature arguments are worth only brief discussion here to correct several inaccuracies in the State's brief.

The State argues that Mr. Bowles's intellectual disability is conclusively refuted by the record because: (1) Mr. Bowles's IQ scores, "considered collectively" reflect that his "IQ is between 78 and 79," AB at 34; (2) records indicate that Mr. Bowles obtained an GED while incarcerated, AB at 35; (3) Mr. Bowles obtained a fake identification card, AB at 36; (4) Mr. Bowles had driven long distances and ridden in greyhound buses, AB at 37; (5) Mr. Bowles can read and write, AB at 37; and (6) Mr. Bowles has had jobs including "working on an oil rig," "as a machinist and a roofer," AB at 38. The State's arguments are inaccurate, misleading, and refuted by Mr. Bowles's factual proffers and the medical community.

First, the State makes a number of inaccurate representations in the interpretation of IQ scores. The State conflates Mr. Bowles's full scale IQ scores on the WAIS-R and the WAIS-IV with his score of 83 on the WASI (Wechsler Abbreviated Scale of Intelligence). As Mr. Bowles's experts would have testified had they been given the chance, the WASI is not a full scale IQ test, it is a short form, screening test of intellectual functioning, and the score resulting from it should not be considered in the assessment of intellectual disability (and particularly not for disqualification for the diagnosis). *See, e.g.*, American Association on Intellectual and Developmental Disabilities Manual (11th ed. 2010) (AAIDD-11), p. 41 ("Short

forms of screening tests are not recommended, and it is critically important to use tests with relatively recent norms."); User's Guide to the AAIDD-11, p. 17 ("Short forms or screening tests are not recommended or professionally accepted for diagnostic purposes."). The WASI also has been observed to overestimate an individual's intellectual functioning when compared with full-scale intelligence tests, and is discouraged from even general use in the medical community. *See, e.g.*, Bradley N. Axelrod, *Validity of the Weschler Abbreviated Scale of Intelligence and Other Very Short Forms of Estimating Intellectual Functioning*, 9 Assessment 1 at 22 (2002) (noting that the WASI produced a higher full scale IQ score estimate than the WAIS-III, and finding that "if the clinician's goal is to obtain an accurate estimation of general intellectual functioning, the current results suggest that the WASI should not be used in the assessment of individual patients.").

The State's suggestion that Mr. Bowles's IQ scores should be averaged, or alternatively, considered in "median," is a creation not found in resources by the medical or psychological community. The State's creative formula for the consideration of IQ scores has been previously rejected on at least one occasion by a psychologist and a Florida circuit court. *See* Order, *State v. Freeman*, No. 16-1986-CF-11599 (Duval County Cir. Ct. April 6, 2018) ("Neither of the State's assertions—that the most recent IQ score should be ignored as 'slant[ed]' or that the mean, median and 'center of the band[]' figured are the correct way to analyze

Defendant's intellectual functioning—is supported by competent, substantial evidence.").[4]

The State's suggestion that Mr. Bowles does not have adaptive deficits because he obtained a GED, obtained a fake identification card, had driven long distances and ridden in greyhound buses, can read and write, and has had jobs including "working on an oil rig," "as a machinist and a roofer," are likewise baseless. Principally, it is critical to understand that these specific potential strengths—even if true, which Mr. Bowles's factual proffer disputes—do not themselves negate an intellectual disability diagnosis, which focuses on deficits, not strengths, and does not pit strengths against weaknesses in adaptive functioning. *See* AAIDD-11, p. 7 (noting a fundamental assumption in defining intellectual disability is that "[w]ithin an individual, limitations often coexist with strengths."); *Moore*, 137 S. Ct. at 1050 ("In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. . . . But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.") (emphasis in original). Even where a crime itself seems sophisticated, this does not disqualify an individual from an intellectual disability diagnosis. *See, e.g.*, *Brumfield*, 135 S. Ct. at 2281 (noting that while the crime suggested that Brumfield

[4] While the circuit court later amended this order, which originally granted an evidentiary hearing, due to application of a time bar, it did not rescind its rejection of the State's dubious IQ score formula.

possessed some adaptive skills including "advanced planning and acquisition of a car and guns" it did not conclusively dispute an intellectual disability diagnosis).

The State's arguments against adaptive deficits are also wrong because they ignore Mr. Bowles's factual proffer, the record in this case, and the guidance of the medical community. For example, that Mr. Bowles could read and write, and drive a car or hold a driver's license, does not dispute his adaptive limitations in other areas and does not bear on his intellectual disability diagnosis. In fact, the AAIDD specifically warns against these improper stereotypes. *See* AAIDD-11, p. 162 (noting that intellectually disabled individuals can, with support, obtain skills such as "academic skills" or "survival skills," such as learning to use a bus system); User's Guide to the AAIDD-11, p. 26 (noting it is an "incorrect stereotype" that "[p]ersons with ID cannot get driver's licenses, buy cars, or drive cars"). The State's argument also ignores Mr. Bowles's factual proffer, in which he provided sworn statements that into his adulthood he struggled with using bus systems without help, *see* PCR-ID at 822, could not have navigated air travel without significant help, *id*. at 833, and that his GED is suspect because another individual present at the time of the testing recalled that the administrator of the exam gave the test takers the answers to the questions, *id*. at 818.

Moreover, the State's argument that Mr. Bowles worked as a "machinist," and thus does not have adaptive deficits, is intentionally misleading. The State's citation

for this proposition (PCR-ID at 796) is one of Mr. Bowles's expert reports, which refers to a sworn statement that Mr. Bowles provided from his previous employer at a temporary labor position at a manufacturing company. This report and corresponding sworn statement is evidence of Mr. Bowles's *deficits*, not strengths—his previous employer describes him as "slow intellectually," "childlike," noted he had to be moved from a four-step machine to a one-step machine because they "were not able to train Gary," and that although he "tr[ied] very hard" he "continually made mistakes," *id*. at 810-11. Likewise, the State's argument that Mr. Bowles worked on an oil rig for two years and that he worked as a roofer, were from Mr. Bowles's self-reports, and do not at all bear on how successful he was at these jobs. Additionally, the medical community cautions against self-reported information in the assessment of intellectual disability. *See, e.g.*, AAIDD-11, p. 52 (noting that due to several factors, including the stigma associated with intellectual disability, "strong acquiesce bias," and masking behaviors, "the authors of this *Manual* caution against relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for the purpose of establishing a diagnosis" of intellectual disability.) (emphasis in original).

Mr. Bowles also proffered information suggesting that Mr. Bowles was not particularly successful at his manual labor position working for a roofing company. *See* PCR-ID at 824 (sworn statement of Minor Kendall White, noting that he helped

Mr. Bowles get the roofing job, and that Mr. Bowles was never promoted while he worked there). Even if he were successful at this manual labor job, however, it still would not be dispositive of the presence of sufficient adaptive deficits for a diagnosis of intellectual disability. *See* User's Guide to the AAIDD-11, p. 26 (noting that it is an "incorrect stereotype" that individuals with intellectual disability "cannot acquire vocational and social skills necessary for independent living."); AAIDD-11, p. 157 (noting that "commonly held jobs" for individuals with intellectual disability "include maintenance, food service, and retail positions" and that they can also obtain jobs in "trade" positions like "plumbing and carpentry."). Because the State's arguments against the presence of Mr. Bowles's adaptive deficits are refuted by Mr. Bowles's factual proffer, the record, and the guidance of the medical community, these arguments should be disregarded.

ii. The State Misstates the Legal Standard for Evidentiary Hearings on the Merits

Mr. Bowles is entitled to an evidentiary hearing on the merits of his intellectual disability claim, and the State's arguments to the contrary apply the wrong legal standard. "Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." *Franqui v. State*, 59 So. 3d 82, 95-96 (Fla.

2011) (citation omitted). In determining whether a postconviction motion may be summarily denied, courts must "accept the [appellant's] allegations as true to the extent they are not conclusively refuted by the record." *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008) (citing *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)).

The State mischaracterizes this standard by failing to accept Mr. Bowles's factual proffers as true, which refute the State's arguments. Further, those arguments that ignore Mr. Bowles's factual proffer and the guidance of the medical community that Mr. Bowles has pleaded are not record evidence, and are not conclusive. The State also argues that Mr. Bowles's claim does not warrant an evidentiary hearing because he does not meet the criteria for intellectual disability "certainly not by clear and convincing evidence." AB at 33. But contrary to the State's suggestion, Mr. Bowles need not conclusively prove he is intellectually disabled to warrant an evidentiary hearing, he only needs to plead sufficient facts to obtain an evidentiary hearing where he may then prove his intellectual disability. Mr. Bowles has proffered sufficient facts to be entitled to an evidentiary hearing on the merits of his intellectual disability claim, notwithstanding any procedural concerns, and the State's legally inaccurate arguments should be disregarded.

B. The State Has Waived Any Arguments Concerning the Necessity of an Evidentiary Hearing on Timeliness

Even aside from the issue of whether Mr. Bowles is entitled to an evidentiary hearing on the merits of his intellectual disability claim, *see supra* section (III)(A), he has explained that he is also separately entitled to an evidentiary hearing on the timeliness of his postconviction motion, but did not receive one. *See* PCR-ID at 754-55; IB at 44-45. Mr. Bowles has alternatively argued that his postconviction attorney should have known to file an intellectual disability claim, and that his failure to do so was neglect sufficient for good cause under Fla. R. Crim. P. 3.203(f). The State has affirmatively argued that he could not have known to file such a claim, *see* AB at 27-28, and thus a factual dispute exists related to timeliness. A factual dispute, including one related to timeliness, is properly resolved through an evidentiary hearing. *See, e.g., State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003) (remanding to the trial court for proceedings which "may include an inquiry into whether the facts [related to timeliness] alleged in the motion for extension are true."); *Peede v. State*, 748 So. 2d 253, 259 (Fla. 1999) ("Because there is a factual dispute as to whether defense counsel was ineffective . . . we find that an evidentiary hearing is required on this claim."). The State, by failing to address this argument, has waived any response. *See Simmons*, 934 So. 2d at 1117 n.14.

III. The State Incorrectly Argues that Mr. Bowles was Not Entitled to Public Records under Fla. R. Crim. P. 3.852

A. The State's Arguments that Mr. Bowles was Not Entitled to Department of Correction Records Under *Muhammad* are Wrong

Contrary to the State's arguments, Mr. Bowles is entitled to records from the Florida Department of Corrections (DOC) under Fla. R. Crim. P. 3.852 and *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013), and these records were plainly relevant to his intellectual disability claim. The requested were narrowly tailored to "records pertaining to any disciplinary proceedings, movement and housing logs, and visitation logs for attorneys and visitors including friends, family and clergy designated by Mr. Bowles from 2002 to the present." PCR-ID at 246. The State concedes that the demanded records, like in *Muhammad*, are an update as many of these records had been provided in 2002. Additionally, like in *Muhammed*, Mr. Bowles sought these records to raise a claim that would bar his execution: his intellectual disability. The circuit court's order wrongly distinguished this case from *Muhammad*, and improperly concluded that the demand in this case was not an update of already disclosed records to which Mr. Bowles was entitled.

B. The Department of Corrections Records are Relevant Both to the Claim of Intellectual Disability and to Establishing Good Cause Under Fla. R. Crim. P. 3.203

The State incorrectly argues that the requested DOC records would not have led to a colorable claim. AB at 51-52. But this is not entirely supported by guidance from the medical community, which maintains that observations of an incarcerated

individual can provide evidence of deficits in functioning. *See* Edward Polloway, *The Death Penalty and Intellectual Disability*, p. 195-96 (2015). Such records can, for example, contain information about performance of prison jobs, and observations from corrections officers can "substantiate impaired functioning." *Id*. at 196. Florida courts have also found information contained in prison records relevant to the assessment of intellectual disability. *See Oats v. State*, 187 So. 3d 457, 459 (Fla. 2015) (noting that records from prison supported defendant's claim of intellectual disability). The demand also included visitation logs for attorneys, which are relevant as to Mr. Bowles's argument that good cause under Fla. R. Crim. P. 3.203(f) exists due to his postconviction attorney's neglect to overcome the untimely filing of his intellectual disability claim. PCR-ID at 751. Thus, the demanded records are relevant both to developing further evidence to support a claim of intellectual disability and to establishing good cause for an untimely filing under 3.203.

C. Appellant's Use of *Bucklew* is Meant to Illustrate the Due Process Considerations Surrounding Discovery Related to Lethal Injection Materials

In addressing the argument for sustaining multiple agencies' objections to produce records relating to lethal injection, the State takes issue with Mr. Bowles's use of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). While the State accurately notes that *Bucklew* does not deal with public records, it is relevant to the question of the due process owed to litigants facing execution by lethal injection. Though the State

points out that Bucklew's claim was unsuccessful, access to public records in this case is not reliant on a *meritorious* claim, but simply a relation to a *colorable* claim. Whether or not Mr. Bowles could ultimately develop a meritorious claim is immaterial; due process calls for access to the documents necessary to fully develop the claim.

It is impossible for Mr. Bowles to do in eighteen days (and with none of the demanded lethal injection records) what Mr. Bucklew failed to do in five years with "extensive discovery." *Id* at 1118, 1129.[5] Florida's use of Rule 3.852 to foreclose any discovery on materials relating to lethal injection in this case preempts any kind of meaningful litigation relating to lethal injection, and thus violated Mr. Bowles's rights under the Eighth and Fourteenth Amendments.

D. Equal Protection Considerations Call for Public Records Not to be Denied Based Upon Impermissible Factors

The State also wrongly argues that not providing these records to death sentenced individuals when the general public would be able to access them does not violate the equal protection clause. Death sentenced individuals, required to utilize the procedure specified under Fla. R. Crim. P. 3.852, are inevitably denied access to these materials. The State argues that death sentenced individuals are not similarly situated to the general public. This is undeniably true, but if anything,

[5] Florida's most current lethal injection protocol was filed on June 13, 2019 and Mr. Bowles' motion to the circuit court was due on July 1, 2019.

efforts to curtail their rights should be more thoroughly scrutinized than the rights of the general public because death sentenced individuals have much more at stake. *See Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); *see also Doe v. District of Columbia*, 701 F. 2d 948, 960 (D.C. Cir. 1983) (noting of prisoners that "[f]ew minorities are so 'discrete and insular,' so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority.") (citation omitted).

IV. Conclusion

The Court should stay Mr. Bowles's scheduled August 22, 2019, execution, reverse the circuit court's decisions procedurally barring his intellectual disability claim and denying his access to records, and remand for a hearing on the merits.

Respectfully submitted,

/s/ Terri Backhus
Terri Backhus
Florida Bar No. 946427
Chief, Capital Habeas Unit
Office of the Federal Public Defender
For the Northern District of Florida
227 N. Bronough St. Suite 4200
Tallahassee, FL 32301
(850) 942-8818
Terri_Backhus@fd.org

/s/ Karin Moore
Karin Moore
Florida Bar No. 351652
Elizabeth Spiaggi
Florida Bar No. 1002602
Assistant CCRC-North
Office of the Capital Collateral
Regional Counsel – North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin_Moore@ccrc-north.org
Elizabeth_Spiaggi@ccrc-north.org

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Terri Backhus, Chief, Capital Habeas Unit, Federal Public Defender for the Northern District of Florida (terri_backhus@fd.org); Bernie de la Rionda (bdelarionda2@gmail.com); Assistant State Attorney Sheila Ann Loizos (sloizos@coj.net); Assistant Attorney General Jennifer A. Donahue (jennifer.donahue@myfloridalegal.com), Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com), (capapp@myfloridalegal.com), the Circuit Court of the Fourth Judicial Circuit (pfields@coj.net), and the Florida Supreme Court (warrant@flcourts.org) this 6th day of August, 2019.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

CERTIFICATION OF FONT

WE HEREBY CERTIFY this petition complies with the font and formatting requirements of Fla. R. App. 9.210(a)(2). A Times New Roman 14 font was used.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,

v. **Case No. 1994-CF-12188**

GARY RAY BOWLES, **CAPITAL CASE**
EXECUTION SCHEDULED

Defendant. **AUGUST 22, 2019 at 6:00 p.m.**

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AMENDED RULE 3.851 MOTION
FOR POSTCONVICTION RELIEF IN LIGHT OF
MOORE v. TEXAS*, *HALL v. FLORIDA*, AND *ATKINS v. VIRGINIA

On October 19, 2017, Mr. Bowles, through counsel, moved for postconviction relief from his sentence of death under the Eighth Amendment in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 572 U.S. 701 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002). *See* Fla. R. Crim. P. 3.851(e)(2). Mr. Bowles now submits this amended motion for postconviction relief.

I. INTRODUCTION[1]

Gary Ray Bowles is now, and has always been, an intellectually disabled person. This was true when his step-fathers physically abused him, R. at 829-36, 869-71, 876-82, when he was forced out of his home around 11 years of age and began sleeping in a detached garage without heat or running water in the Illinois winters, R. at 878, when he was sexually abused by adult men in his childhood, App. at 37-38, when he dropped out of school in the eighth grade, R. at 879, and when he became a homeless child prostitute by the age of 13, R. at 882, PCR. II at 262. It was also true when Mr. Bowles committed the crimes that led to his death sentence, and when he filed for relief from this sentence on the basis of his intellectual disability nearly two years before June 11, 2019, the date on which the Governor of Florida signed a warrant for his execution.

As this motion and the appendix filed contemporaneously with it further describe, Mr. Bowles meets the criteria for intellectual disability. Because the United States Supreme Court has clearly and unequivocally described the execution of the intellectually disabled as "a categorical rule making such offenders ineligible for the death penalty," his death sentence should be vacated. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

II. PROCEDURAL HISTORY

In 1996, Mr. Bowles pleaded guilty to first-degree murder in the Circuit Court, Fourth Judicial Circuit, Duval County, and following a penalty phase, the jury recommended death by a

[1] Citations to the Record on Appeal compiled in Mr. Bowles's second direct appeal, *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), will be "R. at [page]." Citations to the Record on Appeal compiled in Mr. Bowles's appeal for his initial postconviction motion in *Bowles v. State*, 979 So. 2d 182 (Fla. 2008), will be "PCR. [Volume Number] at [page]." Concurrent with this motion, Mr. Bowles has also filed an Appendix, the contents of which will be cited as "App. at [page]."

vote of 10 to 2. *See Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998). Pursuant to Florida's pre-*Hurst*[2] sentencing scheme, the judge imposed a death sentence. *Id*. On appeal, the Florida Supreme Court found that Mr. Bowles's death sentence was unreliable because the trial court erred in allowing the State to introduce prejudicial evidence, and thus vacated Mr. Bowles's death sentence and remanded for a new sentencing. *Id.* at 773.

On remand, a new penalty phase was held on May 24, 25, and 26, 1999, and the jury recommended death by a vote of 12 to 0. *See Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2001). The judge again imposed a death sentence after finding five aggravating factors had been proven beyond a reasonable doubt.[3] The judge also found six mitigating factors, but determined these did not sufficiently outweigh the aggravation in the case.[4] *Id*. The Florida Supreme Court affirmed, *id*. at 1184, and the United States Supreme Court denied certiorari on June 17, 2002, *Bowles v. Florida*, 536 U.S. 930 (2002).

In January 2002, the trial court appointed the Capital Collateral Counsel—Northern Region (CCR) to represent Mr. Bowles in state postconviction proceedings. Shortly thereafter, CCR moved to withdraw from his case, and on February 28, 2002, this Court appointed private attorney Frank J. Tassone, Jr. to represent Mr. Bowles. Mr. Tassone filed an initial motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850 and 3.851, on December 9, 2002. Mr. Tassone filed an amended motion on August 29, 2003, raising nine claims. *See* PCR I at 21-101.[5] On February 8, 2005, an evidentiary hearing was held on two claims: that Mr. Bowles's counsel was ineffective for failing to investigate and present mitigating evidence, and for failing to discover and present evidence rebutting the State's assertion of the HAC aggravating factor. *See* PCR III.

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

[3] The trial court found the following aggravating factors: (1) Defendant was convicted of two other capital felonies and two other violent felonies; (2) Defendant was on probation when he committed the murder; (3) Defendant committed the murder during a robbery or an attempted robbery, and the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). *Id*. at 1175.

[4] In mitigation, the trial court found: (1) Defendant had an abusive childhood; (2) Defendant had a history of alcoholism and absence of a father figure; (3) Defendant's lack of education; (4) Defendant's guilty plea and cooperation with police in this and other cases; (5) Defendant's use of intoxicants at the time of the murder; and (6) the circumstances that caused Defendant to leave home and his circumstances after he left home. *Id*.

[5] The amended postconviction motion raised the following claims: "(1) trial counsel were ineffective for failing to present statutory and nonstatutory mental mitigation, and the trial court erred in finding the two statutory mental mitigators were not proven; (2) the trial court erred in refusing to give the defense's requested jury instructions defining mitigation; (3) the trial court erred in instructing the jury that it could consider victim impact evidence; (4) and (5) Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); (6) *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* required the elements of the offense necessary to establish capital murder be charged in the indictment; (7) *Apprendi* and *Ring* required the jury recommendation of death be unanimous; (8) trial counsel were ineffective for failing to adequately investigate and present mitigating evidence; and (9) trial counsel were ineffective for failing to discover and present evidence rebutting the State's proof of the HAC aggravating factor." *Bowles v. State*, 979 So. 2d 182, 186 n. 2 (Fla. 2008).

Mr. Tassone presented the testimony of only three witnesses: Ronald K. Wright, a medical examiner, Harry Krop, a psychologist, and Bill White, Mr. Bowles's trial attorney. *Id*. On August 12, 2005, the Court denied postconviction relief. On February 14, 2008, the Florida Supreme Court affirmed. *Bowles v. State*, 979 So. 2d 182, 193 (Fla. 2008).

On August 8, 2008, Mr. Bowles filed an initial petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. *Bowles v. Sec'y, Fla. Dep't of Corrs.*, No. 3:08-cv-791-HLA, ECF No. 1 (M.D. Fla. Aug. 8, 2008).[6] The federal district court denied his petition on December 23, 2009. *Id.* (ECF No. 18). The United States Court of Appeals for the Eleventh 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. Tassone filed a successive motion for state postconviction relief on Mr. Bowles's behalf in this Court, arguing for relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), and the ineffectiveness of trial and appellate counsel. This Court summarily denied this motion, and it was not appealed.

On August 31, 2015, Mr. Tassone filed a motion to withdraw as Mr. Bowles's counsel, citing medical issues and the fact that he was winding down his practice and intended only to work limited hours in the future. The Court granted this request on September 3, 2015, and appointed attorney Francis Jerome ("Jerry") Shea to represent Mr. Bowles.

On June 14, 2017, Mr. Bowles filed a successive motion for postconviction relief in this Court in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court denied this motion, and the Florida Supreme Court affirmed. *Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (Mem.) (2018).

On October 19, 2017, Mr. Bowles filed the instant motion pursuant to Fla. R. Crim. P. 3.851, arguing that he is intellectually disabled, and that 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 v. Virginia*, 536 U.S. 304 (2002).

On March 12, 2019, while this R. 3851 motion was pending, Mr. Bowles's state postconviction counsel, Mr. Shea, unexpectedly moved to withdraw from the state proceeding. The State did not oppose the motion.[7] On March 25, 2019, the state court granted Mr. Shea's

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[6] In his federal petition, Mr. Bowles raised 10 claims, including: (1) the State used peremptory strikes to improperly remove jurors who expressed reservations about the death penalty; (2) the trial court erred in permitting evidence of two homicides at the resentencing hearing that were not presented at the original sentencing; (3) the court erred in finding the HAC aggravator; (4) the court erred in giving the HAC jury instruction; (5) Florida's death penalty scheme was unconstitutional; (6) direct appeal counsel was ineffective for failing to appeal the introduction of prejudicial and gruesome photographs; (7) the court erred in finding that Mr. Bowles committed the murder during the course of an attempted robbery or for pecuniary gain; (8) the Florida Supreme Court's finding that Mr. Bowles did not prove the two proposed statutory mitigating circumstances of Extreme Emotional Disturbance (EED) and Diminished Capacity was erroneous; (9) Mr. Bowles's death sentence is disproportionate; and (10) the Florida Supreme Court's holding that Mr. Bowles's trial counsel was not ineffective by failing to introduce Dr. McMahon's testimony regarding mental health mitigation was erroneous.

[7] Prior counsel, attorney Francis Jerome Shea, represented in his motion that he withdrew with the consent of the Office of the Attorney General, but this Court should take notice that, in two other capital postconviction cases, the Office of the Attorney General filed motions with the

motion and appointed a lawyer from the Office of the Capital Collateral Regional Counsel—North (CCRC-N) as Mr. Bowles's new state-appointed counsel. On March 26, 2019, Ms. Karin Moore entered an appearance in the case. On April 11, 2019, Ms. Moore filed a motion asking for additional time to either reply to the State's recently filed answer memorandum, or amend the entire post-conviction motion that had been filed by Mr. Shea, who was not qualified capital postconviction counsel. *See* Motion for Leave to File a Reply or Motion to Amend, *State v. Bowles*, Case No. 1994-CF-12188 (Duval County Circuit Court Apr. 11, 2019).

On April 15, 2019, the state 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 execution for August 22, 2019. The Florida Supreme Court thereafter ordered Mr. Bowles's intellectual disability proceedings expedited. The Florida Supreme Court's order requires the trial court to decide Mr. Bowles's intellectual disability claim *in total* by July 17, 2019. Death Warrant Scheduling Order, *Bowles v. State*, Nos. SC89-261, SC96-732 (Fla. June 12, 2019). Pursuant to this expedited schedule, this timely amended motion follows.

III. GROUNDS FOR RELIEF

CLAIM 1: Mr. Bowles's Death Sentence Violates the Eighth Amendment Because He is Intellectually Disabled.

A. The Legal Standard for Intellectual Disability

In 2002, the United States Supreme Court first held that execution of the intellectually disabled violates the Eighth Amendment in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Court explained:

> Those [intellectually disabled] persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants.

Atkins, 536 U.S. at 306-07.[8]

Circuit Court to remove Mr. Shea for his lack of qualifications under Fla. R. Crim. P. 3.112. *See, e.g.*, State's Motion to Determine Postconviction Counsel's Qualifications, *State v. John Freeman*, Case No. 16-1986-CFO 11599 (Fla. Cir. Ct. February 4, 2019).

[8] After *Atkins*, mental health professionals and the legal community began to use the terms "intellectual disability" rather than "mental retardation." *See Hall*, 572 U.S. at 704 (acknowledging this name change). This pleading will follow suit.

The Court emphasized that *Atkins* announced "a *categorical rule* making such [intellectually disabled] offenders ineligible for the death penalty." *Id*. at 320 (emphasis added).

When the *Atkins* Court ruled that evolving standards of decency prevented the execution of the intellectually disabled it expressly noted: "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). This proscription, however, was not intended to be without limits; in defining intellectual disability for the categorical bar on execution, *Atkins* referred to "clinical definitions" of intellectual disability, *see id.* at 317 n. 22, and cited to the American Association on Mental Retardation (AAMR)[9] and the American Psychological Association's (APA) Diagnostic and Statistical Manual (4th ed. 2000) (DSM-4), as authorities on defining intellectual disability, *see id*. at 308 n. 3.

Since *Atkins*, the Supreme 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 like the AAIDD and the DSM-4. *See Hall v. Florida*, 572 U.S. 701, 719 (2014) ("*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) ("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 2014 in *Hall v. Florida*, the 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 the approach 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. *Hall* holds that all three prongs of an intellectual disability assessment—an intelligence test result, adaptive deficits, and evidence of pre-age 18 onset—should be considered, consistent with the standards of the medical community. *Id.*

The Court reaffirmed that the diagnosis of intellectual disability should be guided by the medical and clinical community in its 2017 decision in *Moore*. 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 AAIDD clinical manual (11th ed. 2010) and the DSM (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 previously promulgated 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

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[9] The AAMR has since changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). Thus, references to the AAIDD used in this pleading refer to the present iteration of the AAMR.

medical or clinical authority. *Id*. The Supreme 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).

In reaffirming that intellectual disability determinations should be guided by the medical community and not only states or courts, *Moore* noted: "'[i]f 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.'" *Moore*, 137 S. Ct. at 1053 (quoting *Hall*, 572 U.S. at 720-21).

This Court should likewise find itself guided in the assessment of Mr. Bowles's intellectual disability by medical and clinical authority. 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)); *see also* Fla. Stat. § 921.137(1) (Intellectual disability is "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18"); Fla. R. Crim. P. 3.203(b) ("[T]he term '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."). No longer can courts hold that an IQ score above 70 is fatal to a claim of intellectual disability, *Foster*, 260 So. 3d at 178-79, and courts are thus instructed to consider evidence of all three prongs of intellectual disability in its assessment of whether a valid claim exists, *id*. at 180 (noting *Hall* requires a 'holistic view' of intellectual disability evidence).

B. Mr. Bowles Meets the Criteria for Intellectual Disability

i. The Diagnostic Standard for Intellectual Disability

As *Atkins*, *Hall*, and *Moore* require, this Court should be guided in its assessment of whether Mr. Bowles has an intellectual disability by the current standards of the medical community. As the Supreme Court recognized, the AAIDD and the APA's DSM are authorities in the medical community. The current version of the DSM, the DSM-5, provides:

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualize, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication,

social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5, p. 33.

The AAIDD provides a similar definition: "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAIDD (11th ed. 2010) (AAIDD-11), p. 6.

ii. Mr. Bowles has Significantly Subaverage Intellectual Functioning

a. Clinical Considerations in the Interpretation of IQ Scores

The first prong of the intellectual disability diagnosis requires significantly subaverage intellectual functioning. *See* DSM-5, p. 33; AAIDD-11, p. 6; *see also Hall*, 572 U.S. at 710. Determination of whether intellectual disability exists requires significantly subaverage intelligence *approximately* two standard deviations below the mean, and this prong of the diagnosis is typically met through the use of standardized intelligence instruments (IQ tests). *See, e.g.*, User's Guide to AAIDD-11, p. 23. The medical community recognizes, however, that while this can be demonstrated through the use of such IQ tests, the determination of whether this prong is met does not include a "cutoff score." *Id.* As the User's Guide to AAIDD-11 notes: "A fixed point cutoff for [intellectual disability] is not psychometrically justifiable." *Id.* "The diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination." *Id.*

While the AAIDD and DSM acknowledge that IQ testing is a significant consideration in whether the deficits in intellectual functioning prong exists, such testing must be considered in conjunction with factors that have been observed to affect the interpretation of IQ scores. IQ test scores, for example, must be considered in conjunction with the SEM. The DSM-5 instructs:

> Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally + 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

DSM-5, p. 37. The AAIDD-11 also instructs that a SEM of up to five points be taken into consideration in the interpretation of IQ scores. AAIDD-11, p. 36; *see also Mental Retardation: Definition, classification, and systems of support* (10th ed. 2002), AAMR (AAIDD-10), p. 58-59 ("[T]he SEM is considered in determining the existence of significant subaverage intellectual functioning . . . In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error.").

Hall also recognized the importance of considering the SEM present in testing instruments, consistent with this guidance from the medical community. *See Hall*, 572 U.S. at 713 ("The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."). Thus, the Supreme Court has held that an IQ score of 75 is "squarely in the range of potential intellectual disability." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015).

Additionally, it has been widely observed that professional authority provides for the correction of IQ scores for norm obsolescence (the 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); DSM-5, p. 37 (discussing the Flynn Effect); AAIDD-11, p. 37 (same).

For example, the AAIDD-11 advises: "As discussed in the *User's Guide* (Shalock et al., 2007) that accompanies the 10th editions of this *Manual*, best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11 at 37. Thus, "[b]oth the [AAIDD-11] and this User's Guide recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted." User's Guide to AAIDD-11, p. 23.

That United States Court of Appeals for the Eleventh Circuit recognizes that the Flynn Effect is both widely observed and accepted. *See, e.g., Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010) ("An evaluator may also consider the 'Flynn effect,' a method that recognizes the fact that IQ test scores have been increasing over time. . . . Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field."); *Hill v. Humprey*, 662 F. 3d 1335, 1373 n. 13 (11th Cir. 2011) (citing *Thomas* and noting: "[T]his circuit has recognized that the statistical phenomenon known as the Flynn Effect and the Standard Error of Measurement of plus or minus 5% can be applied by a test administrator to an individual's raw IQ test score when arriving at a final IQ score.").

Thus, in consideration of whether Mr. Bowles meets the first prong of intellectual disability—significantly subaverage intellectual functioning—this Court should consider any IQ test scores in conjunction with the same factors the medical community uses in their interpretation of the same, including the SEM and the Flynn Effect.

b. Mr. Bowles's IQ and Neuropsychological Testing[10]

Relevant to the determination of his intellectual functioning, Mr. Bowles has had two full-scale IQ tests, and has been further evaluated by two neuropsychologists, in 2003 and 2018 (Dr. Harry Krop and Dr. Barry Crown, respectively). This testing supports that Mr. Bowles has significantly subaverage intellectual functioning, and evidences that Mr. Bowles meets the criteria for the first prong of intellectual disability.

The first relevant full-scale IQ test was given to Mr. Bowles in 1995. Prior to his first penalty phase proceeding in 1996, Mr. Bowles was evaluated by psychologist Elizabeth McMahon. She was the confidential defense expert in Mr. Bowles's case, and Mr. Bowles's trial attorney, Bill White, asked her to evaluate Mr. Bowles only for competence, insanity, and mitigation purposes. *See, e.g.*, PCR-II at 196. Dr. McMahon did not write a report. *See, e.g.*, PCR-II at 251 (Dr. Krop noting that Dr. McMahon did not write a report). As part of her general evaluation, Dr. McMahon administered to Mr. Bowles the Wechler Adult Intelligence Scale, Revised (WAIS-R), in 1995. PCR-II at 199. Mr. Bowles received a full scale IQ score of 80 on this test. PCR-II at 239 (Dr. Krop's testimony about Dr. McMahon's testing).

The second IQ test that Mr. Bowles was administered was the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which was given to him in 2017 by psychologist Jethro Toomer. *See* App. at 21-26. Mr. Bowles received an IQ score of 74 on the WAIS-IV. App. at 23.

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[10] In compliance with Fla. R. Crim. P. 3.203(c)(2), Mr. Bowles states that for the purposes of this proceeding, he has been evaluated by: Dr. Jethro Toomer, 15715 South Dixie Hwy., #417, Miami, Florida, 33157; Dr. Julie Kessel, 851 35th Ave. North, St. Petersburg, Florida 33704; and Dr. Barry Crown, 105 E. Gregory Square, Suite 2A, Pensacola, Florida 32502.

As both of the recent evaluators of Mr. Bowles, psychologist Dr. Toomer and psychiatrist Dr. Julie Kessel, agree, Mr. Bowles meets the prong of significantly subaverage intellectual functioning, which is supported by his IQ testing. The WAIS-IV score of 74 that Mr. Bowles received in 2017, considered within the accepted SEM of ± 5 points, gives Mr. Bowles a potential IQ of as low as 69, which is below two standard deviations from the mean. This is sufficient to establish this prong of a diagnosis of intellectual disability. *See, e.g., Brumfield*, 135 S. Ct. at 2271 (noting that an IQ score of 75 was "entirely consistent with intellectual disability.").

The only other valid full-scale IQ test that Mr. Bowles was given, the WAIS-R in 1995, returned a score of 80, which was not previously corrected for norm obsolesce. When that correction is made, Mr. Bowles's 1995 WAIS-R testing results in a score between 75-76, which when the SEM is taken into account, puts this IQ score as low as approximately 70. As Dr. Toomer observed: "The WAIS-R was normed in 1981, and it is my understanding that this test was given by Dr. McMahon in 1995 to Mr. Bowles. Adjusted for the Flynn effect, this WAIS-R score yields an IQ score of 75-76, which is not inconsistent with the current WAIS-IV results." App. at 23. Dr. Kessel likewise notes: "I agree with Dr. Toomer that, at the time of the [trial] proceedings, the Flynn Effect had not been applied to this score, and that, when this recognized and accepted psychometric principle is applied, the reported score overestimates Mr. Bowles's intellectual functioning. Further, I find that this test score by Dr. McMahon does not rule out intellectual disability." App. at 44.

It is also worth noting that Mr. Bowles's IQ score on the WAIS-IV is likely the most accurate gauge of Mr. Bowles's actual intellectual functioning, because "the WAIS-IV, which was not available to Dr. McMahon, is a more modern, updated, and psychometrically accurate instrument." App. at 23. Dr. Kessel agreed, noting: "The WAIS-R is less psychometrically accurate than the WAIS-IV in this situation and overestimates IQ in non-appropriately normed populations." App. at 44. Even Dr. McMahon herself agreed with the opinions of Dr. Toomer and Dr. Kessel about the WAIS-IV, as she recently observed:

> For the purpose of my general psychological evaluation in the 1990s, I administered the [WAIS-R] to Mr. Bowles. At the time, the WAIS-R was an adequate instrument. The [WAIS-IV] did not exist then. I agree that now the WAIS-IV is the most current, standardized, full-scale intelligence assessment instrument available and is a better measure of a person's intellectual functioning than the WAIS-R.

App. at 78.

Neuropsychological testing conducted by Dr. Barry Crown in 2018 is also consistent with significantly subaverage intellectual functioning. *See* App. at 27-28. Dr. Crown noted that Mr. Bowles performed in one test in the 14th percentile for his age group, and that on the Reitan-Indiana Aphasia Screening Test, "Mr. Bowles mistakenly converted a simple subtraction problem into a division problem. Additionally, when instructed to place his left hand on his right ear, Mr. Bowles places his left hand on his left ear, which is indicative of cerebral disturbance." App. at 27. On the Shipley Abstractions, Mr. Bowles received an "abstraction age of 11 years, 0 months," and scored in the 12th and 6th percentiles for his age group on other testing. App. at 28. Dr. Crown concluded: "As a result of my testing, interview with Mr. Bowles, and review of the records, I conclude that Mr. Bowles suffers from brain damage, particularly in the tertiary area of the frontal lobe of the brain." *Id*. Dr. Crown noted, "Mr. Bowles's brain damage supports the finding that he is an intellectually disabled person[.]" *Id*.

Dr. Crown's neuropsychological findings are supported by Dr. Harry Krop, who evaluated Mr. Bowles in state postconviction in 2003. In his 2018 review of materials developed in the course

of Mr. Bowles's intellectual disability investigation, Dr. Krop found: "Based on materials I have reviewed, it is likely that Mr. Bowles is an intellectually disabled person. These materials are consistent with my prior opinion that Mr. Bowles has neuropsychological and cognitive impairments, which have pervaded Mr. Bowles's life." App. at 33.

c. Other Evidence of Impaired Intellectual Functioning

IQ testing, and other formal psychological testing, is the most persuasive evidence of intellectual functioning. However, evidence showing impaired intellectual functioning is nothing new; Mr. Bowles's intellectual limitations have been observed by past evaluators as well as lay witnesses. For example, lay witnesses that have observed Mr. Bowles over the course of his life have described him consistently as "slow" (App. at 58 (Glen Price), 63 (Julian Owens), 75 (Tina Bozied)), and noted that he couldn't understand directions or how to do simple tasks (App. at 76 (Tina Bozied), 53-54 (Elain Shagena), 58-59 (Glen Price), 50 (Chester Hodges), 46 (Bill Fields)).

Additionally, Dr. McMahon observed from her 1995 evaluation of Mr. Bowles that he had a number of intellectual limitations. Specifically, Dr. McMahon noted that her testing revealed that Mr. Bowles "doesn't learn by his own mistakes," PCR-II at 203, and that Mr. Bowles was "probably not working with what we would say is an intact brain," PCR-II at 207.

Thus, multiple pieces of evidence, including IQ and neuropsychological testing, as well as the statements of lay witnesses and past evaluators, show that Mr. Bowles has significantly subaverage intellectual functioning, satisfying the first prong of an intellectual disability diagnosis.

iii. Mr. Bowles Has Significant Adaptive Deficits

A diagnosis of intellectual disability requires evidence of concurrent deficits in adaptive behavior. *See Foster*, 260 So. 3d at 178. Adaptive deficits "refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5, p. 37; *see also* AAIDD-11, p. 43 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.").

The adaptive deficits prong of an intellectual disability diagnosis "is met when at least one domain of adaptive functioning—conceptual, social, or practical—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." DSM-5, p. 38; *see also* AAIDD-11, p. 43 (noting the same). Importantly, this prong of intellectual disability is met by clinical judgment of deficits, and is not negated by strengths. *See*, *e.g.*, User's Guide to AAIDD-11, p. 26 (noting that it is an incorrect stereotype that "[p]ersons with [intellectual disability] are characterized only by limitations and do not have strengths that occur concomitantly with the limitations").

Although Mr. Bowles need only exhibit deficits in one adaptive deficits domain, he has evidence of deficits in all three of these domains.

a. Mr. Bowles Has Deficits in Conceptual Skills

The conceptual domain includes skills such as "language; reading and writing; and money, time, and number concepts." AAIDD-11, p. 44. For individuals with mild intellectual disability, "abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (i.e., reading, money management), are impaired." DSM-5, p. 34.

Mr. Bowles has deficits in his conceptual skills. Notably, Mr. Bowles struggled in school, particularly after primary school. This was significant to Dr. Kessel, who wrote:

> Gary appears to have performed adequately in primary school until the fourth grade, when his grades and behavior began to decline. There is a reference to him having been transferred to a special education program for challenged learners. This suggests that Gary had difficulty with the transition from concrete to more abstract and conceptual thinking. In middle school, he received Cs and Ds. Gary's school performance continued to decline throughout his adolescence. By the sixth grade, he was receiving primarily failing grades, receiving six F grades and a C grade, and an incomplete grade in English. Despite these grades, records note that he was advanced into seventh grade, where he received Fs, Cs, and a D. In the eighth grade, Gary dropped out of school, failing completely his first semester and having no recorded grades in the second semester.

App. at 37-38.

Mr. Bowles also has significant deficits in his executive functioning and short-term memory, which have been observed by both mental health professionals and lay witnesses. For example, Dr. Toomer administered the Scales of Independent Behavior-Revised (SIB-R) for Mr. Bowles with two third-party reporters, Julian Owens and Ken White. *See* App. at 30. On this standardized assessment tool, which is designed to measure adaptive deficits, Dr. Toomer found that Mr. Bowles had deficits in a number of areas relevant to the conceptual domain, including deficits in language comprehension and expression and understanding of money and value. *Id*.

Further, neuropsychologist Dr. Barry Crown found that Mr. Bowles had brain damage. App. at 28. Mr. Bowles's brain damage indicates that Mr. Bowles specifically struggles with deficits in the conceptual domain. *Id*. Dr. Crown found:

> Mr. Bowles's brain damage would have had a profound effect on his ability to control his impulses, exercise reasoning and judgment, and ability to understand the consequences of his actions, both in the present and in the future. He would have been impaired in all of these areas on a daily basis, but these impairments would be even more pronounced under stress . . . Given [Mr. Bowles's] underlying impairments, the existence of conceptual deficits is manifest.

Id. That Dr. Crown found that Mr. Bowles would have trouble, based on his brain damage, with impulsivity and understanding consequences is supported by the experiences of lay witnesses with Mr. Bowles. *See* App. at 58-59 (Glen Price: "[Gary] wasn't a bad kid, he just didn't think about things like that and couldn't understand the consequences of what he was doing."); 50 (Chester Hodges: "Gary was very impulsive, and did not think about the consequences of his actions. I don't know if he understood the consequences of his actions. He seemed to have no concept that his actions could affect others negatively . . . if he wanted something, he just took it, like a toddler. He did not have self-control.").

In addition to being impulsive, Mr. Bowles also struggled with planning for the future. App. at 73 (Roger Connell: "[Gary] was impulsive, and never seemed to think about his future . . . He only thought of what his next immediate need was."); 76 (Tina Bozied: "Gary wasn't able to plan in advance. If he didn't have it when he needed it he would have just gone without.").

Additionally, many others have observed deficits in Mr. Bowles's short-term memory. Julian Owens recalled from time he spent with Mr. Bowles in his young adulthood:

> Gary was extremely forgetful. I especially remember that Gary would always lose his money, or leave it laying around. We worked in labor pools, which meant that we worked hard – outside, doing manual labor in the hot sun – and we were paid in

> cash at the end of a long, exhausting day. Then whatever we were paid would be all we had until we could get another job assignment, but Gary just didn't seem to understand that. He would leave his money wherever – at the job site, at a bar, or in a hotel. It was always so shocking to me that he would do that, because we worked so hard for so little. How could you lose all you had, after a day like that? Half the time that Gary would lose his money he wouldn't even realize it. Someone else in the group of people that we'd be with would figure out that Gary didn't have his money, and we would all be the ones trying to retrace Gary's steps and figure out where he left his money. This was very common with Gary.

App. at 63-64.

As noted by expert and lay witnesses, Mr. Bowles has significant adaptive deficits in skills within the conceptual domain. On that basis alone, he meets the second prong for a diagnosis of intellectual disability. But Mr. Bowles has deficits within other domains as well.

b. Mr. Bowles Has Deficits in Social Skills

The social domain includes skills such as "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e. wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." AAIDD-11, p. 44. Adults with mild intellectual disability are "immature in social interactions," and may have "difficultly in accurately perceiving peers' social cues." DSM-5, p. 34. Such individuals may also have "difficulties regulating emotion and behavior in age-appropriate fashion" and have "limited understanding of risk in social situations," which means they are "at risk of being manipulated by others (gullibility)." *Id*.

Mr. Bowles has deficits in his social skills. Dr. Toomer, in his assessment of Mr. Bowles's deficits using the SIB-R, found that Mr. Bowles had deficits in social interaction, which indicates deficits in the social domain. *See* App. at 30-31.

Furthermore, Mr. Bowles spent much of his youth being victimized, including being the victim of sexual abuse. *See* App. at 37. Moreover, Mr. Bowles is consistently described by those who have known him from his childhood and through his adulthood as "gullible," "naïve," and frequently getting "taken advantage of." App. at 58 (Glen Price); 66 (Julian Owens); 75 (Tina Bozied); 68-69 (Ken White). Additionally, many individuals described social situations in which Mr. Bowles floundered without help. For example, Julian Owens noted:

> Gary wasn't good at reading social situations, though. I remember that when we would be out, girls would flirt with Gary or hit on him, but he didn't seem to realize it. Gary was a good-looking guy, but had limited understanding of these kinds of social situations with women. It happened so frequently that we would all tease him about it.

App. at 66. Other individuals describe Mr. Bowles as "immature," and having childlike interests. App. at 52 (Diana Quinn); 65-66 (Julian Owens). Tina Bozied, who knew Mr. Bowles when they were both teenagers, described:

> When I spoke to him, sometimes he would be blank, like he didn't understand what I was saying. When we would get into arguments, I would have to explain to him multiple times why I was upset, and even then it seemed like he didn't get it.

App. at 75.

Mr. Bowles has consistently struggled with social skills throughout his life, being victimized by others, described as naïve, gullible, easily taken advantage of, having childlike

interests, and has in several examples given by others, incapable of meeting age-appropriate expectations in social situations. Mr. Bowles has significant deficits in skills in the social domain, and this prong of intellectual disability is therefore met in this case on that basis. But Mr. Bowles also has deficits in the third domain as well.

c. Mr. Bowles Has Deficits in Practical Skills

The practical domain includes skills such as "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." AAIDD-11, p. 44. Adults with mild intellectual disabilities "may function age-appropriately in personal care," but "need some support with complex daily living tasks in comparison to peers." DSM-5, p. 34. These adults typically need help with "grocery shopping, transportation, home and child-care organization, nutritious food preparation, and banking and money management." *Id*. Additionally, these "[i]ndividuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently." *Id*.

Mr. Bowles has deficits in his practical skills. Dr. Toomer, in his assessment of Mr. Bowles's deficits using the SIB-R, found that Mr. Bowles had deficits in personal living skills, community living skills, personal self-care, time and punctuality, and work skills, which indicate deficits in the practical domain. *See* App. at 30-31.

Through his late adolescence and adulthood, Mr. Bowles struggled with travel and public transportation. Julian Owens noted of Mr. Bowles in his adulthood:

> [Gary] had trouble using the public bus in Jacksonville Beach. Back then, the bus system was much simpler than it is now, there was basically two places the buses went, either to the beach or into town. I saw Gary get on the wrong bus several times, going in the completely wrong direction. This always surprised me – how can you get it wrong when it was only going two basic places? – but that was just Gary. Sometimes I would take the bus with Gary to help him out, and if no one were around to help Gary, he would just walk rather than use the bus. I doubt very seriously he could have used the bus system without someone helping him.

App. at 65. Likewise, Tina Bozied recalled:

> Gary and I walked most places, but when we weren't walking, I noticed Gary struggled with other kinds of transportation. He could not use a public bus system without help. On one occasion, my parents bought Gary and me airplane tickets so we could fly back from Florida to where they lived in Michigan. If I had not been there to make sure we got our tickets, were checked in, and made it to the right location to board our flight, Gary would never have made it. I believe he would have missed his flight, or tried to get on the wrong place. The whole process was out of Gary's abilities, and it was obvious it overwhelmed him.

App. at 76.

Other individuals also noted that Mr. Bowles lacked basic skills to care for himself, well into his adulthood. He struggled especially with using money, from paying for items with cash and counting appropriate change, to being able to save money, or pay for larger items like hotel rooms, rent, or other bills. *See* App. at 64-65 (Julian Owens); 75-76 (Tina Bozied). Mr. Bowles frequently used others as a "crutch," App. at 73 (Roger Connell), because he could not otherwise provide for himself. He relied on other people to let him live with them, which they allowed for free, and to care for him. *See* App. at 67 (Ken White); 75 (Tina Bozied); 73 (Roger Connell); 64-65 (Julian

Owen). Additionally, while Gary was for the most part not formally employed during his adult life, he required assistance in finding employment, *see* App. at 67 (Ken White), and was not successful at the jobs that he did have. For example, one of his former employers, Elain Shagena, remembered:

> [Gary] did not do any tasks that required any level of sophistication or complexity, even if it was a slightly complex task. . . . We tried to train Gary to use [a four-step] machine, but he could never learn it, and Gary was never able to work the machine properly. He could not understand the process or follow the four basic steps. He seemed to try very hard, but he continually made mistakes. Gary also came so close to cutting himself with the razor knife involved in operating the machine a few times. I was worried about Gary's safety. He never managed to successfully use the machine, even with help and under a great deal of supervision. I had to move him off of the machine as a result of his mistakes and the risk of him injuring himself.

App. at 53. Because of his inability to provide for himself, Gary turned to prostitution and temporary living situations with others. As Dr. Kessel summarized:

> In total, Gary's adulthood, outside of the incarceration setting, was largely transient and dysfunctional. Gary lacked the ability to function as an adult, provide for himself, problem-solve, and understand the world around him. It is unsurprising in this context and with his history of sexual abuse, that Gary turned to prostitution for survival and depended heavily on older men to care for him. He has little ability to use money, to use public transportation, or to provide his own basic needs. The pattern of his adulthood reflects the same theme of deficiencies that were present in his adolescence and childhood.

App. at 41. Mr. Bowles has displayed significant practical domain deficits as a result of his intellectual limitations, which have pervaded his entire life, and thus, on that basis alone and in combination with his deficits in the other domains described above, he meets the second prong for a diagnosis of intellectual disability.

iv. Mr. Bowles's Intellectual Disability Onset Before 18 Years of Age

The third prong of an intellectual disability diagnosis requires the "[o]nset of intellectual and adaptive deficits during the developmental period," DSM-5, p. 33, which is generally referred to as prior to the age of 18 years old, *see* AAIDD-11, p. 5. *See also Foster*, 260 So. 3d at 178. This prong refers only to "recognition that intellectual and adaptive deficits are present during childhood or adolescence," and can be met by "history or current presentation." DSM-5, p. 38.

Importantly, Mr. Bowles is not required to prove that he was *diagnosed* with intellectual disability before the age of 18 years old, just that *evidence* of such manifested prior to the age of 18. *See, e.g., Oats v. State*, 181 So. 3d 457, 460 (Fla. 2015) ("[T]he circuit court erroneously conflated the term 'manifested' with 'diagnosed' and held that Oats failed to satisfy one of the necessary prongs of the statutory test for intellectual disability because Oats was not diagnosed as a child, even though the applicable Florida statute requires only that the intellectual disability 'manifested during the period from conception to age 18.'") (quoting Fla. Stat. § 921.137(1)); *see also Brumfield*, 135 S. Ct. at 2283 ("If Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child."). Mr. Bowles also need not prove the exact origin of his disability, be it in utero, due to progressive damage such as

malnutrition, or due to acquired disease or injury (such as traumatic brain injury) to meet this prong of the diagnosis. *See* AAIDD-11, p. 27 (noting that "disability does not necessarily have to have been formally identified").

Mr. Bowles's intellectual and adaptive deficits existed before he was 18 years old. Several individuals note deficits for Mr. Bowles who knew him in his early childhood, *see* App. at 58-59 (Glen Price); 45-46 (Bill White); 49-50 (Chester Hodges), and who knew him in his teenaged-years and young adulthood, *id.* at 75-76 (Tina Bozied); 67-69 (Ken White). Moreover, Mr. Bowles struggled in school, achieved failing grades once academic requirements "beg[an] to move from concrete to more abstract areas." *See* App. at 24 (Report of Dr. Toomer). And Dr. Crown noted that his brain damage was consistent from a source in his childhood, possibly his juvenile use of inhalants (such as paint, glue, or gasoline), or potentially even earlier, such as a perinatal origin. App. at 28. Drs. Kessel, Toomer, and Krop likewise found that evidence existed of his poor intellectual functioning in his childhood. *See* App. at 37-38; 43; 33; 24-26.

v. Mr. Bowles Has Numerous Risk Factors for Intellectual Disability

Evidence of risk factors is not required for the diagnosis of intellectual disability either by medical communities or courts. But the medical community considers "risk factors" as "cause to explore the prospect of intellectual disability further." *Moore*, 137 S. Ct. at 1051. Thus, risk factors are persuasive evidence that an intellectual disability may exist or develop. *See Moore*, 137 S. Ct. at 1051 ("At least one or more of the risk factors described in the [DSM] will be found in every case of intellectual disability.") (internal brackets and quotation marks omitted) (quoting AAIDD-11, p. 60). Mr. Bowles had multiple risk factors for intellectual disability before and after age 18.

Prenatal Risk Factors. Prior to Mr. Bowles's birth, a number of risk factors for intellectual disability existed. For example, as Dr. Kessel observed, risk factors "began in utero and are related principally to his mother's lack of prenatal care, likely use of alcohol and/or other substances, and impoverished environmental conditions, including exposure to unpasteurized food and possible environmental hazards." App. at 43. Furthermore, "[e]motional risk factors related to his mother's health also include the sudden death of her spouse during pregnancy with Gary and her tendency to depression." *Id*.

Poverty, Abandonment, and Rejection of Parental Caretaking. Mr. Bowles was not yet born when his father, a coal miner, died at the age of 23. R. at 864-65; App. at 36. His mother was left at the age of 17 with an infant, Mr. Bowles's elder brother Frank, and pregnant with Mr. Bowles. Their family was impoverished, living in rural West Virginia, and many members of the family were illiterate and alcoholics. After her husband's death, Mr. Bowles's mother was described as "emotionally unwell," App. at 60, and at points after Mr. Bowles's birth, she left Mr. Bowles and Frank in West Virginia with extended family members, with no indication where she had gone, *see id*. at 55 (Geraldine Trigg). The inadequate family support, familial poverty, malnutrition, and rejection of parental caretaking and abandonment present in Mr. Bowles's early childhood constitute additional risk factors for intellectual disability. *See* AAIDD-11, p. 60.

Abuse, Neglect, and Domestic Violence. Mr. Bowles suffered physical abuse throughout his childhood. R. at 830-31, 868-71, 876-77. Mr. Bowles's mother, following the death of his father, subsequently married severely abusive men. R. at 866, 874. Mr. Bowles was also often kicked out of his house when he was a child, sleeping wherever he could. R. at 878, 882-83. Mr. Bowles's mother was often not around to care for him. PCR. II at 218, R. at 837, 869-71, 877-78. She was an alcoholic. R. at 876, 888.

Mr. Bowles's first step-father, Bill Fields, abused Mr. Bowles and his brother. R. at 831, 868-70. In contrast, their half-brother and half-sister, Fields's biological children, received

preferential treatment. R. at 828, 868-69. Fields also physically abused Mr. Bowles's mother, particularly if she tried to defend Mr. Bowles from Fields's abuse. R. at 871. Fields physically abused Mr. Bowles and his brother two to three times a week, starting for Mr. Bowles at the age of six or eight. R. at 831. Although Fields beat both Mr. Bowles and his brother, Mr. Bowles's beatings were worse. R. 828, 830. Fields punched Mr. Bowles and his brother, knocked him down, hit him with fists, R. at 869, used a board, PCR II at 2019, used branches, and used a black leather strap. Fields hit Mr. Bowles across the forehead with a broom handle. Mr. Bowles needed medical attention after several of the beatings, but his parents never sought it out for him. Eventually Fields's beatings forced Mr. Bowles and his brother to run away from home. R. at 873.

Mr. Bowles's second step-father, Chester "Chet" Hodges, was also abusive. R. at 835, 877. Hodges was an alcoholic, R. at 875, and he would often pummel, slap, and punch Mr. Bowles and his brother. He too beat Mr. Bowles with his belt. A photo from Mr. Bowles's 13th birthday actually displays a black eye inflicted by Hodges. R. at 885-86. And Hodges would also kick Mr. Bowles out of the house in the winter while it was snowing and cold. He boarded up the garage windows when he discovered Mr. Bowles was getting into the garage. Mr. Bowles was in the home on some occasions in which his mother being beat and injured from Hodges. R at 876. She was hospitalized on at least three occasions. R at 876. Her injuries included broken ribs, R. at 876, a broken arm, R. at 876, and a laceration to her neck that necessitated the removal of part of her larynx, R. at 835-36, in addition to black eyes and bruises. The abuse became so bad that Mr. Bowles's mother attempted suicide before she eventually divorced Hodges. R. at 878-81.

On an especially brutal occasion of abuse, Hodges held Mr. Bowles, then 13 or 14 years old, by the throat, beating him with a hammer and a rock, ultimately lacerating his neck. R. at 882. Mr. Bowles's brother had just come home on leave from military service when he witnessed this scene and stepped in to stop it. R. at 836. Mr. Bowles then ran away, and he did not have a stable home or any parental support or guidance for the remainder of his childhood. R. at 882-83.

Mr. Bowles's suffering of abuse, abandonment, and trauma constitute risk factors for intellectual disability. *See* DSM-5, p. 39; *see also Moore*, 137 S. Ct at 1051 (acknowledging that "childhood abuse and suffering" is a risk factor for intellectual disability). Domestic violence, neglect, abuse, and social deprivation are risk factors for intellectual disability. AAIDD-11, p. 60.

Alcohol and Drug Abuse. Mr. Bowles became a substance abuser in his childhood. R. at 832-34, 872-73, 880. Mr. Bowles started using drugs and alcohol between the ages of 8 and 10. R. at 833. He began smoking marijuana, and then started sniffing glue and huffing paint thinner. R. at 833. Mr. Bowles and other children would steal the glue, and they would huff it. R. at 833. On one occasion, Mr. Bowles glue-sniffing resulted in hospitalization. Mr. Bowles also developed a drinking problem. R. at 872. Mr. Bowles's pre-18 substance abuse, which continued into his adulthood, constitutes another risk factor for intellectual disability. *See* AAIDD-11, p. 60.

C. Mr. Bowles's Motion is Timely

Mr. Bowles's motion is timely for four principle reasons; first, his intellectual disability is a categorical bar to execution, and thus is not able to be waived or defaulted, *see* section (III)(C)(i); second, to the extent that the Florida Supreme Court's holdings in *Rodriguez v. State*, 250 So. 3d 616 (Mem.) (Fla. 2016), and *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), foreclose relief to individuals like Mr. Bowles, such holdings violate the United States Constitution, *see* section (III)(C)(ii); third, his motion is timely under Fla. R. Crim. P. 3.851(d)(2)(B), because he could only have filed after the Florida Supreme Court's decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), making *Hall v. Florida* retroactive to him, *see* section (III)(C)(iii); and fourth, Mr. Bowles's claim is timely because he can establish good cause under Fla. R. Crim. P. 3.203(f), *see* section

(III)(C)(iv). For his argument concerning R. 3.203(f) Mr. Bowles argues in the alternative two primary reasons for good cause in his case. *Compare* section (III)(C)(iv)(b) and (III)(C)(iv)(c). Any one of the aforementioned arguments is sufficient to find Mr. Bowles's motion timely.

i. Intellectual Disability is a Categorical Bar to Execution that Cannot Be Waived or Defaulted

The United States Supreme Court is clear: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 553-564 (2005)) (emphasis in original). The Florida Supreme Court has, at times, endorsed this reading of the Supreme Court's precedent, noting: "It is unconstitutional to impose a death sentence upon any defendant with [intellectual disability]. *Moore*, 137 S. Ct. at 1048; *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *see also* § 921.137(2), Fla. Stat. (2017)." *Wright v. State*, 256 So. 3d 766, 770 (Fla. 2018) (internal citation omitted).

The United States Supreme Court has never suggested that the Eighth Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver or procedural bar or default. 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, or to execute a person who was convicted of rape but not murder and failed to raise a challenge at the appropriate time, *see Kennedy v. Louisiana*, 554 U.S. 407 (2008), so too it would be illegal to execute an intellectually disabled person who failed to raise his claim at the appropriate procedural time. *See, e.g., State ex re. Clayton v. Griffith*, 457 S.W.3d 735, 757 (Mo. 2015) (Stith, J., dissenting) ("[I]f [petitioner] is intellectually disabled, then the Eighth Amendment makes him ineligible for execution . . . [I]f a 14–year–old had failed to raise his age at trial or in post-trial proceedings then [] would [it] be permissible to execute him for a crime he committed while he was a minor? Of course not; his age would make him ineligible for execution. So too, here, if [petitioner] is intellectually disabled, then he is ineligible for execution.").

Notwithstanding any waiver or provision of Florida law, the Eighth Amendment requires that persons "facing that most severe sanction . . . have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001; *see also Walls*, 213 So. 3d at 348 (Pariente, J., concurring) ("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied."). The Eighth Amendment's categorical bar on executing intellectually disabled individuals does not give way to a state procedural rule—rather, the procedure must give way to the constitutional prohibition. Because Mr. Bowles is categorically ineligible for execution, his claim cannot be defaulted or waived, and this Court should find his motion timely, and review it on the merits.

ii. If the Florida Supreme Court's Holdings in *Rodriguez* and *Blanco* Foreclose Relief to Intellectually Disabled Individuals like Mr. Bowles, They Violate the United States Constitution

To the extent this court finds that *Rodriguez v. State*, 250 So. 3d 616 (Mem.) (Fla. 2016), and *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), foreclose relief or review to individuals like Mr. Bowles, who have qualifying IQ scores between 70-75 and thus raise intellectual disability for the first time pursuant to *Walls* (making *Hall* retroactive to Florida litigants), this Court should depart from those precedents because they are contrary to the United States Constitution. While Mr.

Bowles argues that his intellectual disability is a categorical bar to his execution, *see supra* section (III)(C)(i), that cannot be waived or defaulted, even if it could be waived, the Florida Supreme Court's holdings in *Rodriguez* and *Blanco* violate the rights of individuals like Mr. Bowles by depriving him of due process guarantees of notice and an opportunity to be heard, by contravening the Supreme Court's holdings in *Atkins*, *Hall* and progeny, and by creating an unconstitutional risk of arbitrary and capricious imposition of the death penalty on such offenders, in violation of the Eighth Amendment.

a. *Rodriguez* and *Blanco* Violate Mr. Bowles's Due Process Rights to Notice and an Opportunity to Be Heard

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, the Supreme Court decided *Atkins*. At the time that *Atkins* was decided, although the Court was explicit about the prohibition on execution of the intellectually disabled, it "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 how to raise a meritorious *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 v. State*, 959 So. 2d 702, 712 (Fla. 2007). 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)).

To the extent the Florida Supreme Court's decision in *Blanco* found that an individual like Mr. Bowles who failed to raise their intellectual disability claim prior to the Florida Supreme Court's explicit holding of the hard-IQ cutoff of 70 in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), could have their claim time-barred, that decision violates the constitutional rights of such individuals. Like in *Blanco*, Mr. Bowles has an IQ score that is between 70-75, and he failed to raise his intellectual disability pre-*Cherry*; this does not mean, however, that Mr. Bowles or his counsel should have known to raise this claim based on *Atkins*. *Atkins* explicitly left to states to implement its constitutional restriction, and Florida's statute defined intellectual disability, in essence, to include only 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. § 921.127, not the medical definition of intellectual disability, as 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 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.").

Because individuals like Mr. Bowles were entitled to rely on this "plain meaning" interpretation of the Florida statute defining intellectual disability, which *Cherry* formally

recognized, until the Supreme Court rejected it in *Hall*, Mr. Bowles was not previously on notice that he should have filed a claim based on *Atkins* or anytime thereafter until the principles in *Hall* were made retroactive in *Walls*. Notice and a reasonable opportunity to be heard is critical to due process, *see Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985), and the "fundamental fairness" required by the Due Process Clause, *see Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment). That Mr. Bowles could potentially suffer the ultimate loss—his life—because he failed to meet a procedural requirement, when he could not have been on notice that he was eligible for relief, violates his due process rights. *See Mathews v. Elridge*, 424 U.S. 319, 348-49 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

b. *Rodriguez* and *Blanco* Violate *Atkins*, *Hall*, and Progeny, and Create an Unconstitutional Risk of Imposition of the Death Penalty on Intellectually Disabled Persons

To the extent that *Blanco* and *Rodriguez* foreclose individuals like Mr. Bowles from obtaining even *review* of their intellectual disability claims in Florida courts, this violates the Supreme 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, in violation of the Eighth Amendment.

As the Supreme 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. They are not free to create rules, or in this case, procedural bars, that are "rigid" and risk the execution of an intellectually disabled person.

The Supreme Court clearly stated that "[i]n *Atkins v. Virginia*, we held that the Constitution 'restrict[s] ... the State's power to take the life of' *any* intellectually disabled individual," not individuals who meet an arbitrary, later-created procedural requirement. *Moore*, 137 S. Ct. at 1048 (citation omitted) (emphasis in original). *Rodriguez* and *Blanco*, by creating for the first time a procedural impediment that an individual have previously raised an *Atkins* claim, with an IQ score that would have been fatal to the claim, before they can have their intellectual disability claim reviewed on the merits or seek the benefit of *Hall* (available to Florida litigants after *Walls*), creates such an arbitrary and unacceptable risk. Thus, their application in cases like Mr. Bowles's violates Eighth Amendment.

iii. Mr. Bowles's Motion is Timely Under Fla. R. Crim. P. 3.851(d)(2)(B), Because He Could Not Have Filed Before the Decisions *Hall v. Florida* and *Walls v. State*, Which Expanded the Category of Offenders Who are Ineligible for Execution

Fla. R. Crim. P. 3.851(d)(2)(B) provides for the timeliness of a successive R. 3.851 motion where "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

Mr. Bowles files the instant motion with a diagnosis of intellectual disability from two psychologists that relies, in part, on his IQ score of 74 on the WAIS-IV. *See* App. at 26; 23; 42-44. Only after the Supreme Court's decision in *Hall* would this IQ score legally qualify to establish his intellectual disability – prior to that, such a score would have been 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.").

There is no question that when the Supreme Court decided *Atkins*, it announced a new, substantive rule of constitutional law that was necessarily retroactive. *See, e.g., In re Holladay*, 331 F. 3d 1169, 1172-73 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in *Atkins* is retroactively applicable to cases on collateral review."). However, because the law in Florida indicated that only IQ scores of 70 or below were qualifying, *see Cherry v. State*, 959 So. 2d 702 (Fla. 2007), it was not until the Supreme Court decided *Hall v. Florida* that individuals like Mr. Bowles with IQ scores between 70-75 had a viable legal claim for intellectual disability. *See Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017) ("Instead, the language [in *Hall*] justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70.").

Thus, although *Hall* expanded the range of IQ scores that could establish that an individual was ineligible for execution, it was not until the Florida Supreme Court made *Hall* retroactive in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), that Mr. Bowles could file his R. 3.851 motion.[11] The Florida Supreme Court issued its opinion in *Walls* on October 20, 2016, and Mr. Bowles filed his R. 3.851 motion on October 19, 2017, within one year of *Walls*. *See, e.g., Foster*, 260 So. 3d at 179 (noting a renewed *Atkins* claim was "timely" filed because it was within the *Walls* deadline). Because Mr. Bowles could not have filed this motion before the decisions in *Hall* and *Walls*, and he timely filed within one year of *Walls*, his motion is timely pursuant to Fla. R. Crim. P. 3.851(d)(2)(B).

iv. Mr. Bowles Can Demonstrate Good Cause Under Fla. R. Crim. P. 3.203(f) to Excuse Any Delay in Filing this Motion

As this Court has previously ruled, Fla. R. Crim. P. 3.203 applies to this postconviction proceeding. *See* Order, *State v. Bowles*, No. 1994-CF-12188 (Duval Cty. Cir. Ct. March 5, 2019). The State has argued affirmatively that R. 3.203 applies in total, including subsection (f). *See* Motion to Compel Compliance with Rule 3.203(c)(2) in the Amended Successive Motion and Motion to Compel Disclosure of All Mental Health Experts' Reports, *State v. Bowles*, No. 1994-CF-12188 (Duval Cty. June 22, 2019). Subsection (f) of this rule provides:

> A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, *unless good cause* is shown for the failure to comply with the time requirements.

Fla. R. Crim. P. 3.203(f) (emphasis added).

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[11] Furthermore, this Court should note that nowhere in the *Walls* opinion, in which the Florida Supreme Court analyzed retroactivity pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), does the *Walls* Court require that an individual previously have raised an intellectual disability claim to get the benefit of *Hall* retroactivity.

a. The Standard for "Good Cause" in Rule 3.203(f)

"Good cause" under R. 3.203(f) has rarely been cited by the Florida Supreme Court, and even then, the references have not been extensive or substantive. *See Rodriguez v. State*, 250 So. 3d 616 (Fla. Aug. 2016) (noting that good cause under R. 3.203(f) was not established, but not discussing the standard).

In determining what good cause for Fla. R. Crim. P. 3.203(f) means, this Court should be guided by rules of statutory construction. *See Rowe v. State*, 394 So. 2d 1059, 1059 (Fla. Dist. Ct. App. 1981) ("When construing court rules, the principles of statutory construction apply.") (citations omitted). Thus, while "good cause" is not defined by R. 3.203, the interpretation of "good cause" in other parts of the Florida Rules of Criminal Procedure which affect motions such as the one, are instructive. *Cf. Ferguson v. State*, 377 So. 2d 709 (Fla. 1979) ("At the outset we note the basic rule of statutory construction that statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and should be construed together and compared with each other.") (citation omitted).

What constitutes "good cause" within other provisions of the Florida Rules of Criminal Procedure has been discussed by the Florida Supreme Court and several district courts of appeals, and these decisions are instructive. For example, the Florida Supreme Court in *State v. Boyd*, considered the meaning of "good cause" for an extension of time under Fla. R. Crim. P. 3.050 to file his postconviction R. 3.850 motion. *State v. Boyd*, 846 So. 2d 458, 459 (Fla. 2003). In Boyd, the court compared the "good cause" standard in R. 3.050 to other instances in which the good cause standard was used for extension of a time limitation pursuant to a civil statute. *See Boyd*, 846 So. 2d at 460. Specifically, *Boyd* noted:

> We defined good cause in [*In re Estate of*] *Goldman* [79 So.2d 846 (Fla. 1955)], finding that it is "a substantial reason, one that affords a legal excuse, or a cause moving the court to its conclusion, not arbitrary or contrary to all the evidence, and not mere ignorance of law, hardship on petitioner, and reliance on [another's] advice."

Id. (quoting *Dohnal v. Syndicated Offices Systems*, 529 So. 2d. 267, 269 (Fla. 1988)). "The determination of good cause is based on the peculiar facts and circumstances of each case," and is reviewable only under an abuse-of-discretion standard. *Id*. In *Boyd*, the Court considered the argument that good cause existed because Boyd "was transferred to another prison and his legal files had not arrived." *Boyd*, 846 So. 2d at 460. Reversing a trial court's summary denial of Boyd's R. 3.850 motion as untimely, *Boyd* said of these factual circumstances, "[s]uch allegations, if true, may constitute good cause under the rule," for an extension of time, making the postconviction motion timely. *Id*. *Boyd* also specifically instructed that on remand, the lower court proceedings "may include an inquiry into whether the facts alleged in the motion for extension are true." *Id*. (internal quotation omitted).

The *Boyd* instructions on good cause, and how lower courts should review "good cause" allegations for the purposes of timeliness under the Florida Rules of Criminal Procedure, support both how Mr. Bowles can establish good cause in this case, as discussed below, and the principle that the trial court should conduct an inquiry into whether the facts underlying his good cause argument "are true." *Id.* This necessarily supports Mr. Bowles's request for an evidentiary hearing in this case, which is the proper forum for the resolution of factual disputes.

Mr. Bowles can establish good cause in this case for why his R. 3.203 intellectual disability claim, presented in a R. 3.851 motion, should not be considered waived pursuant to R. 3.203(f). In

the following two sections, Mr. Bowles makes arguments in the alternative, either of which is sufficient for good cause.

b. Mr. Bowles Could Not Have Known to File His Intellectual Disability Claim Before The Florida Supreme Court Made *Hall* Retroactive in *Walls*, and This Is Good Cause under R. 3.203(f)

As discussed in *infra* section (III)(C)(iii), Mr. Bowles has a qualifying full-scale IQ score of 74, which would have been fatal to any claim of intellectual disability prior to the Supreme Court's decision in *Hall*, *see, e.g.*, *Foster*, 260 So. 3d at 178-79, and would not have retroactively applied to him until *Walls*. That Mr. Bowles could not have raised a successful intellectual disability until *Walls* should constitute good cause under R. 3.203(f).

Good cause for timeliness within the Florida Rules of Criminal Procedure can be met when "the failure to act was the result of excusable neglect." *Parker v. State*, 907 So. 2d 694, 695 (Fla. Dist. Ct. App. 2005) (quoting *Boyd*, 846 So. 2d at 460). In this case, Mr. Bowles has at least met that standard, because Mr. Bowles cannot have been expected to foresee *Hall*, and at minimum his interpretation of Florida law to foreclose relief to him was excusable. Between *Atkins* in 2002, and *Cherry* in 2007, Mr. Bowles and his counsel would have been left to ascertain the definition of intellectual disability in Florida, and that would have been controlled by the same statute that *Cherry* held the "plain meaning" dictated a hard-IQ cutoff of 70. In reality, although the *Cherry* decision did not issue until 2007, circuit courts were routinely finding *Atkins* claims precluded prior to *Cherry* on the basis of the same interpretation of the relevant statute. *See, e.g.*, *Zack v. State*, 228 So. 3d 41, 45-46 (Fla. 2017) (noting that Zack's pre-*Cherry Atkins* claim, filed in 2004, was denied by the circuit court because "previous evidence demonstrates that his I.Q. was well above the *statutory figure of 70 or below*.") (emphasis added).

To hold that because Mr. Bowles's initial state postconviction proceeding should have included an intellectual disability claim under *Atkins*, when such was foreclosed for his IQ score by Florida statute, would be akin to holding that Mr. Bowles should have interpreted that statute contrary to the Florida Supreme Court's eventual interpretation of the same in *Cherry*. He cannot be expected to know more than the Florida Supreme Court did. Thus, because Mr. Bowles could not have raised his intellectual disability before the decisions in *Hall* and *Walls*, this should constitute good cause for his failure to file pursuant to R. 3.203(f).

c. Even if the Florida Supreme Court's Decisions in *Rodriguez* and *Blanco* are Accepted as Standing for the Proposition that Mr. Bowles Should Have Known to File a Claim After *Atkins*, Counsel's Neglect Constitutes Good Cause Under R. 3.203(f)

Even assuming hypothetically that Mr. Bowles should have known to file his intellectual disability claim pursuant to *Atkins*, there are separate grounds under that premise for a finding of good cause here. If *Rodriguez* and *Blanco* are accepted as standing for the proposition that individuals with IQ scores between 70-75 should have known to file claims after *Atkins*, then Mr. Bowles's attorney was grossly negligent in failing to investigate, discover, and file a claim under *Atkins* and pursuant to Fla. Stat. § 921.137 and Fla. R. Crim. P. 3.203 in Mr. Bowles's case, particularly when Mr. Bowles had never been assessed for intellectual disability consistent with medical standards, and the record indicated that he had limited intellectual functioning and brain damage.

Mr. Bowles was not assessed for intellectual disability by Dr. McMahon when she gave him the WAIS-R in 1995. *See* App. at 78 (Dr. McMahon: "When I evaluated Mr. Bowles in the

1990s, I was not asked to evaluate Mr. Bowles for intellectual disability. Additionally, after Mr. Bowles received an IQ score of 80 on the WAIS-R that I administered to him, I would not have looked any further into intellectual disability unless I had been specifically asked to."); *see also Brumfield*, 135 S. Ct. at 2281 (observing there was "little reason" for a pre-*Atkins* defendant to "investigate or present evidence relating to intellectual disability.") Moreover, Dr. Krop did not administer a full scale IQ test, and did not assess Mr. Bowles for intellectual disability, during Mr. Bowles's postconviction proceedings. App. at 32.

When Mr. Bowles's postconviction counsel, attorney Frank Tassone, undertook representation of Mr. Bowles in February 2002, it was already the law in Florida that the intellectually disabled could not be executed. *See Kilgore*, 55 So. 3d at 507. Then, in June 2002, the Supreme Court announced its decision in *Atkins v. Virginia*, creating a categorical bar against the execution of the intellectually disabled. In June 2002, Mr. Tassone had not yet filed a Mr. Bowles's initial motion for postconviction relief, and would not do so until December 2002. Thereafter, Mr. Tassone even amended the postconviction motion in August 2003. PCR I at 21-101. Mr. Bowles's *Huff*[12] hearing occurred in February 2004, and an evidentiary hearing did not occur until February 2005. *See* PCR III.

In 2004, while Mr. Bowles's initial state postconviction motion was still pending, Rule 3.203 was promulgated. *See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563, 566 (Mem) (Fla. 2004) (hereinafter "Amendments"). The first iteration of Rule 3.203 specifically divided its application into three categories of defendants: pretrial defendants, defendants for which direct appeal was not complete and convictions were thus not yet final, and defendants whose convictions were final. *See Amendments*, 875 So. 2d at 565-566. Subsection (d) of the original Rule 3.203 specified procedures for filing intellectual disability claims in conformity with Rule 3.851 for individuals in postconviction postures such as Mr. Bowles. *See* Fla. R. Crim. P. Rule 3.203(d)(4)(A-F) (2004).

If the state of the law is as *Rodriguez* and *Blanco* suggest, then there was no question that in 2001, when Florida law barred the execution of the intellectually disabled, and in 2002, when *Atkins* held that execution of such individuals violated the Eighth Amendment, and in 2004, when the Florida Rules of Criminal Procedure laid out the process by which a death-sentenced individual whose conviction was final could get review of their sentence, that it was clear to attorneys practicing in Florida that intellectual disability claims should be investigated for death-sentenced clients. Mr. Tassone failed to

do so in Mr. Bowles's case, despite multiple pieces of record evidence indicating Mr. Bowles had limited intellectual functioning. That Mr. Tassone did not investigate the potential viability of an *Atkins* claim is supported by Dr. Harry Krop, who was retained by Mr. Tassone in state postconviction to conduct neuropsychological testing of Mr. Bowles, and recalled:

> I did not administer a full-scale I.Q. test to Mr. Bowles, as I was not then asked to evaluate Mr. Bowles for intellectual disability, and I have never been asked to do so. I, therefore, did not undertake an intellectual disability assessment which would have included the administration of the full I.Q. test being used at that time as well as a comprehensive assessment of adaptive functioning.

App. at 32.

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[12] Pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (holding that a defendant should have the opportunity to raise objections and alternative suggestions prior to the denial of a postconviction motion).

Moreover, it is not that an intellectual disability assessment as Dr. Krop describes would not have been warranted; when presented with much of the same information that is presented in this motion, Dr. Krop agreed:

> Based on materials I have reviewed, it is likely that Mr. Bowles is an intellectually disabled person. These materials are consistent with my prior opinion that Mr. Bowles has neuropsychological and cognitive impairments, which have pervaded Mr. Bowles's life. Additionally, the materials I reviewed are consistent with my prior opinion that Mr. Bowles's impairments would have had an origin as early as birth.

App. at 33.

While there is no right to effective assistance of postconviction counsel for the purposes of the Sixth Amendment, *see Kokal v. State*, 901 So. 2d 766, 778 (Fla. 2005), attorney misconduct or neglect could form the basis of "good cause" under R. 3.203(f). If a death-sentenced individual should have known to file an intellectual disability claim immediately after *Atkins* was decided, as the Florida Supreme Court has held in *Rodriguez* and *Blanco*, Tassone's failure to even investigate that possibility, when his client specifically had documented limited intellectual functioning and neuropsychological problems consistent with brain damage, *see* PCR. II at 240, 260, 267-70, constitutes "excusable neglect" sufficient for "good cause" under R. 3.203(f). *Cf. Parker*, 907 So. 2d at 695 (quoting *Boyd*, 846 So. 2d at 460).

D. Mr. Bowles is Entitled to an Evidentiary Hearing

This Court must take the facts pled by Mr. Bowles as true. Unless the files and records conclusively rebut his claims, the trial court must hold an evidentiary hearing to resolve those conflicts. Fla. R. Crim. P. 3.851(f)(5)(b); *see also Franqui v. State*, 59 So. 3d 82, 95-96 (Fla. 2011) (citing *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)). This includes an inquiry into the facts that Mr. Bowles asserts makes his motion timely, *see, e.g., Boyd*, 846 So. 2d at 460, and any such factual disputes would be properly resolved in an evidentiary hearing.

IV. CONCLUSION

The Court should rule that Mr. Bowles is intellectually disabled and vacate his death sentence under the Eighth Amendment.

Respectfully submitted,

/s/ Karin L. Moore
Karin L. Moore, Fla. Bar No. 351652
Capital Collateral Regional Counsel-N
1004 DeSoto Park Dr.
Tallahassee, FL 32301
karen.moore@ccrc-north.org

/s/ Terri Backhus
Terri Backhus, Fla. Bar No. 946427
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
terri_backhus@fd.org

CERTIFICATION OF COUNSEL

Pursuant to Fla. R. Crim. P. 3.851(e)(1)(F) and Fla. R. Crim. P. 3.851 (e)(2)(a), undersigned counsel hereby certifies that she has discussed the contents of this motion fully with Mr. Bowles, that she has complied with Rule 4-1.4 of the Rules of Professional conduct, and that this motion is filed in good faith.

/s/ Karin L. Moore
Karin L. Moore

CERTIFICATE OF SERVICE

I, Karin L. Moore, hereby certify that on July 1, 2019, I served this filing by electronic transmission via the e-portal to Terri Backhus, Chief, Capital Habeas Unit, Federal Public Defender for the Northern District of Florida (terri_backhus@fd.org); Assistant State Attorney Bernie (bdelarionda2@gmail.com); Assistant State Attorney Sheila Ann Loizos (sloizos@coj.net); Assistant Attorney General Jennifer A. Donahue (jennifer.donahue@myfloridalegal.com), and Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com) and (capapp@myfloridalegal.com); and Florida Supreme Court (warrant@flcourts.org).

/s/ Karin L. Moore
Karin L. Moore

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,

v. **Case No. 1994-CF-12188**

GARY RAY BOWLES,

Defendant.
_____/

APPENDIX TO
AMENDED RULE 3.851 MOTION
FOR POSTCONVICTION RELIEF IN LIGHT OF
MOORE v. TEXAS*, *HALL v. FLORIDA*, AND *ATKINS v. VIRGINIA

___ Probation Violator

___ Community Control Violator

___ Retrial

___ Resentence

State of Florida
v
GARY RAY BOWLES
Defendant

FILED
MAY 17 1996
Henry W. Cook
CLERK CIRCUIT COURT

In the Circuit Court, Fourth Judicial Circuit,
in and for Duval County, Florida
Division CR-A

Case Number 94- 12188-CF-A

Book 8433 Pg 1892

THE SENTENCE OF 5/17/96 IS SET ASIDE AND VACATED PER MANDATE OF 8/27/98

JUDGMENT

The defendant, GARY RAY BOWLES, being personally before this court represented by White & de la Rionda the attorney of record, and the state represented by _____, and having

___ been tried and found guilty by jury/by court of the following crime(s)

✓ entered a plea of guilty to the following crime(s)

___ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
1	Murder In The First Degree	782.04(1)(A)			Capital

Bk: 8433
Pg: 1892 - 1895
Doc# 96189810
Filed & Recorded
09/10/96
03:25:11 P.M.
HENRY W. COOK
CLERK CIRCUIT COURT
DUVAL COUNTY, FL
REC. .00

✓ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

___ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submit blood specimens.

___ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

State of Florida
v.

GARY RAY BOWLES
Defendant

Case Number 94- 12188-CF-A
Book 8433 Pg 1893

RE-RECORD Book 9408 Pg 1781

Imposition of Sentence Stayed and Withheld (Check if Applicable) _____

The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation/community control for a period of _____ under the supervision of the Department of Corrections (conditions of probation/community control set forth in separate order.)

DOC# 96189810

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

Fingerprints taken by: L. H. Gordon 9/68 (Name) BAILIFF (Title)

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, GARY RAY BOWLES, and that they were placed thereon by the defendar in my presence in open court this date.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 17 day of MAY, 19 96.

RE-RECORD
DOC# 92252426

Judge

101

Page 002 of 50

Form CCFB0A

Cert. Appx. 215

Defendant GARY RAY BOWLES Case Number NEW 94- 12188-CF-A OBTS Number 0006122014

SENTENCE

(As to Count 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record pd W. White, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on _____ (date) deferred imposition of sentence until this date.

X and the court having previously entered a judgment in this case on 5-17-96 (date) now resentences the defendant

____ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court That:

____ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes plus $ _____ as the 5% surcharge required by 938.04, Florida Statutes.

X The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To be Imprisoned (Check one; unmarked sections are inapplicable):

____ For a term of natural life.

X For a term of Death.

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

OTHER PROVISIONS

Retention of Jurisdiction ____ The court retains jurisdiction over the defendant pursuant to section 947.16(4), Florida Statutes.

Jail Credit ____ It is further ordered that the defendant shall be allowed a total of 654 days as credit for time incarcerated before imposition of this sentence.

Prison Credit ✓ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

Consecutive/ Concurrent As To Other Counts ____ It is further ordered that the sentence imposed for this count shall run (check one)_____ consecutive to_____ concurrent with the sentence set forth in count _____ of this case.

Defendant GARY RAY BOWLES Case Number 94- 12188-CF-A

OTHER PROVISIONS

Consecutive/ Concurrent As To Other Convictions

____ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run
(check one) ____ consecutive to ____ concurrent
with the following:
(check one)

_____ any active sentence being served.

_____ specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Duval County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends _____

DONE AND ORDERED in open court at Jacksonville, Duval County, Florida, this 7 day of Sep, 19 99.

Judge

Form CCFM0E

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 94-12188-CF
DIVISION: CR-A

STATE OF FLORIDA

vs.

GARY RAY BOWLES
_____/

SENTENCING ORDER

GARY RAY BOWLES is before the Court for sentencing having pleaded guilty on May 17, 1996, to the crime of Murder in the First Degree. The crime was committed on or about November 16, 1994. On May 25, 1999, a jury was selected for the penalty phase and from May 25, 1999 through May 26, 1999, evidence was heard related to aggravating and mitigating factors. On May 27, 1999, the jury returned a 12-0 recommendation that the Defendant be sentenced to Death for the murder of Walter Jamel Hinton. On June 24, 1999, a second sentencing hearing was afforded the Defendant to present evidence.

The Court has considered the evidence presented in the penalty phase and sentencing hearing, has had the benefit of argument and memoranda from the parties, and now weighs the statutory aggravating factors and the mitigating factors as required by law.

1. **The Defendant has been previously convicted of another capital felony or of a felony involving the use or threat of violence to some person.**

The Defendant has been previously convicted of two other capital felonies and of five crimes of violence against persons.

A. Sexual Battery and Aggravated Battery Convictions in Hillsborough County, Florida.

On September 27, 1982, in Hillsborough County, Florida, the Defendant was convicted of Sexual Battery and Aggravated Battery. These offenses involved an extremely high degree of violence. Corporal Jan Edenfield of the Hillsborough County Sheriff's Office testified that the Defendant between the dates of June 3, 1982 and June 4, 1982, beat and raped his girlfriend. The victim was brutally attacked in the motel room which they shared. She suffered hematomas, contusions to her head, face, neck, and chest, as well as bites to her breasts. Lacerations and cuts were also observed in her vagina and rectum.

On September 27, 1982, the Defendant was sentenced on each count to two consecutive three year prison terms.

B. Robbery Conviction in Volusia County, Florida.

On July 18, 1991, the Defendant was convicted in Volusia County, Florida of Unarmed Robbery. This offense involved a small amount of violence. In this crime, the Defendant pushed a woman down and stole her purse.

C. First Degree Murder, Armed Robbery and Burglary of a Dwelling With a Battery in Volusia County, Florida.

On March 15, 1994, the Defendant robbed and killed John Roberts while burglarizing his home. The facts of this case are

eerily similar to the facts of the instant case. The victim had permitted the Defendant to move into his home a few days prior to the murder. Roberts became angry with the Defendant when he learned that the Defendant had made long distance phone calls to a lady friend. The Defendant became angered when Mr. Roberts confronted him and the lady friend about it. One day, the Defendant entered the home and approached the victim from behind while he was sitting on the sofa. He removed the lamp shade from a lamp and used the lamp to hit the victim over the head. A violent struggle ensued during which the Defendant strangled Mr. Roberts and stuffed a rag into his mouth. The Defendant emptied Mr. Roberts' pockets, took his credit cards, money, keys and wallet, and left the scene. Mr. Roberts sustained injuries caused by blunt trauma to his head and a fractured neck. Other wounds were also found.

On August 6, 1997, the Defendant was convicted of First Degree Murder and Armed Burglary of a Dwelling with a Battery and sentenced to life in prison.

D. <u>First Degree Murder in Nassau County, Florida.</u>

The Defendant on or between May 18, 1994, and May 19, 1994, murdered Albert Morris. Mr. Morris had also befriended Mr. Bowles and allowed him to stay in his home. While at a bar the Defendant and Mr. Morris got into an argument and physical fight which continued at another bar. The Defendant struck Mr. Morris

over the head with a candy dish and a struggle ensued resulting in the victim being beaten and shot. The Defendant also strangled Mr. Morris and tied a towel over his mouth. Mr. Morris' injuries included head injuries, a shot to the chest, and a fractured hyoid bone.

On October 10, 1996, the Defendant was convicted of First Degree Murder and sentenced to life in prison.

The Defendant's prior convictions, excluding the robbery conviction in Volusia County in 1991, are marked by extreme violence. The State has proved this aggravating factor beyond any reasonable doubt.

2. **The crime for which the Defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of or an attempt to commit the crime of robbery.**

Mr. Hinton was found inside his locked home on November 22, 1994. His sister and her then fiancé became concerned when he failed to respond to telephone calls and knocks on his door. After several days went by without word from Mr. Hinton, the fiancé broke into his locked mobile home and found his dead body wrapped in sheets and bedspreads.

Mr. Hinton's watch, car keys, automobile and stereo equipment were missing from the home. Stereo wires had been cut. A knife was on the floor next to where the stereo equipment had formerly been. His wallet was found on the floor next to the bed. The

Defendant was seen after the murder driving Mr. Hinton's car and wearing his watch.

Although the Defendant admits that property of Mr. Hinton was taken, he submits that it was an afterthought and not the motivation for the murder. He suggests that his subsequent abandonment of the automobile and watch proves that he was not motivated by pecuniary gain. However, his prior statements prove otherwise. In his statements to Agent Dennis Reegan of the FBI, the Defendant stated he expected to find money on the victim or in the trailer. When he didn't find any, he felt stuck and unable to flee because he had no money and no other place to go. This evidence establishes beyond a reasonable doubt that the murder was committed in the course of an attempted robbery or robbery. The fact that money was not there to be taken does not preclude the finding of this aggravating circumstance.

3. <u>The Crime for Which the Defendant is to be Sentenced was Committed for Financial Gain.</u>

This aggravating factor was proved beyond a reasonable doubt, but merges with the above aggravating factor and has been treated as one by the Court.

4. <u>The Crime for which the Defendant is to be Sentenced was Especially Heinous, Atrocious or Cruel.</u>

While Mr. Hinton was sleeping, the Defendant went outside the mobile home and lifted from the ground a 40-pound cement stepping stone and brought it inside. He placed the stepping stone

on a table in the living room area, sat down and thought for a few moments. He then entered Mr. Hinton's bedroom and dropped the cement stepping stone on Mr. Hinton's face. Mr. Hinton sustained a skull fracture which extended on the right side of his face across his cheek to the roots of his teeth. Despite the force of this blow, Mr. Hinton did not die nor lose complete consciousness. In an effort to save his life, Mr. Hinton struggled with the Defendant. The Medical Examiner observed on Mr. Hinton's body five (5) broken ribs, abrasions to the front and back of his right forearm, and more abrasions on the outside of his left knee. These findings corroborate the Defendant's statement that Mr. Hinton continued to struggle for his life after the Defendant dropped the 40-pound stone on his face.

The findings of the Medical Examiner also corroborate the Defendant's statement that he then choked Mr. Hinton with his hands. Mr. Hinton had hemorrhaging on the right side of his neck. The helix bone, a "U" shaped bone found at the top of the neck, and the hyoid bone located underneath his Adam's Apple were fractured. Toilet paper was stuffed down his throat and a rag was placed over the paper which protruded from his mouth. The Medical Examiner "logically assumed" that Mr. Hinton was strangled to death or to unconsciousness and these items were then stuffed down his throat blocking his airway and resulting in his death.

The Defendant argues in his Memorandum that although the intensity of the struggle was great and resulted in suffering by Mr. Hinton, there is no evidence that the Defendant intended to do anything but to kill by whatever means were at hand. He further argues that he did not set out to strangle, choke, or beat Mr. Hinton to death. Lastly, he argues that he was intoxicated, which he suggests negates the finding that he intended to cause pain.

The Court finds that Mr. Bowles was, as he argues, prepared to take the life of Walter Hinton by any means available. Although this Court cannot determine if Mr. Bowles enjoyed the suffering of Walter Hinton, he was certainly indifferent and determined to take his life. Since the Defendant could not have known with certainty whether crushing Walter Hinton's face with a 40-pound stepping stone would take his life, he was prepared to inflict further suffering. This is just what he had been prepared to do only months earlier when he took the life of Mr. Roberts in Volusia County.

Finally, the fact that Mr. Hinton was likely unconscious when the toilet paper and rag were stuffed down his throat, does not bar a finding that the Defendant's conduct was consciousless, pitiless, heinous, atrocious and cruel. Without a struggle, the Defendant's efforts to strangle Mr. Hinton would have, according to the medical examiner, taken at least 30 to 45 seconds before a loss of consciousness. With a struggle, Mr. Hinton would have endured the

fright, pain, and fear of being strangled for an even longer period.

The Court finds beyond a reasonable doubt that this aggravator has been proved.

5. **The Capital Felony was Committed in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification.**

The Defendant does not suggest that this murder was committed out of some "moral or legal justification." He argues that it was not done in a cold or calculated manner exhibiting the degree of heightened premeditation necessary for this Court to find this aggravating circumstance.

The Defendant admitted that he went outside the mobile home, picked up a 40-pound concrete stepping stone, brought it inside and sat it on a table. He then sat down and thought for a few moments. Then, with deliberate ruthlessness, walked into Mr. Hinton's bedroom and crushed his face with the stone. No evidence exists that the act was prompted by emotional frenzy, panic, or a fit of rage. The Defendant selected the opportune time, while Mr. Hinton was sleeping, to overpower him and take his life.

The State argues that the Defendant was angry that Mr. Hinton had reneged on his agreement to allow the Defendant to stay in his home in exchange for the help the Defendant provided Mr. Hinton in moving some furniture from Georgia to Jacksonville. The State then suggests that the murder of John Roberts on March 15, 1994, in

Volusia County, and the murder of Albert Morris on or about May 18 or 19, 1994, in Nassau County, "help in showing why this murder was cold, calculated and premeditated." The State argues that either the Defendant wanted something his victims had or was upset at the way he was treated by each victim. The State suggests the killings were revenge for the way each victim had treated the Defendant.

The murder of Mr. Roberts, committed just months earlier in a manner strikingly similar to the way Mr. Hinton's life was taken, convinces the Court that the Defendant devised his plan to take the life of Walter Hinton no later than from the moment he stepped outside the mobile home to retrieve the stepping stone which he later used to crush Mr. Hinton's face. This was a cold and calculated act done with heightened premeditation.

In reaching this conclusion, the Court finds that the Defendant was partly motivated to take money and property of Mr. Hinton; and also motivated by his anger at Mr. Hinton for earlier removing him from his home. The similarity of this murder and the murder of Mr. Roberts in Volusia county eliminates any doubt that the Defendant's intentions were to kill and not merely to injure when he retrieved the stone. The point in time when he went to get the stone would be the latest point in time that he planned the death of Walter Hinton. As he argues in his Sentencing Memorandum, he thought the forty pound stone would achieve his purpose. When it did not, he was prepared, as he suggests, to take Mr. Hinton's

13 of 20

013

life by "whatever means were at hand." As the State argues, this plan may have been devised earlier. However, the court concludes that the period of time from retrieval of the stone until attack was sufficient to sustain the requirement of heightened premeditation, and finds this aggravating factor has been proved beyond a reasonable doubt.

7. **The Crime for which the Defendant is to be Sentenced was Committed while he was on Felony Probation.**

The Defendant was on probation for the robbery he committed in Volusia County. He was sentenced on July 18, 1991, to four (4) years in prison followed by six (6) years probation. The Court finds beyond a reasonable doubt that there are five[1] separate aggravating factors.

The Court gives tremendous weight to the Defendant's previous convictions of other capital felonies and felonies involving the use of threat or violence to some person. These convictions establish beyond a reasonable doubt that this Defendant possesses an extraordinary propensity for killing and violence. The Court gives great weight to the fact that this murder was heinous, atrocious and cruel; and cold, calculating and premeditated. The Court gives significant weight to its finding that this murder was motivated by pecuniary gain. The Court has given some weight to

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[1]The Court finds that two aggravators merge, to-wit: The offense was committed while the Defendant was engaged in the commission of or an attempt the crime of robbery and the offense was committed for pecuniary gain.

the fact that the Defendant was on probation for strong armed robbery at the time of this offense. None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court. Nothing except as previously indicated was considered as aggravation.

B. Statutory and Other Mitigating Factors.

The Defendant asserts the following as statutory or other mitigating factors reasonably established by the greater weight of the evidence:

1. **The Defendant suffered from extreme emotional disturbance at the time of the murder.**

The Defendant asserts that evidence of his drinking and abusive childhood requires the finding that at the time of Mr. Hinton's murder, he was suffering from an extreme emotional disturbance. His theory, unsupported by expert testimony, is that the rage within him was unleashed by the use of alcohol and drugs. He argues that the 1982 prior violent felony in which he raped and battered his girlfriend, and Mr. Hinton's murder, can only be explained in the context of an underlying emotional disturbance.

The Court finds that the Defendant is an alcoholic and has been using drugs and alcohol since his youth, and that many members of his family and extended family are alcoholics. However, this evidence does not support a finding of this mitigator unless being an alcoholic, standing alone, meets the definition of an extreme emotional disturbance. If so, then the Court would find

this statutory mitigator to have been met by the evidence, but entitled to little weight.

2. **The capacity of the Defendant to appreciate the criminality of his acts, was, at the time of the homicide, substantially diminished.**

The Defendant contends that his level of intoxication at the time of the murder substantially reduced his ability to appreciate the criminality of his conduct. On the day of the murder he had been drinking heavily. He drank six beers on his way to the train station with Mr. Hinton and Mr. Smith. He also smoked marijuana. When he returned to Mr. Hinton's home, he continued to drink. Although the Court finds that the Defendant was under the influence of drugs and alcohol at the time of the murder, the greater weight of the evidence does not sustain a finding that his ability to appreciate the criminality of his acts was substantially diminished.

To commit this crime, the Defendant waited for Mr. Hinton to fall asleep. He needed a hard object to overpower Mr. Hinton. He thought of a stepping stone outside, which was embedded in the ground. He had to lift this heavy object and bring it inside. He then had to enter quietly into Mr. Hinton's room. He had to aim the stone so it fell squarely on Mr. Hinton's head. He had to fend-off Mr. Hinton's efforts to save his life. He was able to think, act, and react in order to commit this murder, despite being under the influence of drugs and alcohol. When he was arrested

approximately six days later, he was able to relate with clarity and detail how he killed Mr. Hinton. His only omission was how he stuffed toilet paper down Mr. Hinton's throat. He was also able to tell of events leading up to, and following, the murder. These facts prove to the Court that although he had ingested a substantial amount of alcohol and smoked marijuana, his ability to appreciate the criminality of his conduct was not substantially diminished.

The Defendant also argues that there was nothing in his "post-murder actions" to indicate that he was acting in a normal, sober manner. After the killing, he was able to drive a car, purchase additional liquor, pick-up a woman on the beach and bring her back to the mobile home where he committed the murder. He was also sufficiently alert to keep her from the room in which Mr. Hinton's dead body lay covered in sheets. These events do not describe an individual whose ability to function and appreciate the criminality of his acts were substantially diminished. On the contrary, this evidence strongly suggests that Mr. Bowles was minimally affected by alcohol and drugs, despite his extensive use. The Court has given no weight to this factor.

3. <u>Background and/or Personal History of the Defendant.</u>

The Defendant enjoyed a good childhood until age six or seven. However, by age ten he was sniffing glue and huffing paint. The discipline utilized by both his stepfathers was abusive.

Beatings were administered on occasion with belts and fists. His mother testified that on occasion when she returned from work, she observed him bruised from the whippings. His mother was the victim of severe abuse which was witnessed by the defendant and his siblings.

The Defendant further asserts as mitigation the fact that he never had a positive male role model in his life. He was abandoned by his mother, who chose an abusive stepfather over him. He did not receive parental encouragement to perform in school. He did not complete junior high school and did not receive the necessary educational tools to function well as a productive member of society. He also asserts his intoxication at the time of the offense, and extensive alcoholic background, to support this element of mitigation.

The Defendant further submits that he provided testimony on behalf of the State of Florida in a case where a man was raped in a jail in Tampa, Florida. He further asserts that he cooperated by confessing to the instant crime and other crimes, and by voluntarily pleading guilty in the instant case and in two other homicide cases.

The Court has carefully considered the evidence regarding the Defendant's abusive childhood and the severe abuse endured by his mother which he witnessed as a child. Those factors are given significant weight. The Court has also given some weight to the

Book 9408 Pg 798

Defendant's history of alcoholism and the absence of a true father figure in his home during his childhood. The Court has given little weight to the Defendant's failure to complete junior high school and lack of an education; or his cooperation in this and other cases; or his voluntary plea of guilty to this and other murders.

The Court has also given little weight to the defendant's use of intoxicants and drugs at the time of the murder. The frequency with which the Defendeant has used this as an explanation to law enforcement officers, when confronted about his violent actions, causes the court to give this factor less weight as mitigation and more weight as a convenient, but poor excuse. The Court has not given any weight to the circumstances which caused the Defendant to leave home or his circumstances after he left home. As to the latter, no evidence was presented.

After carefully considering and weighing the aggravating and mitigating circumstances found to exist in this case, and mindful that human life is at stake in the balance, the Court finds that the aggravating circumstances proved beyond a reasonable doubt overwhelmingly outweigh the mitigating circumstances reasonably established by the evidence.

Accordingly, it is **ORDERED AND ADJUDGED** that the Defendant, GARY RAY BOWLES, is hereby sentenced to death for the murder of Walter Jamel Hinton. The Defendant is hereby committed to the

custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law. May God have mercy on his soul.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 7th day of September, 1999.

JACK M. SCHEMER
CIRCUIT JUDGE

Copies to:

Bernardo de la Rionda
Assistant State Attorney

William P. White
Chief Assistant
Public Defender's Office

RE-RECORD

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Pg: 780 - 799
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HENRY W. COOK
CLERK CIRCUIT COURT
DUVAL COUNTY, FL
REC. .00

Book 9408 Pg 799

DECLARATION/REPORT OF DR. JETHRO TOOMER
Pursuant to 28 U.S.C. § 1746 and Section 92.525 of Title VII, Florida Statutes

I, Jethro Toomer, Ph.D., hereby testify, affirm, and declare as follows:

1. I am a licensed clinical psychologist. My practice includes clinical and forensic psychology. I have been qualified by federal and state courts in several jurisdictions to testify about questions of intellectual disability and other forensic issues. I am experienced in the assessment and testing of individuals on the question of intellectual disability, and I also have expertise in the assessment of adaptive deficits. I have served as a professor of psychology.
2. I am preparing this report in declaration form as I understand it will be submitted to both the state and federal courts.
3. I am presently retained by the Office of the Federal Public Defender, Northern District of Florida, Capital Habeas Unit ("CHU"), to provide expert services and opinions related to the question of intellectual disability in the case of Gary Ray Bowles. In aid to the development of my opinions, I reviewed voluminous records concerning Mr. Bowles that were provided to me by the Office of the Federal Public Defender. I am familiar with his history of intellectual, adaptive, social and mental functioning. In addition, I tested Mr. Bowles's intellectual functioning using the standardized instrument known as the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). This test is the most widely used current standardized, individually administered, full-scale intelligence assessment instrument.
4. I provided my conclusions about Mr. Bowles's intellectual disability diagnosis to federal counsel, and I understand federal counsel relayed my conclusions to state counsel, Jerry Shea, and that Mr. Shea, with federal counsel's assistance, described my conclusions in a

motion for post-conviction relief filed on behalf of Mr. Bowles. My conclusions were the basis of the motion filed by Mr. Shea on behalf of Mr. Bowles, as this report highlights.

5. The diagnostic criteria for Intellectual Disability include sub-average intellectual functioning, occurring together with deficits in adaptive functioning, with onset during the developmental period (pre-18 years of age). With respect to the first criterion, IQ test scores are an approximation of intellectual functioning. An IQ test score of 75 or below is currently considered to be within the confidence band for Intellectual Disability. Evidence of significant adaptive deficits, the second criterion, addresses the individual's functional ability. Adaptive deficits are described in the Diagnostic and Statistical Manual, Fifth Edition (DSM-V) as how well an individual is able to meet community standards of personal independence and social responsibility. Adaptive deficits are assessed within three "domains" under the current standards of the American Association on Intellectual and Developmental Disabilities (AAIDD) and the DSM-V. The domains are the conceptual, social, and practical domains. Deficits within only one of the three domains is sufficient for a diagnosis of intellectual disability under the AAIDD and the DSM-V criteria. The last factor requires evidence that the intellectual disability began in childhood or early adolescence, meaning that it began due to factors arising before age 18 as opposed to factors arising later, such as a medical condition developed in adulthood.

6. Intellectual functioning refers to a person's ability to reason, problem solve, and use or understand abstract concepts. To meet the criterion of deficits in intellectual functioning for the purposes of an intellectual disability diagnosis, the individual must have an IQ score of approximately 75 or below on an individually administered full-scale test. As indicated, I tested Mr. Bowles using the most widely used current standard instrument, the WAIS-

IV. I tested Mr. Bowles's intellectual functioning using the WAIS-IV at the Union Correctional Facility (UCI), in October of this year. Mr. Bowles received a full scale IQ score of 74. This falls within the range for intellectual disability.

7. I am aware that Mr. Bowles was given the Wechsler Adult Intelligence Scale-Revised (WAIS-R) test prior to this trial by Dr. Elizabeth McMahon, who reported a full-scale score of 80. During prior proceedings, this score was not adjusted for the Flynn Effect. The Flynn Effect is a well-known psychometric rubric used for test scores achieved over periods of time after a test's publication. The general principle from the Flynn Effect is that an IQ score should be corrected downward at a rate of at least 0.3 points per year from the date when the test was normed. The WAIS-R was normed in 1981, and it is my understanding that this test was given by Dr. McMahon in 1995 to Mr. Bowles. Adjusted for the Flynn effect, this WAIS-R score yields an IQ score of 75-76, which is not inconsistent with the current WAIS-IV results. It is also noteworthy that the WAIS-IV, which was not available to Dr. McMahon, is a more modern, updated, and psychometrically accurate instrument. For example, the WAIS-IV assesses fluid intellectual functioning, where the WAIS-R had a greater focus on crystallized intelligence. As such, the WAIS-IV is, in my opinion, a better measure of Mr. Bowles's IQ.

8. In terms of adaptive functioning, Mr. Bowles has significant impairments in the recognized domains for adaptive functioning (conceptual, social and practical). Significant deficits in only one of the three domains is necessary for a diagnosis of Intellectual Disability. Skills included in the conceptual domain relate to executive functioning (judgment, planning, impulse control, abstract thinking, and problem solving), memory, language, functional academic skills, and self-direction. Skills in the social domain include social judgement

and competence, interpersonal responsibility, self-esteem, gullibility, naiveté, following rules, obeying law, and avoiding victimization. Skills in the practical domain include activities of daily living/learning and self-management across life settings, occupational skills, use of money, health and safety, and other self-care skills. As I noted, an individual does not need to show deficits across all three domains to meet the criteria for Intellectual Disability, and an intellectually-disabled individual's deficits in one domain may also coexist with strengths in other domains or in other functions within the same domain. The diagnosis is based on weaknesses (or deficits), and is not negated by strengths.

9. Mr. Bowles has exhibited significant deficits in the conceptual domain. I directly observed evidence of limits in Mr. Bowles's conceptual skills in the course of my evaluation. Like other intellectually disabled individuals, Mr. Bowles is overly concrete in his thinking. The records I reviewed highlight additional conceptual deficits. For instance, Dr. Krop noted "significant deficits" in Mr. Bowles's memory, particularly working memory, and described him "cognitively inefficient in general. I mean he is just not sharp, not good." He found that Mr. Bowles was deficient in his learning capacity. There is evidence also of this in Mr. Bowles's academic record beginning in the sixth grade. Of note, as I informed counsel, sixth grade is where learning begins to move from concrete to more abstract areas.

10. Mr. Bowles also displayed social adaptive deficits. For example, he is deficient in his capacity to perceive social cues accurately. He has relied on others for help with day to day life skills, has been socially naïve and gullible, and was easily victimized. He has trouble in assessing consequences of a situation, particularly in social situations. Since his childhood, these social deficits have been a pattern for him.

11. Mr. Bowles also exhibits practical adaptive deficits. As noted, he was dependent on others. He has displayed an inability to function in the world. He often functioned day to day on a hand to mouth basis, and could only be employed in unskilled labor positions involving repetitive tasks.

12. Mr. Bowles's deficits had their onset during the developmental, pre-18 period. Mr. Bowles's record of school failure is telling. Mr. Bowles's grades dropped before he ultimately left school. His record provides a common pattern seen in those with intellectual disability, as he declined academically when learning moved from more concrete concepts, as in earlier grades, to more abstract concepts in later grades. His practical and social deficits, like his conceptual deficits, also had their onset in childhood, pre-18. There is no evidence of an adult medical condition that would provide a trigger for the onset of his intellectual disability, providing for a professional inference that the onset of his disability was in childhood.

13. It is noteworthy that the materials I reviewed are replete with references to childhood risk factors for intellectual disability in Mr. Bowles's case. Information concerning risk factors is helpful to the diagnosis because it sheds light on the onset of the condition prior to age 18. For instance, chronic social deprivation is a risk factor for intellectual disability, and Mr. Bowles's chronic social deprivation is shown by abuse, abandonment, and trauma during his childhood. Mr. Bowles was heavily abused by his step-fathers, and likewise witnessed the abuse of his brother, Frank Bowles, and his mother, Frances Carol Graves. The abuse from one of his stepfathers, Chet Hodges, to his mother became so bad that she attempted suicide and eventually divorced Hodges. One of their stepfathers, Bill Fields, would beat both Mr. Bowles and his brother Frank. Mr. Bowles's beatings were worse.

Bruises and other injuries were observed on Mr. Bowles following the abuse. It also appears his only consistent parental figure, his mother, often abandoned him. By twelve or thirteen, Mr. Bowles would stay in a shed or abandoned house. Mr. Bowles has a history of childhood substance abuse, another risk factor for intellectual disability. There is also evidence of brain damage, another risk factor. My testing was consistent with such a cerebral impairment. I find it significant that Dr. Harry Krop previously indicated frontal lobe damage. The frontal lobe is the area of the brain involved in executive functions. It is involved in problem solving, decision-making, and impulse control, and contains some memory functions, all of which appear to be areas of weakness for Mr. Bowles.

14. In conclusion, based on my review, testing, and evaluation, I have concluded that Mr. Bowles meets the diagnostic criteria for a diagnosis of Intellectual Disability, and I make that diagnosis. Mr. Bowles has a qualifying IQ score within the accepted range, has significant adaptive deficits, and his disability had its onset prior to the age of 18.

15. I hold all my opinions as stated herein to a reasonable degree of professional certainty.

I, Jethro Toomer, Ph.D., declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Jethro Toomer Ph.D.
Dr. Jethro Toomer, Ph.D.

12-5-17
Date

Barry M. Crown, Ph.D., FACPN
Barry M. Crown, Ph.D. and Associates, P.A.
105 E. Gregory Square, Suite 2A
Pensacola, Florida 32502
Telephone: (850) 439-5550
Fax: (877) 483-4856
bmcrown@barrycrown.com

Billy H. Nolas, Esquire
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301

Re: Gary Ray Bowles, 01/25/62

Dear Mr. Nolas:

I was asked by you to evaluate Gary Ray Bowles and provide an opinion on whether he suffers from any cognitive impairments indicative of brain damage. I am a licensed psychologist. I specialize in the areas of clinical and forensic psychology and neuropsychology. I originally provided my views to you in February 2018, and this summary follows.

In preparation for my evaluation of Mr. Bowles, I reviewed many background and court records about him and his case. I also assessed and tested Gary Ray Bowles on February 1, 2018. He was cooperative and put forth good effort. The errors he made relate to his underlying deficiencies, not to any lack of effort. There was no evidence of malingering when I evaluated Mr. Bowles.

On the RBANS, Mr. Bowles received a composite score in the 14th percentile for his age group. Mr. Bowles also presented with constructional deficits on the Reitan-Indiana Aphasia Screening Test. For example, during this exam Mr. Bowles mistakenly converted a simple subtraction problem into a division problem. Additionally, when instructed to place his left hand on his right ear, Mr. Bowles places his left hand on his left ear, which is indicative of cerebral disturbance.

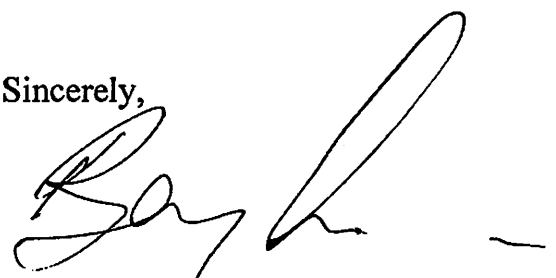
On the Shipley Abstractions, he received an abstraction age of 11 years, 0 months. Mr. Bowles also performed below average in categorical fluency, in the 12th percentile for his age range, and letter naming, in the 6th percentile, on the Test of Verbal Conceptualization and Fluency. This indicates mild to moderate impairment. He scored within the average to above average range on the Comprehensive Trailmaking Test, and within normal limits on the Rey 15 Figure Test.

As a result of my testing, interview with Mr. Bowles, and review of the records, I conclude that Mr. Bowles suffers from brain damage, particularly in the tertiary area of the frontal lobe of the brain. Mr. Bowles's brain damage would have had a profound effect on his ability to control his impulses, exercise reasoning and judgment, and ability to understand the consequences of his actions, both in the present and in the future. He would have been impaired in all of these areas on a daily basis, but these impairments would be even more pronounced under stress.

His brain damage is consistent with the use of an inhalant (commonly known as "huffing"). References in the record I reviewed, as well as my interview with Mr. Bowles, reflected that he started using inhalants, in the form of glue, paint, and gasoline, from about 8 years of age until he was a teenager, supporting this finding. His brain damage is also consistent with an even earlier origin, including a possibly perinatal origin.

Mr. Bowles's brain damage supports the finding that he is an intellectually disabled person with adaptive deficits. Given this underlying impairments, the existence of conceptual deficits is manifest. So too are his impairments consistent with deficits in the practical and social skills adaptive areas.

Sincerely,



Barry M. Crown, Ph.D.
Dated: March 2 2018

SUPPLEMENTAL DECLARATION/REPORT OF DR. JETHRO TOOMER
Pursuant to 28 U.S.C. § 1746 and Section 92.525 of Title VII, Florida Statutes

I, Jethro Toomer, Ph.D., hereby testify, affirm, and declare as follows:

1. I am a licensed clinical psychologist. I was retained by the Office of the Federal Public Defender, Northern District of Florida, Capital Habeas Unit ("CHU"), to provide expert services and opinions related to the question of intellectual disability in the case of Gary Ray Bowles.

2. In December 2017, I initially provided my opinions in the form of a Declaration/Report to the CHU. I understand the CHU counsel provided my Declaration/Report to attorney Francis Shea, who was appointed in state court. I am now providing this Declaration/Report in light of my ongoing assessment of Mr. Bowles and his intellectual functioning. I intend for this Declaration/Report to serve as a supplement to my December 2017 Declaration/Report.

3. I am aware of the report of Dr. Barry Crown, dated March 2, 2018. Dr. Crown is known to me as a qualified and experienced clinical psychologist, with expertise in neuropsychology. I am aware he evaluated Mr. Bowles in February 2018 and provided his opinions to the CHU in the form of the aforementioned report, which I have reviewed. I find Dr. Crown's opinions regarding Mr. Bowles's brain damage and intellectual impairments significant, and consistent with my opinion that Mr. Bowles is intellectually disabled.

4. In March and April 2018, I evaluated Mr. Bowles's adaptive functioning with a standardized instrument, the Scales of Independent Behavior-Revised (SIB-R). The SIB-R is specifically designed to measure an individual's adaptive functioning, and is a well-known and valid testing instrument for this purpose. The SIB-R has multiple subscales of adaptive behaviors. Deficits in these subscales highlight deficits in the more general

clusters relevant to an adaptive behavior, which includes motor skills; social interaction and communication; personal living skills; and community living skills.

5. The SIB-R assessment is commonly conducted through the use of a third-party reporter, in addition to other sources. Individuals with low intelligence are often not valid reporters of their own functional abilities, and the use of third-party reporters is frequently a more useful gauge of their actual functioning.

6. In the case of Mr. Bowles, I conducted interviews with two close friends and sources of support for Mr. Bowles: Julian Owens, who frequently interacted with Mr. Bowles in Mr. Bowles's young adulthood, and Minor Kendall White, who interacted with Mr. Bowles beginning in Mr. Bowles's teenaged years through his adulthood. Both of these individuals are appropriate sources, as they have known and observed Mr. Bowles's functioning in varied community settings. The analysis of the data received from Mr. Owens and Mr. White allows for integration of reported adaptive behavior information. In this case, the examination revealed performance deficits of defined skills for Mr. Bowles, consistent with adaptive deficits.

7. My examination revealed information concerning adaptive behavior deficits for Mr. Bowles, within three clusters previously listed: community living skills; personal living skills; and social interaction and communication skills.

8. My analysis revealed deficits in several areas within those named clusters. These include deficits in the areas of language comprehension; language expression; personal self-care; time and punctuality; work skills; and understanding of money and value.

9. These results are consistent with a finding of deficits within the three broad domains recognized by the American Association on Intellectual and Developmental Disabilities

(AAIDD) – i.e., the conceptual, social, and practical domains. Mr. Bowles has substantial adaptive deficits in each of those domains, as reflected by his history. His deficits have impaired his ability to function in the world, in a manner consistent with a diagnosis of intellectual disability. Accordingly, my further assessment of Mr. Bowles corroborates the diagnosis of intellectual disability for Mr. Bowles.

10. Based on my prior testing, evaluation, and review of records, in addition to the opinions of Dr. Crown and the results from my SIB-R evaluation of Mr. Bowles, it continues to be my clinical opinion and judgment that Mr. Bowles is an intellectually disabled person.

11. I hold all my opinions as stated herein to a reasonable degree of professional certainty.

I, Jethro Toomer, Ph.D., declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Jethro Toomer Ph.D.
Dr. Jethro Toomer, Ph.D.

7-2-18
Date

DECLARATION OF DR. HARRY KROP
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. § 1746

I, DR. HARRY KROP, hereby testify, affirm, and declare as follows:

1. I am a licensed clinical psychologist and have been in practice since 1971, and my practice has included clinical psychology, forensic psychology, and neuropsychology. I have been qualified as an expert witness in state and federal courts, including the courts of Florida.

2. In the early 2000s, I was consulted for my expert services in the postconviction capital case of Gary Bowles by attorney Frank Tassone. The primary purpose of my work was to review the testing of Dr. Elizabeth McMahon and complete additional neuropsychological testing. I did not administer a full-scale I.Q. test to Mr. Bowles, as I was not then asked to evaluate Mr. Bowles for intellectual disability, and I have never been asked to do so. I, therefore, did not undertake an intellectual disability assessment which would have included the administration of the full I.Q. test being used at that time as well as a comprehensive assessment of adaptive functioning.

3. I have reviewed the report of Dr. Jethro Toomer, who has diagnosed Mr. Bowles with intellectual disability, and materials developed during the investigation by Mr. Bowles's current state postconviction counsel and the Federal Public Defender's Office, Capital Habeas Unit ("CHU"). I am aware that Mr. Bowles has received a full-scale I.Q. score of 74 on the Weschler Adult Intelligence Scale, Fourth Edition (WAIS-IV). This is within the I.Q. range acceptable for a diagnosis of intellectual disability.

4. I am aware that Dr. McMahon administered the Weschler Adult Intelligence Scale Revised (WAIS-R) to Mr. Bowles during his trial proceedings. At the time, this test was one of the accepted measures of an individual's intellectual functioning. However, the WAIS-IV, which was published in 2008, is now the most current, standardized, full-scale intelligence assessment instrument available and is a more accurate measure of a person's intellectual functioning than the WAIS-R.

5. Based on materials I have reviewed, it is likely that Mr. Bowles is an intellectually disabled person. These materials are consistent with my prior opinion that Mr. Bowles has neuropsychological and cognitive impairments, which have pervaded Mr. Bowles's life. Additionally, the materials I reviewed are consistent with my prior opinion that Mr. Bowles's impairments would have had an origin as early as birth.

6. Apart from my contacts with the CHU, I have not had any communication with counsel regarding Mr. Bowles's case since the early 2000s. The CHU asked me to provide this declaration in order to clearly and directly state my views with regard to Mr. Bowles's potential intellectual disability.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. § 1746 and § 92.525 of Title VII, Florida Statutes.

Harry Krop
Dr. Harry Krop

10/3/18
Date

March 12, 2019
Julie B. Kessel, MD
St. Petersburg, FL 33704

Terri Backhus, Esquire
Capital Habeas Unit
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301

State of Florida v. Gary Ray Bowles, Case No. 1994-CF-12188

Dear Ms. Backhus,

As you are aware, I am a medical doctor licensed in Florida, Pennsylvania, and North Carolina. I am Board Certified by the American Board of Psychiatry and Neurology. I am familiar with issues of intelligence, intellectual disability, and brain damage. I am also familiar with these issues in the context of Florida law and the Florida capital sentencing statute. All opinions herein are stated to a reasonable degree of psychiatric and medical certainty.

I evaluated Gary Ray Bowles at Union Correctional Institute in Raiford, Florida, at the request of Mr. Bowles' Federal legal team. The assessment took approximately four hours. The purpose of this report is to offer opinions related to Mr. Bowles' intellectual and adaptive function. In addition to my evaluation, this report is based on the review of numerous records outlined below and including, but not limited to, legal records, records about his life, statements from friends and family members about his functional abilities, and other expert opinions about his disability.

Records Reviewed

1) Sentencing Order – 1996
2) Direct Appeal Opinion – 1998
3) Sentencing Order – 1999
4) Direct Appeal Opinion – 2001
5) Post-Conviction Opinion – 2008
6) School Records
7) Deposition of Dr. McMahon – 1996
8) Depositions of Dr. McMahon and Dr. Krop, Post-Conviction – 2004
9) Evidentiary Hearing Testimony – 2005
10) Dr. Toomer Declaration/Report – 12/5/17
11) Ken White Declaration – 2018
12) Roger Connell Affidavit – 2018
13) Catherine Mendell Declaration – 2018
14) Geraldine Trigg Affidavit – 1999
15) Preliminary review of Dr. Crown Summary, reflecting his evaluation of 2/1/18
16) Glen Price Declaration – 2018
17) Diana Quinn Affidavit – 2018

18) Julian Owens Declaration – 2018
19) 1994 Inactive DOC File & Medical Records
20) Marla Hagerman Declaration – 2018
21) William Franklin Bowles School Records
22) Holly Ayers Affidavit – 2018
23) Dr. Barry Crown Report – 3/2/18
24) William Fields Declaration – 2018
25) Birth Certificate of Gary Bowles
26) Death Certificate of Franklin William Bowles
27) Marriage & Divorce Records of Frances Carol Price (Bowles)
28) Dr. Toomer Declaration/Report – 7/2/18
29) Elain Shagena Affidavit – 2018
30) Tina Bozied Declaration – 2018
31) Dr. Harry Krop Declaration – 2018

Opinion

Gary Ray Bowles is an intellectually disabled person who has significant adaptive deficits that have failed to meet the developmental and cultural standards for personal independence and social responsibility. The adaptive deficits span conceptual, practical, and social domains. His intellectual disability and the resultant adaptive deficits have their origin of onset in his developmental period, well before the age of 18. These deficits have continued in to his adult years.

Additional detail and findings are contained within the summary and conclusion section of this document.

Identification

Gary Ray Bowles was born on January 25, 1962, in Clifton Forge, Virginia. At the time of my evaluation, Mr. Bowles was a 55-year-old man, who had never been married and had fathered no known children. He had been incarcerated since 1994 after he was arrested for homicide. He was found guilty and sentenced to death on September 6, 1996. The Supreme Court of Florida later vacated this death sentence and remanded for another penalty phase proceeding, after which Mr. Bowles was again sentenced to death on September 7, 1999.

Background and Early Childhood Through Age 13

Gary Ray Bowles, "Gary", was the second child born to Frances Carol Bowles and Franklin William Bowles. They were married on July 2, 1959, shortly after the fifteenth birthday of Frances and the twenty-first birthday of Franklin. Their first child, William Franklin Bowles, "Frank," was born on February 2, 1960, and Gary was born just under two years later, on January 25, 1962. Gary was born in Clifton Forge, Virginia. Gary's parents were impoverished and living in West Virginia, largely with other family members, and particularly with Franklin's parents. Many of Franklin's family members, Gary's extended family, were "illiterate" and

mostly were subsistence farmers. Most of Franklin's siblings were also alcoholics, and Franklin himself abused alcohol at some points in his short life.

Gary's early childhood was characterized by loss, instability, and the abandonment of family, including the abandonment of his mother. Gary's father died unexpectedly at twenty-two years of age, when Frances was approximately three months pregnant with Gary. After his death and during her pregnancy, Frances was described as emotionally unwell as a result of the loss. During her pregnancy, Frances described having no prenatal care and to having an unsteady diet. Shortly after Gary's birth, Frances moved them to Illinois and married William "Bill" Fields on November 3, 1962. She and Bill had two children: Pamela Fields (born in 1963) and David Fields (born in 1968).

When Gary was approximately three years old, he and his brother Frank were abandoned by his mother Frances to the care of family in West Virginia, including Geraldine Trigg, Gary's paternal aunt. Frances' whereabouts were generally unknown over the next few years. When Gary and Frank's paternal grandmother, Myrtle Bowles, began to have severe health concerns, two of their paternal aunts located Frances and put the boys on a bus and sent them to her in Kankakee, Illinois." Gary was about 6 or 7 at the time. Gary did not attend kindergarten and was first enrolled in school in the fall of 1968 when he was 6 years old.

The marriage of Frances and Bill Fields was fraught with instability and characterized by emotional and physical abuse. Their marriage officially ended in March of 1976 when Gary was 14 years old, though they separated four years earlier in 1972. Bill acknowledged that their marriage was not good. He also indicated that Frances drank heavily often and dated other men. Bill was violent toward Frances and beat her frequently, sometimes causing her to require urgent medical care, and even hospitalization. The children, including Gary, were witness to the abuse.

Neither Frances nor Bill were engaged or attentive parents to the children, including Gary. From a young age, Gary was left to fend for himself and was often lived on the street and in the homes of other people. Frances was frequently absent. Bill was violent toward both Gary and Frank on a near daily basis. Family reported that Bill was especially abusive toward Gary. Bill beat Gary with belts, which left marks on him, hit him with his fists, and frequently caused bruises to Gary's face and body. Frances also recalled Gary being thrown against the wall by Bill. Frank was also beaten. The beatings happened every day and were unpredictable in provocation or length. The police came to the family's home and confronted Bill Fields about the obvious abuse to Gary, eventually removing him for an interval of time. Bill was far more kind to his own biological children. He showed them love and, by Frank's report, did not beat them.

Frances and Bill did not take care of Gary or Frank's basic physical needs. The boys were left to fend for themselves and find food and shelter on their own. Gary was noted by family members to be small and thin for his age. His relatives in West Virginia described Gary as always hungry and looking for food and said he would stuff himself to the point of choking when food was available. According to stepfather, Bill Fields, Gary's mother did not take care of the children. In fact, she would encourage them to eat and sleep elsewhere.

Gary reports being anally raped when he was nice years old by a man when he was at the YMCA. He told his mother who reportedly called the police. His assailant was not caught. Gary said he was frightened and that he screamed, cried and tried to get away but could not. Gary described subsequently having significant nightmares, generalized fearfulness, sadness and anger, and he started to wet the bed, a behavior that did not stop until his late adolescent years. He continued to worry about being raped into his adult years. He reports his early life as one of sadness and isolation, rejection and fear. About this time, he noted school to be increasingly difficult. He lost interest in school and became more internally preoccupied. He looked to his brother, Frank, for guidance. He thinks he may have been depressed. It was about this time that Gary started to sniff glue and use alcohol and marijuana.

When Gary was about 10 years old, in approximately 1972, Bill and Frances separated. In spite of Bill's removal from Gary's life, his preadolescence continued to be characterized by parental neglect and abuse. Frances moved in with a man named Chester "Chet" Hodges in 1974. Frances' neglect of the older boys was so significant that when Chet moved in, he was not even aware that Frances had children. Chet was an alcoholic, who was very abusive toward Frances. Gary was home during some of these abusive incidents, in which, for example, Chet stomped on Frances, broke her arm, or jerked her out of a car by a chain on her neck. Frances also abused alcohol during this time, and attempted suicide, suggesting the presence of depression.

Gary lived in the garage, on the street, and at others people's homes in order to protect himself. He spent little time at home. Neither Chet nor Frances made efforts to help him. Gary lived on the street for much of their relationship. Chet reported that during their relationship, Frances would disappear for days. Chet indicated he had no idea who helped Gary get food, do chores, take care of himself, or get to school.

Chet also severely physically abused Gary when he lived with Frances. Chet's violence towards Gary did not stop until Gary left home permanently at the age of 13. According to Gary's brother, Frank, Chet's abuse of Gary was even worse of Gary's first step-father Bill.

After one particularly bad episode in which Chet beat Gary with a hammer and a rock out in the yard, Gary told his mother that she had to choose between Chet and him. Frances told him she chose Chet, so Gary left home for good. Without resources or support, thirteen-year-old Gary lived on the street and became a child prostitute.

Academic Performance and Early Cognitive Development

Gary appears to have performed adequately in primary school until the fourth grade, when his grades and behavior began to decline. There is a reference to him having been transferred to a special education program for challenged learners. This suggests that Gary had difficulty with the transition from concrete to more abstract and conceptual thinking. In middle school, he received Cs and Ds. Gary's school performance continued to decline throughout his adolescence. By the sixth grade, he was receiving primarily failing grades, receiving six F grades and a C grade, and an incomplete grade in English. Despite these grades, records note that he was advanced into seventh grade, where he received Fs, Cs, and a D. In the eighth grade, Gary

dropped out of school, failing completely his first semester and having no recorded grades in the second semester.

Family members noticed Gary's cognitive deficiencies early in his life. His paternal cousin, Glen Price, indicated that Gary was always slow and noted that it took Gary longer to understand instructions. He recalls that he and other peers had to repeat instructions to Gary and help him. He appeared slow and distracted and often did not appear to understand what he was supposed to do. Glen indicated Gary would be especially confused with they changed plans and decided to do something new. Novelty and change were especially hard.

Glen also recalled that Gary seemed impulsive. He did not think about things before he acted. He offered an example from Gary's childhood, where on one occasion, instead of throwing away unwanted bottles in a trash can, Gary would just throw them out the window. Gary didn't really seem to understand why that was a problem, and Glen would have to continually redirect him in simple things. Gary's former stepfather Chet reported that Gary didn't seem to know how to get food for himself and had trouble following directions. Both stepfathers, Chet and Bill, noted that Gary had a lot of difficulty doing chores and had difficulty understanding instructions. Chet agreed that Gary seemed impulsive and acted in the moment. He appeared to lack thoughtful consideration of his actions, could not follow instructions, and behaved liked a toddler the entire time Chet knew Gary.

From an early age, there were significant indications that Gary had deficits in his social skills domain. Gary was gullible, naïve, and displayed follower type behavior, as referenced by multiple family members, including Frank, Glen, Bill and Chet. Gary was especially attached to Frank and looked to him for guidance. He was anxious when he did not know where he was, looked up to him and tried to copy the things Frank did. Chet postulated that Gary learned bad behaviors from Frank, which is also suggested by other friends and family who knew Gary in his adolescence and adulthood.

Adolescence

From the age of approximately 13 years old and on, after he left home, Gary dropped out of school and worked primarily as a prostitute. Gary was essentially homeless, living a transient and danger-filled life into his adulthood. His life lacked stability or direction. He moved around frequently, from state to state, and spent his first five years on the street – when he was still an adolescent – prostituting himself in Louisiana, Florida, Virginia and Georgia. He sold his body in order to eat and obtain occasional shelter. His adjustment to living on his own was poor, and he relied primarily on others to meet his basic needs.

While a teenager, Gary met an older man, Ken, who showed a paternal interest in him. Off and on for many years, Gary would reside with Ken. To this day, Gary's relationship with Ken is the most significant and supportive relationship in Gary's life. They remain in regular communication, and Ken sometimes provides Gary money for basic things like food and self-care items.

Tina Bozied, who was also a homeless teenager, met Gary during his later adolescence in Florida. Tina recalled that they spent nearly all of their time together for several years and that Gary was slow and seemed childlike. Tina recognized that Gary was unable to function without substantial assistance, and she supported him for much of this time as well, securing shelter, food, or basic self-care items for Gary. She remembered Gary as unable to understand during disagreements, unable to plan for the future, unable to save or use money as expected for his age, and unable to use public transportation without assistance. Tina recalled that Gary was impulsive, naïve and frequently taken advantage of and that Gary would have been lost without individuals like her helping him to survive. Tina's description of Gary is wholly consistent with Ken's description.

Adulthood and Adaptive Function

Gary continued to struggle in his level of independence and adaptive functioning into adulthood. He was not able to hold regular employment, drifted from state to state, and had no enduring relationships, save for his friend Ken. Gary made money principally through prostitution, though he would do day labor at times. Gary spent about five years in prison in the 1980s and got out of prison in January of 1994, shortly before he was arrested for the crime for which he is on death row.

Even when Gary was employed, he struggled to take direction and execute simple tasks. One former employer, Elain Shagena, whose family owned Trend Manufacturing in the 1990s, noted that Gary seemed slow intellectually and that he was not able to perform tasks that required any complexity. For example, she observed that Gary, even with significant training and supervision, could not operate a four-step machine commonly operated by other laborers. She moved Gary to a simpler machine that only contained one step, because Gary could not operate the four-step machine.

Friends observed that Gary had difficulty in managing his day-to-day activities. Julian Owens recalled that Gary was always intellectually slow appeared easily confused. In Julian's words, it seemed that something was missing in his head. Diane Quinn reported that Gary was very superficial and limited in his conversational style and content. She described Gary's interests as limited and childlike. Ken White made similar observations, concluding that Gary's thoughts were limited. Roger Connell reflected that Gary did not read the paper or watch the news. During social outings, Gary sat alone and did not participate. Friends noted that Gary did not appear to have his own hobbies or interests.

Those same friends described Gary as having limited memory. Julian Owens observed that Gary appeared spaced out, forgot where he was working, and would lose his train of thought in the middle of a statement or activity. He was forgetful, inattentive, and lost things, including money.

Ken White expressed concern that Gary had limited ambition and self-direction. He said that Gary did not show self-reflection, was directionless, lived day-to-day, and had no goals. This led him to have the impression that Gary was impulsive and immature and needed support. He reported his lifestyle as living hand to mouth. Gary had trouble finding or keeping employment. His longest job, aside from prostitution, was with a roofing company in the greater Washington,

D.C. area. His friend, Ken, arranged that work opportunity. Ken also arranged to have Gary driven to work so he would arrive on time.

Friends noted other adaptive deficits in to his adulthood. Many friends noted that Gary was very bad with money. He lost his money, did not appear to know how to make change, and needed help to give the right amount of money and to count change. Julian Owens observed that Gary never had a bank account or saved any of the money he had. He didn't think about the future like that or understand how to plan for the future with his money. Ken White likewise indicated that he thought Gary never had a bank account, did not save money, and had no financial goals. He was unable to budget.

Transportation was also an issue for Gary. He received significant help from others getting around. Tina Bozied and Julian Owens noted that he had significant difficulty with public transportation, such as taking the wrong bus, heading in the wrong direction, and wasting significant time getting lost. He did much better when accompanied. Tina Bozied relayed significant doubts that Gary could use air transportation at all without assistance.

As a result of his deficits, Gary relied largely on others to care for him or ensure that his basic needs were met. Most significantly, he relied on Ken White, in addition to a man named George Parra, as well as peers like Julian Owens and Tina Bozied, or other men that he met through his prostitution. This was widely known by individuals who knew Gary in his adulthood. Julian Owens indicated that Gary had trouble caring for basic issues and that he and friends would do what they could to help. For instance, many of the people in the day-laborer pool struggled and sometimes didn't have anywhere to stay, so they'd put their money together and get a hotel room for the night. Gary was not able to initiate this kind of solution, but others included him so he had a place to stay sometimes. Otherwise, Gary would sleep outside or wherever he found a place. Tina Bozied recalled nearly identical circumstances for Gary when they were teenagers. Julian, like Tina, also indicated that he would buy things for Gary if he needed them, like shampoo or soap, or a shirt to wear. He indicated if he had not done that, Gary would not have done that for himself.

Roger Connell opined that Gary used George Parra as a crutch. George was always Gary's support; for example, George paid rent for both himself and Gary. Gary knew he could always rely on George for money and a place to stay. Gary never had his own money or his own car. Ken White indicated that Gary lived with him often over the years, in various places including Atlanta, Georgia; St. Louis, Missouri; and Arlington, Virginia. Gary did not pay any rent, and had trouble completing chores or participating in the household. Ken did his laundry, purchased house hold items, and helped Gary to manage his money, including sending him money when he was not living with him. Ken opined that Gary was not able to function like a normal adult and needed a lot of help. He further opined that Gary's dysfunction was why Gary was so nomadic and relied heavily on others to help him survive.

Friends noted that when Gary didn't have someone on whom to depend, he had trouble with basic self-care. Multiple friends noted that he was very thin, ate very little, did not prepare or shop for food. He most often drank and sometimes would purchase some prepared food at the bar.

Gary's adulthood continued to be marked by gullibility and naiveté, social deficits he'd struggle with since childhood. Gary also had other social deficits, including the inability to read social situations properly. He continued to have poor interpersonal skills and again was described as having follower-like behaviors well in to his adulthood by those same friends. They recalled that Gary was easygoing, quiet and reserved, and happy to follow the lead of others. He tried to fit in and seemed to be easily influenced.

Julian Owens recalled that Gary could not tell when women would flirt with him. He described Gary as having a limited understanding of these kinds of social situations. Ken White noted that Gary would write letters to his mother constantly, and she'd never write him back. Although Gary was upset that she rarely contacted him, he never said anything negative about her and did not stop trying, even when her disinterest was obvious. He didn't seem to understand this dynamic the way an outsider would.

In total, Gary's adulthood, outside of the incarceration setting, was largely transient and dysfunctional. Gary lacked the ability to function as an adult, provide for himself, problem-solve, and understand the world around him. It is unsurprising, in this context and with his history of sexual abuse, that Gary turned to prostitution for survival and depended heavily on older men to care for him. He had little ability to use money, to use public transportation, or to provide his own basic needs. The pattern of his adulthood reflects the same theme of deficiencies that were present in his adolescence and his childhood.

Correctional Setting Adjustment

Gary had trouble initially adjusting socially in the correctional setting. His disciplinary reports reflect that during his initial incarceration, prior to the crimes for which he was sentenced to death, he consistently got himself into debt with other inmates, either from gambling or borrowing money to use drugs, and then he could not pay back the debts. At least once this resulted in an altercation, and on other occasions Gary requested administrative confinement to avoid inmates to whom he owed money. Gary had difficulty learning from his experience with others in the corrections setting and did not adjust his behavior, causing him to be in potential danger. His adjustment improved when his social interactions were limited, such as in Union Correctional Institute and in Florida State Prison, where inmates are primarily kept in solitary confinement. He responded positively to the external structure and routine provided in the higher level of supervision and confinement.

While incarcerated, Gary received information that his mother was killed in a boating accident. The information concerning her death came to Gary's attention through his brother, Frank. Because Frank Bowles is deceased, little more information is known. However, after Frank's report to Gary about their mother's death, it seems Gary made no outside efforts to verify the information, and he believed for many months that his mother had died, to his great emotional distress. This information was later proved untrue, and she remains alive today. This event is significant, however, because it is suggestive of several of Gary's lack of self-directness, problem solving skills, gullibility, and naiveté.

Family Behavioral Health History

Gary's mother has longstanding alcohol abuse and likely dependence. Her functioning as a parent has been grossly compromised, and her overall level of functioning is limited. It is not clear if there is a formal behavioral health history or if she takes medications. She is known to have made a least one suicide attempt, referenced in earlier notes.

Gary's brother, Frank, had academic and behavioral problems from a young age and may have had intellectual deficits. Though promoted from grade to grade, his performance was characterized as Ds and Fs. He eventually dropped out of school. Frank is now deceased. Frank's former wife indicated that Frank was immature and impulsive and had deficits into his adulthood. She reported that he required support to care for his basic needs as well, including feeding himself and bathing. He was unable to hold jobs and was discharged from the military under general conditions.

Mental State Examination

Gary Bowles appeared as a tall and slender Caucasian male in no apparent distress. He was handcuffed and wearing an orange jumpsuit. His facial hair was consistent with multiple days of not being shaved, but he was otherwise adequately groomed and appeared clean. He had no obvious body odor. There was no evidence of abnormal motor movements, and his speech appeared normal in quality, soft in volume and blunted in variability. He was pleasant and cooperative, though not well connected in his interaction. He reported being easily startled, though did not appear hyper vigilant during the interview. His mood was slightly down. His facial expression reflected reduced range and a blunted, slightly sad expression. He did appear frustrated at times, even slightly angry on occasion, but he denied feeling frustrated or angry. His manner of expression was brief but goal oriented. His responses tended to be short. He evidenced no overt fixed false beliefs. There were no hallucinatory experiences. His thoughts were logical and goal oriented though limited in content. He was concrete in his thought process and production and interpretation of questions. He denied suicidal or homicidal thinking. He did indicate he did not care what happened to him. The content of his speech was aligned and relevant to the conversation in which we were engaged.

He made multiple mistakes on counting backwards by 7 and spelled the world "world" backwards inaccurately. He was able to do basic calculations but also made multiple errors. He showed poor motor control on object copying. He showed some attentional problems with registering objects but was able to recall them a few minutes later after multiple registration attempts. He was able to name objects and follow two-step directions in the context of the interview. He was able to write and read a sentence.

Opinions of Dr. Jethro Toomer and Dr. Barry Crown

Dr. Jethro Toomer, a clinical and forensic psychologist, evaluated Gary, indicating a full scale IQ of 74 on the fourth edition of the Wechsler Adult Intelligence Scale (WAIS-IV), and the presence of adaptive deficits through the review of records as well as interviews with Gary's friends. Dr. Toomer, through the use of third party reporters, also administered the Scales of

Independent Behavior, revised (SIB-R). This standardized instrument revealed information concerning adaptive deficits in community living skills, personal living skills, and social interaction and communication skills. Within these broader clusters of adaptive behavior, Dr. Toomer noted deficits within the areas of language comprehension, language expression, personal self-care, time and punctuality, work skills and understanding of money and value. In sum, Dr. Toomer opined that Gary was intellectually disabled. Psychologist, Dr. Elizabeth McMahon, on the other hand, recorded a full-scale IQ score of 80 on the Wechsler Adult Intelligence Scale, revised (WAIS-R).

At my request, Gary Bowles's legal team obtained neuropsychological testing of Mr. Bowles. Dr. Barry Crown, a forensic neuropsychologist, examined Gary in February of 2018. He opined that Gary suffers from brain damage. He noted significant impairments in his ability to control his impulses, exercise reasoning and judgment, and understand the consequences of his actions. Dr. Crown noted Mr. Bowles's early use of inhalants, suggesting a possible contributory etiology to his cognitive impairment and intellectual disability. Dr. Crown also postulated that Gary's brain damage could have had its origin much earlier in the perinatal time interval.

Summary and Conclusions:

a. Gary Ray Bowles is an intellectually disabled person who has significant adaptive deficits that have failed to meet the developmental and cultural standards for personal independence and social responsibility. The adaptive deficits span conceptual, practical and social domains. His intellectual disability and the resultant adaptive deficits have their origin of onset in his developmental period, well before the age of 18. These deficits have continued into his adult years.

b. Gary Ray Bowles has multiple risk factors for the development of intellectual disability. These risk factors fall into the following categories: maternal and prenatal, social and emotional, external, and heritable. These factors began in utero and are related principally to his mother's lack of prenatal care, likely use of alcohol and or other substances, and impoverished environmental conditions, including exposure to unpasteurized food and possible environmental hazards. Emotional risk factors related to his mother's health also include the sudden death of her spouse during her pregnancy with Gary and her tendency to depression. Additional risks for such impairments are directly related to the extremity, frequency and cumulative impact of physical assaults perpetrated on Gary by the multiple men in his mother's life. Emotional factors include Gary's own traumatic experiences of physical abuse, neglect, abandonment, and sexual abuse. External factors include impoverished socioeconomic conditions, poor nutrition, and the use of neurotoxic substances from an early age, namely, alcohol, as well as inhalants in the form of glue, paint, and gasoline. Finally, Gary's deceased biological brother, Frank, may have suffered from intellectual disability and may have had adaptive deficits into his adulthood as well, suggesting the possibility of a heritable factor.

c. Gary Ray Bowles has a qualifying IQ score of 74 on the Wechsler Adult Intelligence Scale Fourth Edition (WAIS-IV), based on his assessment by Dr. Jethro Toomer, a psychologist. Though Dr. McMahon recorded a full scale IQ of 80 in 1995, she used the

WAIS-R, rather than the WAIS-IV. The WAIS-R is less psychometrically accurate than the WAIS-IV in this situation and overestimates IQ in non-appropriately normed populations, an effect known as the Flynn effect. I agree with Dr. Toomer that, at the time of the proceedings, the Flynn Effect had not been applied to this score, and that, when this recognized and accepted psychometric principle is applied, the reported score overestimates Mr. Bowles's intellectual functioning. Further, I find that this test score by Dr. McMahon does not rule out intellectual disability. Changing standards in the assessment of intellectual disability require both a limited IQ and, critically, the attendant adaptive deficits which have taken on greater importance in diagnosis over time.

d. Mr. Bowles has adaptive deficits from the time of his childhood that have persisted through his adolescence and into his adulthood. They have spanned the conceptual, social, and practical domains of function. Family members described Mr. Bowles as slow, unable to understand the consequences of his actions, easily influenced or manipulated by others, gullible, naïve, impulsive, and struggling to understand and obey rules or instructions. In addition, as his schooling progressed, his performance suffered notably at the time of intellectual development when information processing moves from more concrete in early elementary school to increasingly abstract in upper elementary and middle school years. In adulthood, those who spent time with him also described him as slow, immature, impulsive, lacking depth of content and critical thought, having poor memory, being easily influence and manipulated, gullible, and struggling to understand social situations and behave with age appropriateness. As an adult he continued to struggle with money management, job procurement and success, public transit navigation, and taking care of basic needs such as securing housing and food. He relied significantly on the assistance of others for many of his basic needs.

e. Mr. Bowles' intellectual disability and adaptive deficits were clearly present prior to the age of 18, beginning in his early childhood. His intellectual and adaptive deficits have persisted into his adulthood.

f. Gary Ray Bowles suffers from post-traumatic stress disorder (PTSD). The origin of this disorder resides in his extensive exposure to trauma including physical abuse and rape in his preadolescent years. This disorder coexists with Mr. Bowles' intellectual disability.

Thank you for the opportunity to offer these opinions. These opinions are offered within a reasonable degree of psychiatric and medical certainty.

Sincerely,

JBKessel MD

Julie B. Kessel, MD
Board Certified Psychiatrist

AFFIDAVIT/ DECLARATION OF WILLIAM FIELDS
PURSUANT TO 28 U.S.C. § 1746

I, WILLIAM FIELDS, hereby testify, affirm, and declare as follows:

1. My name is William Fields, but everyone calls me "Bill." I married a woman named Frances in 1963, who is Gary Ray Bowles's mother. I was married to her until 1976, although we were separated long before this. During this time, I was Gary Ray Bowles's step-father. I have two biological children with Frances, named Pamela and David.
2. Frances and I did not have a good marriage. I worked a lot, and many times I worked the night shift, trying to provide for my family. Frances did whatever she wanted to, and would often be gone at night while I worked. She was always out with other men, and drinking heavily. She certainly did not take care of the children the way you would expect a mother to while I was working. She abandoned Gary, just left him running around in the streets at night as young as six years old, following Frank around. Frank, who was about 8 years old at the time, was Gary's brother.
3. I imagine that the kids ate whatever they could get their hands on for dinner, because Frances was not around taking care of them while I was working the night shift. Frances would even tell Frank and Gary to go try to eat at other people's houses. Specifically, she would tell them to "go get in line" at a house around the corner, where the family had 10 children, because they "wouldn't even notice." I think Frank helped care for Gary, getting him what he needed while Frances was gone. Gary was always very thin, and small for his age as a child.
4. Gary was very easily influenced, by Frank particularly. If Frank was gone, Gary would go around looking for him, asking everyone if they knew where Frank was. Frank also taught Gary how to use drugs. I remember specifically Frank having Gary smoke marijuana with

him when he was in about the second or third grade. I believe Frank also taught Gary how to sniff glue, and huff paint like he did later. Over his childhood, Gary spent more time with Frank than he did with his mother Frances.

5. I was gone at work a lot, and Frances was gone doing whatever she wanted, and so little got done at home. When I would tell Gary to do things around the house, he never could get things done. It was frustrating because I could never understand why he just couldn't do what I asked him to. I don't remember him ever doing chores properly or figuring out how to do anything else around the house. He could not follow directions as a child should, I felt bad for him.

6. This is the first time that I spoke with anyone from Gary's defense team. No one visited me until the federal defenders recently asked me about Gary.

I, William Fields, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

William O. Fields
William Fields

March 13, 2018
Date

DECLARATION OF VONA CATHERINE MENDELL
PURSUANT TO 28 U.S.C. § 1746

1. My name is Vona Catherine Mendell. I go by Catherine. I currently live in St. Peters, Missouri. I am a former educational counselor at the King Jr. High School in Kankakee, Illinois. I am now retired.
2. I was Gary Ray Bowles' counselor at King Jr. High School in Kankakee, and signed all of his report cards. During that time period, I was the only counselor in the school assisting students with learning study habits, career planning and discussing any educational related issues with parents. I did not handle discipline, that was dealt with by the principal or assistant principal.
3. I have a Bachelor's Degree in Secondary Education, and I have taken Master's Degree level classes. I did not complete a Master's Degree. I am not a licensed psychologist, and I do not have a Ph.D.
4. I did the IQ testing at King Jr. High School. Any of my testing and scoring in this time period was only for the purpose of assisting students in my capacity as a school counselor. I completed a class on testing at DePaul University in the early 1960s, and I administered these tests to the best of my ability at the time. I understand that a psychologist should give IQ tests, and my reported scores should not be relied on in any court proceeding. I believe that only tests administered by a psychologist should be relied on in such a proceeding.
5. I was visited by an investigator and an attorney from Florida about Gary Bowles, and they showed me a copy of his school records. There is a notation on Gary's school records indicating that his health records were in "spec. ed."office. "Spec. ed." is a shorter term for

special education, which I am familiar with from my time working in the Kankakee school system. The only reason I know that these records would be in the special education office would be if the student was placed in the special education program.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Vona Catherine Mendell

Vona Catherine Mendell

9-20-18

Date

DECLARATION OF CHESTER HODGES

I, Chester Hodges, hereby testify, affirm, and declare as follows:

1. My name is Chester Hodges, but people call me Chet. In the 1970s, I was married to a woman named Carol, the mother of Gary Ray Bowles. Our relationship ended in December of 1979, and we divorced some time later. When I knew Gary, I believe he was under eighteen years of age.
2. Carol was not a typical mother. When we first started dating, it was at least two or three months before I knew that she had any children at all, and it could have been as long as a year before I knew about them. We had moved in together before I ever knew about Gary or any of her other three children. Shortly after we moved in together was the first time I met Gary. I do not know where Gary or her other three children were during the time I was dating her, or before we moved in together. Carol neglected her children, and I have no idea who, if anyone, was caring for them during the times she was gone.
3. During the time I was married to Carol, she would leave for days at a time, sometimes more than a week. On these occasions, she would not tell me where she was going. She would also leave Gary during this time. When I was home, I would sometimes cook for Gary so he would have something for dinner. I am not sure on other occasions who cared for Gary, or how his basic needs were met. I don't remember Gary ever cooking for himself, cleaning, or doing any chores. He might not have been able to do so. Additionally, Gary ended up getting taken in by other people, and it did not seem like anyone knew where he was regularly.
4. Gary never attended school for any significant time. I did not help him with school work, and I don't believe anyone did at home. Gary never had any kind of job in the summer months or saved any money.
5. Gary made poor decisions when I knew him. Gary sniffed glue and huffed paint from the time he was very young. Gary also began smoking marijuana at a young age, and he did so frequently. He did these things often with his older brother, Frank Bowles. Frank would frequently steal, lie, and use drugs, and Gary developed the same habits. Frank was worse than Gary about these things, and Gary probably learned how to behave from

Frank. I think Gary looked up to Frank as his older brother, and he was always following Frank.

6. Gary was very impulsive, and did not think about the consequences of his actions. I don't know if he understood the consequences of his actions. He seemed to have no concept that his actions could affect others negatively, and didn't understand money or the limited financial resources of others. It was like he just did things to satisfy an immediate need or desire – if he wanted something, he just took it, like a toddler. He did not have self-control. For instance, even when we would tell him not to, Gary would drink a six-pack of Pepsi before we could even get it home from the grocery store. This is how Gary was consistently. Gary did whatever came to his mind, and seemed to live only for what was immediately in front of him. He never had any plans or goals for the future.
7. Telling Gary to do things, whether around the house or otherwise, did not work very well. It was like talking past him, as if things went in one of ear and out the other and never really registered with him. He couldn't understand what others wanted or needed of him.
8. I have not seen or spoken to Gary Bowles since he was arrested for the crimes he is presently under a death sentence for committing.

I, Chester Hodges, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Chester Hodges

12-18-17
Date

AFFIDAVIT/ DECLARATION OF DIANNA QUINN

PURSUANT TO 28 U.S.C. § 1746

I, DIANNA QUINN, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Dianna Quinn. I met Gary Bowles in early 1991, in Daytona Beach, Florida. When we met, I was about 25 years old, and Gary was about 29 years old. I worked as a bar tender at the Daytona Beach Pier, and Gary was a daily customer.
2. During the time that I knew Gary, he would come to the pier and hangout while I was working. This was a daily occurrence. I do not know if he had a job. He talked with the fisherman on the pier, and then he would sit down at the bar and drink. I would give him free drinks. We would just talk, but about nothing that was very deep or meaningful. Gary never talked about things like that. I would sometimes give him free French fries, but he just picked at them, and never really ate the fries. I actually don't remember Gary ever having a real meal. Gary was very slender.
3. Gary told me that he was an alcoholic by age 10, and that he was smoking marijuana and sniffing spray paint between ages 10 and 13. He told me about how his two step-fathers beat him. His mother was no help with the abuse, and that is why he left home at age 12 or 13. He grew up on the streets.
4. Gary and I would just hang out after work sometimes too at the pier. Neither one of us had a car. We would go play video games or look at the cars at the car show, things I now look back and think were really more teenage type things.
5. I can remember when some of the 20-somethings would get off of work and come to the bar for happy hour, they would order shots. Gary joined in too, like he was trying to fit in with the crowd. It seemed like he wanted to fit in, and that he was easily influenced by

the way the other younger guys at happy hour were acting. He would act like some immature college student, even though he was much older.

6. During the time I knew Gary, my boyfriend was out of town. When my boyfriend came back into town, I told Gary that we could not hang out like we used to. Gary's feelings were hurt, because he had fallen in love with me in a two-month period. Gary reacted like a child when I told him to leave. As he left my house, my dog was following after him, and Gary tried to get my dog to come with him. I had to run after my dog to get it back. Even though he was a 29-year-old man, he was trying to take my dog because I'd hurt his feelings by asking him to leave. I have always thought that was very immature, and I was mad at the time. This was the last time I saw Gary in person.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Dianna Quinn

2/16/18
Date

FURTHER AFFIANT SAYETH NAUGHT.

Sworn and subscribed before me this 16 day of February 2018 by Diana Quinn, who is personally known to me or has produced the following identification:

Notary Public, State of Florida

HOLLY C. AYERS
Commission # FF 920261
Expires September 22, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

AFFIDAVIT/ DECLARATION OF ELAIN SHAGENA
PURSUANT TO 28 U.S.C. § 1746

I, ELAIN SHAGENA, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Elain Shagena. My late father, Bob Whyte, owned Trend Manufacturing Company (TMC) located in Jacksonville Beach, Florida, during the 1990s. I worked at TMC, and I did everything from working on the floor to payroll. TMC was a manufacturing company that made various plumbing and bathroom-related products. It closed sometime in the early 2000s.
2. TMC often used the services of temporary laborers, and we frequently used a company called Ameri-Force. Gary Bowles was one of the temporary laborers sent to us by Ameri-Force. I knew Gary from when I worked at TMC.
3. Gary came across to me as slow intellectually. He could not do any tasks that required any level of sophistication or complexity, even if it was a slightly complex task. For example, when Gary first started at TMC, we tried to train him to use a particular machine that formed the plastic molds used on bathtubs or for other plumbing products. The machine had a four-step process, none of which were difficult steps. The machine was not challenging to use, and our other temporary laborers were able to work the machine without a problem after being briefly trained. While we were able to train other temporary laborers on the machine, we were not able to train Gary. We tried to train Gary to use the machine, but he could never learn it, and Gary was never able to work the machine properly. He could not understand the process or follow the four basic steps. He seemed to try very hard, but he continually made mistakes.
4. Gary also came close to cutting himself with the razor knife involved in operating the machine a few times. I was worried about Gary's safety. He never managed to successfully use the machine, even with help and under a great deal of supervision. I had to move him off of the machine as a result of his mistakes and the risk of him injuring himself.

5. We tried Gary on other machinery, but we realized multistep machines were just too complicated for him. Because Gary couldn't use multistep machinery, Gary was moved to a grinder machine, which was a simple, one-step machine. In fact, it was the simplest machine at TMC. To use the grinder machine, his task was very simple, and it did not change from one day to the next. That is extent of the work Gary could perform at TMC.

6. During the time that Gary worked at TMC, if a temporary laborer showed initiative and the ability to understand the machines, they usually would get hired on full-time. Gary was not someone I recall us anting to hire on fulltime.

7. I remember that Gary seemed childlike in several ways. For instance, at TMC we had two guard dogs for the property. On several occasions, I found Gary trying to talk to or calm down the dogs because they were barking. I explained to him that they were guard dogs, and they had a purpose to protect the property, which is why they would often bark. Even after that, Gary would seem confused as to why the dogs were barking. He still continued to try and calm the dogs down, and seemed to not grasp their purpose.

8. Before I was contacted by the Federal Public Defender's Office, I do not remember ever talking to anyone from Gary's defense team about him. I would have been able and willing to talk to anyone about Gary had they asked.

I, Elain Shagena, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Elain Shagena

Elain Shagena

8/16/18
Date

FURTHER AFFIANT SAYETH NAUGHT.
Sworn and subscribed before me this 16 day of August, 2018, by Elain Shagena who is personally known to me or has produced the following identification: _____.

Holly C. Ayers
Notary Public, State of Florida

HOLLY C. AYERS
Commission # FF 920261
Expires September 22, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

BEFORE ME, THE UNDERSIGNED AUTHORITY, THIS DAY PERSONALLY appeared, Geraldine Triss, who being first duly sworn on OATH, deposes and says:

MAY 8, 1999

My name is Geraldine Triss. I was born Dec. 3, 1928 and I live in Ripley W.VA.

GARY RAY BOWLES IS my nephew. GARY's father, Franklin Bowles was my brother. Franklin died at 22 years of age and before GARY was born. GARY's mother, Francis (Carol) left GARY and his older brother Frank at my [redacted] mother's house when GARY was around 3 years of age. She left the area and moved to Illinois but her whereabouts were generally unknown for several years. She left the boys for my mother, Myrtle Bowles, to care for until GARY was around 6 or 7 years of age.

Francis would return periodically during that time for short visits at my mother's but she would leave without informing anyone where she was going or when she planned to return.

When GARY was around 6 or 7 years old, My mother's health was in serious decline and she was not able to care for the boys. Myself and my sister Doris took the boys to Rainelle W.VA, put them on a bus to

Kanketell, ULC. We called Francis and told her to pick up the boys.

That was the last time I saw GARY.

FURTHER AFFIANT SAYETH NOT.

Geraldine Trigg

GERALDINE TRIGG

The foregoing instrument was acknowledged before me this the 8th DAY OF MAY 1999, by Geraldine Trigg, who has produced her W.VA. drivers license, no. A623499, and who did take an OATH.

Brian D Morrissey

NOTARY PUBLIC

Brian D Morrissey
My Commission CC805421
Expires January 31 2003

AFFIDAVIT/ DECLARATION OF GLEN R. PRICE

PURSUANT TO 28 U.S.C. § 1746

I, GLEN R. PRICE, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Glen Price. My mother's name was Doris Price, but her maiden name was Doris Bowles. My mother's mother, my grandmother, was named Myrtle Bowles, and her maiden name was Myrtle Stickler. She married my grandfather, Benjamin Dewey Bowles, and they had ten children that lived to adulthood. The youngest of these ten children is Franklin Bowles, Gary Ray Bowles's father. Franklin Bowles was also my mother's brother. Gary Ray Bowles is my cousin, and my family always called him "Gary Ray." I am about two years older than Gary Ray.
2. I grew up in Greenbrier County, West Virginia, where I still live today. My father passed away when I was seven years old. Until my grandmother's death, I lived in my grandmother Myrtle's house, with my mother Doris, and other family members. My grandmother Myrtle passed away when I was in the eighth grade, in the early 1970s. For the last few years of her life, my mother Doris and my aunt Geraldine cared for her and the home, and all the family members living in it. Everyone in the house smoked cigarettes except my grandmother, but she still died of lung cancer. Back in those days, no one knew any better really.
3. We were not a rich family, but we weren't exactly dirt poor either. We always kept a large garden, and that fed us all. We had an old fashioned up-bringing, and were taught real good values. Many of my family members lived through the great depression, and had struggled, and I remember hearing stories about that growing up. Many of the men in my family had been coal miners. It was a humble household.

4. I remember Gary Ray, and his brother Frank, being in West Virginia at my grandmother's house. Frank was closer to my age, but I remember playing with both of them. Sometimes we would just play in the mud, it was a simpler time. One of the things that I remember doing a lot is walking from my grandmother's house to the nearby train tracks, and putting pennies on the track to flatten them to the size of fifty-cent pieces.

5. Gary Ray was a little short for his age, and on the thin side. For a long time, I knew that Gary Ray's childhood outside of West Virginia was not a good one. Gary Ray was always slow. He had trouble with wetting the bed when he was younger, and it took him longer to understand things. When Frank and I would decide to walk down to the train tracks, or walk over to the local gas station where we would sometimes buy candy, he would hesitate. It was like it took him a long time to think about it, and process it, so Frank and I would always have to say "Come on, Gary Ray! Come on, let's go!" It took him longer to think about things. When we would make suggestions to him about what we were doing, he would have trouble following. He would be especially confused when we changed plans or decided to do something new. He would lag behind us.

6. Gary Ray definitely looked up to Frank, his older brother, and would follow us around, but especially Frank. Gary Ray was very gullible, and Frank would test that, like brothers do. Gary Ray was easy to tease and boss around, but it was all in good fun.

7. Gary Ray was a sweet kid, and I remember that he did his best to mind my grandmother. He did get in trouble occasionally, though. Once, while driving down the street, Gary Ray started throwing glass soda bottles out of the window of the car. He didn't think about why that wasn't the way to get rid of the bottles. I remember that my family was not happy about that, but Gary Ray didn't seem to really get it. He wasn't a bad kid, he just didn't

think about things like that and couldn't understand the consequences of what he was doing.

8. Up until this month when I was contacted by the Federal Defender's Office, I was never contacted by any defense lawyer about Gary Ray.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Glen R Price
Glen R. Price

2-27-2018
Date

AFFIDAVIT/ DECLARATION OF HOLLY AYERS

PURSUANT TO 28 U.S.C. § 1746

I, HOLLY AYERS, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Holly Ayers. I am an investigator with the Federal Public Defender's Office, Capital Habeas Unit. I am the lead investigator on Gary Ray Bowles's case.
2. In early 2018, I spoke with several of Gary Ray Bowles's family members on his father's side of the family. Specifically, one of the people I spoke with was Frank Johnson, Gary Ray Bowles's cousin. Frank's mother, Maxine Bowles Johnson, and Gary's biological father, Franklin Bowles, Sr., were siblings. All of Maxine's siblings are now deceased. Frank told me that most of his family members were farmers in West Virginia, and that many of them were illiterate. I learned that Frances, Gary's mother, and Franklin married when Frances was just 15 years old. They married when Frances was so young because Frances was pregnant with her first child, William Franklin "Frank" Bowles, who is now deceased. Frances, Franklin and Frank Jr., all lived with Myrtle, Franklin's mother, until Franklin died at the age of 22 years old from bronchitis. Franklin died when Frances was about 3 months pregnant with Gary. She was 17 years old. During both pregnancies, Frances drank a lot of unpasteurized cow's milk. Gary's mother, Frances, was very negatively affected by his death. Frank Johnson said Frances was pregnant with Gary when Franklin died, and Frances was emotionally unwell after his death.
3. After Franklin's death, Frances left both of her sons, Frank and Gary, with Myrtle for several years. Frances was in and out of her son's lives in their early years. Many of the Bowles's family members did not know Frances's whereabouts. Myrtle raised several of her other grandchildren when their parents (her children) were unable or not around. Myrtle died in approximately 1974, but was sick for many years before that. When Gary was about 6 or 7 years old, Gary and Frank were sent back to Kankakee, Illinois, from West Virginia, on a bus back to their mother. Frances was married to Bill Fields at that time. After Frank and Gary returned to Illinois, Frances told the

Bowles family in West Virginia that she was unable to handle them and then threatened to have them committed to a mental health hospital.

4. Many family members also remembered Gary being very hungry all the time. Gary was seen getting into the refrigerator all the time, and he ate until he almost choked himself. As a child, Gary was also always thin, and was described as small for his age.
5. Gary's cousin, Danny Bowles, said that the Bowles family were "moonshiners," meaning they made moonshine grain alcohol, which was and is still illegal. Some of Gary's aunts and uncles would go to the storage shed and drink the moonshine when they were young. Many of the aunts and uncles became alcoholics and died early in life.
6. In summary, the conditions of his childhood in West Virginia were very poor. Gary was also described by family as slow or not capable of proper functioning.
7. I also spoke with Anthony "Tony" Bauza on December 27, 2017, over the phone. Tony is a former acquaintance of Gary Ray Bowles. He first met Gary while incarcerated in Desoto Correctional Institution in the early 1980s. He was placed in the same dormitory as Gary. He and Gary became friends when they realized they knew some of the same people on the outside, including a man named George that Gary was close with. Tony said that he participated in the GED program while incarcerated at Desoto CI. He took the GED test while incarcerated there as well. He remembers that he and Gary were in the same GED class in the early 1980s. The GED program was a "shortened" basic program. It lasted about a month, and it was very easy. He told me that the teacher simply gave the students most of the answers to the questions on test during classes, and she also gave them, including him and Gary, the answers while they were taking the test. There was no supervision. The idea was just to feed them the answers so they could pass. There were about 14 or 15 inmates in the program while Tony was there. He said that it would have been easy to cheat on the test if anyone wanted to, but they didn't need to because the answers were provided.

8. I reviewed records describing Gary Bowles's adaptive deficits, which we provided to defense experts.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Holly C. Ayers

FURTHER AFFIANT SAYETH NAUGHT.

Sworn and subscribed before me this 12th day of April, 2018, by Holly Ayers, who is personally known to me or has produced the following identification: _____.

Notary Public, State of Florida

Notary Public State of Florida
Terri L Backhus
My Commission FF 228221
Expires 06/18/2019

AFFIDAVIT/ DECLARATION OF JULIAN OWENS
PURSUANT TO 28 U.S.C. § 1746

I, JULIAN OWENS, hereby testify, affirm, and declare as follows:

1. My name is Julian Owens, but people call me "Bubba." I lived in Jacksonville Beach, Florida in the early and mid-1990s, and frequently worked at temporary labor pools. In one labor pool, Ameri-Force, I met Gary Ray Bowles, who I knew at the time as "Tim Whitfield." I worked with Gary in the labor pools, and I also spent a lot of time around him for about a year, both at work and outside of work. We were running around with a lot of the same people, and he was my friend.
2. Gary was always slow. Gary smoked marijuana, and did some other drugs back then, but Gary's slowness was not from drugs, there was something else going on. A lot of the people that we spent time with, myself included, did drugs back then, so I understand their effects from those experiences. But even when Gary was sober, he wasn't normal. I spent enough time with Gary that I knew the difference between when he was sober or wasn't, and even when he was sober he still wasn't all there.
3. Gary was clumsy, he lost his balance and tripped frequently. Gary struggled on our job sites at work. He was spaced out half the time, and he would forget the job sites that we were working on, or forget what we were doing right in the middle of the task. He was easily confused. This was how he was when he was sober, and it wouldn't surprise me if he was brain damaged because he acted like it, like something was missing in his head.
4. Gary was extremely forgetful. I especially remember that Gary would always lose his money, or leave it laying around. We worked in labor pools, which meant that we worked hard – outside, doing manual labor in the hot sun – and we were paid in cash at the end of

a long, exhausting day. Then whatever we were paid would be all we had until we could get another job assignment, but Gary just didn't seem to understand that. He would leave his money wherever – at the job site, at a bar, or in a hotel. It was always shocking to me that he would do that, because we worked so hard for so little. How could you lose all you had, after a day like that? Half the time that Gary would lose his money he wouldn't even realize it. Someone else in the group of people that we'd be with would figure out that Gary didn't have his money, and we would all be the ones trying to retrace Gary's steps and figure out where he left his money. This was very common with Gary.

5. Gary was also very bad with money. Not only was he always losing his money, but he also never got it right when he tried to pay for things. When we would be out, Gary would try to pay for something, like a drink for example, and he wouldn't put the right amount of cash down. The person receiving the money, usually a bartender, would have to tell Gary that it wasn't enough money, and then usually someone else in the group we were in would help Gary put the right amount down. When this would happen, it wouldn't even phase Gary, because it happened all the time. It seemed like he just guessed, and put down some random amount of cash, and then wasn't surprised when he got it wrong. Gary never had a bank account, or saved any of the money he had. He didn't think about the future like that, or understand how to plan for the future with his money.

6. Gary had a hard time taking care of himself, and other people around him helped him out a lot. For example, many of the people in the labor pool struggled, and sometimes didn't have anywhere to stay, so we'd put our money together and get a hotel room for the night. This is not the kind of thing that ever occurred to Gary. If we hadn't included Gary when we did get a hotel like that, I think he would have just slept on the beach or wherever he

could. Gary never made any arrangements for the hotel rooms, we'd always do it for him. He didn't have a plan of where to stay, or knowledge of how to find somewhere to stay, he just tagged along with whoever he was around. We would also buy things for Gary if he needed them, like shampoo or soap, or a shirt to wear. If we hadn't gotten some of these things for Gary, he would have gone without. We did our best to look out for him.

7. Gary would struggle with other things too. For example, he had trouble using the public bus in Jacksonville Beach. Back then, the bus system was much simpler than it is now, there was basically just two places the buses went, either to the beach or into town. I saw Gary get on the wrong bus several times, going in the completely wrong direction. This always surprised me – how can you get it wrong when it was only going two basic places? – but that was just Gary. Sometimes I would take the bus with Gary to help him out, and if no one were around to help Gary, he would just walk rather than use the bus. I doubt very seriously he could have used the bus system without someone helping him.

8. In the whole time I knew Gary, I don't think he ever went to a grocery store or prepared his own food. I wouldn't be surprised if he couldn't do so. Gary mostly drank instead of eating, or when he did eat, it would be something he ordered. He had the same problems with money in those kinds of situations, and needed help paying for things. We did drink a lot back then, myself included.

9. Gary was pretty immature. Although he was a grown man when I knew him, somewhere around thirty years old, he had the interests of a much younger person. He use to read comic books all the time, but it was hard to tell if he was really reading them or just looking at the pictures. I wouldn't be surprised if he was just looking at the pictures. Gary also didn't know how to do things that you would expect of an adult – he didn't know how to get

things he needed, like through government assistance or from a food bank or anything else. I can't imagine Gary filling out forms, or knowing where to go for that sort of thing. Even if he had gotten food stamps or something like that, I'm sure he would have just lost them before he could use them anyhow.

10. Gary was also taken advantage of a lot. Gary could not even buy his own marijuana without getting ripped off. It was so obvious to the people around him that we would even buy Gary's drugs for him, because we couldn't stand to see him get ripped off as badly as he was. Sadly, I don't even think Gary realized when he was being taken advantage of.
11. Gary was easy to get along with. He never said a rude thing to anyone, and was pretty reserved and quiet. He didn't speak much unless he had something to say, he was happy to just follow the lead of others. He wasn't aggressive or assertive. He was pretty easily influenced too, and tried to fit in with whatever crowd he was around. Gary wasn't good at reading social situations, though. I remember that when we would be out, girls would flirt with Gary or hit on him, but he didn't seem to realize it. Gary was a good-looking guy, but had limited understanding of these kinds of social situations with women. It happened so frequently that we would all tease him about it.

I, Julian Owens, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Julian Owens

Julian Owens

03.13.2018

Date

AFFIDAVIT/ DECLARATION OF MINOR KENDALL WHITE
PURSUANT TO 28 U.S.C. § 1746

I, MINOR KENDALL WHITE, hereby testify, affirm, and declare as follows:

1. My name is Minor Kendall White, and I typically go by "Ken." I have known Gary Ray Bowles for nearly forty years. I met Gary in Atlanta, Georgia when he was a teenager. Gary was living on his own then, and primarily homeless. Gary described a very abusive upbringing to me, and I have always understood that to be the reason Gary left home at such a young age. Gary did not speak very much about his childhood, but I know that it was not very good at all.
2. Gary lived with me in many different places, including Atlanta, Georgia; St. Louis, Missouri; and Arlington, Virginia. I never asked Gary for money for rent, he always lived with me for free. I would do most of the cleaning and laundry around the house when Gary lived with me.
3. When we lived in Arlington, Virginia, I helped Gary get a job with a roofing company. I gave him the names of people to contact. Gary worked at the roofing company periodically. I do not believe he was ever promoted at this job, nor was he ever a supervisor. When he was working there, I would sometimes drive him to work. Gary never had his own car as long as I've known him.
4. During the time I knew Gary, he was hustling gay men, and earning money through engaging in sexual activities with them. Gary would use this money to buy things he wanted. Sometimes I would purchase things for Gary, such as clothing. When Gary was not living with me, I would send him money when he needed it or asked for it and tried to help him out as much as I could.

5. I don't believe Gary ever had a bank account. Gary never saved any money, and he never had financial goals (including small goals, like saving for something relatively affordable, or larger goals like saving to get his own apartment or to buy a car). I don't think that Gary ever filed taxes, or really even thought to do so. Gary essentially spent the money he had as soon as he got it, and lived hand to mouth. Gary was very impulsive, and did not think long term. He never thought about how his present actions affected the future, or made any plans or decisions based on wanting things in the future.

6. I would not describe Gary as someone able to function as an adult. He always needed others to help keep him off of the streets, and provide him with some basic needs. I believe this is why Gary was so nomadic and relied heavily on me, girlfriends, and people he had just met to survive.

7. Gary is a go along to get along sort of guy. He followed along with whatever others had planned. He was only ever concerned with what he was doing at a particular moment in time. He was also very easily manipulated and did not think about or understand the consequences of his actions, in my opinion. For instance, when I lived with Gary in St. Louis, Missouri, in the early 1980s, Gary stole some collectible coins from me. This was right after Gary reconnected with his older brother Frank Bowles, and I believe Frank told him to steal from me. I never met Frank before he passed away, but Gary seemed easily influenced and manipulated by Frank. Later, I spoke to Gary about stealing from me, and he admitted it. He was shocked that I would still want to have a friendship with him. Gary never stole from me again, but I see this as an example of Gary doing something impulsively, without thinking about the consequences of his actions until after the fact.

8. Gary is also very naïve. I remember that Gary would write letters to his mother constantly, and she'd never write him back. Although Gary was upset that she didn't contact him at all, he never said anything negative about her and did not stop trying, even when her disinterest was obvious. He doesn't seem to understand this dynamic the way an outsider would.

9. Gary is not a very deep person. None of the conversations I've ever had with Gary in the time that I've known him were difficult or complex. Gary doesn't ever talk about things in a philosophical or existential way, and I don't believe he is capable of having those kinds of thoughts.

10. Gary never had strong opinions on things or specific interests. When we would watch television together, Gary never had an opinion on what he wanted to watch, and he would just watch whatever I was watching. This is how Gary is. He never had comments or opinions on current events, the news, politics, or anything else. He never self-reflected, or had goals for himself or his life. He was directionless, and only concerned with whatever day he was living in and nothing more.

I, Minor Ken White, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Minor K White
Minor Ken White

20 FEB 2018
Date

AFFIDAVIT/ DECLARATION OF MARLA HAGERMAN
PURSUANT TO 28 U.S.C. § 1746

I, Marla Hagerman, hereby testify, affirm, and declare as follows:

1. My name is Marla Hagerman now, but formerly was Marla Bowles. I was married to Frank Bowles in the late 1970s. Gary Ray Bowles is Frank Bowles's brother, and he is my ex-brother-in-law. Frank and I had one child together, Robbie Bowles, on December 13, 1980. Frank and I ended our relationship in approximately 1983, when Robbie was two years old.
2. I was about 15 years old when I met Gary and Frank. I met them in 1978 in Joliet, Illinois, and at that time they were homeless. Their mother, Frances, had just vanished, leaving their home on Brick Street, and leaving behind Frank and Gary. Gary was only about 16 years old at the time. Frank and Gary had been bouncing around and were transient for a while before I met them, I know they both left home at early ages. Shortly after meeting Frank, we began a romantic relationship and we became pregnant. Frank and I became homeless too until I could find work.
3. During our marriage, Frank told me that the only thing his mother taught him was how to wash his body with Dove soap and a washcloth. He really had no other adult skills, and he could not figure out things for himself. I had to teach him how to cook, which he never could do very well. Frank was not a functional adult for our entire marriage. Frank also was not a functional parent or father. Frank did not do any of the parental duties for Robbie, I took care of Robbie essentially alone. Although I think Frank loved Robbie, he didn't know or understand how to care for a baby. For example, when Robbie was a newborn, Frank went to the grocery store, but he forgot the baby formula. It was not like Frank just made an honest mistake in forgetting the baby formula either, I remember this incident as Frank not having any idea what he was doing when it came to caring for our son, or

understanding what he needed I don't think Frank could care for another person, because he couldn't even care for himself.

4. Frank was not a good husband. He had a substance abuse problem, and he smoked a lot of marijuana. Frank went into the military when he was very young, and was discharged from the military after only 6 months for using marijuana. Frank just couldn't follow rules, so it is not surprising that he didn't make it long in the military. After he was discharged from the military, Frank never held a job. He was incapable of doing work that needed to be done in any job he had, or getting a new job himself. He relied on others to care for him, and while we were together I had to work to support our family.

5. Frank was also always getting in trouble. Frank got arrested once for possession of marijuana. Frank was released and given a court date, but ended up skipping out on his case instead of dealing with it. I don't think he really understood that he needed to go to court, and how that is supposed to work. This is just one of many examples of Frank not knowing or understanding the consequences of his actions, and his inability to follow basic rules or structures. Frank only thought of what he wanted in the moment, and he was very impulsive. For instance, he even stole from family and pawned items for money, some of those items were mine and Robbie's. This is how Frank was, impulsive and unable to understand appropriate behaviors, and looking for instant gratification for whatever he needed because he was unable to provide for himself like a normal adult.

6. When our son Robbie was two years old, I left Frank. I could not take the abuse any longer, and I was tired of him not working, and not being able to act like an adult. I could never understand why he couldn't get a job. I also was disturbed by Frank's immaturity. For instance, once after I had begun trying to end my relationship with Frank, he kidnapped

Robbie from the daycare in an attempt to get me to stay with him. Frank didn't understand that that was wildly inappropriate behavior, possibly against the law, and not a normal thing to do, which was typical of Frank. After he took Robbie, I had to trick Frank into thinking we were getting back together just to get my son back. It worked, and I basically packed up with my son and got out of town quickly. Frank was not very bright, so it was not difficult to trick him.

7. Although I did not really know Gary Bowles, I know that Gary, who was Frank's brother, followed Frank around and was led by Frank. I know that Gary saw Frank as an authority figure and as intelligent. This says a lot about Gary and his own problems.

8. I was never contact about Gary Bowles's case before now.

I, Marla Hagerman, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Marla Hagerman

3-28-18
Date

AFFIDAVIT/ DECLARATION OF ROGER CONNELL

PURSUANT TO 28 U.S.C. § 1746

I, ROGER CONNELL, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Roger Connell, and I am a former acquaintance of Gary Bowles. I am a former Deputy Sheriff with the Hillsborough County ~~Police Department.~~ Sheriff's office RMC I was a deputy for 10 years. I then worked for a supply company. I am currently retired.
2. I first met Gary sometime in the early 1980s in Tampa, Florida. I believe it was prior to 1982, because that's when I met my partner, Harold King, and I know I met Gary before I met him. We had a mutual friend, George Parra, who is now deceased. George introduced me to Gary. George and Gary were very close friends. George was a bar tender at Kiki's Bar in Tampa, FL, and George would give Gary free drinks.
3. George and Gary lived with me briefly in the early 1980s. Gary was a happy-go-lucky kind of guy and would just go with the flow. Gary did not work. He slept all day, and then went to the bar all night long. He'd close the bars down. He would then go home to sleep and do it all again the next day. He would wake up just in time to catch a ride with George to the bar. Sometimes Gary would not be seen for a day or two, and then he just showed back up again. There were times where Gary was gone for months at a time too.
4. Gary used George as a crutch. George was always Gary's back up guy. George paid rent for both himself and Gary. Gary knew he could always rely on George for money and a place to stay. Gary never had his own money or his own car. He was impulsive, and never seemed to think about his future. Gary also liked to be taken care of, and liked when others would pay for things for him. It seemed like Gary only thought of himself, like in terms of when he was going to get his next meal, where he was going to sleep, who was going to buy him drinks. He only thought of what his next immediate need was. Gary learned that

sex could be used as a tool to get some of those things he wanted or needed, and he relied on that. He was always slender because he mostly just drank.

5. Gary couldn't talk about current events, but he could talk about whiskey and beer. I never saw him read a newspaper or watch the news. My friends and I played baseball, bar vs. bar, and Gary never participated. He'd just wait at the bar until the game was over. He never had any of this own hobbies or interests.
6. I last spoke with Gary in the early 1990s.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

Roger A Connell

FURTHER AFFIANT SAYETH NAUGHT.

Sworn and subscribed before me this 15 day of February, 2018 by Roger Connell, who is personally known to me or has produced the following identification: DL C546072583010 80.

Holly C. Ayers

Notary Public, State of Florida

HOLLY C. AYERS
Commission # FF 920261
Expires September 22, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

AFFIDAVIT/ DECLARATION OF TINA BOZIED
PURSUANT TO 28 U.S.C. § 1746

I, TINA BOZIED, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Tina Bozied. I met Gary Ray Bowles in Florida when we were both teenagers. He was living on the streets at the time.
2. Gary and I were together for about two or three years. We lived in Florida, Missouri, and Michigan together at different points. We spent nearly all of our time together.
3. I have always thought that Gary seemed a little slow, like he wasn't all there. When I spoke to him, sometimes he would be blank, like he didn't understand what I was saying. When we would get into arguments, I would have to explain to him multiple times why I was upset, and even then it seemed like he didn't get it.
4. Gary always seemed childlike to me. He was always trying to fit in with the other kids who were living on and off the street. He was naïve, and people would take advantage of him. He relied on others to take care of him a lot. I knew Ken White as someone who always took care of Gary and tried to look out for him. Ken seemed to know, as I did, that Gary could not take care of himself. Other people on the streets would also try to help Gary, so he could survive.
5. When I was with Gary, I tried my best to take care of him. For a while, I had an apartment, and Gary lived with me there. I took care of everything for the apartment – paying all the bills and utilities. Gary did not know how to do those things himself. After that, when we were living out of motels, I always made the arrangements for that, too. I would see if we had enough money to stay in a motel that night. I would find the motels, pay for them, and get us checked in. If I had not done these things, I think Gary would have just slept on the street. He didn't know how to save money for a motel, how to check if a motel had an available room, or how to fill out the forms at the motel.

6. I also tried to make sure that Gary had other things he needed, like clothes and toiletries like toothpaste and toothbrushes. These are things that Gary wouldn't have thought to make sure that he had or brought with him. Gary wasn't able to plan in advance. If he didn't have it when he needed it he would have just gone without.

7. Gary was not good with money at all. Whatever money he had, he spent it immediately. He didn't think to save for anything, like an apartment or something he needed. He just didn't have any money skills like that. Even on days when we were saving for a motel room, if he got a dollar or two, he would buy a soda, candy, or cigarettes. It was like he didn't understand that those couple of dollars got us closer to having a room. I had to hold on to his money, so we could pool our resources for a motel room or food. Gary just never thought about the future. He was like a child, just trying to buy whatever he thought he wanted at the time. He would have been lost if he didn't have people like me and Ken who would take care of the important things he needed to survive.

8. Gary and I walked most places, but when we weren't walking, I noticed Gary struggled with other kinds of transportation. He could not use a public bus system without help. On one occasion, my parents bought Gary and me airplane tickets so we could fly back from Florida to where they lived in Michigan. If I had not been there to make sure we got our tickets, were checked in, and made it to the right location to board our flight, Gary would never have made it. I believe he would have missed his flight, or tried to get on the wrong plane. That whole process was out of Gary's abilities, and it was obvious that it overwhelmed him.

9. For a little while, we lived in Branson, Missouri, near where Gary's mother was living at the time. We spent time with his mother then, and I met his brother, Frank Bowles. During this time, Frank stole a money order from me that my parents had sent me and Gary. Gary told me that Frank taught him when they were younger how to use drugs and steal. Gary was a very nice

person, and I think Frank taught him how to do a lot of things he otherwise would not have thought to do.

10. I was never contacted by anyone about Gary Ray Bowles before I was contacted by the Federal Public Defender's Office. I would have been willing to talk to anyone about Gary had they asked.

I, Tina Bozied, declare, affirm, verify and state that the facts set forth herein are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury pursuant to 28 U.S.C. § 1746 and section 92.525 of Title VII, Florida Statutes.

Tina Bozied — 9-6-2018

Tina Bozied — Date

DECLARATION OF DR. ELIZABETH MCMAHON
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. § 1746

I, DR. ELIZABETH MCMAHON, hereby testify, affirm, and declare as follows:

1. I am a clinical psychologist, and my practice has included clinical and forensic psychology. I have been qualified by courts in several jurisdictions to testify to my opinions as a forensic psychologist.
2. In the 1990s, I served as an expert in the capital case of Gary Bowles in Duval County, Florida. I worked with Mr. Bowles's trial attorney, Bill White.
3. For the purpose of my general psychological evaluation in the 1990s, I administered the Weschler Adult Intelligence Scale Revised (WAIS-R) to Mr. Bowles. At the time, the WAIS-R was an adequate instrument. The Weschler Adult Intelligence Scale, Fourth Edition (WAIS-IV), did not exist then. I agree that now the WAIS-IV is the most current, standardized, full-scale intelligence assessment instrument available and is a better measure of a person's intellectual functioning than the WAIS-R.
4. Assessment of an individual for intellectual disability includes intelligence testing, in addition to review and clinical judgment concerning whether qualifying adaptive deficits are present, and whether intellectual and adaptive deficits onset during the developmental period. A thorough assessment of an individual for intellectual disability would include as much information as possible about adaptive functioning and the developmental period.
5. When I evaluated Mr. Bowles in the 1990s, I was not asked to evaluate Mr. Bowles for intellectual disability. Additionally, after Mr. Bowles received an IQ score of 80 on the WAIS-R that I administered to him, I would not have looked any further into intellectual disability unless I had been specifically asked to. For my evaluation, I administered Mr. Bowles the WAIS-R to assess generally his intellectual functioning for mitigation purposes.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. § 1746 and § 92.525 of Title VII, Florida Statutes.

Elizabeth A. McMahon
Dr. Elizabeth McMahon

6/28/19
Date