No. 19-5617

IN THE

Supreme Court of the United States

GARY RAY BOWLES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

BRIEF OF AMICI CURIAE FLORIDA ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS AND FLORIDA ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS—MIAMI CHAPTER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are a group of professional organizations in Florida dedicated to the criminal defense attorneys who dedicate themselves to the service of the accused, and formed for the scientific and educational purposes related to the practice of criminal defense.[1]

Amici recognize that the Florida Supreme Court's decision in *Rodriguez v. State* deprives capital defendants with intellectual disability claims of the opportunity to present evidence to that fact and imposes an unrealistic burden on defense counsel to foresee changes in the law by requiring counsel to act in accordance with what the law could be and not what the law was at the time. *Amici* have a vital professional interest in ensuring procedural protections for these intellectually disabled capital defendants who, because of Florida's procedural roadblocks, have been stripped

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[1] *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or its counsel made any monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than the *amici* or their counsel made such a contribution.

Amici certify that counsel for the parties have consented to the filing of this brief. *Amici* also certify that the 10-day notice described in U.S. Supreme Ct. R. 37.2(a) is not required in this case, as the *Amici* are filing this brief more than 10 days before the due date set out in the rule.

of the protections established by *Atkins v. Virginia*. This Court's recent decisions in *Hall v. Florida* and its progeny mandate that a defendant with an intellectual disability claim must have an opportunity to be meaningfully heard on his claim that he is constitutionally exempt from execution.

The *Amici* include the following:

The Florida Association of Criminal Defense Lawyers, Inc. is a not-for-profit corporation formed exclusively for scientific and educational purposes and affiliated with the National Association of Criminal Defense Lawyers. Among its founding purposes, the Florida Association of Criminal Defense Lawyers seeks to promote the administration of criminal justice as well as the study and research in criminal defense law and related disciplines.

The Miami-Dade Chapter of the Florida Association of Criminal Defense Lawyers was founded in 1963 and is composed of a vast and varied membership, from distinguished and established practitioners to young attorneys and public defenders at the dawn of their careers. Its members fight for defendant's rights on the front lines, day in and day out.

SUMMARY OF ARGUMENT

The *Amici* ask this Court to intervene in Florida's continued disregard for the U.S. Constitution's prohibition against executing intellectually disabled people. The *Amici* are compelled to present this Brief because Florida is circumventing the U.S. Constitution's requirements by denying an intellectually disabled defendant the ability to present evidence that could bar the imposition of the death penalty simply because the defense bar, including members of the *Amici*'s organizations, failed to foresee the future and predict jurisprudence before it was issued. Such desecration of the Eighth and Fourteenth Amendments must be stopped, and Florida should not be permitted to rely upon a defense lawyer's failure to foresee the future as an excuse for imposing the ultimate, final, and irreversible punishment of death on an intellectually disabled person.

Florida's procedures for intellectual disability claims have deprived an entire class of capital defendants with legitimate intellectual disability claims from presenting evidence supporting that fact. Now, Gary Bowles, a capital defendant with an intelligence quotient ("**IQ**") score of 74 and well-documented deficits in adaptive behavior, is set to be executed on August 22, 2019, without ever having a fair opportunity to present evidence regarding his intellectual disability so that a proper determination of the merits of his claim can be made.

In clear contravention of this Court's precedent and its admonishment of Florida's previous failures to properly apply protections due to capital defendants in *Hall*, Florida's highest court has held that capital defendants who previously could not be found to be intellectually disabled as a matter of Florida law are now barred from presenting evidence to support a claim of intellectual disability because they (and their counsel) failed to preserve the claim. The Florida Supreme Court issued this ruling despite the fact that the state's statutes and precedents never allowed defendants like Mr. Bowles to make a legally cognizable claim. The Eighth Amendment, however, establishes a clear prohibition against the state's ability to execute intellectually disabled individuals and requires that they be given an opportunity to be heard. The ability of intellectually disabled individuals to present evidence of their disability may not be waived by a defendant's actions or inactions.

In effect, Florida's current procedural bar penalizes defendants and their counsel for failing to foresee a change in the law and for failing to act accordingly to preserve a right that would not materialize for more than a decade. Foreseeability of a change in the law should have no place the death penalty context. Even if the prohibition against the execution of intellectually disabled individuals could be waived, a defendant cannot waive a right by his failure to act in accordance

with laws and procedures that were not yet in existence.

Florida has been abusing the discretion afforded by this Court's decision in *Atkins* and the fact that *Hall* is not explicitly made retroactive by its own language, to carve what is a categorical constitutional ban into a qualified ban, excluding an entire class of capital defendants from its protections in the process.

By depriving Mr. Bowles of his opportunity to be heard, Florida is creating an unreasonable risk that on August 22nd it will unconstitutionally execute an intellectually disabled individual, in part because his counsel did not foresee jurisprudence yet to be issued. This result simply cannot stand.

The *Amici* ask to be heard because it is clear that the state courts tasked with reviewing the constitutionality of Mr. Bowles' death sentence ignored the fundamental prohibition against the execution of intellectually disabled individuals, denying him a crucial, individualized hearing.

Amici urge the Court to grant Mr. Bowles' petition for a writ of certiorari, stay his execution, and use this case as a vehicle to clarify that the Eighth Amendment to the U.S. Constitution requires an individualized hearing on a defendant's claim of intellectual disability and imposes a categorical bar on the execution of intellectually disabled individuals that may not be waived.

ARGUMENT

I. THE STATE OF FLORIDA'S INTELLECTUAL DISABILITY PROCEDURES HAVE HISTORICALLY DENIED MR. BOWLES, AND SIMILARLY SITUATED CAPITAL DEFENDANTS, THE OPPORTUNITY TO PRESENT EVIDENCE OF INTELLECTUAL DISABILITY.

Unless this Court intervenes, Florida is about to execute Gary Bowles, an intellectually disabled individual with an IQ score of 74 and a well-documented history of deficits in adaptive behavior, without allowing him a single opportunity to present evidence that his intellectual disability should bar the imposition of the death penalty. This Court has already said in clear terms that the U.S. Constitution and the finality of the death penalty mandate that Florida take all steps necessary to ensure that it is not executing an intellectually disabled person. Nonetheless, Florida is shirking its constitutional obligations by trying to excuse itself from evaluating intellectual disability claims, like that of Mr. Bowles, on the pretext that members of the defense bar, like members of the *Amici* organizations, failed to foresee the future and somehow waived a constitutional bar to imposition of the death penalty.

By way of background, in 1996, Mr. Bowles pled guilty to first-degree murder. His guilty plea came five years *before* Florida enacted its statute prohibiting the

imposition of the death penalty on intellectually disabled individuals, (§ 921.137, Fla. Stat. (2001)), and six years *before* this Court's decision in *Atkins v. Virginia* held that such a punishment was categorically barred by the U.S. Constitution's Eighth Amendment.[2] 536 U.S. 304, 321 (2002). In 1996, Mr. Bowles was sentenced to death.

Twenty-three years later, Mr. Bowles is scheduled to be executed on August 22, 2019, at 6:00 p.m. Eastern Daylight Time. When that time comes, Mr. Bowles will be executed without having had a single opportunity to present evidence of his intellectual disability and deficits in adaptive behavior so that a proper determination can be made as to whether subjecting him to the death penalty is constitutional. For 23 years, Florida's statutes, rules, and regulations have denied Mr. Bowles that constitutionally-mandated opportunity, and now there is an unconstitutional risk that an intellectually disabled individual will be executed.

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[2] "[T]he Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. . . . Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (internal citations omitted).

A. *Despite prohibiting the imposition of the death penalty on the intellectually disabled before* Atkins*, Florida Statute Section 921.137 never provided Mr. Bowles an opportunity for a merits review of his claim.*

Prior to 2001 in Florida, there was no prohibition against the imposition of the death penalty for intellectually disabled people under Florida or federal law. This changed when Florida enacted statute 921.137, titled "Imposition of the death sentence upon a mentally retarded defendant prohibited" (the "**Florida Statute**"), on June 12, 2001. Regardless of how well intended its enactment may have been, there were serious problems with its structure and the protection afforded to individuals like Mr. Bowles.

The Florida Statute, on its face, prevented an entire class of individuals—including Mr. Bowles—from receiving any opportunity for a merits review of their intellectual disability claims. When enacted, the Florida Statute defined intellectual disability as:

> Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. **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 Department of Children and Family Services.

Fla. Stat. § 921.137 (2001) (emphasis added).

On most IQ tests, both then and now, a score of 100 is considered the average score, or mean.[3] Sixty-eight percent of scores from those who take these test fall within one standard deviation of the mean, which has been established to be between 15 or 16 points, or total scores between 85 and 115.[4] Two standard deviations

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[3] "The usual procedure, although there are exceptions, is to express a given standard score on a normative sample mean of 100, with a standard deviation of ±15. Because standard scores are normally (or Gaussian) distributed, a score of 100 is at the 50th percentile. . . . This test information derives from well-standardized and well-normed assessment instruments and is always applicable at the level of total or overall indices of functioning, such as an adaptive behavior composite score, which was normed on a mean of 100 and a standard deviation of 16." Domenic V. Cicchetti, *Guidelines, Criteria, and Rules of Thumb for Evaluating Normed and Standardized Assessment Instruments in Psychology*, Psychol. Assessment, 1994, Vol. 6, No. 4, pp. 284–90.

[4] "It is known that 68 percent of the area of a normal curve lies between one standard deviation below the mean and one standard deviation above the mean." Leo M. Harvill, *An NCME*

from the mean clearly represents scores between 70 and 130. By the plain language of the Florida Statute then, an IQ score of 70 or lower was required for a defendant to be considered intellectually disabled. This would later be confirmed by the Florida Supreme Court's decision in *Cherry v. State*. 959 So. 2d 702, 712–13 (Fla. 2007).

The Florida Supreme Court's decision in *Cherry* was not a new pronouncement of the law or a newly enacted procedural hurdle; it simply confirmed what anyone reading the Florida Statute already knew: a capital defendant needed an IQ score of 70 or lower to be considered intellectually disabled. *See id.* The Florida Supreme Court said as much when it affirmed the lower court's decision, noting that:

> One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. **As pointed out by the circuit court, the 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**.

Instructional Module on Standard Error of Measurement, J. of Educ. Measurement, 1991, vol. 10, issue 2, pp. 181–89.

Cherry, 959 So. 2d at 712–13 (emphasis added).

For Mr. Bowles, similarly situated individuals with an IQ score above 70, and their legal counsel, Florida law provided no opportunity to raise a claim for intellectual disability. Mr. Bowles—as a matter of law—could not have been intellectually disabled. Regardless of his deficits in adaptive behavior, any motion brought under the Florida Statute would have been denied without a merits review of his claim. This Court's decision in *Atkins* did not change this fact.

B. *Florida used the discretion afforded to the states by this Court to implement a procedural rule that undermines* Atkins' *purpose.*

On June 20, 2002, this Court decided *Atkins* and announced the constitutional ban of the execution of intellectually disabled individuals based on the Eighth Amendment. 536 U.S. at 320. This Court left it up to the several states to determine how to ensure that the categorical bar was not violated. *Id.*

The discretion afforded to the states meant that, for Mr. Bowles and those like him in Florida, nothing changed. The Florida Statute was still in full effect, and those with an IQ score above 70 remained—as a matter of law—without an opportunity to present evidence of intellectual disability. Mr. Bowles remained a nonintellectually disabled individual as a matter of law in Florida. The *Atkins* decision actually

lead to the creation of additional hurdles for those in Mr. Bowles' shoes—hurdles later used to deny them a merits review of their intellectual disability claims when, finally, they would have an opportunity to be considered intellectually disabled under Florida law.

Inspired by *Atkins*, the Florida Supreme Court promulgated Florida Rule of Criminal Procedure 3.203, titled "Defendant's Intellectual Disability as a Bar to Imposition of the Death Penalty" (the "**Florida Rule**"). The Florida Rule went into effect on October 1, 2004, establishing procedures for four types of cases: (1) cases that had not begun when the new rule went into effect on October 1, (2) cases for which the trial has started as of October 1, (3) cases for which a direct appeal was pending, and (4) cases for which the direct appeal was final. *See Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure*, 875 So. 2d 563, 570 (Fla. 2004).

Mr. Bowles and many like him fell into the third category. Mr. Bowles filed a post-conviction relief motion in 2002. This motion was still pending on October 1, 2004, when the Florida Rule went into effect. Pursuant to the 2004 version of the Florida Rule, individuals—like Mr. Bowles—whose cases were final and were currently litigating post-conviction motions had a mere 60 days from the date of the Florida Rule's promulgation to bring a Motion for Determination of Mental Retardation as a Bar to Execution. *Id.* at 570. Failure to so move meant that

Mr. Bowles and similarly situated capital defendants would be barred from ever presenting evidence to establish their intellectual disability claims.

The Florida Rule, in effect, determined against whom the application of the death penalty was barred through a technical procedure—not a merits review of their claims. This unfair and unconstitutional situation was made worse by the fact that in 2004, anyone with an IQ score above 70 would still be considered not to be intellectually disabled as a matter of law and had no reason to bring a motion, as it would have been summarily denied. As the Florida Rules of Criminal Procedure state: "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(f)(5)(B). The Florida Rule's enactment forced an entire class of intellectually disabled individuals and their counsel to either waste time and resources bringing a facially unmeritorious claim—which no Florida court would ever review on the merits—or be forever barred from presenting evidence of their intellectual disability claim at the state level. In reality, the Florida Rule provided Mr. Bowles no real choice at all. If, as this Court has stated, "[i]ntellectual disability is a condition, not a number[,]" then a determination of whether a defendant is intellectually disabled should certainly not be decided by a procedural time bar. *Hall*, 572 U.S. at 723.

Regardless of Mr. Bowles' adherence to any procedural requirement, neither he nor those in his position ever had a legitimate avenue for post-conviction relief. It was not until the Florida's Supreme Court's decision in *Walls v. State* 213 So. 3d 340 (Fla. 2016), that capital defendants in Mr. Bowles' position would have an opportunity for review of their claims on the merits or, more simply, any notice or reason to bring such a claim.

This Court's decision in *Hall* overturned Florida's statutory hard IQ score cutoff of 70, as confirmed in *Cherry*. In doing so, this Court noted that Florida's hard cutoff "bar[red] an essential part of a sentencing court's inquiry into adaptive functioning" because "the **law requires the [defendant] have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime**." *Hall*, 572 U.S. at 708 (emphasis added). As discussed in detail below, the ruling in *Hall* was not a new legal pronouncement by this Court, but a clarification of what *Atkins* had established as required by the Eighth Amendment.

For those in Mr. Bowles' position, *Hall* alone did not constitute a legitimate opportunity for a merits review of their intellectual disability claims because *Hall* was not retroactively applicable by its own language. In Florida, *Hall* was not made retroactive until 2016, when the Florida Supreme Court held that *Hall*

applied retroactively to defendants on death row who had unsuccessfully argued that they are ineligible for the death penalty based on an IQ score above 70, and that those defendants must be given the opportunity to present their claims. *Walls*, 213 So. 3d at 340. Nevertheless, Florida once again cut off a swath of individuals from the protections of the U.S. Constitution by not making *Hall* retroactively applicable to those in Mr. Bowles' position. Throughout Florida's evolving intellectual disability claim procedures, Mr. Bowles has been denied a fair opportunity to present evidence of his claims first as a matter of law, and then through procedural bars denying him the ability to adequately support his intellectual disability claim. This injustice should not be allowed to stand, and his execution should not go forward without affording him the opportunity to be heard on the issue of the constitutionality of his punishment.

C. *Instead of following* Hall*'s mandate, Florida chose once again to deny those in Mr. Bowles' position the opportunity to present evidence to support their claims.*

Just two months after its decision in *Walls*, the Florida Supreme Court held that individuals like Mr. Bowles—previously barred as a matter of law from being considered intellectually disabled—were foreclosed from the constitutionally-required

opportunity to present evidence of their intellectual disability if they had failed to adhere to the procedures outlined in the Florida Rule. *See Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016).

In *Rodriguez*, the Florida Supreme Court held that, despite the Florida Statute's hard IQ cutoff established in 2001, defendants in Mr. Bowles' position had "no reason" for failing to raise a claim of intellectual disability in compliance with the Florida Rule. *Id.*; *see also 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*. In *Rodriguez*, this Court applied the time-bar contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim under *Atkins* for the first time in light of *Hall*.").

For those like Mr. Bowles who were in the post-conviction phase at the time of the Florida Rule's enactment, the Florida Supreme Court's holding means that to receive merits review of an intellectual disability claim now, they must have filed a motion in compliance with the Florida Rule by November 29, 2004—regardless of the fact that no Florida court would have, or could have, ruled in their favor at that time.

The result is clear: Florida's intellectual disability claim procedures have never offered those in Mr. Bowles' position "**the opportunity to present**

evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime" as required by the U.S. Constitution and this Court's precedent. *Hall*, 572 U.S. at 724 (emphasis added).

As this Court stated in *Hall*, "[t]he 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." *Id.*

With a documented IQ score above 70, Florida would have dismissed any requests for relief by Mr. Bowles outright before *Walls*. Now, when the merits of his claim may actually be at least considered, Florida has held that Mr. Bowles and his counsel foreclosed his opportunity to be heard, leaving him without recourse once again.

The result: **Mr. Bowles and others in his position may be wrongfully put to death**. Thus, it is particularly concerning to the *Amici* that the Florida Supreme Court would hold that a categorical constitutional prohibition may be waived by a defendant. Especially when he had no occasion or fair opportunity to demonstrate that the U.S. Constitution prohibits his execution and when it is unreasonable to expect legal counsel to foresee changes in the legal landscape.

II. FLORIDA'S *RODRIGUEZ/BLANCO* BAR IS NOT SUPPORTED BY THIS COURT'S PRECEDENT AND WAS NOT FORESEEABLE BY THE CRIMINAL DEFENSE BAR PRACTICING IN FLORIDA AT THE TIME BETWEEN *ATKINS* AND *HALL*.

By way of its *Rodriguez/Blanco* bar, Florida is holding capital defendants like Mr. Bowles—and the practitioners who represented them—to the impossible standard of fortune tellers. The law, as is stands, requires that trained legal professionals must have foreseen the possibility that the law would change and that they therefore should have preserved an argument that was not proper at the time but would become proper 12 years later. Otherwise, absent this extraordinary feat of prescience, a defendant is deemed to have waived a constitutional bar to the imposition of the death penalty. Certainly, this is not within the spirit or the letter of the Eighth Amendment.

A. *Capital defendants and their counsel are being penalized for failing to foresee a change in the law in order to preserve constitutional protections.*

As this Court has previously stated, "[w]e should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971).

Before *Hall*, it was completely unforeseeable that Florida's hard IQ cutoff of 70 would be found unconstitutional and that those with scores above 70 would someday be considered eligible to raise an intellectual disability claim to prevent the unconstitutional imposition of the death penalty. Perhaps even more unforeseeable was the subsequently established *Rodriguez/Blanco* procedural bar, requiring an individual who would clearly not have qualified as intellectually disabled under Florida law at the time to have raised such a claim in compliance with the Florida Rule **before *Hall* was decided** in order for *Hall*'s holding to be retroactively applicable to him. *Rodriguez*, 250 So.3d at 616.

When Mr. Bowles and his then-attorney had 60 days to make a decision about whether to file a claim for intellectual disability determination following the enactment of the Florida Rule, any individual with an IQ score above 70 would have been categorically denied relief. Even during the time between the *Atkins* and *Hall* decisions, which the Florida Supreme Court references in its *Rodriguez* decision, Mr. Bowles and others like him would still have had their claims denied as a matter of law based on Florida's hard IQ cutoff. Therefore, neither defendants nor their counsel had any reason to seek such relief during that time—absent what the Florida Supreme Court seems to require of a defense lawyer: fortune-telling skills.

Furthermore, Mr. Bowles and his attorney were without adequate notice or information to properly act to preserve their intellectual disability claims in this short 60-day period.

There is no dispute that Mr. Bowles did not raise a claim of intellectual disability as a basis for post-conviction relief under the Florida Rule's timeframe as required by *Rodriguez*. 250 So. 3d at 616. Likewise, it cannot be disputed that—with an IQ score of 74—any such motion brought by Mr. Bowles in that timeframe would have been tantamount to a frivolous claim and summarily rejected by Florida courts. *See Cherry*, 959 So. 2d at 713; see also Fla. R. Crim. P. 3.851(f)(5)(B). Practitioners representing capital defendants, like *Amici*, have a duty not to bring frivolous motions; as such, those in Mr. Bowles situation who were represented by counsel at the time would have been unlikely to bring such a facially frivolous motion. Clearly, at the time, neither Mr. Bowles nor his counsel had any reason to pursue his intellectual disability claim further, and it is patently unfair, and contrary to this Court's precedent, to hold that he is now foreclosed from any opportunity to do so.

For example, in *Brumfield v. Cain*, this Court held that the state's denial to hold an evidentiary hearing on Mr. Brumfield's intellectual disability claims was improper even when they had not been previously raised at an earlier stage of proceedings. 135 S. Ct. 2269, 2281 (2015). In reaching this decision, this Court

noted that "[a]t his pre-*Atkins* trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability. In fact, had he done so at the penalty phase, he ran the risk that it would enhance the likelihood . . . future dangerousness [would] be found by the jury." *Id.* (internal quotation omitted)

The reasoning underpinning this Court's decision in *Brumfield* should lead to the same result here—a ruling that Florida's denial of Mr. Bowles' opportunity to present evidence of his intellectual disability claim is improper and should be reversed. Mr. Bowles, and similarly situated defendants, had little reason to request a hearing to present evidence of an intellectual disability that would not meet Florida's arbitrary requirements before *Hall* because the request alone would have been summarily denied.

Collectively, *Amici* have extensive experience in the representation of individuals appealing capital sentences and with Eighth Amendment intellectual disability claims. Yet, even with such experience, they could not have foreseen that a failure to bring a then-frivolous motion would foreclose their clients' opportunity to even present evidence supporting their intellectual disability when it may be properly considered on the merits. As this Court stated in *Huson*, "[t]he most the[y] could do was to rely on the law as it then was." 404 U.S. at 107.

B. *Waiver of a constitutional protection is not supported by this Court's precedent and creates an unreasonable risk that intellectually disabled individuals will be executed.*

If the Eighth Amendment's prohibition against the execution of intellectually disabled individuals is a categorical bar on the states' ability to apply the death penalty, as clearly set out by this Court in *Atkins* and *Hall*, it cannot be waived by the defendant or his counsel. *See Atkins*, 536 U.S. at 321; *Hall*, 572 U.S. at 720. If it is a right held by intellectually disabled individuals, "[w]e should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Huson*, 404 U.S. at 107.

The distinction between a substantive right and a categorical bar on a state's ability to impose a particular punishment is important: A right may be waived by the holder, but a constitutional bar is absolute. This Court clearly established that the prohibition against the imposition of the death penalty on the intellectually disabled is a categorical bar when it held that "the Constitution 'places a substantive restriction on the State's power to take the life' of a[n intellectually disabled] offender." *Atkins*, 536 U.S. at 321.

Faced with similar situations, lower courts have refused to recognize waivers of constitutional prohibitions by defendants. In *Trop v. Dulles*, this Court held that the Eighth Amendment prohibits Congress from punishing someone by banishment or taking away his citizenship. 356 U.S. 86, 103 (1958). Subsequently, the Ninth Circuit held that even when a defendant was given the choice to elect it, the imposition of banishment as a punishment would be in violation of the U.S. Constitution. *Dear Wing Jung v. United States*, 312 F.2d 73, 76 (9th Cir. 1962) ("[D]efendant is not a citizen of the United States, his departure therefrom would leave him without any right to return to this country. The condition is equivalent to a 'banishment' from this country and . . . 'cruel and unusual' punishment or a denial of due process of law."); *see also Rutherford v. United States*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("Banishment was a condition voluntarily and knowingly agreed to by petitioner in the course of the plea bargain negotiations, . . . this court holds that the condition is unenforceable."); *Henry v. State*, 276 S.C. 515, 516 (1981) ("However, the trial judge was without authority to impose banishment from the State as a condition of probation, even if appellant agreed to the sentence.").

Holding that a defendant can waive his claim of intellectual disability cannot make the imposition of the death penalty constitutional, just as it could never

be constitutional for a defendant to choose banishment or for a minor to volunteer for the death penalty. *See generally Roper v. Simmons*, 543 U.S. 551, 568 (2005); *see also Dear Wing Jung*, 312 F.2d at 76.

Like Mr. Hall, Mr. Bowles "may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability . . . ." *Hall*, 572 U.S. at 724. Barring individuals from such an opportunity because neither they nor their counsel had the prescience to seek relief when there was none to be had will result in the same "den[ial of] basic dignity the Constitution protects" this Court overturned in *Hall*. *Id.*

III. THIS COURT'S DECISION TO LEAVE THE APPLICATION OF *ATKINS* TO THE STATES, AND TO NOT EXPLICITLY MAKE *HALL* RETROACTIVELY APPLICABLE, HAS LED TO INCONSISTENT TREATMENT OF THOSE WITH INTELLECTUAL DISABILITY CLAIMS AND SUBVERSION OF THE EIGHTH AMENDMENT'S CATEGORICAL BAN ON THE EXECUTION OF SAID INDIVIDUALS, AND THIS COURT SHOULD TAKE STEPS TO CORRECT THAT INJUSTICE.

Florida has time and again used the discretion afforded to it by this Court's decision in *Atkins* to undermine the U.S. Constitution—and this Court's precedent—and to deny an entire class of individuals

their right to present evidence in support of their claims of intellectual disability.

In *Atkins*, this Court announced that the U.S. Constitution categorically prohibits the imposition of the death penalty on persons with intellectual disabilities at the time of the offense. 536 U.S. at 321. This Court held that "the Constitution 'places a substantive restriction on the State's power to take the life' of a[n intellectually disabled] offender." *Id.* In doing so, this Court recognized that the sentencing of individuals with intellectual disabilities fails to serve any of the rationales for punishment: rehabilitation, deterrence, and retribution. *Id.*; *see also Hall*, 572 U.S. at 708 ("No legitimate penological purpose is served by executing a person with intellectual disability."). This Court, however, left it to the several states to develop standards that would ensure this constitutional prohibition on death sentences was properly carried out. *Atkins,* 536 U.S. at 317.

Nevertheless, "*Atkins* did not give [the states] unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 724. "The States are laboratories for experimentation, but **those experiments may not deny the basic dignity the Constitution protects**." *Id.* (emphasis added) This Court explicitly established that "the law requires that [a capital defendant] have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* This

Court's decision in *Hall* was not a new pronouncement of the law, it was a clarification of what *Atkins* announced was required by the U.S. Constitution.

Despite this Court's admonishment in *Hall*, Florida has once again created "an unacceptable risk that persons with intellectual disability will be executed" by using the discretion provided by *Atkins*, and the fact that *Hall* is not retroactively applicable by its language alone, to create and uphold procedural bars that prevent individuals from presenting evidence of their intellectual disability claims and deny them a merits review. *Id.* at 704.

Florida can only do this because of the discretion allowed by *Atkins*, and because *Hall* was not made explicitly retroactive by its own language. By giving the states little guidance on what their procedures must ensure based on *Atkins*, and failing to make *Hall* explicitly retroactive, this Court has in effect left an avenue by which the states can—and in fact have—carve out *Atkins*' categorical prohibition, making it a qualified prohibition, and can deny individuals the required opportunity to present their case for intellectual disability.

This subversion of constitutional law and precedent will continue until this Court steps in and clearly sets out minimum requirements that the state's procedures must meet under *Atkins* and makes *Hall* explicitly retroactive. As detailed fully above, Florida has

continuously found ways to deprive individuals with potential intellectual disability claims from having a legitimate opportunity to present their claims. The *Rodriguez/Blanco* bar is just the most recent example of how Florida has abused its discretion under *Atkins*. By establishing that, as stated in *Hall*, *Atkins* requires "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution" and making *Hall* explicitly retroactive regardless of what stage of the criminal proceedings a person is in, this Court can close this loophole the states have been using to subvert the U.S. Constitution. Otherwise, intellectually disabled individuals like Mr. Bowles will continue to face an unacceptable risk that they will be unconstitutionally executed.

It bears repeating that the crucial inquiry at this juncture is not whether this Court believes Mr. Bowles will assuredly be able to prove that he is intellectually disabled or that he is entitled to the protections of *Atkins*. At this stage, the question is whether Mr. Bowles should be permitted to put on proper evidence of those matters and have a court consider that evidence in light of this Court's recent precedent in *Hall*. This does not mean that those with intellectual disabilities "may not be tried and punished. They may not, however, receive the law's most severe sentence." *Hall*, 572 U.S. at 709.

CONCLUSION

This Court should stay Gary Ray Bowles' scheduled execution, grant his petition for a writ of certiorari, and then determine that the Eighth Amendment requires an individualized assessment of a defendant's intellectual disability before the imposition of the death penalty and that this requirement cannot be waived by a defendant's (or his or her counsel's) failure to raise such a challenge at an earlier stage, especially when it was not foreseeable, and would have been frivolous, for defense counsel to raise at the time.

Respectfully submitted,

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