No. 19-5617

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

REPLY BRIEF FOR PETITIONER

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

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I. The State Inaccurately Characterizes the Petition as Presenting No Federal Constitutional Questions

A. The Florida Supreme Court's Silence on Mr. Bowles's Federal Constitutional Arguments Is Not a Barrier to This Court's Review—It Makes Review Even More Important

As Mr. Bowles's petition for a writ of certiorari explains, he raised explicit federal constitutional challenges to the Florida Supreme Court's *Rodriguez v. State,* 250 So. 3d 616 (Fla. 2016), time bar below, and those challenges, although not directly addressed by the Florida Supreme Court's August 13, 2019, decision, appropriately form the basis for the questions presented in to this Court.

The State wrongly argues that "[t]here is no federal question presented in the petition," and that the Florida Supreme Court's *Rodriguez* time bar is "a matter of state law and therefore, not subject to review by this Court." Brief in Opposition ("BIO") at 14. This Court is not prevented from granting certiorari review simply because the Florida Supreme Court applied a time bar of its own creation and did not address Mr. Bowles's explicit federal constitutional challenges to the time bar itself. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 327 (1988) ("The mere existence of a . . . state procedural bar does not deprive this Court of jurisdiction."). As this Court explained long ago, the "adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

The State's argument confuses the adequate-and-independent-state-law doctrine. The doctrine does not immunize all state-law procedural rules from federal constitutional review by this Court. Such a doctrine would render this Court's review of state court judgments so limited as to be nearly meaningless. That is why a state

court ruling is deemed "independent" only when it has a state-law basis for the denial of a federal constitutional claim that is separate from "the merits of the federal claim." *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *see also Florida v. Powell*, 559 U.S. 50, 56-59 (2010); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

Although this Court generally refrains from intervening where a state court's decision relies on an independent state ground, *Michigan v. Long* also explains that the record must clearly indicate that the rationale does not rely on any interpretation of federal law. 463 U.S. at 1040-44. For example, where a state court references federal law, but does not "offer a plain statement that its references to federal law were 'being used only for the purpose of guidance,'" it is insufficient to bar review by this Court. *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (quoting *Long*, 463 U.S. at 1041). Further, where the rationale by a state court is "interwoven with federal law," there is "a conclusive presumption of jurisdiction" to decide on issues arising out of a case. *Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (citing *Long*, 463 U.S. at 1040-41).

The application of the *Rodriguez* time bar to Mr. Bowles's case was based on the Florida Supreme Court's determination that he was "similarly situated" to the defendants in *Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018), *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018), and *Rodriguez*, 250 So. 3d at 616, making Mr. Bowles "not entitled to relief based on intellectual disability claims because [he] failed to raise timely intellectual disability claims under *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)]." *Bowles v. State*, No. 19-1184, 2019 WL 3789971, at *2 (Fla. Aug. 13. 2019). However, integral to the Florida Supreme Court's holding—and reference to *Atkins*—is the

Florida Supreme Court's interpretation of what *Atkins* actually means. That the Florida Supreme Court applied a state-law procedural bar in this case is secondary to its interpretation that, under *Atkins*, such a procedural bar *could* be applied in the first place; Mr. Bowles's arguments to the Florida Supreme Court and in his certiorari petition directly challenge this underlying assumption about federal law. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.").

The very application of the *Rodriguez* bar in the subsequent cases cited by the Florida Supreme Court (*Blanco* and *Harvey*), relied on an interpretation of this Court's ruling in *Hall v. Florida,* 572 U.S. 701 (2014). Blanco and Harvey explicitly argued that they were entitled to relief based on *Hall* because their IQ scores fell between 70 and 75, and would not have qualified prior to *Hall* for relief in Florida courts. *See, e.g.,* Appellant's Initial Brief, *Blanco v. Florida*, No. SC17-330, 2018 WL5258962, at *19-23 (Fla. March 28, 2018); Appellant's Initial Brief, *Harvey v. State*, No. SC17-790, 2018 WL 5259021, at *10-13 (Fla. April 27, 2018). While the Florida Supreme Court again in those cases ignored the litigants' federal arguments, those decisions necessarily had at issue, as in Mr. Bowles's case, what the proper interpretation of this Court's decision in *Hall* is as to the availability of *Atkins*-based relief. Thus, these interpretations and "federal-law holding[s] [are] integral to the state court's disposition of [this] matter," and the Florida Supreme Court's holding is

not sufficiently independent from an interpretation of federal law to bar this Court's review. *Ake*, 470 U.S. at 75.

Under the State's misguided rationale, any actions taken by the state court that are done under the guise of state law would be unreviewable by this Court, regardless of any federal constitutional issues raised. That would create absurd results. For example, under the State's reading, Mr. Bowles's constitutional prohibition on his execution could be barred from any merits review if he failed to comply with a procedural rule requiring all such claims be filed when it is raining outside, or that such claims could only be filed by litigants with birthdays in January. When a constitutional prohibition like *Atkins* is at issue, this Court's certiorari jurisdiction cannot be impeded every time a state court invokes a state procedural rule. As this Court clearly announced in *Hall* and subsequently in *Moore v. Texas*, the Eighth Amendment cannot tolerate state or judicial rules that "create[] an unacceptable risk that persons with intellectual disability will be executed." *Hall v. Florida*, 572 U.S. 701, 704 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (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."). It cannot be the case that this Court lacks jurisdiction to review the Florida Supreme Court's ruling creating such a risk.

The State's misunderstanding of *Hall v. Florida* is also squarely at issue in the State's brief in this case, as they argue that "*Hall v. Florida* does not apply to any

defendant whose full-scale IQ score is above 75," BIO at 17, and Mr. Bowles's "collective IQ score is above 75," *id*. at 18. This misunderstands the principle of *Hall* and by extension *Moore,* which support Mr. Bowles's petition. The focus in *Hall* and *Moore* was whether the rules created by the state of Florida and Texas courts unacceptably risked the execution of the intellectually disabled by improperly defining who *was* intellectually disabled (i.e., who was in the category prohibited from execution). *Moore*, 137 S. Ct. at 1053 ("'If the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.'") (quoting *Hall*, 572 U.S. at 720-21). Mr. Bowles asks this Court to now do the same: the Florida Supreme Court's determination of who is in the category of offenders prohibited from execution, like in *Hall* and *Moore*, unacceptably risks the execution of the intellectually disabled because it fails to allow for any merits review for individuals like Mr. Bowles.

B. The State Argues Wrongly That There is No Conflict Between the Florida Supreme Court's *Rodriguez* Bar and Federal Law

The State does not meaningfully engage with Mr. Bowles's federal arguments that, because his execution is prohibited by the Eighth Amendment, it is not subject to default or waiver, and that even if it was, such a procedural rule must not create an "unacceptable risk that persons with intellectual disability will be executed." *Hall,* 572 U.S. at 704. These arguments necessarily challenge the Florida Supreme Court's application of the *Rodriguez* bar to Mr. Bowles as a matter of federal law.

Instead, the State argues that Mr. Bowles "really seems to be asserting that the Eighth Amendment prohibits all time bars, all waivers, and all procedural bars in any capital case, or at least, in any capital case raising a 'fundamental' constitutional claim." BIO at 14-15. But Mr. Bowles has never argued that time bars or other procedural bars are impermissible for "all types of constitutional claims," as the State asserts. BIO at 15. The issue here is narrow, and with good reason; this Court has found very few categorical constitutional bars to execution based on the characteristics of the offender. *See Graham v. Florida*, 560 U.S. 48, 59-61 (2010). Intellectual disability is one of them. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime."). Mr. Bowles does not ask not whether a categorical bar exists—that is well-settled by this Court's precedent following *Atkins*—but what the *effect* of this categorical prohibition is, and whether or not a state-created procedural rule can supersede even the review of evidence necessary to determine if a certain individual resides within the categorical exemption.

II. The Underlying Merits of Mr. Bowles's Intellectual Disability Claim are Strong; the State's Arguments to the Contrary are Contradicted By the Record and Proffer Below

To be clear, even though he has been seeking relief since 2017, no court has ever reviewed or reached the merits of Mr. Bowles's intellectual disability claim. Mr. Bowles has never had the opportunity to present the live testimony of lay or expert witnesses concerning whether or not he is intellectually disabled, and no court has

ever found that his intellectual disability diagnosis was conclusively refuted—or even contraindicated—by the record. Mr. Bowles is before this Court because of the Florida Supreme Court's application of a time bar, and there is no underlying alternative ruling on the merits of Mr. Bowles's claim.

But it is important to note that granting certiorari to review Mr. Bowles's federal constitutional challenges to the *Rodriguez* time bar would not be an exercise in futility when it comes to Mr. Bowles's case itself. The underlying merits of Mr. Bowles's intellectual disability claim are strong. The State's arguments to the contrary are contradicted by the record and Mr. Bowles's evidentiary proffer.

The State, in arguing that Mr. Bowles is not intellectually disabled, advances several medically unsupported theories for considering Mr. Bowles's two full-scale IQ scores,[1] BIO at 18-19, and argues without basis that Mr. Bowles has not met the "age

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[1] Mr. Bowles has two full-scale IQ scores, a 74 on the WAIS-IV obtained in 2017 and a score of 80 on the WAIS-R obtained in 1995, and regardless of the fact that the State contends it "disagrees," BIO at 18 n. 3, and cites no medical authority to support its position, only these two scores are appropriate to consider for diagnostic purposes. Mr. Bowles's score of 83 on the WASI in the early 2000s is not appropriate to consider because it is a short-form test intended for screening purposes only. *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 has also been observed to overestimate an individual's intellectual functioning compared with full scale IQ tests, and is discouraged from even general use by 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.").

of onset" prong of an intellectual disability diagnosis because he "was not intellectually disabled as a child," *id*. at 20. These points deserve brief clarification.

With respect to Mr. Bowles's IQ scores, Mr. Bowles's experts would testify, if given the chance, that the State's creative mathematical formulas for considering his IQ scores—including averaging them, *see* BIO at 18—are not supported by the scientific or medical community. Professional authority actually supports the opposite of what the State argues; experts are instructed to consider IQ test scores individually because "[n]ot all scores obtained on intelligence tests given to the same person will be identical . . . IQ scores are not expected to be the same across tests, editions of the same test, or time periods." American Association on Intellectual and Developmental Disabilities Manual (11th ed. 2010) (AAIDD-11) at p. 38. That is why experts should consider a variety of factors in their clinical judgment in assessing the weight of an IQ score to the potential diagnosis, including factors such as the practice effect, *id*. at p. 38, norm obsolescence (the Flynn Effect), *id* at p. 37, the standard error of measurement (SEM), *id*. at p. 36, and so on. "A valid diagnosis of [intellectual disability] is based on *multiple data points* that not only include giving equal consideration to significant limitations in adaptive behavior and intellectual functioning, but also require evaluating *the pattern* of test scores[.]" *Id*. at p. 28 (emphasis added). Indeed, "[a] fixed point cutoff for [intellectual disability] is not psychometrically justifiable." User's Guide to AAIDD-11, at p. 23. "The diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination." *Id*.

Mr. Bowles has an IQ score of 74 on the WAIS-IV, which every expert who has ever evaluated Mr. Bowles agrees is the most psychometrically accurate testing instrument available. *See, e.g.,* App. at 236, PCR-ID at 780 (Report of Dr. Toomer); App. at 245, PCR-ID at 789 (Declaration of Dr. Krop); App. at 257, PCR-ID at 801 (Report of Dr. Kessel); App. at 291, PCR-ID at 835 (Report of Dr. McMahon). Moreover, experts also agree that Mr. Bowles's 1995 score of 80 on the WAIS-R should be corrected for norm obsolescence,[2] and that it is not disqualifying from an intellectual disability diagnosis. *See, e.g.*, App. at 236, PCR-ID at 780 (Report of Dr. Toomer); App. at 257, PCR-ID at 801 (Report of Dr. Kessel). The State is wrong to discount the findings of these experts that Mr. Bowles has a qualifying IQ score for an intellectual disability diagnosis, based on the most psychometrically valid instrument available for the assessment of IQ, and that his prior score is not disqualifying.

The State's argument that Mr. Bowles cannot meet the "age of onset" prong for an intellectual disability diagnosis is belied by Mr. Bowles's factual proffer and misstates the relevant standard for this prong of the diagnosis. Mr. Bowles proffered evidence that his intellectual disability manifested before the age of 18—nearly half

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[2] While the State contends it takes issue with correction for norm obsolescence (the Flynn Effect), BIO at 19 n. 3, its position is not supported by the medical and psychological community. "[B]est 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 p. 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 [intellectual disability], 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.

of the lay witnesses who provided sworn statements knew Mr. Bowles in his childhood or teenaged years, and neuropsychological testing revealed that Mr. Bowles's brain damage was consistent with an "earlier origin, including a possibly perinatal origin." App. at 241, PCR-ID at 785 (Dr. Crown's report). The State's reading of Mr. Bowles's school records—which are incomplete, and only approximately a dozen pages long—to reflect that he was "not intellectually disabled as a child," BIO at 20, because he was able to achieve good grades early in school, again ignores his factual proffer. Mr. Bowles's experts state clearly in their reports that it is unsurprising that an intellectually disabled person with a higher IQ score could do well in school initially, but then struggle as schooling became more difficult in higher grades, and required more abstract or conceptual thinking. *See, e.g.*, App. at 250, PCR-ID at 794 (Report of Dr. Kessel); App. at 238, PCR-ID at 782 (Report of Dr. Toomer).

Additionally, under medical standards and Florida law, 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 v. Cain,* 135 S. Ct. 2269, 2283 (2015) ("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.").

If this Court grants certiorari review to address the constitutionality of the Florida Supreme Court's *Rodriguez* time bar, and ultimately invalidates that time bar and remands Mr. Bowles's case for a hearing on his intellectual disability claim, Mr. Bowles has shown that there is a considerable probability that Florida courts will agree Mr. Bowles is constitutionally prohibited from execution.

III. The State's Own Arguments Opposing a Stay of Mr. Bowles's Execution Recognize the Troubling Nature of the Florida Supreme Court's *Rodriguez* Time Bar, and Actually Support Granting Review

The State's own response to Mr. Bowles's application for a stay of execution recognizes that "some members of this Court" may be "troubled by a time bar being applied" to an intellectual disability claim. Response to Application for Stay of Execution (Response) at 3. The State recognizes that the result in this case—a man who the evidence strongly suggests is intellectually disabled is about to be executed with no judicial review of his Eighth Amendment rights under *Atkins*—is troubling, to say the least. The State's only explanation for this distressing result is that Mr. Bowles's is not "a particularly compelling case" because the State has concluded for itself that Mr. Bowles "is not intellectually disabled." Response at 3. The State makes this assertion after consistently opposing any evidentiary hearing on the claim, and without acknowledging Mr. Bowles's strong factual proffer in the state trial court. The State's conclusory arguments are not supported by professional medical or psychological authority. *Supra* section (II). As explained in more detail in Mr.

Bowles's petition, the underlying merits of his intellectual disability claim are strong, and a remand from this Court on the *Rodriguez* questions could well result in Mr. Bowles being deemed intellectually disabled and exempted from execution.

Atkins claims are not like every other constitutional claim, and Florida's misunderstanding of the categorical protection *Atkins* provides highlights exactly why this Court should grant Mr. Bowles a stay to speak clearly and unequivocally on the issue. *Cf. Madison v. Alabama*, 138 S. Ct. 943 (2018) (Mem.), and *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (This Court granted a stay to consider whether the prisoner was incompetent under *Ford v. Wainwright*, 477 U.S. 399 (1986), which would render execution unconstitutional).

The State's arguments concerning delayed litigation by death row prisoners under warrant, *see* Response at 6 (citing *Price v. Dunn*, 139 S. Ct. 1533 (2019) (Thomas, Alito, and Gorsuch, JJ., concurring in the denial of certiorari)), themselves emphasizes why this case is particularly compelling—the Governor of Florida signed Mr. Bowles's warrant *in the middle* of his attempts to litigate this categorical protection from execution, causing his intellectual disability litigation to be expedited, truncated, and summarily dismissed. 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 State's attempt to hurriedly execute him in spite of pending constitutional litigation.

IV. Conclusion

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

Respectfully submitted,

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AUGUST 18, 2019