No. 19A183
CAPITAL CASE

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

In the
Supreme Court of the United States

GARY RAY BOWLES, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

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

On August 16, 2019, six days before his scheduled execution, Bowles filed a stay of execution to litigate his pending petition for writ of certiorari raising an intellectual disability claim that was raised for the first time 15 years after *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided and over five years after *Hall v. Florida*, 572 U.S. 701 (2014), was decided. The Florida Supreme Court concluded the claim was untimely as a matter of state law. The State of Florida objects to any stay of execution because Bowles does not meet the standard for being granted a stay.

Stays of execution

Bowles is not entitled to a stay of execution merely because his petition is pending. Stays of execution are not a matter of right, even if irreparable injury results. *Nken v. Holder*, 556 U.S. 418, 433 (2009). As this Court recently observed, last-minute stays of execution "should be the extreme exception, not the norm." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). This Court explained that the last-minute nature of an application for stay in relation to a claim that "could have been brought earlier" that may show an "attempt at manipulation," is itself grounds to deny the stay. *Id.* at 1134.

To be granted to a stay, Bowles must establish four factors: 1) there is a reasonable probability that the petition for writ of certiorari will be granted; 2) there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; 3) irreparable harm is likely to result from the denial of a stay; and 4) the balance between the harm to the party seeking the stay and the harm to the other party and the public interest. *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (noting a four-part showing is required); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (same). Bowles has the burden to establish all four factors. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (stating that the party requesting a stay bears the burden). Despite having the burden, Bowles did not discuss these factors in his application for stay.

Reasonable probability that the petition will be granted

First, Bowles must establish that there is a reasonable probability that his petition for writ of certiorari will be granted by four Justices. Bowles, in his petition, seeks to have this Court declare that intellectual disability claims can be raised at any time and cannot be forfeited, or waived, or procedurally barred. This Court has shown no inclination to declare constitutional rights cannot be limited by reasonable time restrictions. Such a ruling would positively invite more dilatory tactics in capital cases when the majority of this Court condemns such tactics.

And even if some members of this Court are troubled by a time bar being applied to this type of claim, because the underlying intellectual disability claim is meritless, this would not be a particularly compelling case to grant a petition to decide the issue. As the State explains in detail in its brief in opposition, Bowles is not intellectually disabled.

For these reasons, the petition is unlikely to garner the necessary votes. Bowles has not established a reasonable probability that the petition will be granted. Bowles does not meet the first factor for being granted a stay of execution.

Fair prospect that the decision below was erroneous

Second, Bowles must establish that there is a fair prospect that if the petition is granted, he would win on the merits. Bowles would not prevail on the merits. Even if this Court granted the petition, this Court is unlikely to hold that intellectual disability claim cannot be forfeited by being raised in a dilatory fashion. Both the

majority and the dissent in *Bucklew* agreed that the long delays that now typically occur in capital cases are "excessive." *Id.* at 1134; *Id.* at 1144 (Breyer, J., dissenting). These are not the statements of a Court willing to prohibit a State from having reasonable time limitations on raising claims including important constitutional claims.

And this Court would have to distinguish or overrule its long-standing precedent regarding forfeiture of claims. *Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (observing that the "most basic rights of criminal defendants are similarly subject to waiver" citing cases); *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."); *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (stating that a "constitutional claim can become time-barred just as any other claim can"). This Court routinely enforces time bars and procedural bars in capital habeas cases, including in capital habeas cases raising "fundamental" constitutional claims. *Lawrence v. Florida*, 549 U.S. 327, 337 (2007) (affirming the dismissal of a capital habeas petition as untimely).

Furthermore, the underlying intellectual disability claim is meritless. Bowles is not intellectually disabled. Therefore, Bowles does not have a fair prospect of winning on the merits of his *Atkins* claim. Bowles does not meet the second factor for being granted a stay of execution.

Irreparable harm

Third, Bowles must establish that he will suffer irreparable injury unless the stay issues. While he can meet the third factor, Bowles must establish all of the factors including lack of delay in raising the claim, not just one factor. Moreover, this one factor is not determinative. *Nken v. Holder*, 556 U.S. 418, 433 (2009) ("A stay is not a matter of right, even if irreparable injury might otherwise result" quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)).

The balance of harm to the State and the public interest

Fourth, Bowles must establish that the balance between the harm to him versus the harm to the State and the public interest, is in his favor. But it is not in his favor. As this Court recently noted, "both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S.Ct. at 1133 (2019). Unwarranted delays undermine the deterrent effect of the death penalty. As this Court has observed, without finality, "the criminal law is deprived of much of its deterrent effect." *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). There is substantial harm to the State when its executions are cancelled. "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Ferguson v. Sec'y, Fla. Dep't. of Corr.*, 494 Fed.Appx. 25, 28 (11th Cir. 2012) (Carnes, J., concurring) (quoting *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983)).

Bowles must also establish that a stay would not be adverse to the public interest. But as this Court recently observed regarding the protracted litigation in a capital case

where the murder occurred in 1996, the people of the state and the surviving victims of the murder "deserve better." *Bucklew*, 139 S.Ct. at 1134. This murder occurred in 1994, which was two years before the murder in *Bucklew*. The people of Florida and the surviving victims "deserve better" than to have the execution stayed to litigate an untimely and meritless *Atkins* claim. Three Justices of this Court have recently stated that enabling the delay of executions is a "miscarriage of justice" to the State, the victim, and the victim's family. *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring in the denial of certiorari). A stay would be adverse to both the State's and the public's interest. Bowles does not meet the fourth factor for being granted a stay of execution.

Bowles fails three of the four factors.

Furthermore, a capital defendant must also establish that the claim was not raised in a dilatory manner because there is "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay" but this claim was raised in a dilatory manner. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). While, as opposing counsel states, the intellectual disability claim was first raised in 2017, before the warrant was signed, the intellectual disability claim was raised over 15 years after *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided and over three years after *Hall v. Florida*, 572 U.S. 701 (2014), was decided. Pet. at 3, n.2. And even then, the claim was raised in a manner certain to cause delay. The successive postconviction motion raising the claim in state court filed in 2017 did not comply with the specific Florida

rule of court governing claims of intellectual disability, rule 3.203, which requires the reports of the mental health experts named in the motion to be attached. So, in 2017, the State filed a motion to strike the motion for failing to comply with the rule. Opposing counsel only provided Dr. Krop's report, an expert named in the motion, when ordered to do so by the trial court after the State filed a motion to compel during the recent warrant litigation. So, a proper motion raising this claim was only filed in June of 2019, after the warrant was signed. The strong equitable presumption against a stay applies in such a situation.

Accordingly, the stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carolyn Snurkowski, a member of the Bar of this Court, hereby certify that on this 17th day of August, 2019, a copy of the RESPONSE TO APPLICATION FOR STAY OF EXECUTION was furnished by United States mail and by email 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; and 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.

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