

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

GARY RAY BOWLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

APPLICATION FOR STAY OF EXECUTION

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

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

The State of Florida has scheduled the execution of Petitioner Gary Ray Bowles for **August 22, 2019, at 6:00 p.m.** Mr. Bowles requests a stay of execution pending the consideration and disposition of the petition for a writ of certiorari that he is filing simultaneously with this application.¹

¹ Mr. Bowles requests expedited consideration of the petition. *See* Petition at 1 n.1.

As described in the petition, Mr. Bowles is an intellectually disabled man who is scheduled to be executed without any court having considered the strong evidence that he is intellectually disabled, despite Mr. Bowles’s continuous efforts to present that evidence to the state courts for almost two years.

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

Since 2017, Mr. Bowles developed and proffered evidence of his intellectual disability.² Regarding significantly subaverage intellectual functioning, Mr. Bowles provided evidence that every mental health professional who is known to have evaluated Mr. Bowles’s intellectual functioning—including Dr. McMahon (1995, pretrial); Dr. Krop (2003, initial state postconviction); Dr. Toomer (2017); Dr. Crown (2018); and Dr. Kessel (2018-2019)—admits either that they did not assess Mr. Bowles for intellectual disability (Dr. McMahon, *see* PCR-ID at 835, and Dr. Krop, *id.*

² Following *Hall v. Florida*, 572 U.S. 701 (2014), 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)).

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 also has neuropsychological testing results indicating brain damage consistent with an intellectual disability stemming from early childhood. *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). No mental health professional who has conducted an evaluation on Mr. Bowles currently disputes Mr. Bowles's intellectual disability diagnosis.

Nevertheless, as a result of the rule first announced by the Florida Supreme Court in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), which provides that certain intellectual disability claims filed after *Hall v. Florida*, 572 U.S. 701 (2014), are time-barred and no evidence supporting those claims can even be considered, Mr. Bowles is set to be executed without any court having reviewed his intellectual disability evidence, or considered on the merits whether he is in fact intellectually disabled and therefore ineligible for execution.

The Florida Supreme Court's decision below ignored Mr. Bowles's federal constitutional argument that the *Rodriguez* time-bar rule, like the erroneous IQ-score rule this Court invalidated in *Hall*, violates the Eighth Amendment by creating an

unacceptable risk that intellectually disabled individuals will be executed. Mr. Bowles pressed his federal constitutional arguments explicitly, but the Florida Supreme Court applied the *Rodriguez* bar without addressing them.

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

The Florida Supreme Court's unconstitutional *Rodriguez* time-bar is not just a matter of life and death for Mr. Bowles. The Florida Supreme Court will continue to apply the bar to foreclose merits review in other cases, creating an unacceptable risk that individuals who are intellectually disabled, in fact, will nevertheless be denied the Eighth Amendment protections this Court recognized in *Atkins*, *Hall*, and *Moore v. Texas*, 137 S. Ct. 1039 (2017).

The Court should stay Mr. Bowles's execution and grant his petition for a writ of certiorari to address the important constitutional questions raised in this case.

Respectfully submitted,

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