No. _____

IN THE

Supreme Court of the United States

GARY RAY BOWLES,

Petitioner,

v.

RON DESANTIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S APPENDIX

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

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12929-P

D.C. Docket No. 4:19-cv-00319-MW-CAS

GARY RAY BOWLES,

Plaintiff-Appellant,

versus

RON DESANTIS, Governor, in his official capacity,
JIMMY PATRONIS, Chief Financial Officer, in his official capacity,
ASHLEY MOODY, Attorney General, in her official capacity,
NIKKI FRIED, Commissioner of Agriculture, in her official capacity,
JULIA MCCALL, Coordinator, Office of Executive Clemency, in her official capacity,
MELINDA COONROD, Chairman, Commissioner, Florida Commission on Offender Review, in her official capacity,
SUSAN MICHELLE WHITWORTH, Commission Investigator Supervisor, Florida Commission on Offender Review, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before ED CARNES, Chief Judge, TJOFLAT, and MARTIN, Circuit Judges.

ED CARNES, Chief Judge:

Gary Ray Bowles is a Florida death row inmate scheduled to be executed on August 22, 2019, at 6:00 p.m. He has moved for a stay of execution so that we can consider more fully the district court's denial of his motion for a stay of execution.

Bowles sought a stay in the district court in order to pursue his 42 U.S.C. § 1983 claim that the State of Florida interfered with what he views as his right under 18 U.S.C. § 3599 to have attorneys in the Capital Habeas Unit (CHU) of the Federal Public Defender's Office represent him before the Florida Clemency Commission and Board. Those attorneys had represented Bowles in his federal habeas proceedings and had served as co-counsel, along with state-appointed counsel, in his state collateral proceedings. The Clemency Commission appointed another attorney to represent Bowles in the clemency proceedings, and that attorney appeared in person at the clemency interview before the Commission. Even though the CHU attorneys were not allowed to appear in person at the interview, they were repeatedly offered opportunities to submit any written materials they desired in support of clemency. And they did submit a joint letter from them, state-appointed collateral counsel, and state-appointed clemency counsel urging that clemency be granted. After holding the interview and

considering all of the written materials the Commission submitted a report to the Board, which made the final decision to deny clemency.

The district court denied the motion for a stay of execution because it determined that § 3599 does not create a right that is enforceable against the states. We agree. We also conclude that Bowles has not shown that he is otherwise entitled to a stay of execution from this Court.

I. FACTS AND PROCEDURAL HISTORY

A. Bowles' Crimes And Procedural History

In November of 1994 Bowles murdered a man named Walter Hinton by dropping a 40-pound concrete block on his head while Hinton was asleep. See Bowles v. State, 716 So. 2d 769, 770 (Fla. 1998) (Bowles I); Bowles v. State, 804 So. 2d 1173, 1177 (Fla. 2001) (Bowles II). After he was arrested Bowles confessed to the crime. Bowles I, 716 So. 2d at 770. He explained how Hinton had given him a place to stay in his mobile home in Jacksonville, Florida, and how on the night of the murder the two men had been drinking and smoking marijuana. Id. How after Hinton went to sleep Bowles went outside and got the cement stepping stone, brought it inside the mobile home, placed it on a table and "thought for a few moments." Bowles II, 804 So. 2d at 1177 (quotation marks omitted). How he then quietly entered Hinton's bedroom and dropped the stone on Hinton's face, fracturing his face from cheek to jaw. Bowles I, 716 So. 2d at 770; Bowles

II, 804 So. 2d at 1181. How at that point, because Hinton was still alive, he "began to manually strangle [Hinton]," and put a rag in his mouth to smother him to death. Bowles I, 716 So. 2d at 770. The only thing Bowles left out of his confession "was how he [also] stuffed toilet paper" down Hinton's throat. Bowles II, 804 So. 2d at 1181.

After Hinton was dead, Bowles went out. Id. He drove to get some liquor, then picked up a woman on the beach and brought her back to Hinton's home. Id. He made sure to keep her away from the room where Hinton's dead body lay covered in sheets. Id. Bowles was arrested approximately six days later, after having been "seen driving Hinton's car and wearing Hinton's watch." Id. at 1180–81.

Bowles pleaded guilty to first degree murder and a jury recommended that he be sentenced to death, which the trial court did. Id. at 1175. The Florida Supreme Court affirmed the conviction but vacated the death sentence because of an evidentiary error at the original sentence proceeding. Bowles I, 716 So. 2d at 773. On remand, a jury unanimously recommended death and the trial court again imposed that sentence. Bowles II, 804 So. 2d at 1175. This time the Florida Supreme Court affirmed. Id. at 1184.

Bowles' killing of Hinton was no isolated incident, and the sentencing court "assigned tremendous weight to the prior violent capital felony convictions." Id. at

1175. In 1982 Bowles had "brutally attacked" his girlfriend, leaving her with "contusions to her head, face, neck, and chest, as well as bites to her breasts . . . [and] internal injuries including lacerations to her vagina and rectum." Id. For that Bowles was convicted of sexual battery and aggravated sexual battery. Id.

Bowles was released from prison in April of 1990. In July 1991, just over a year after getting out, he was convicted of robbery for pushing a woman down and stealing her purse. Id. at 1175–76. For that crime he was sentenced to four years in prison followed by six years of probation. Id. at 1175. While out on probation in 1994, Bowles committed three murders.

The first murder was of John Roberts on March 14, 1994.[1] Roberts made the same mistake that Hinton would later make. He was kind to Bowles, letting him move into his home. Bowles II, 804 So. 2d at 1176. A few days after doing so: "Bowles approached [Roberts] from behind and hit him with a lamp. A

[1] The Florida Supreme Court decisions do not mention the names of Bowles' other victims, the exact dates of their deaths, or Bowles' sentences for committing the murders. We have gleaned that information from the dockets for those consolidated cases. See Certified Copies of Prior Convictions, State v. Bowles, No. 1994 036050 CFAES/1996 036260 CFAES (Fla. 7th Cir. Ct. Aug. 6, 1997), Doc. No. 169 (containing certified copies of indictments and judgments); see also Florida Department of Corrections, Gary Ray Bowles, Corrections Offender Network, http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=086158&TypeSearch=AI (last updated Aug. 11, 2019). In keeping with Eleventh Circuit Internal Operating Procedure 10, "Citation to Internet Materials in an Opinion," under Federal Rule of Appellate Procedure 36, a copy of the internet materials cited in this opinion is available at this Court's Clerk's Office.

struggle ensued during which Bowles strangled [Roberts] and stuffed a rag into his mouth. Bowles then emptied the victim's pockets, took his credit cards, money, keys, and wallet." Id.

Two months later another person, Albert Morris, fell prey to Bowles. Like Roberts before him (and Hinton after him), Morris "befriended Bowles and allowed Bowles to stay at his home." Id. at 1176. Bowles and Morris "got into an argument and a fight outside of a bar." Id. Bowles hit him "over the head with a candy dish, and a struggle ensued, resulting in [Morris] being beaten and shot. Bowles also strangled [Morris] and tied a towel over his mouth." Id.[2]

Then in November of that same year Bowles murdered Walter Hinton. We have already discussed the details of that brutal crime. See supra at 3–4. In addition to murdering Hinton, Roberts, and Morris, Bowles apparently murdered three other victims.[3]

After the Florida Supreme Court affirmed Bowles' conviction and death sentence for murdering Hinton, he unsuccessfully sought post-conviction relief in state post-conviction proceedings, Bowles v. State, 979 So. 2d 182 (Fla. 2008), and

[2] For the murder of Roberts, Bowles was sentenced in 1996 to life in prison. For the murder of Morris, in 1997 he was also sentenced to life in prison.

[3] In a state post-conviction proceeding in connection with an ineffective assistance of counsel claim, Bowles was evaluated by a clinical psychologist. That psychologist testified "that Bowles told him that 'it bothers him [that] he killed six people who probably didn't deserve to die.'" Bowles v. State, 979 So. 2d 182, 187 (Fla. 2008) (alteration in original) (emphasis added). Not three, but six.

in federal habeas proceedings, Bowles v. Sec'y for Dep't of Corr., 608 F.3d 1313 (11th Cir. 2010). Last year the Florida Supreme Court denied another motion for post-conviction relief; in that motion Bowles claimed that he was entitled to have his death sentence vacated based on the Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016). See Bowles v. State, 235 So. 3d 292, 292–93 (Fla. 2018).

Bowles filed another successive post-conviction motion in Florida state court on October 19, 2017, raising for the first time an intellectual disability claim. The Florida Supreme Court affirmed the denial of that motion on August 13, 2019. Bowles v. State, Nos. SC19-1184 & SC19-1264, 2019 WL 3789971, at *2–3, 4 (Fla. Aug. 13, 2019). It also denied Bowles' habeas petition in which he claimed that the death penalty is cruel and unusual punishment barred by the Eighth Amendment of the United States Constitution. Id. at *3–4.

B. Federal Appointment Of Counsel

In September 2017 the federal district court that had denied Bowles' § 2254 petition in December 2009 granted his motion to appoint under 18 U.S.C. § 3599(a)(2) CHU attorneys to serve as Bowles' new federal habeas counsel. See Order, Bowles v. Sec'y, Fla. Dep't of Corr., No. 3:08-cv-791 (M.D. Fla. Sept. 27, 2017), ECF No. 33. The court also granted Bowles' motion to permit the CHU attorneys to represent him as co-counsel in Florida state court in connection with

Bowles' motion for post-conviction relief based on intellectual disability. See Order, Bowles v. Sec'y, Fla. Dep't of Corr., No. 3:08-cv-791 (M.D. Fla. Dec. 6, 2017), ECF No. 36. The CHU attorneys served as co-counsel with state-appointed counsel in those proceedings. See Bowles, 2019 WL 3789971.[4]

C. State Clemency Proceedings

While Bowles' intellectual disability claim was proceeding in the Florida courts, the Governor of Florida, through the Florida Commission on Offender Review, began clemency proceedings for Bowles. Under Florida law the clemency power is vested in the executive branch, and exercise of that power is purely discretionary. See Fla. Const. Art. IV, § 8(a).

The Governor and members of his cabinet make up the Clemency Board, which is responsible for promulgating the "Rules of Executive Clemency." One of those rules, Rule 15, governs the "Commutation of Death Sentences." Under that Rule, the Florida Commission on Offender Review (which is separate from the Board) "may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board." Fla. R. Clemency 15(B). That investigation is to include an interview of the inmate by the Commission. He is allowed to have clemency counsel present at the interview.

[4] We do not, as our concurring colleague suggests, "[u]nderstand 18 U.S.C. § 3599 to authorize federally appointed (and federally paid) habeas counsel to appear in state proceedings." At least, not in all state proceedings and not in all circumstances. See infra at 26 n.9.

Id. By statute, the Board "may" in its "sole discretion" appoint the clemency counsel; the Board must maintain a list of private counsel who are available for that purpose. Fla. Stat. § 940.031. But the statute "does not create a statutory right to counsel in such proceedings." Id.

Once the Commission completes its investigation, it sends a report to the Board. Fla. R. Clemency 15(D). The Board then may, but is not required to, hold a clemency hearing, at which "the inmate's clemency counsel and the attorneys for the state may make an oral presentation, each not to exceed 15 minutes collectively." Id. at (H). Then the Board votes on whether to grant clemency. Only after "the executive clemency process has concluded" may the Governor issue a death warrant. Fla. Stat. § 922.052.

In this case, the Commission began clemency proceedings for Bowles in March of 2018. It appointed Nah-Deh Simmons, a private practitioner, as Bowles' clemency counsel. Simmons had not represented Bowles before, nor did he already know when he was first appointed that Bowles had brought an intellectual disability claim that was pending in state court. On March 26, 2018, the Commission notified Bowles that Simmons would be representing him and that a clemency interview had been set for August 2, 2018. Two days later an investigator for the Commission wrote to one of the CHU attorneys inviting them

"as the post-conviction counsel" for Bowles to submit written comments to the Commission.

On June 21, 2018, the CHU attorneys, attorney Simmons, and Bowles' state-appointed attorney in his post-conviction proceedings jointly submitted a six-page, single-spaced letter to the Clemency Board. In that letter, they informed the Board of the intellectual disability claim that Bowles was pursuing in state court and asked the Board to postpone the clemency proceeding until after that claim had been resolved. Their letter also included information about Bowles' traumatic childhood and his history of substance abuse. It stated that "[b]ecause of the pending litigation in the Circuit Court on his intellectual disability claim, the narrative of [Bowles'] life cannot be further expanded on at this time." The letter asked that Bowles' sentence be commuted to life imprisonment without parole.

The CHU attorneys also contacted the Governor's office directly to request postponement of Bowles' clemency interview in light of the fact that he had an intellectual disability claim pending in state court. That request was denied on June 22, 2018. The Governor's office explained: "The clemency process is wholly separate and distinct from the successive legal challenges to [Bowles'] death sentence[], and inmate Bowles has been appointed separate legal counsel to represent him in the clemency proceedings. You are welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given

full consideration." The CHU attorneys did not submit any materials in response to that second invitation to do so. According to Bowles' complaint in this case, Simmons interpreted the response from the Governor's office "to mean that 'the Board will only consider communications from [him],'" not from the CHU attorneys.

The CHU attorneys then assisted Simmons in preparing for Bowles' interview before the Commission, which was still set for early August, a little over a month away. During that month the CHU attorneys remained in contact with Simmons, helping him prepare for Bowles' clemency interview. They also planned to participate in that interview so that they could, in their words, protect Bowles' "rights as they pertained to his ongoing intellectual disability litigation" and provide the Commission "a full picture of . . . Bowles'[] life history and intellectual disability." But on July 24 Simmons received a phone call from the Commission "informing him that neither [the CHU attorneys] nor [the CHU's expert witness] would be allowed to attend or participate in the clemency presentation." Only Simmons, as the duly appointed clemency counsel, would be permitted to do so. The CHU attorneys asked the Commission to reconsider that decision and allow them to appear at the clemency interview, but the Commission denied that request. In doing so, the Commission again emphasized that "[a]ny party is welcome to submit any materials in support of inmate Bowles' request for

clemency, which will be given full consideration." The CHU attorneys did not submit any more materials in response to that third invitation.

Bowles' clemency interview occurred on August 2, 2018 as planned. Bowles was present along with his clemency counsel, Simmons, who gave a presentation to the Commission, arguing for clemency. No attorney from the CHU was present. The interview lasted about an hour-and-a-half. The next month the CHU attorneys submitted a letter to the Clemency Board asking that a supplemental clemency interview be conducted by the Commission and the Board (which had not conducted or participated in the first one) at which the CHU attorneys could represent Bowles. Their letter asserted that Bowles' federal rights under 18 U.S.C. § 3599 had been abridged because the Commission had not allowed his § 3599 counsel (the CHU attorneys) to represent him at the clemency interview. The letter went unanswered.

On June 11, 2019, Simmons received a letter from the Board stating that the Governor had denied Bowles' request for clemency and had signed a death warrant. Bowles' execution is set for August 22, 2019.

D. Bowles' § 1983 Claim And Motion To Stay

On July 11, 2019, a month after the Governor denied him clemency and signed the death warrant, Bowles filed a complaint in federal district court seeking declaratory and injunctive relief under 42 U.S.C. § 1983. Seven members or

agents of the Clemency Board, including the Governor and the Attorney General, were named as Defendants. The complaint asserts that Bowles' state-appointed counsel did not, "and could not, give a meaningful clemency presentation [because of] his lack of experience in death penalty litigation, lack of training regarding intellectual disability, lack of familiarity with [the] case, and lack of resources to investigate and present experts to educate [the Commission] about intellectual disability as it applied to [Bowles]." The claim is that by refusing to allow his federally appointed counsel to participate more fully in the clemency process, the defendants had violated his "federal statutory right to representation by adequate counsel in state clemency proceedings under 18 U.S.C. 3599." (Emphasis added).[5]

The relief requested includes: (1) a declaratory judgment that the defendants "interfered with his federal right, in the absence of adequate, similarly qualified replacement counsel, to be represented in clemency proceedings by his existing counsel appointed under 18 U.S.C. § 3599," and (2) a "permanent injunction, barring Defendants from executing him until a clemency proceeding occurs that complies with federal law." Bowles also moved in the district court for an emergency stay of execution.

[5] In his reply brief in support of his motion to stay in the district court, Bowles clarified that he was not asserting that the defendants violated his rights under the Due Process Clause or the Sixth Amendment, and his only claim for relief was that the defendants "violated his federal statutory right, codified in § 3599, to representation by his appointed federal counsel."

The district court denied Bowles' motion for a stay on July 19, 2019. The court explained that for a statute to create a federal right enforceable through § 1983 it must impose a binding obligation on the states. And because § 3599 does not, the court concluded, Bowles cannot establish a substantial likelihood of success on the merits and his motion for a stay necessarily fails. Bowles appealed that order on August 1, 2019 and has moved this Court for an emergency stay of execution "so that the appeal of the denial of a stay in his 42 U.S.C. § 1983 action can be considered."

II. STANDARD OF REVIEW

"[A] stay of execution is an equitable remedy and all of the rules of equity apply." Long v. Sec'y, Dep't of Corr., 924 F.3d 1171, 1176 (11th Cir. 2019). We may grant a stay of execution "only if the movant establishes that (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest." Id.; see also Powell v. Thomas, 641 F.3d 1255, 1257 (11th Cir. 2011).

III. DISCUSSION

A. Substantial Likelihood Of Success On The Merits

The first requirement for a stay pending appeal is that the movant must establish a substantial likelihood of success on the merits of his appeal. For

Bowles that means he must have shown a substantial likelihood that the district court abused its discretion when it denied his motion for a stay because it is the denial of that stay he is appealing. See Brooks v. Warden, 810 F.3d 812, 818 (11th Cir. 2016) ("[W]e review the denial of a stay of execution only for an abuse of discretion."). It's a request for a stay pending appeal in order to more fully review the district court's denial of a stay to give that court more time to decide the merits of Bowles' § 1983 claim based on the § 3599 issue he raises.

The district court denied Bowles' motion for a stay because it concluded that he had not shown a substantial likelihood of success on the merits of his underlying claim. The underlying claim was that he had an enforceable right under § 1983 to have his § 3599 counsel represent him in the state clemency proceeding more fully than they were allowed to do. The district court was not persuaded that Congress had created a right enforceable against the states when it provided in § 3599 for the appointment of federal counsel to represent capital defendants seeking federal habeas relief.

Section 1983 provides a private cause of action against any person who, under color of state law, deprives a person of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. "In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law." Blessing v. Freestone,

520 U.S. 329, 340 (1997). The first thing we do in determining whether a statute confers a federal right enforceable under § 1983 is "identify[] 'exactly what rights, considered in their most concrete, specific form, [plaintiff] [is] asserting.'" Burban v. City of Neptune Beach, 920 F.3d 1274, 1278 (11th Cir. 2019) (some alterations in original) (quoting Blessing, 520 U.S. at 342). Bowles has specified that the right he asserts is the purported right under § 3599 to have his federal counsel represent him in state clemency proceedings instead of being "forced . . . to proceed with inadequate counsel."[6]

[6] Bowles says that his § 3599 counsel was not allowed to represent him in the clemency proceedings, but that's not quite accurate. As Bowles' complaint notes, the Clemency Commission reached out to his CHU attorneys and invited them to submit comments and materials to the Commission. Those attorneys did so, submitting a six-page letter with information about Bowles' traumatic childhood and history of substance abuse. They also stated that "[b]ecause of the pending litigation in the Circuit Court on his intellectual disability claim, the narrative of [Bowles'] life cannot be further expanded on at this time." That perceived difficulty was not, of course, caused by the CHU attorneys not being appointed clemency counsel.

The CHU attorneys were also invited two more times to submit information to the Commission. The first was when the Governor's office rejected their request to reschedule Bowles' clemency interview. The Governor's office told the CHU attorneys: "You are welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration." The other additional invitation (which was the third one in all) came when the Commission denied the CHU attorneys' request to appear at the clemency interview. In doing so, it again stressed that "[a]ny party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration."

The CHU attorneys never submitted any more materials in response to those additional invitations. And Bowles does not claim that the Commission did not consider the letter that they had submitted or that it prevented them from submitting any other information or materials. The sum total of his claim appears to be that at the hour-and-a-half long clemency interview on August 2, 2018, Bowles should have been represented by the CHU attorneys instead of by the clemency attorney the Commission had appointed.

Having identified the alleged right, we "look at the text and structure of [the] statute in order to determine if it unambiguously provides" that specific right. 31 Foster Children v. Bush, 329 F.3d 1255, 1270 (11th Cir. 2003). In making that determination, we consider the three Blessing requirements to decide if that purported right is enforceable under § 1983. See Blessing, 520 U.S. at 340. Only if all three requirements are met will a rebuttable presumption arise that the right exists and is enforceable. See Burban, 920 F.3d at 1279; 31 Foster Children, 329 F.3d at 1269 (characterizing the Blessing factors as "requirements that must be met before a federal statute will be read to confer a right enforceable under § 1983"). Those three requirements are that: (1) "Congress must have intended that the provision in question benefit the plaintiff," (2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence," and (3) "the statute must unambiguously impose a binding obligation on the States." Blessing, 520 U.S. at 340–41 (quotation marks omitted). We will begin by examining more closely the statute Bowles relies on.[7]

[7] We note, as the district court did, that other "courts have considered whether an attorney appointed pursuant to section 3599 was authorized [by a federal court] to represent the defendant for a particular purpose, but not whether the defendant was entitled as a matter of federal law to have that attorney appear at a particular proceeding." Doc. 25 at 7–8 (emphasis added). Compare, e.g., Samayoa v. Davis, 928 F.3d 1127, 1132 (9th Cir. 2019) (holding that "state provisions for clemency counsel do not bar the appointment of additional counsel under § 3599 for purposes of state clemency proceedings"), with Irick v. Bell, 636 F.3d 289, 291 (6th Cir. 2011) (holding that § 3599 does not "obligate the federal government to pay for counsel in

1. 18 U.S.C. § 3599

Section 3599 provides funding for representation. It "authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.'" Ayestas v. Davis, 138 S. Ct. 1080, 1092 (2018) (quoting 18 U.S.C. § 3599(a)). Congress enacted this authorization for the funding of counsel and other legal services when it passed the Anti-Drug Abuse Act of 1988, which created a federal capital offense of drug-related homicide. See Pub. L. No. 100-690, § 7001, 102 Stat. 4181 (codified originally at 21 U.S.C. §§ 848(q)(4)-(10), then re-codified without change at 18 U.S.C. § 3599); Harbison v. Bell, 556 U.S. 180, 190 (2009). Congress did not limit this funding authorization to representation of defendants charged in federal court with a capital

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state [clemency] proceeding where the state itself has assumed that obligation"). Authorization to appear (and be paid) if allowed is one thing, right to appear instead of, or in addition to, state-appointed counsel is another. None of the § 3599 authorization decisions, as far as we can tell, were brought under § 1983 or sought the right to appear in a state clemency proceeding where the state provides other counsel.

By noting that distinction and by focusing on whether Bowles had a right to have his federally appointed counsel appear in the state clemency proceedings, we do not mean to imply that § 3599 obligates or even authorizes a federal district court to appoint federal counsel to appear in state clemency proceedings where the State has already appointed counsel for that purpose. That question is simply not before us. Nor was it before the Supreme Court when it held that "§ 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation." Harbison v. Bell, 556 U.S. 180, 194 (2009); cf. id. at 189 (noting that § 3599(a)(2) "provides for counsel only when a state petitioner is unable to obtain adequate representation").

crime; it also extended it to state death row inmates seeking habeas relief in federal court.

Under § 3599(a)(2), the provision applicable to state death row inmates, a prisoner seeking collateral relief in federal court "shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)." Subsections (b) through (d) set the qualifications that counsel must meet to be appointed, and subsection (e) "sets forth counsel's responsibilities." Harbison, 556 U.S. at 185. That subsection provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599(e) (emphasis added). Subsections (f) and (g) address when a court may authorize the defendant's attorneys to obtain other services on his behalf and how the attorneys will be paid for their services. Id. § 3599(f), (g).

2. The Intended Benefit?

With that brief overview we move now to the first Blessing requirement: whether Congress intended for the provision in question to benefit Bowles. Blessing, 520 U.S. at 340. The Supreme Court has explained that when Congress

intends for a provision to benefit specific individuals, it will use "rights-creating" language that is "individually focused," Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002), and "phrased in terms of the persons benefited," id. at 284 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 692 n.13 (1979)). Title VI of the Civil Rights Act of 1964 is a good example. See Gonzaga, 536 U.S. at 284. Title VI very specifically provides: "No person . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The right created is clear (not to be subject to discrimination by a program receiving federal funds), and it is equally clear who is obligated to respect that right ("any program or activity receiving Federal financial assistance").

In Gonzaga, the Supreme Court contrasted Title VI's "unmistakable focus on the benefited class," id. at 284 (emphasis and quotation marks omitted), with the statute that was before it: the Family Education Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g. In FERPA Congress instructed the Secretary of Education that "[n]o funds shall be made available . . . to any [school] which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents . . . ." 20 U.S.C. § 1232g(b)(1). The Court determined that this language did not "confer the sort of individual entitlement that is enforceable under § 1983" because the provisions spoke "only to the Secretary of Education" and the provisions' focus was "two steps removed

from the interests of individual students and parents." Gonzaga, 536 U.S. at 287 (quotation marks omitted).

Here, some provisions of § 3599 do contain the kind of individually focused language that indicates that Congress may have intended the statute to benefit certain individuals. Under subsection (a)(2), for example, it is the individual "defendant" who "shall be entitled to the appointment of one or more attorneys and the furnishing of such other services" as other subsections allow. 18 U.S.C. § 3599(a)(2). That could indicate that Congress intended to benefit capital defendants by entitling them to the appointment of counsel and other services.

But that's not the end of the analysis. Even if § 3599 creates some kind of private entitlement, we must still ensure that it compels the specific "right the plaintiff seeks to vindicate as opposed to some other right." Burban, 920 F.3d at 1280; see Blessing, 520 U.S. at 340 (explaining that our focus is whether the "provision in question" benefits the plaintiff) (emphasis added). The right Bowles seeks to vindicate is not the appointment or compensation of counsel but the right to have his federally appointed counsel appear at a state clemency interview where the State has appointed another attorney to do so. Nowhere in § 3599 did Congress "speak[] with a clear voice" that a state death row inmate has an individual right to have his § 3599 counsel, instead of or in addition to some other counsel, represent

him in a state clemency proceeding against the State's wishes. See Gonzaga, 536 U.S. at 280.

As Bowles sees it, § 3599(e) defines the scope of his right and embodies a mandate from Congress that his § 3599 appointed attorney "shall also represent" him in any "proceedings for executive or other clemency as may be available." 18 U.S.C. § 3599(e). Therefore, according to Bowles, Congress has created an individual right for him to have his attorney appear in any state clemency proceedings, regardless of the rules that the State normally applies to those proceedings. And unless that right is honored, he insists, the state court judgment conferring his death sentence cannot be carried out.

We do not believe that Congress intended to include such an expansive right, coupled with such a drastic remedy, in such an innocuously worded statute. After all, "[i]t is beyond dispute that [federal courts] do not hold a supervisory power over the courts of the several States." Dickerson v. United States, 530 U.S. 428, 438 (2000); see Harris v. Rivera, 454 U.S. 339, 344–45 (1981) ("Federal judges have no general supervisory power over state trial judges; they may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Federal Constitution."); Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional

dimension."). It would be a radical departure from the norm for lower federal courts, or Congress, to tell state courts what to do in state proceedings, including which lawyers they must permit to appear before them in those proceedings.

And that is, if anything, especially true of state clemency proceedings. Clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera v. Collins, 506 U.S. 390, 412 (1993). It is undisputed that there is no constitutional right to clemency. Id. at 414. It is instead a discretionary remedy that is "granted 'as a matter of grace.'" Valle v. Sec'y, Fla. Dep't of Corr., 654 F.3d 1266, 1268 (11th Cir. 2011) (quoting Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280–81 (1998)). Over that discretionary act of state executive officials, the federal judiciary exercises very little, if any, oversight. See Woodard, 523 U.S. at 289 (O'Connor, J., concurring) ("[J]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."); Wellons v. Comm'r, Ga. Dep't of Corr., 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (per curiam) (recognizing Justice O'Connor's concurring opinion in Woodard as "set[ting] binding precedent").[8]

[8] To the extent Bowles complains that his state-appointed counsel did not do a good enough job representing him in the state clemency proceedings, the right to have a more effective attorney represent him than the one who did is even further removed from the language of

Not only that, but as the district court pointed out, "it is questionable" whether the kind of interference in state clemency processes that Bowles says § 3599 provides would even be constitutionally permissible. Cf. Hoover v. Ronwin, 466 U.S. 558, 569 n.18 (1984) (explaining that regulation of the bar is an important "sovereign function" of state government linked to the power to protect the public). That is another reason not to interpret § 3599 in the way Bowles urges. See Clark v. Martinez, 543 U.S. 371, 380–81 (2005) (stating that statutes should be construed to avoid constitutional questions if fairly possible to do so); Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). At the very least, the intrusion of federal courts into state clemency proceedings would "aggravate the harm to federalism that federal habeas review" already causes. Davila v. Davis, 137 S. Ct. 2058, 2070 (2017); see also id. ("Federal habeas review of state convictions entails significant costs and intrudes

§ 3599. And given that there is no constitutional right to clemency, there is no constitutional right to effective assistance of counsel in clemency proceedings. Cf. Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (citations omitted); Murray v. Giarratano, 492 U.S. 1, 11 (1989) ("[P]risoners seeking judicial relief from their sentence in state proceedings [are] not entitled to counsel."); Chavez v. Sec'y, Fla. Dep't of Corr., 742 F.3d 940, 944 (11th Cir. 2014) ("The Supreme Court has long held that there is no constitutional right to counsel in post-conviction proceedings, even in capital cases, which necessarily means that a habeas petitioner cannot assert a viable, freestanding claim for the denial of the effective assistance of counsel in such proceedings.").

on state sovereignty to a degree matched by few exercises of federal judicial authority.") (citations and quotation marks omitted). And as we have discussed, federal courts have never exercised supervisory power over state courts and may not intervene in these proceedings except to prevent or remedy constitutional violations. See supra at 22–23.

When legislating against that backdrop, if Congress intends to allow federal interference into areas traditionally reserved to the states, it speaks clearly and unequivocally. See, e.g., 28 U.S.C. § 2251(a)(1) (explicitly granting "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending" the authority to "stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding"); id. § 2251(a)(3) (explicitly authorizing court to grant stay to allow for appointment of counsel under § 3599(a)(2)). There is nothing in § 3599 to indicate that Congress meant to empower Bowles' federally appointed and funded counsel to force themselves into state clemency proceedings.

A more natural reading of § 3599 is that all it does is what it says it does. Subsection (a) entitles defendants to the appointment of counsel and to the furnishing of certain other services. The other subsections explain just what that appointment and the furnishing of those services entails, including funding. No part of § 3599 states that appointed counsel have the right to appear in state

clemency proceedings where the State has provided other counsel. It is telling that every decision the parties rely on in which a court has interpreted § 3599 concerns when a federal district court has the authority to appoint counsel or approve the funding of other services — not whether federally appointed counsel can force their way into proceedings in which they would otherwise not be allowed and where there is already state-appointed counsel.[9] Congress may have created other rights in § 3599, but we are not persuaded that it intended to give Bowles the specific and extraordinary right he claims.

3. Intended Enforcement?

Our conclusion is reinforced by consideration of the second Blessing requirement: whether the "right assertedly protected by the statute" is "so vague and amorphous" that its enforcement would "strain judicial competence."

[9] E.g., Ayestas, 138 S. Ct. at 1085 (resolving in § 2255 appeal question of what standard courts must use to grant or deny funding under § 3599(f)); Harbison, 556 U.S. at 194 (holding that § 3599 authorizes a district court to appoint and fund counsel to represent defendant in state clemency proceedings); McFarland v. Scott, 512 U.S. 849, 855–57 (1994) (holding that the right to appointed counsel in federal habeas proceedings "adheres prior to the filing of a formal, legally sufficient habeas corpus petition"); Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1213–14 (11th Cir. 2014) (noting that "it would be an abuse of discretion for a district court to appoint federal habeas counsel to assist a state prisoner in exhausting his state postconviction remedies before a formal § 2254 petition has been filed"); Gary v. Warden, Ga. Diagnostic Prison, 686 F.3d 1261, 1277–79 (11th Cir. 2012) (holding that § 3599 does not provide for the federal appointment and funding of counsel to bring a new state court post-conviction proceeding unrelated to any federal claim); King v. Moore, 312 F.3d 1365, 1368 (11th Cir. 2002) (holding that a state prisoner is not entitled to federally funded counsel for the purpose of pursuing state post-conviction remedies); In re Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989) (holding that the right to federally appointed counsel does not encompass "any proceedings convened under the authority of a State").

Blessing, 520 U.S. at 340–41 (quotation marks omitted). As we construe it, § 3599 is sufficiently definite that our judicial competence is not strained. We are routinely confronted with questions of whether the statute authorizes the appointment of counsel or the furnishing of other funding in this or that circumstance. See, e.g., Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1213–14 (11th Cir. 2014) (noting that it would be an abuse of discretion for a district court "to appoint federal habeas counsel to assist a state prisoner in exhausting his state postconviction remedies before a formal § 2254 petition has been filed"); Gary v. Warden, Ga. Diagnostic Prison, 686 F.3d 1261, 1268–69 (11th Cir. 2012) (holding that district court did not abuse its discretion in refusing to authorize federal funds for experts to testify at state clemency hearing). As a primarily funding statute, there are objective guidelines.

But not if we construe the statute as Bowles would have us. The statute says nothing about when and how and under what circumstances the provisions of § 3599 are to override state clemency rules and procedures. We do not think Congress would enact such a far-reaching and intrusive right as the one Bowles asserts without also providing an objective benchmark to measure the extent of that right and gauge how it is to be enforced. See Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 519 (1990) (holding that obligation imposed on the states by statute was not "vague and amorphous" where the statute set out factors for the state to consider).

4. An Intended Obligation on the States?

Finally, even if Congress did enact § 3599 to benefit § 1983 plaintiffs in the way Bowles asserts, and even if we could find clarity in the statute about how to enforce the right Bowles claims, we would still conclude that Congress did not intend for the right to be enforceable through § 1983. We would because no provision of § 3599, "read individually or together, 'unambiguously impose[s] a binding obligation on the States'" to allow federally appointed counsel to appear in state clemency proceedings where that counsel would not otherwise have a right to appear. Burban, 920 F.3d at 1279 (alteration in original) (quoting Blessing, 520 U.S. at 341).

A provision unambiguously imposes a binding obligation on the states when it is "couched in mandatory, rather than precatory, terms." Blessing, 520 U.S. at 341. Section 3599 does use some mandatory language: defendants "shall be entitled" to the appointment of counsel, and counsel "shall" represent the defendant in certain proceedings, including clemency proceedings. § 3599(a)(2), (e). But that language does not even indirectly obligate the states to do anything. The statute does not say that clemency officials shall or must allow counsel appointed by a federal court under § 3599 to appear and represent the petitioner in a state clemency proceeding. Instead, as the district court pointed out, the statute "places an obligation on the federal courts to appoint and compensate

postconviction counsel for indigent capital defendants," and it "places a binding obligation on the defendant's federally appointed attorney," but at no point does the statute obligate "state courts or executive bodies to allow the federally appointed attorney to appear and practice before them." Doc. 25 at 6–7.

That's true of subsection (e), which specifically lists the state proceedings at which an appointed attorney "shall also" represent the defendant. That subsection does two things. First, it defines the scope of any appointment made under subsections (a)(1) and (a)(2). To the extent the subsection is definitional in nature, that definition "alone cannot and do[es] not supply a basis for conferring rights enforceable under § 1983." See 31 Foster Children, 329 F.3d at 1271. Second, the subsection obligates the attorney to represent his client in certain proceedings, including "proceedings for executive or other clemency as may be available to the defendant." § 3599(e). But the attorney is obligated to do that, and can do that only if he is allowed to do so by the relevant clemency officials. The statute does not obligate any state officials, including clemency officials, to allow an attorney appointed under § 3599 by a federal court to appear in and represent the petitioner in any state proceeding.

Bowles contends to the contrary. He insists that his right to an attorney and the obligation the statute imposes on that attorney to represent him in state clemency proceedings necessarily create a derivative obligation on the State to

allow his attorney to appear in that proceeding. He argues that the right Congress created would be meaningless unless the states had to affirmatively accommodate it. Cf. McFarland v. Scott, 512 U.S. 849, 859 (1994) (explaining that (1) criminal defendants are entitled to challenge their conviction and sentence in habeas corpus proceedings, (2) Congress has provided "indigent capital defendants with a mandatory right to qualified legal counsel" in those proceedings, and (3) as a result, a stay of execution is sometimes necessary "to give effect to that statutory right" to have appointed counsel file a § 2254 petition on the defendant's behalf).

Not quite. In § 3599, Congress created a mechanism for the appointment of counsel for certain capital defendants seeking to set aside their convictions or sentences in federal court. Otherwise, some of them might not be able to obtain counsel. But because Congress is not in the business of hiding elephants in mouseholes, see Whitman v. Am. Trucking Ass'n, 531 U.S. 467, 468 (2001), we doubt that it meant to use that procedural mechanism to stealthily impose a new set of rules on the states requiring them to treat federally appointed counsel differently than they would treat any other lawyer. Cf. Younger v. Harris, 401 U.S. 37, 46 (1971) (emphasizing the "fundamental policy against federal interference with state criminal prosecutions"). Under Bowles' interpretation of the statute, does § 3599 also impose an obligation on the states to allow federally appointed counsel to practice in state courts where they are not admitted? Bowles argues that "[i]n no

other context can a state court . . . refuse to hear from a death-sentenced litigant's counsel simply because of the origin of their representation." First, that argument gets things backward. The State appointed counsel for Bowles and allowed that counsel to represent him in the clemency proceedings. It is Bowles who seeks to have a federal court order the State to allow other counsel into a state proceeding "simply because of the origin of their representation." Second, the factual premise of the argument is wrong. The Clemency Commission did not, as he asserts, "refuse to hear from a death-sentenced litigant's counsel." The Commission heard from his state-appointed counsel and his federally appointed counsel were invited three times to submit any written materials they wished, and they did submit a lengthy letter in support of clemency.

As the district court concluded, "[t]o the extent section 3599(e) bears at all on a state's action, it is a precatory statement that the state should allow the defendant's federally appointed counsel to appear in such proceedings." But precatory statements, like implications, are not enough under Blessing. Blessing, 520 U.S. at 341.

Because Bowles seeks to enforce a right under § 1983 that Congress did not make enforceable against the states, he has not shown a substantial likelihood of success on the merits of his § 1983 claim before the district court. For that same

reason he has not shown a substantial likelihood of success on his appeal of the district court's denial of his motion to stay his execution.

B. Other Stay Requirements

Bowles contends that even if he cannot show a substantial likelihood of success on the merits, this Court should still grant him a stay of execution because his lawsuit "presents substantial issues of first impression for this Circuit" and he has made a strong showing on the other three factors. Even if he has, the standard he argues for is not the one the Supreme Court has instructed us to use. Instead, it has held that inmates seeking a stay of execution "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Hill v. McDonough, 547 U.S. 573, 584 (2006) (emphasis added).

And that has long been our rule. See Brooks, 810 F.3d at 818 ("It is by now hornbook law that a court may grant a stay of execution only if the moving party establishes that: (1) he has a substantial likelihood of success on the merits . . . .") (quotation marks omitted); Jones v. Comm'r, Ga. Dep't of Corr., 811 F.3d 1288, 1292 (11th Cir. 2016) ("It is by now axiomatic that a court may grant a stay of execution only if the moving party establishes that: (1) he has a substantial likelihood of success on the merits . . . .") (emphasis added) (quotation marks omitted); Gissendaner v. Comm'r, Ga. Dep't of Corr., 779 F.3d 1275, 1280 (11th Cir. 2015) (stating that a stay of execution "is appropriate only if the moving party

establishes all of the" traditional elements for granting a stay) (emphasis added); Powell, 641 F.3d at 1257 ("This Court may grant a stay of execution only if the moving party shows that: (1) he has a substantial likelihood of success on the merits . . . .") (emphasis added).

For that reason, we have often declined to consider the remaining stay requirements when an inmate has not shown a substantial likelihood of success on the merits. See Mann v. Palmer, 713 F.3d 1306, 1310 (11th Cir. 2013) ("Because [the defendant] cannot establish a substantial likelihood of success on the merits of his complaint, we deny [his] motion for a stay of execution."); Valle v. Singer, 655 F.3d 1223, 1225 (11th Cir. 2011) (per curiam) ("Because [the defendant] has failed to show a substantial likelihood of success on the merits, we need not address the other three requirements for issuance of a stay of execution."); DeYoung v. Owens, 646 F.3d 1319, 1328 (11th Cir. 2011) ("[The defendant] has not demonstrated a substantial likelihood of success on the merits of his claims. Therefore, the Court denies [his] motion for a stay of execution in this Court.").

Second, the balance of the equities does not weigh in Bowles' favor anyway. Specifically, he has not shown that "the injunction would not substantially harm the other litigant" or that "the injunction would not be adverse to the public interest." Long, 924 F.3d at 1176. The Supreme Court has repeatedly recognized that "equity must be sensitive to the State's strong interest in enforcing its criminal

judgment without undue interference from the federal courts." Hill, 547 U.S. at 584; see Nelson v. Campbell, 541 U.S. 637, 650 (2004) (recognizing "the State's significant interest in enforcing its criminal judgments"); In re Blodgett, 502 U.S. 236, 239 (1992) (noting that a stay prevents a state "from exercising its sovereign power to enforce the criminal law"); Gomez v. U.S. Dist. Ct. of N. Dist. of Cal., 503 U.S. 653, 654 (1992) (per curiam) ("Equity must take into consideration the State's strong interest in proceeding with its judgment . . . ."); McCleskey v. Zant, 499 U.S. 467, 493 (1991) (recognizing the "State's interest in the finality of its criminal judgments"). As the Supreme Court has explained: "Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citations and quotation marks omitted).

We have also long emphasized the "the State's and the victims' interests in the finality and timely enforcement of valid criminal judgments." Ledford v. Comm'r, Ga. Dep't of Corr., 856 F.3d 1312, 1320 (11th Cir. 2017); see Arthur v. King, 500 F.3d 1335, 1340 (11th Cir. 2007) (per curiam) ("The strong interest of the State and the victims'[] families is in the timely enforcement of a sentence,

which acquires an added moral dimension once post-trial proceedings finalize.") (citation and quotation marks omitted); Williams v. Allen, 496 F.3d 1210, 1214 (11th Cir. 2007) (noting that "[b]oth the State and the victim's family have a strong interest in the timely enforcement of [the defendant's] death sentence," and explaining that an entry of a stay would grant the defendant a "reprieve from his judgment"). And we have rejected the argument that "the equities favor a stay because [the defendant] will suffer irreparable harm if he is executed, whereas the state will only suffer [a] minimal inconvenience," because "the state, the victim, and the victim's family also have an important interest in the timely enforcement of [the defendant's] sentence." Brooks, 810 F.3d at 825–26 (quotation marks omitted).

So while "neither [the State] nor the public has any interest in carrying out an execution" based on a defective conviction or sentence, see Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 702 (11th Cir. 2019), "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [valid] sentence," Hill, 547 U.S. at 584. Stays of executions where the conviction and sentence are valid impose a cost on the State and the family and friends of the murder victim. As we have stated many times, "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983); see McNair v. Allen, 515 F.3d

1168, 1176 (11th Cir. 2008) (same); Jones v. Allen, 485 F.3d 635, 641 (11th Cir. 2007) (same); Williams v. Allen, 496 F.3d 1210, 1214 (11th Cir. 2007) (same); Schwab v. Sec'y, Dep't of Corr., 507 F.3d 1297, 1301 (11th Cir. 2007) (per curiam) (same); Rutherford v. McDonough, 466 F.3d 970, 978 (11th Cir. 2006) (same); Lawrence v. Florida, 421 F.3d 1221, 1224 n.1 (11th Cir. 2005) (same).

V. CONCLUSION

Because Bowles seeks to enforce a right under § 1983 that Congress did not make enforceable against state clemency officials under that statute, he has not shown a substantial likelihood of success on the merits of his claim that the district court abused its discretion by denying his motion for a stay. Nor has he shown that the balance of equities warrants the entry of a stay of execution for his 1994 murder of Walter Hinton.

Gary Bowles murdered Walter Hinton, John Roberts, and Albert Morris in separate incidents during 1994. And he later informed a psychologist that he had killed three other people as well. Now, a quarter of a century after his three-murder year, he wants the carrying out of his death sentence, which was unanimously recommended by the jury, stayed. He is not entitled to a stay of execution, which would amount to a commutation of his death sentence for the duration of the stay. See Bucklew v. Precythe, 139 S. Ct. 1112, 1133–34 (2019) (lamenting that the State's "interests have been frustrated" by the imposition of

legal delays because the defendant "committed his crimes more than two decades ago," and stating that "[t]he people of [the State], the surviving victims of [the defendant's] crimes, and others like them deserve better").

MOTION FOR A STAY OF EXECUTION DENIED.

MARTIN, Circuit Judge, concurring:

Like the Majority, I understand 18 U.S.C. § 3599 to authorize federally appointed (and federally paid) habeas counsel to appear in state proceedings.[1] See Harbison v. Bell, 556 U.S. 180, 185–87, 129 S. Ct. 1481, 1486–87 (2009). Yet I believe the Majority reaches the correct legal ruling when it holds that Mr. Bowles has not shown a substantial likelihood of success on the merits of his 42 U.S.C. § 1983 claim. Legal precedent tells me that 18 U.S.C. § 3599 does not unambiguously impose a binding obligation on the States to allow federally appointed habeas counsel to appear in state clemency proceedings to advocate for a death row inmate. See Blessing v. Freestone, 520 U.S. 329, 341, 117 S. Ct. 1353, 1359 (1997) (stating a federal statue must "unambiguously impose a binding obligation on the States" to be enforceable under § 1983). For that reason, I must

[1] The Majority Opinion seems to suggest that once "the State has already appointed counsel" to represent a death row inmate, § 3599 may not authorize federally appointed and paid counsel to represent their client in state clemency proceedings. Maj. Op. at 17 n.7. However, the statute does not make this distinction:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599(e).

agree that the right Mr. Bowles says Congress conferred through § 3599 is not enforceable in a § 1983 action. See id.; see also Burban v. City of Neptune Beach, 920 F.3d 1274, 1279–80 (11th Cir. 2019).

However, I believe the question presented by Mr. Bowles's case is fully answered by analysis of the third Blessing factor alone, which means there was no need for the Majority opinion to discuss the other factors. See Burban, 920 F.3d at 1279 ("If a provision fails to meet any one of the three Blessing factors, it does not provide a person with a federal right enforceable under § 1983."). With regard to the Blessing analysis contained in the Majority opinion, therefore, I join only that related to the third of its requirements. Neither do I join in the analysis contained in the Majority opinion regarding the requirements for a stay of execution, beyond that related to the first factor: substantial likelihood of success on the merits. See Hill v. McDonough, 547 U.S. 573, 584, 126 S. Ct. 2096, 2104 (2006) (explaining that inmates seeking a stay of execution "must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits").

I also write separately to express my view that both Mr. Bowles and the Florida Commission on Offender Review (the "Commission") could have benefited by having counsel from the Capital Habeas Unit of the Federal Public Defender for the North District of Florida ("CHU") continue to represent Mr. Bowles in his state clemency proceedings. It is puzzling that the Commission

barred the knowledgeable and willing CHU lawyers from representing Mr. Bowles. Just as I must acknowledge that Mr. Bowles may not enforce a legal right to be represented by counsel from the CHU, neither was there any legal impediment to those lawyers appearing on his behalf. Thus, it is not only mysterious but possibly tragic that counsel was turned away.

Attorneys from the CHU have specialized training in the intricacies of death penalty litigation. And Mr. Bowles's CHU counsel represented him in his federal habeas proceedings. As a result, they became intimately familiar with Mr. Bowles's history of being physically and sexually abused; the neglect and abuse he suffered at the hands of his mother; his intellectual disabilities; his early introduction to substance abuse; and the details of his life as a homeless child prostitute. This wealth of knowledge about Mr. Bowles would have aided the Commission members in learning whether he would be a good candidate for executive clemency. See Fla. Stat. § 947.13(e) (noting the Commission must report to the Clemency Board about an inmate's "social, physical, mental, and psychiatric conditions and histor[y]"); see also Am. Bar Ass'n, Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States, 63 Ohio State L.J. 487, 511–12 (2002) (listing factors that may be considered during the clemency process).

Instead of hearing from Mr. Bowles's experienced and knowledgeable counsel, the Commission appointed a new lawyer. According to Mr. Bowles's filings, this new lawyer had never handled a death penalty case at any stage. Also, at the time of his appointment, this lawyer had no familiarity with Bowles's history. Perhaps it was for these reasons that the new lawyer welcomed participation by the CHU lawyers in Mr. Bowles's clemency proceedings. The Commission, on the other hand, was not welcoming at all. For me, the Commission's decisions to bar the appearance of experienced counsel casts a shadow over Mr. Bowles's clemency proceeding.

Particularly in cases where the State intends to take a man's life, clemency proceedings play an important role. Clemency power is "a prerogative granted to executive authorities to help ensure that justice is tempered by mercy." Cavazos v. Smith, 565 U.S. 1, 8–9, 132 S. Ct. 2, 7 (2011) (per curiam). And the Supreme Court has repeatedly recognized that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera v. Collins, 506 U.S. 390, 411–412, 113 S. Ct. 853, 866 (1993) (footnote omitted); see also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288–89, 118 S. Ct. 1244, 1253–54 (1998) (O'Connor, J., concurring) (recognizing that death row inmates have a limited due

process interest in their state clemency proceedings).[2] Clemency is "the fail safe in our criminal justice system." Harbison, 556 U.S. at 192, 129 S. Ct. at 1490 (2009) (quotation marks omitted). That the State of Florida would turn away competent counsel from Mr. Bowles' clemency proceeding devalues the role that clemency was long ago established to play in our criminal justice system.

Florida law gives the Commission the authority and responsibility to "conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board." Fla. R. Exec. Clemency 15(B); see Fla. Stat. § 947.13 (powers and duties of the commission). The Commission must report to the Clemency Board on "the circumstances, the criminal records, and the social, physical, mental, and psychiatric conditions and histories of persons under consideration [for clemency]." Fla. Stat. § 947.13(e). For inmates who have been sentenced to die at the hands of the state, yet who are seeking a commutation of their death sentence, the Commission must conduct "an interview with the inmate, who may have clemency counsel present." Fla. R. Exec. Clemency 15(B). This clemency process is likely the last opportunity a death-sentenced inmate has to persuade the State that his life is worth sparing. I cannot understand why Florida would fail to equip itself with the most fulsome

[2] This Court has recognized that the holding in Woodard was provided by Justice O'Connor's concurring opinion. See Wellons v. Comm'r, Ga. Dep't of Corr., 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (per curiam).

presentation possible, when its charge is to be sure that the execution of a man is not a miscarriage of justice. The same holds true for its charge to examine whether a man warrants mercy.

When Mr. Bowles appeared for his clemency interview, he did not have the counsel who had been by his side through his federal habeas proceedings. This happened, even though federal law funds counsel for this purpose, *and* his habeas counsel was ready to represent him. See 18 U.S.C. § 3599(e). Mr. Bowles, the Commission, and the Clemency Board all would have benefitted from continuity of counsel. See Harbison, 556 U.S. at 193, 129 S. Ct. at 1490–91 (recognizing that in designing § 3599, "Congress likely appreciated that federal habeas counsel are well positioned to represent their clients in the state clemency proceedings that typically follow the conclusion of [federal habeas] litigation"). This is especially troubling because neither the District Court's records nor the records before this Court offer any explanation as to why the Commission turned away CHU counsel.

There are currently 343 men and women on Florida's death row. See Death Row Roster, Fla. Dep't of Corr., http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited Aug. 16, 2019). Florida gives each of them an opportunity to seek clemency from the governor, "as a matter of grace," Woodard, 523 U.S. at 280–81, 118 S. Ct. at 1250 (plurality opinion). Grace would include, in my view, the opportunity for them to make their very best case for mercy.

(//www.dc.state.fl.us/index.html)

Florida Department of Corrections
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Statistics (//www.dc.state.fl.us/pub/index.html)

Corrections Offender Network

Inmate Population Information Detail

(This information was current as of 8/11/2019)

DC Number:	086158
Name:	BOWLES, GARY R
Race:	WHITE
Sex:	MALE
Birth Date:	01/25/1962
Initial Receipt Date:	09/09/1996
Current Facility:	FLORIDA STATE PRISON (http://prod.wpws001.fdc.myflorida.com/org/facility
Current Custody:	MAXIMUM
Current Release Date:	DEATH SENTENCE

VINELink CLICK HERE for Custody Status Updates
(https://www.vinelink.com/vinelink/servlet/SubjectSearch?siteID=10000&agency=900&offenderID=086158)

Visiting Request Form - Part 1 (http://prod.fdc-wpws001.fdc.myflorida.com/ci/visit/205.pdf)

Visiting Request Form - Part 2 (http://prod.fdc-wpws001.fdc.myflorida.com/ci/visit/DC6-111B.pdf)

How to Apply for Visitation (http://prod.fdc-wpws001.fdc.myflorida.com/ci/visit.html)

Special Note:	**See Detainer Section**

Aliases:

GARY RAY BOLES, GARY RAY BOWELS, GARY R BOWLES, GARY RAY BOWLES, MARK RAY BOWLES, RAY BOWLES MARK, TIMOTHY WHITFIELD

Current Prison Sentence History:

Offense Date	Offense	Sentence Date	County	Case No.	Prison Sentence Length
11/16/1994	1ST DG MUR/PREMED. OR ATT.	09/06/1996	DUVAL	9412188	DEATH SENTENCE
05/18/1994	1ST DG MUR/PREMED. OR ATT.	10/10/1996	NASSAU	9500012	SENTENCED TO LIFE
03/14/1994	1ST DG MUR/PREMED. OR ATT.	08/06/1997	VOLUSIA	9436050	SENTENCED TO LIFE
03/14/1994	ROBB. GUN OR DEADLY WPN	08/06/1997	VOLUSIA	9436050	SENTENCED TO LIFE
03/14/1994	BURGLARY ASSAULT ANY PERSON	08/06/1997	VOLUSIA	9436050	SENTENCED TO LIFE
03/14/1994	GRAND THEFT,300 L/5,000	08/06/1997	VOLUSIA	9436050	5Y 0M 0D

Note: The offense descriptions are truncated and do not necessarily reflect the crime of conviction. Please refer to the court documents or the Florida Statutes for further information or definition.

Detainers:(Further informa ion may be obtained by contacting the detaining agency)

Detainer Date	Agency	Type	Date Canceled
01/12/1998	STATE ATTORNEY	DETAIN	
01/12/1998	ROCKVILLE, MD	DETAIN	
04/02/1998	CHATHAM COUNTY S/O	DETAIN	
04/02/1998	SAVANNAH, GA	DETAIN	
09/10/1996	VOLUSIA COUNTY S/O	DETAIN	
09/27/1982	NOTIFY HILLSBORO P&P	DETAIN	12/28/1983
09/28/1998	***AMEND TO ADD**	DETAIN	
09/28/1998	SAVANNAH, GA	DETAIN	
09/28/1998	PH 912/652-7308	DETAIN	
10/01/1991	NTFY:070-VOLUSIA P&P	NTFY/P&P	12/30/1993

Incarceration History:

Date In-Custody	Date Out-Custody
10/01/1982	12/28/1983
11/18/1987	04/03/1990
09/26/1991	12/30/1993
09/09/1996	Currently Incarcerated

Prior Prison History: (Note: Data reflected covers periods of incarceration wi h the Florida Dept.of Correc ions since January of 1983)

Offense Date	Offense	Sentence Date	County	Case No.	Prison Sentence Length
06/04/1982	AGG BATTERY INTENDED HARM	09/27/1982	HILLSBOROUGH	8206355	3Y 0M 0D
06/04/1982	SEX BAT/ WPN. OR FORCE	11/09/1987	HILLSBOROUGH	8206355	8Y 0M 0D
02/17/1991	ROBB. NO GUN/DDLY.WPN	07/18/1991	VOLUSIA	9100838	4Y 0M 0D
08/04/1990	GRAND THEFT MOTOR VEHICLE	07/18/1991	VOLUSIA	9005390	5Y 0M 0D
06/07/1991	GRAND THEFT,$300 LESS &20,000	07/18/1991	VOLUSIA	9103122	5Y 0M 0D

First | Previous | Next | Last | Return to List | New Search

Record: 1 of 1

The Florida Department of Corrections updates this information regularly, to ensure that it is complete and accurate, however this information can change quickly. Therefore, the information on this site may not reflect the true current location, status, release date, or other information regarding an inmate.

This database contains public record information on felony offenders sentenced to the Department of Corrections. This information only includes offenders sentenced to state prison or state supervision. Information contained herein includes current and prior offenses. Offense types include related crimes such as attempts, conspiracies and solicitations to commit crimes. Information on offenders sentenced to county jail, county probation, or any other form of supervision is not contained. The information is derived from court records provided to the Department of Corrections and is made available as a public service to interested citizens. The Department of Corrections makes no guarantee as to the accuracy or completeness of the information contained herein. Any person who believes information provided is not accurate may contact the Department of Corrections.

For questions and comments, you may contact the Department of Corrections, Bureau of Classification and Central Records, at (850) 488-9859 or go to Frequently Asked Questions About Inmates for more information (http://prod.fdc-wpws001.fdc.myflorida.com/ci/index.html). This information is made available to the public and law enforcement in the interest of public safety.

Search Criteria: (/OffenderSearch/search.aspx?TypeSearch=AI) Last Name: bowles First Name: gary Search Aliases: YES Offense Category: County of Commitment: ALL Current Location: ALL

Return to Corrections Offender Information Network (../OffenderSearch/InmateInfoMenu.aspx)

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Corrections Offender Network

Death Row Roster

This page contains two tables: Death Row Statistics and a list of all inmates on Death Row. These tables are being compiled from our current inmate population information database and will take a few minutes to build.

Statistics:

Total White Males	204
Total Black Males	127
Total Other Males	9
Total White Females	1
Total Black Females	2
Total Other Females	0
8/16/2019 Total	343

The following table provides a complete roster of all inmates on Florida's Death Row. The table is sorted by the date the inmate was received by the Department of Corrections. Click on the inmate number for additional information and photograph.

Inmate Name	DC#	Race/ Gender	Date Received	Crime	Date of Offense	Date of Sentence
Rose, James	011225 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=011225&TypeSearch=AI)	WM	10/14/1971	1ST DG MUR/PREMED. OR ATT.	10/22/1976	05/13/197
Phillips, Harry	008035 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=008035&TypeSearch=AI)	BM	04/30/1974	1ST DG MUR/PREMED. OR ATT.	08/31/1982	02/01/198
Foster, Charles	049546 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=049546&TypeSearch=AI)	WM	10/07/1975	1ST DG MUR/PREMED. OR ATT.	07/15/1975	10/04/197
Zeigler, William	053948 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=053948&TypeSearch=AI)	WM	07/19/1976	1ST DG MUR/PREMED. OR ATT.	12/24/1975	07/16/197
			07/19/1976	1ST DG MUR/PREMED. OR ATT.	12/24/1975	07/16/197
Sireci, Henry	056338 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=056338&TypeSearch=AI)	WM	11/16/1976	1ST DG MUR/PREMED. OR ATT.	12/03/1975	11/15/1976
Lucas, Harold	058279 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=058279&TypeSearch=AI)	WM	02/10/1977	1ST DG MUR/PREMED. OR ATT.	08/14/1976	02/09/197
Hitchcock, James	058293 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=058293&TypeSearch=AI)	WM	02/14/1977	1ST DG MUR/PREMED. OR ATT.	07/31/1976	02/11/197
Thompson, William	053779 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=053779&TypeSearch=AI)	WM	01/26/1978	1ST DG MUR/PREMED. OR ATT.	03/30/1976	09/20/197
Downs, Ernest	063143 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=063143&TypeSearch=AI)	WM	01/27/1978	1ST DG MUR/PREMED. OR ATT.	04/23/1977	01/27/197
Booker, Stephen	044049 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=044049&TypeSearch=AI)	BM	10/02/1978	1ST DG MUR/PREMED. OR ATT.	11/09/1977	10/20/197
Dillbeck, Donald	068610 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=068610&TypeSearch=AI)	WM	06/13/1979	1ST DG MUR/PREMED. OR ATT.	06/24/1990	03/15/199
Scott, Paul	071615 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=071615&TypeSearch=AI)	WM	01/07/1980	1ST DG MUR/PREMED. OR ATT.	12/04/1978	12/14/197
Jennings, Bryan	073045 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=073045&TypeSearch=AI)	WM	05/08/1980	1ST DG MUR/PREMED. OR ATT.	05/11/1979	04/25/198
Jackson, Etheria	072847 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=072847&TypeSearch=AI)	BM	07/10/1980	1ST DG MUR/PREMED. OR ATT.	12/03/1985	08/08/198
Quince, Kenneth	075812 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=075812&TypeSearch=AI)	BM	10/21/1980	1ST DG MUR/PREMED. OR ATT.	12/28/1979	10/21/198
			10/21/1980	BURGLARY ASSAULT ANY PERSON	12/28/1979	10/21/198
Robertson, James	322534 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=322534&TypeSearch=AI)	WM	11/26/1980	1ST DG MUR/PREMED. OR ATT.	12/10/2008	12/18/201
Oats, Sonny	051769 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=051769&TypeSearch=AI)	BM	02/10/1981	1ST DG MUR/PREMED. OR ATT.	12/20/1979	02/10/198
Lightbourn, Ian	078081 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=078081&TypeSearch=AI)	BM	05/01/1981	1ST DG MUR/PREMED. OR ATT.	01/16/1981	05/01/198
* Card, James	081792 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=081792&TypeSearch=AI)	WM	02/01/1982	1ST DG MUR/PREMED. OR ATT.	06/03/1981	01/28/198
			02/01/1982	KIDNAP;COMM.OR FAC.FELONY	06/03/1981	01/28/198
			02/01/1982	ROBB. GUN OR DEADLY WPN	06/03/1981	01/28/198
			02/01/1982	GRAND THEFT,$300 LESS &20,000	10/30/1980	03/26/198
			02/01/1982	TRAFFIC IN STOLEN PROPERTY	10/30/1980	03/26/198
			02/01/1982	POSS.FIREARM BY FELON	11/06/1980	03/26/198
Pope, Thomas	083040 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=083040&TypeSearch=AI)	WM	04/09/1982	1ST DG MUR/PREMED. OR ATT.	01/16/1981	04/07/198

Blanco, Omar	084582 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=084582&TypeSearch=AI)	WM	06/23/1982	1ST DG MUR/PREMED. OR ATT.	01/14/1982	05/24/198
Pace, Bruce	084643 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=084643&TypeSearch=AI)	BM	06/28/1982	1ST DG MUR/PREMED. OR ATT.	11/04/1988	11/16/198
Byrd, Milford	085488 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=085488&TypeSearch=AI)	WM	08/18/1982	1ST DG MUR/PREMED. OR ATT.	10/12/1981	08/13/198
Doyle, Daniel	086006 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=086006&TypeSearch=AI)	WM	09/22/1982	1ST DG MUR/PREMED. OR ATT.	09/05/1981	05/13/198
Cave, Alphonso	087429 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=087429&TypeSearch=AI)	BM	12/17/1982	1ST DG MUR/PREMED. OR ATT.	04/27/1982	12/10/198
* Parker, J.	789049 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=789049&TypeSearch=AI)	BM	01/12/1983	KIDNAP;COMM.OR FAC.FELONY	04/27/1982	01/11/198
			01/12/1983	ROBBERY-BUSINESS-GUN	07/11/1979	10/12/197
			01/12/1983	ROBB. GUN OR DEADLY WPN	04/27/1982	01/11/198
			01/12/1983	1ST DG MUR/PREMED. OR ATT.	04/27/1982	01/11/198
Bates, Kayle	088568 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=088568&TypeSearch=AI)	BM	03/14/1983	1ST DG MUR/PREMED. OR ATT.	06/14/1982	03/11/198
Rose, Milo	090411 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=090411&TypeSearch=AI)	WM	07/14/1983	1ST DG MUR/PREMED. OR ATT.	10/18/1982	07/08/198
Wright, Joel	749768 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=749768&TypeSearch=AI)	WM	09/23/1983	1ST DG MUR/PREMED. OR ATT.	02/06/1983	09/23/198
Smith, Derrick	490606 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=490606&TypeSearch=AI)	BM	12/02/1983	1ST DG MUR/PREMED. OR ATT.	03/21/1983	07/13/199
Peede, Robert	093094 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=093094&TypeSearch=AI)	WM	03/07/1984	1ST DG MUR/PREMED. OR ATT.	03/31/1983	03/05/198
Walton, Jason	093268 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=093268&TypeSearch=AI)	WM	03/22/1984	1ST DG MUR/PREMED. OR ATT.	06/18/1982	03/14/198
Kelley, William	093417 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=093417&TypeSearch=AI)	WM	04/06/1984	1ST DG MUR/PREMED. OR ATT.	10/03/1966	04/02/198
Puiatti, Carl	716927 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=716927&TypeSearch=AI)	WM	05/14/1984	1ST DG MUR/PREMED. OR ATT.	08/16/1983	05/04/198
Muehleman, Jeffrey	094506 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=094506&TypeSearch=AI)	WM	07/17/1984	1ST DG MUR/PREMED. OR ATT.	05/05/1983	06/08/198
Kokal, Gregory	072002 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=072002&TypeSearch=AI)	WM	11/14/1984	1ST DG MUR/PREMED. OR ATT.	09/29/1983	11/14/1984
Mckenzie, Norman	648711 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=648711&TypeSearch=AI)	WM	11/27/1984	1ST DG MUR/PREMED. OR ATT.	10/04/2006	10/19/200
			11/27/1984	1ST DG MUR/PREMED. OR ATT.	10/04/2006	10/19/200
Nixon, Joe	910610 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=910610&TypeSearch=AI)	BM	11/30/1984	1ST DG MUR/PREMED. OR ATT.	08/12/1984	07/30/198
Rhodes, Richard	099269 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=099269&TypeSearch=AI)	WM	09/17/1985	1ST DG MUR/PREMED. OR ATT.	02/29/1984	09/12/198
Owen, Duane	101660 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=101660&TypeSearch=AI)	WM	03/19/1986	1ST DG MUR/PREMED. OR ATT.	03/24/1984	03/13/198
			03/19/1986	1ST DG MUR/PREMED. OR ATT.	05/29/1984	03/13/198
Marshall, Matthew	648254 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=648254&TypeSearch=AI)	BM	05/20/1986	1ST DEG MUR,COM.OF FELONY	11/01/1988	12/12/198
Rodriguez, Manolo	073283 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=073283&TypeSearch=AI)	HM	05/27/1986	1ST DEG MUR,COM.OF FELONY	12/04/1984	10/24/199

			05/27/1986	1ST DEG MUR,COM.OF FELONY	12/04/1984	10/24/199
			05/27/1986	1ST DEG MUR,COM.OF FELONY	12/04/1984	10/24/199
Harvey, Harold	102992 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=102992&TypeSearch=AI)	WM	06/23/1986	1ST DG MUR/PREMED. OR ATT.	02/23/1985	06/20/198
			06/23/1986	1ST DG MUR/PREMED. OR ATT.	02/23/1985	06/20/198
Stewart, Kenneth	479774 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=479774&TypeSearch=AI)	WM	10/08/1986	1ST DG MUR/PREMED. OR ATT.	04/14/1985	10/03/198
Reed, Grover	105661 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=105661&TypeSearch=AI)	WM	01/09/1987	1ST DG MUR/PREMED. OR ATT.	02/27/1986	01/09/198
Barwick, Darryl	092501 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=092501&TypeSearch=AI)	WM	01/30/1987	1ST DEG MUR,COM.OF FELONY	03/31/1986	08/11/199
Davis, Mark	106014 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=106014&TypeSearch=AI)	WM	02/03/1987	1ST DG MUR/PREMED. OR ATT.	07/01/1985	01/30/198
Brown, Paul	019762 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=019762&TypeSearch=AI)	WM	03/05/1987	1ST DG MUR/PREMED. OR ATT.	03/20/1986	03/02/198
Rivera, Michael	640779 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=640779&TypeSearch=AI)	WM	05/08/1987	1ST DG MUR/PREMED. OR ATT.	01/30/1986	05/01/198
Trotter, Melvin	573461 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=573461&TypeSearch=AI)	BM	06/18/1987	1ST DG MUR/PREMED. OR ATT.	06/16/1986	05/18/198
Dailey, James	108509 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=108509&TypeSearch=AI)	WM	08/10/1987	1ST DG MUR/PREMED. OR ATT.	05/05/1985	08/07/198
Reaves, William	040002 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=040002&TypeSearch=AI)	BM	09/02/1987	1ST DG MUR/PREMED. OR ATT.	09/23/1986	03/06/199
Occhicone, Dominick	226426 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=226426&TypeSearch=AI)	WM	11/10/1987	1ST DG MUR/PREMED. OR ATT.	06/10/1986	11/09/198
Sochor, Dennis	639131 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=639131&TypeSearch=AI)	WM	11/16/1987	1ST DG MUR/PREMED. OR ATT.	01/01/1982	11/02/198
Freeman, John	072746 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=072746&TypeSearch=AI)	WM	12/14/1987	1ST DG MUR/PREMED. OR ATT.	11/11/1986	11/02/198
Anderson, Richard	042115 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=042115&TypeSearch=AI)	WM	02/29/1988	1ST DG MUR/PREMED. OR ATT.	05/07/1987	02/26/198
Haliburton, Jerry	046651 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=046651&TypeSearch=AI)	BM	04/19/1988	1ST DG MUR/PREMED. OR ATT.	08/09/1981	04/11/198
* Johnson, Paul	019513 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=019513&TypeSearch=AI)	WM	04/22/1988	1ST DG MUR/PREMED. OR ATT.	01/09/1981	04/28/198
			04/22/1988	1ST DG MUR/PREMED. OR ATT.	01/09/1981	04/28/198
			04/22/1988	1ST DG MUR/PREMED. OR ATT.	01/09/1981	04/28/198
			04/22/1988	1ST DG MUR/PREMED. OR ATT.	01/09/1981	04/28/198
			04/22/1988	1ST DG MUR/PREMED. OR ATT.	01/09/1981	04/28/198
			04/22/1988	KIDNAP;COMM.OR FAC.FELONY	01/09/1981	04/28/198
			04/22/1988	ROBB. GUN OR DEADLY WPN	01/09/1981	04/28/198
			04/22/1988	ROBB. GUN OR DEADLY WPN	01/09/1981	04/28/198
			04/22/1988	ARSON,WILLFUL DAMA.STRUCT.	01/09/1981	04/28/198
Jones, Randall	111508 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=111508&TypeSearch=AI)	WM	05/04/1988	1ST DG MUR/PREMED. OR ATT.	07/27/1987	05/03/198
Burns, Daniel	111918 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=111918&TypeSearch=AI)	BM	06/07/1988	1ST DG MUR/PREMED. OR ATT.	08/18/1987	06/02/198

Duckett, James	112232 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=112232&TypeSearch=AI)	WM	06/30/1988	1ST DG MUR/PREMED. OR ATT.	05/12/1987	06/30/198
Derrick, Samuel	097494 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=097494&TypeSearch=AI)	WM	07/25/1988	1ST DG MUR/PREMED. OR ATT.	06/24/1987	07/25/198
Walls, Frank	112850 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=112850&TypeSearch=AI)	WM	08/24/1988	1ST DEG MUR,COM.OF FELONY	07/22/1987	07/29/199
Ponticelli, Anthony	112967 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=112967&TypeSearch=AI)	WM	09/06/1988	1ST DG MUR/PREMED. OR ATT.	11/27/1987	09/06/198
Randolph, Richard	115769 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=115769&TypeSearch=AI)	BM	04/05/1989	1ST DG MUR/PREMED. OR ATT.	08/15/1988	04/05/198
Taylor, Perry	086160 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=086160&TypeSearch=AI)	BM	05/15/1989	1ST DEG MUR,COM.OF FELONY	10/24/1988	05/12/198
Shere, Richard	116320 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=116320&TypeSearch=AI)	WM	05/18/1989	1ST DG MUR/PREMED. OR ATT.	12/25/1987	04/17/198
Hodges, George	117157 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=117157&TypeSearch=AI)	WM	08/11/1989	1ST DG MUR/PREMED. OR ATT.	01/08/1987	08/10/198
Watts, Tony	286020 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=286020&TypeSearch=AI)	BM	09/15/1989	1ST DG MUR/PREMED. OR ATT.	02/17/1988	09/15/198
Pietri, Noberto	096867 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=096867&TypeSearch=AI)	HM	03/30/1990	1ST DG MUR/PREMED. OR ATT.	08/22/1988	03/15/199
Valentine, Terance	119682 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=119682&TypeSearch=AI)	BM	04/16/1990	1ST DG MUR/PREMED. OR ATT.	09/09/1988	09/30/199
Peterka, Daniel	119773 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=119773&TypeSearch=AI)	WM	04/25/1990	1ST DG MUR/PREMED. OR ATT.	07/12/1989	04/25/199
Rodriguez, Juan	394141 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=394141&TypeSearch=AI)	HM	06/12/1990	1ST DEG MUR,COM.OF FELONY	05/13/1988	03/28/199
Cox, Allen	188854 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=188854&TypeSearch=AI)	WM	06/20/1990	1ST DG MUR/PREMED. OR ATT.	12/21/1998	07/24/200
Atwater, Jeffrey	120467 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=120467&TypeSearch=AI)	WM	07/10/1990	1ST DG MUR/PREMED. OR ATT.	08/11/1989	06/25/199
Gaskin, Louis	751166 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=751166&TypeSearch=AI)	BM	07/19/1990	1ST DG MUR/PREMED. OR ATT.	12/20/1989	06/19/199
			07/19/1990	1ST DG MUR/PREMED. OR ATT.	12/20/1989	06/19/199
* Deparvine, William	256512 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=256512&TypeSearch=AI)	WM	09/13/1990	1ST DEG MUR,COM.OF FELONY	12/25/2003	01/09/200
			09/13/1990	1ST DEG MUR,COM.OF FELONY	12/25/2003	01/09/200
			09/13/1990	ARSON,WILLFUL DAMA.STRUCT.	06/19/1989	08/29/199
			09/13/1990	CARJACK W/FA,DEADLY WEAPON	12/25/2003	01/09/200
			09/13/1990	POSS.FIREARM BY FELON	07/14/1993	03/14/199
			09/13/1990	CARRYING CONCEALED FIREARM	07/14/1993	03/14/199
			09/13/1990	UTTERING FORGERY	01/04/1990	08/29/199
			09/13/1990	UTTERING FORGERY	01/03/1990	08/29/199
			09/13/1990	UTTERING FORGERY	11/01/1988	11/15/198
			09/13/1990	UTTERING FORGERY	12/01/1988	08/29/199
			09/13/1990	UTTERING FORGERY	11/07/1988	08/29/199
			09/13/1990	UTTERING FORGERY	12/15/1989	11/09/199
			09/13/1990	UTTERING FORGERY	12/15/1989	08/29/199

			09/13/1990	GRAND THEFT,$300 LESS &20,000	10/06/1989	08/29/199
			09/13/1990	GRAND THEFT,$300 LESS &20,000	01/03/1990	08/29/199
			09/13/1990	GRAND THEFT,$300 LESS &20,000	01/04/1990	08/29/199
			09/13/1990	GRAND THEFT O/20,000 L/$100,00	12/15/1989	08/29/199
			09/13/1990	GRAND THEFT O/20,000 L/$100,00	12/15/1989	11/09/199
			09/13/1990	GRAND THEFT O/20,000 L/$100,00	10/07/1988	08/29/199
			09/13/1990	GRAND THEFT O/20,000 L/$100,00	12/01/1988	08/29/199
			09/13/1990	GRAND THEFT MOTOR VEHICLE	09/14/1991	12/11/1991
Geralds, Mark	729185 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=729185&TypeSearch=AI)	WM	09/14/1990	1ST DEG MUR,COM.OF FELONY	02/01/1989	03/26/199
Fotopoulos, Konstantin	616550 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=616550&TypeSearch=AI)	WM	11/01/1990	1ST DG MUR/PREMED. OR ATT.	10/20/1989	11/01/199
			11/01/1990	1ST DG MUR/PREMED. OR ATT.	11/04/1989	11/01/199
Heath, Ronald	065145 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=065145&TypeSearch=AI)	WM	12/17/1990	1ST DG MUR/PREMED. OR ATT.	05/23/1989	12/17/199
Guardado, Jesse	324342 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=324342&TypeSearch=AI)	WM	02/15/1991	1ST DG MUR/PREMED. OR ATT.	09/13/2004	10/13/200
Lawrence, Gary	039763 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=039763&TypeSearch=AI)	WM	02/21/1991	1ST DEG MUR,COM.OF FELONY	07/28/1994	05/05/199
Clark, Ronald	812974 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=812974&TypeSearch=AI)	WM	02/22/1991	1ST DEG MUR,COM.OF FELONY	01/12/1990	02/22/199
Trepal, George	121965 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=121965&TypeSearch=AI)	WM	03/08/1991	1ST DG MUR/PREMED. OR ATT.	10/15/1988	03/06/199
Arbelaez, Guillermo	122079 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=122079&TypeSearch=AI)	HM	04/02/1991	1ST DG MUR/PREMED. OR ATT.	02/14/1988	03/14/199
Griffin, Michael	182543 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=182543&TypeSearch=AI)	WM	04/25/1991	1ST DEG MUR,COM.OF FELONY	04/27/1990	03/07/199
Pittman, David	351997 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=351997&TypeSearch=AI)	WM	04/26/1991	1ST DG MUR/PREMED. OR ATT.	05/15/1990	04/25/199
Lowe, Rodney	699349 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=699349&TypeSearch=AI)	BM	05/14/1991	1ST DG MUR/PREMED. OR ATT.	07/03/1990	05/01/199
* Armstrong, Lancelot	693504 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=693504&TypeSearch=AI)	BM	07/02/1991	1ST DG MUR/PREMED. OR ATT.	02/17/1990	06/20/199
			07/02/1991	ROBB. GUN OR DEADLY WPN	02/04/1990	06/26/199
			07/02/1991	ROBB. GUN OR DEADLY WPN	07/17/1990	06/20/199
			07/02/1991	ATTEMPT MURDER LAW ENFORCE OFF	02/17/1990	06/20/199
Stein, Steven	122551 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=122551&TypeSearch=AI)	WM	07/23/1991	1ST DEG MUR,COM.OF FELONY	01/20/1991	07/23/199
Sweet, William	100063 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=100063&TypeSearch=AI)	BM	08/30/1991	1ST DG MUR/PREMED. OR ATT.	06/27/1990	08/30/199
Johnson, Emanuel	338043 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=338043&TypeSearch=AI)	BM	09/10/1991	1ST DG MUR/PREMED. OR ATT.	09/22/1988	06/28/199
			09/10/1991	1ST DG MUR/PREMED. OR ATT.	10/03/1988	06/28/199
Rimmer, Robert	649748 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=649748&TypeSearch=AI)	BM	09/24/1991	1ST DG MUR/PREMED. OR ATT.	05/02/1998	03/19/199
			09/24/1991	1ST DG MUR/PREMED. OR ATT.	05/02/1998	03/19/199

Archer, Robin	216728 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=216728&TypeSearch=AI)	WM	09/25/1991	1ST DG MUR/PREMED. OR ATT.	01/26/1991	09/20/199
Kearse, Billy	138315 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=138315&TypeSearch=AI)	BM	11/08/1991	1ST DG MUR/PREMED. OR ATT.	01/18/1991	11/08/199
Mungin, Anthony	288322 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=288322&TypeSearch=AI)	BM	11/27/1991	1ST DG MUR/PREMED. OR ATT.	09/16/1990	02/23/199
Taylor, Steven	288500 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=288500&TypeSearch=AI)	WM	12/09/1991	1ST DG MUR/PREMED. OR ATT.	09/15/1990	12/09/199
Willacy, Chadwick	707742 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=707742&TypeSearch=AI)	BM	12/13/1991	1ST DEG MUR,COM.OF FELONY	09/05/1990	12/10/199
Cole, Loran	335421 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=335421&TypeSearch=AI)	WM	02/24/1992	1ST DG MUR/PREMED. OR ATT.	02/18/1994	12/20/199
Melton, Antonio	217358 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=217358&TypeSearch=AI)	BM	05/27/1992	1ST DEG MUR,COM.OF FELONY	01/23/1991	05/19/199
Krawczuk, Anton	721842 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=721842&TypeSearch=AI)	WM	05/28/1992	1ST DEG MUR,COM.OF FELONY	09/13/1990	02/13/199
Barnes, James	071551 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=071551&TypeSearch=AI)	WM	07/01/1992	1ST DG MUR/PREMED. OR ATT.	04/20/1988	12/13/200
Suggs, Ernest	220267 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=220267&TypeSearch=AI)	WM	07/15/1992	1ST DEG MUR,COM.OF FELONY	08/06/1990	07/15/199
Johnson, Ronnie	440701 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=440701&TypeSearch=AI)	BM	08/04/1992	1ST DG MUR/PREMED. OR ATT.	03/11/1989	12/13/199
			08/04/1992	1ST DG MUR/PREMED. OR ATT.	03/20/1989	07/16/199
Whitton, Gary	936283 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=936283&TypeSearch=AI)	WM	09/10/1992	1ST DEG MUR,COM.OF FELONY	10/10/1990	09/10/199
Jones, Harry	062368 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=062368&TypeSearch=AI)	BM	11/20/1992	1ST DG MUR/PREMED. OR ATT.	06/01/1991	11/20/199
Windom, Curtis	368527 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=368527&TypeSearch=AI)	BM	11/23/1992	1ST DG MUR/PREMED. OR ATT.	02/07/1992	11/10/199
Finney, Charles	516349 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=516349&TypeSearch=AI)	BM	12/02/1992	1ST DG MUR/PREMED. OR ATT.	01/16/1991	11/10/199
Fennie, Alfred	490989 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=490989&TypeSearch=AI)	BM	12/02/1992	1ST DEG MUR,COM.OF FELONY	09/08/1991	12/01/199
Spencer, Dusty	321031 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=321031&TypeSearch=AI)	WM	01/04/1993	1ST DG MUR/PREMED. OR ATT.	01/18/1992	12/21/199
Marquard, John	122995 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=122995&TypeSearch=AI)	WM	02/05/1993	1ST DG MUR/PREMED. OR ATT.	06/20/1991	02/05/199
Bogle, Brett	110365 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=110365&TypeSearch=AI)	WM	02/24/1993	1ST DG MUR/PREMED. OR ATT.	09/13/1991	02/15/199
Cumming-el, F	120190 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=120190&TypeSearch=AI)	BM	03/03/1993	1ST DEG MUR,COM.OF FELONY	09/16/1991	02/19/199
* Orme, Roderick	726848 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=726848&TypeSearch=AI)	WM	03/30/1993	SEX BAT/ WPN. OR FORCE	03/03/1992	03/25/199
			03/30/1993	1ST DEG MUR,COM.OF FELONY	03/03/1992	03/25/199
			03/30/1993	ROBB. NO GUN/DDLY.WPN	03/03/1992	03/25/199
			03/30/1993	STOLEN PROPERTY	04/15/1982	06/28/198
Robinson, Michael	713735 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=713735&TypeSearch=AI)	WM	04/19/1993	1ST DG MUR/PREMED. OR ATT.	07/24/1994	04/12/199
Jones, Victor	420481 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=420481&TypeSearch=AI)	BM	06/02/1993	1ST DG MUR/PREMED. OR ATT.	12/19/1990	03/01/199

			06/02/1993	1ST DG MUR/PREMED. OR ATT.	12/19/1990	03/01/199
Reese, John	123069 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123069&TypeSearch=AI)	BM	06/25/1993	1ST DEG MUR,COM.OF FELONY	01/28/1992	06/25/199
Gamble, Guy	123096 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123096&TypeSearch=AI)	WM	08/11/1993	1ST DG MUR/PREMED. OR ATT.	12/10/1991	08/10/199
Hunter, James	115624 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=115624&TypeSearch=AI)	BM	08/18/1993	1ST DEG MUR,COM.OF FELONY	09/17/1992	08/18/199
Franklin, Quawn	268130 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=268130&TypeSearch=AI)	BM	09/28/1993	1ST DG MUR/PREMED. OR ATT.	12/29/2001	06/03/20(
Smith, Stephen	189262 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=189262&TypeSearch=AI)	WM	11/02/1993	1ST DG MUR/PREMED. OR ATT.	06/11/2003	08/18/20(
Consalvo, Robert	941687 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=941687&TypeSearch=AI)	WM	11/19/1993	1ST DG MUR/PREMED. OR ATT.	09/27/1991	11/17/1993
Hartley, Kenneth	318987 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=318987&TypeSearch=AI)	BM	12/09/1993	1ST DEG MUR,COM.OF FELONY	04/22/1991	12/09/199
* Merck, Troy	118167 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=118167&TypeSearch=AI)	WM	12/10/1993	1ST DG MUR/PREMED. OR ATT.	10/11/1991	12/10/199
			12/10/1993	ROBB. GUN OR DEADLY WPN	03/15/1989	10/09/198
			12/10/1993	ROBB. GUN OR DEADLY WPN	03/23/1989	10/31/198
			12/10/1993	ROBB. GUN OR DEADLY WPN	03/23/1989	10/31/198
			12/10/1993	ROBB. GUN OR DEADLY WPN	03/23/1989	10/31/198
			12/10/1993	ESCAPE	06/25/1989	10/31/198
			12/10/1993	ROBB. WPN-NOT DEADLY	03/02/1989	03/28/199
Moore, Thomas	116335 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=116335&TypeSearch=AI)	BM	12/16/1993	1ST DG MUR/PREMED. OR ATT.	01/21/1993	12/02/199
Sliney, Jack	905288 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=905288&TypeSearch=AI)	WM	02/21/1994	1ST DG MUR/PREMED. OR ATT.	06/18/1992	02/14/199
Evans, Steven	330290 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=330290&TypeSearch=AI)	BM	03/18/1994	1ST DG MUR/PREMED. OR ATT.	04/25/1996	06/07/199
Morton, Alvin	309066 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=309066&TypeSearch=AI)	WM	03/21/1994	1ST DG MUR/PREMED. OR ATT.	01/26/1992	03/18/199
			03/21/1994	1ST DG MUR/PREMED. OR ATT.	01/26/1992	03/18/199
Hall, Enoch	214353 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=214353&TypeSearch=AI)	BM	04/01/1994	1ST DG MUR/PREMED. OR ATT.	06/25/2008	01/15/201
* Anderson, Charles	447891 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=447891&TypeSearch=AI)	BM	04/19/1994	SEX BAT BY ADULT/VCTM LT 12	09/01/1987	11/24/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	11/01/1986	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	12/01/1986	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	01/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	02/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	03/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	04/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	05/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	06/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	07/01/1987	04/07/199

			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	08/01/1987	04/07/199
			04/19/1994	SEX BAT BY ADULT/VCTM LT 12	09/01/1987	04/07/199
			04/19/1994	1ST DG MUR/PREMED. OR ATT.	01/16/1994	04/19/199
Jones, Marvin	309567 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=309567&TypeSearch=AI)	BM	05/31/1994	1ST DG MUR/PREMED. OR ATT.	03/03/1993	05/31/199
Williamson, Dana	048606 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=048606&TypeSearch=AI)	WM	07/21/1994	1ST DG MUR/PREMED. OR ATT.	11/04/1988	07/15/199
Thomas, William	311509 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=311509&TypeSearch=AI)	WM	07/22/1994	1ST DG MUR/PREMED. OR ATT.	09/12/1991	07/22/199
Foster, Jermaine	310094 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=310094&TypeSearch=AI)	BM	08/26/1994	1ST DG MUR/PREMED. OR ATT.	11/29/1992	07/25/199
			08/26/1994	1ST DG MUR/PREMED. OR ATT.	11/29/1992	07/25/199
Gonzalez, Ricardo	123763 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123763&TypeSearch=AI)	HM	10/18/1994	1ST DG MUR/PREMED. OR ATT.	01/03/1992	10/11/199
Franqui, Leonardo	445903 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=445903&TypeSearch=AI)	WM	10/18/1994	1ST DG MUR/PREMED. OR ATT.	12/06/1991	11/24/199
			10/18/1994	1ST DG MUR/PREMED. OR ATT.	01/03/1992	10/11/199
San martin, Pablo	445904 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=445904&TypeSearch=AI)	WM	10/18/1994	1ST DG MUR/PREMED. OR ATT.	12/06/1991	11/24/199
			10/18/1994	1ST DG MUR/PREMED. OR ATT.	01/03/1992	10/11/199
Hoskins, Johnny	962032 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=962032&TypeSearch=AI)	BM	11/04/1994	1ST DG MUR/PREMED. OR ATT.	10/17/1992	11/04/199
Damren, Floyd	061360 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=061360&TypeSearch=AI)	WM	06/07/1995	1ST DG MUR/PREMED. OR ATT.	05/01/1994	06/02/199
Hamilton, Richard	123846 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123846&TypeSearch=AI)	WM	06/12/1995	1ST DG MUR/PREMED. OR ATT.	04/27/1994	06/12/199
Wainwright, Anthony	123847 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123847&TypeSearch=AI)	WM	06/12/1995	1ST DG MUR/PREMED. OR ATT.	04/27/1994	06/12/199
Gudinas, Thomas	379799 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=379799&TypeSearch=AI)	WM	06/19/1995	1ST DG MUR/PREMED. OR ATT.	05/24/1994	06/16/199
Lott, Ken	026985 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=026985&TypeSearch=AI)	WM	07/07/1995	1ST DG MUR/PREMED. OR ATT.	03/27/1994	06/23/199
Davis, Toney	300807 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=300807&TypeSearch=AI)	BM	07/18/1995	1ST DEG MUR,COM.OF FELONY	12/09/1992	07/18/199
Mendoza, Marbel	459307 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=459307&TypeSearch=AI)	WM	08/03/1995	1ST DEG MUR,COM.OF FELONY	03/17/1992	08/02/199
James, Edward	969121 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=969121&TypeSearch=AI)	WM	08/18/1995	1ST DEG MUR,COM.OF FELONY	09/19/1993	08/18/199
			08/18/1995	1ST DEG MUR,COM.OF FELONY	09/19/1993	08/18/199
* Franklin, Richard	990054 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=990054&TypeSearch=AI)	BM	09/08/1995	1ST DG MUR/PREMED. OR ATT.	11/24/1994	09/06/199
			09/08/1995	1ST DG MUR/PREMED. OR ATT.	03/18/2012	08/02/201
			09/08/1995	ROBB. GUN OR DEADLY WPN	12/19/1994	09/06/199
			09/08/1995	FELONY BATTERY	03/18/2012	08/02/201
			09/08/1995	BATT.LEO/FIRFGT/EMS/ETC.	06/07/1994	06/08/199
			09/08/1995	AGG BATTERY/W/DEADLY WEAPON	12/19/1994	09/06/199
			09/08/1995	CONSTRUC.POSSESS CONTRAB.	03/18/2012	08/02/201

			09/08/1995	ESCAPE	09/11/1994	06/08/199
Whitfield, Ernest	764970 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=764970&TypeSearch=AI)	BM	10/24/1995	1ST DG MUR/PREMED. OR ATT.	06/19/1995	10/20/199
Gordon, Robert	123911 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123911&TypeSearch=AI)	BM	11/17/1995	1ST DG MUR/PREMED. OR ATT.	01/25/1994	11/16/199
Mcdonald, Meryl	180399 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=180399&TypeSearch=AI)	BM	11/17/1995	1ST DG MUR/PREMED. OR ATT.	01/25/1994	11/16/199
Knight, Ronald	610979 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=610979&TypeSearch=AI)	WM	12/21/1995	1ST DEG MUR,COM.OF FELONY	07/08/1993	05/29/199
Raleigh, Bobby	124052 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124052&TypeSearch=AI)	WM	02/16/1996	1ST DG MUR/PREMED. OR ATT.	06/05/1994	02/16/199
			02/16/1996	1ST DG MUR/PREMED. OR ATT.	06/05/1994	02/16/199
Bell, Michael	108426 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=108426&TypeSearch=AI)	BM	03/01/1996	1ST DG MUR/PREMED. OR ATT.	12/09/1993	06/02/199
			03/01/1996	1ST DG MUR/PREMED. OR ATT.	12/09/1993	06/02/199
Alston, Pressley	709795 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=709795&TypeSearch=AI)	BM	03/05/1996	1ST DEG MUR,COM.OF FELONY	01/22/1995	01/12/199
Zakrzewski, Edward	554000 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=554000&TypeSearch=AI)	WM	04/19/1996	1ST DG MUR/PREMED. OR ATT.	06/10/1994	04/19/199
			04/19/1996	1ST DEG MUR,COM.OF FELONY	06/10/1994	04/19/199
			04/19/1996	1ST DEG MUR,COM.OF FELONY	06/10/1994	04/19/199
Pooler, Leroy	124283 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124283&TypeSearch=AI)	BM	04/30/1996	1ST DG MUR/PREMED. OR ATT.	01/30/1995	02/23/199
* Brookins, Elijah	P01395 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=P01395&TypeSearch=AI)	BM	06/17/1996	1ST DG MUR/PREMED. OR ATT.	09/20/2011	01/23/201
			06/17/1996	1ST DEG MUR,COM.OF FELONY	04/01/1995	05/23/199
* Belcher, James	286173 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=286173&TypeSearch=AI)	BM	09/06/1996	1ST DG MUR/PREMED. OR ATT.	01/08/1996	05/17/200
			09/06/1996	SEX BAT/ WPN. OR FORCE	01/08/1996	05/17/200
			09/06/1996	GRAND THEFT,$300 LESS &20,000	01/31/1985	02/11/198
			09/06/1996	GRAND THEFT,$300 LESS &20,000	07/27/1987	09/23/198
			09/06/1996	BURG/DWELL/OCCUP.CONVEY	11/21/1992	02/17/199
			09/06/1996	AGG ASSLT-INTENT COMMIT FELONY	10/30/1988	02/27/198
			09/06/1996	ARSON,WILLFUL DAMA.STRUCT.	04/01/1996	08/08/199
			09/06/1996	BURGUNOCCSTRUC/CV OR ATT.	04/01/1996	08/08/199
			09/06/1996	BURGLARY,ARMED W/EXP. OR WEAPO	10/30/1988	02/27/198
Bowles, Gary	086158 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=086158&TypeSearch=AI)	WM	09/09/1996	1ST DG MUR/PREMED. OR ATT.	11/16/1994	09/06/199
Jennings, Brandy	721097 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=721097&TypeSearch=AI)	WM	12/06/1996	1ST DG MUR/PREMED. OR ATT.	11/15/1995	12/02/199
			12/06/1996	1ST DG MUR/PREMED. OR ATT.	11/15/1995	12/02/199
			12/06/1996	1ST DG MUR/PREMED. OR ATT.	11/15/1995	12/02/199
Nelson, Joshua	989102 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=989102&TypeSearch=AI)	WM	12/10/1996	1ST DG MUR/PREMED. OR ATT.	03/10/1995	11/27/199

* Guzman, James	395352 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=395352&TypeSearch=AI)	WM	12/27/1996	ROBB. GUN OR DEADLY WPN	01/23/1982	08/24/198
			12/27/1996	1ST DG MUR/PREMED. OR ATT.	08/10/1991	08/30/201
			12/27/1996	2ND DEG.MURD,DANGEROUS ACT	01/23/1982	08/24/198
			12/27/1996	2ND DEG.MURD,DANGEROUS ACT	01/23/1982	08/24/198
			12/27/1996	KIDNAP;COMM.OR FAC.FELONY	01/23/1982	08/24/198
			12/27/1996	BURGUNOCCSTRUC/CV OR ATT.	11/04/1981	01/11/198
			12/27/1996	ROBB. GUN OR DEADLY WPN	08/10/1991	08/30/201
			12/27/1996	BURG/DWELL/OCCUP.CONVEY	11/04/1981	08/24/198
			12/27/1996	GRAND THEFT,$300 LESS &20,000	11/04/1981	08/24/198
Trease, Robert	124346 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124346&TypeSearch=AI)	WM	01/23/1997	1ST DEG MUR,COM.OF FELONY	08/17/1995	01/22/199
Holland, Albert	122651 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=122651&TypeSearch=AI)	BM	02/13/1997	1ST DG MUR/PREMED. OR ATT.	07/29/1990	02/07/199
Doty, Wayne	375690 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=375690&TypeSearch=AI)	WM	03/28/1997	1ST DG MUR/PREMED. OR ATT.	05/17/2011	06/05/201
Lukehart, Andrew	391485 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=391485&TypeSearch=AI)	WM	04/04/1997	1ST DEG MUR,COM.OF FELONY	02/25/1996	04/04/199
Smith, Sean	X06883 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X06883&TypeSearch=AI)	BM	04/18/1997	1ST DG MUR/PREMED. OR ATT.	10/29/1996	12/18/199
Rogers, Glen	124400 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124400&TypeSearch=AI)	WM	07/11/1997	1ST DEG MUR,COM.OF FELONY	11/05/1995	07/11/199
Zack, Michael	124439 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124439&TypeSearch=AI)	WM	12/05/1997	1ST DEG MUR,COM.OF FELONY	06/13/1996	11/24/199
Mansfield, Scott	124460 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124460&TypeSearch=AI)	WM	02/02/1998	1ST DG MUR/PREMED. OR ATT.	10/15/1995	01/30/199
Lamarca, Anthony	071588 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=071588&TypeSearch=AI)	WM	03/10/1998	1ST DG MUR/PREMED. OR ATT.	12/02/1995	02/20/199
Stephens, Jason	124493 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124493&TypeSearch=AI)	BM	04/07/1998	1ST DG MUR/PREMED. OR ATT.	06/02/1997	04/07/199
Beasley, Curtis	356054 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=356054&TypeSearch=AI)	WM	06/03/1998	1ST DG MUR/PREMED. OR ATT.	08/24/1995	05/22/199
Bradley, Donald	066600 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=066600&TypeSearch=AI)	WM	06/29/1998	1ST DEG MUR,COM.OF FELONY	11/07/1995	06/25/199
Foster, Kevin	Y01561 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Y01561&TypeSearch=AI)	WM	07/22/1998	1ST DG MUR/PREMED. OR ATT.	04/30/1996	06/17/199
Miller, David	J08118 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J08118&TypeSearch=AI)	BM	07/24/1998	1ST DEG MUR,COM.OF FELONY	03/06/1997	07/24/199
* Doorbal, Noel	M16320 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=M16320&TypeSearch=AI)	WM	08/31/1998	1ST DG MUR/PREMED. OR ATT.	11/15/1994	07/17/199
			08/31/1998	KIDNAP;COMM.OR FAC.FELONY	11/15/1994	07/17/199
			08/31/1998	KIDNAP;COMM.OR FAC.FELONY	05/24/1995	07/17/199
			08/31/1998	KIDNAP;COMM.OR FAC.FELONY	05/24/1995	07/17/199
			08/31/1998	1ST DEG MUR,COM.OF FELONY	05/25/1995	07/17/199
			08/31/1998	1ST DEG MUR,COM.OF FELONY	05/24/1995	07/17/199
			08/31/1998	ROBB. GUN OR DEADLY WPN	11/15/1994	07/17/199

			08/31/1998	ROBB. GUN OR DEADLY WPN	01/01/1995	07/17/199
Lugo, Daniel	M16321 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=M16321&TypeSearch=AI)	WM	08/31/1998	1ST DEG MUR,COM.OF FELONY	05/24/1995	07/17/199
			08/31/1998	1ST DEG MUR,COM.OF FELONY	05/25/1995	07/17/199
* Doorbal, Noel	M16320 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=M16320&TypeSearch=AI)	WM	08/31/1998	BURG/DWELL/OCCUP.CONVEY	11/15/1994	07/17/199
			08/31/1998	GRAND THEFT O/20,000 L/$100,00	11/15/1994	07/17/199
			08/31/1998	GRAND THEFT MOTOR VEHICLE	05/20/1995	07/17/199
			08/31/1998	ARSON WILLFUL DAMA.DWELLING	12/14/1995	07/17/199
			08/31/1998	EXTORTION	05/24/1995	07/17/199
			08/31/1998	EXTORTION	11/15/1994	07/17/199
			08/31/1998	ACQUIRE PROP. F/RACKETEERING	10/01/1994	07/17/199
			08/31/1998	CONS.TO VIO.RACKTEERING LAW	10/01/1994	07/17/199
Brooks, Lamar	124538 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124538&TypeSearch=AI)	BM	09/29/1998	1ST DG MUR/PREMED. OR ATT.	04/24/1996	02/25/200
			09/29/1998	1ST DG MUR/PREMED. OR ATT.	04/24/1996	02/25/200
* Pagan, Alex	668630 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=668630&TypeSearch=AI)	WM	10/22/1998	ROBB. GUN OR DEADLY WPN	02/23/1993	10/15/199
			10/22/1998	1ST DG MUR/PREMED. OR ATT.	02/23/1993	10/15/199
			10/22/1998	1ST DG MUR/PREMED. OR ATT.	02/23/1993	10/15/199
			10/22/1998	1ST DG MUR/PREMED. OR ATT.	02/23/1993	10/15/199
			10/22/1998	1ST DG MUR/PREMED. OR ATT.	02/23/1993	10/15/199
			10/22/1998	BURGLARY,ARMED W/EXP. OR WEAPO	02/23/1993	10/15/199
			10/22/1998	AGG BATTERY INTENDED HARM	09/13/1987	10/30/198
			10/22/1998	AGG BATTERY INTENDED HARM	09/13/1987	10/30/198
			10/22/1998	AGG BATTERY/W/DEADLY WEAPON	09/13/1987	09/26/198
			10/22/1998	CRIMINAL MISCHIEF/PROP.DAMAGE	09/13/1987	10/30/198
			10/22/1998	L/L, INDEC.ASLT CHILD U/16	03/13/1988	09/26/198
Francis, Carlton	W08567 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=W08567&TypeSearch=AI)	BM	11/17/1998	1ST DG MUR/PREMED. OR ATT.	07/24/1997	11/10/199
			11/17/1998	1ST DG MUR/PREMED. OR ATT.	07/24/1997	11/10/199
* Morrison, Raymond	113388 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=113388&TypeSearch=AI)	BM	12/21/1998	1ST DEG MUR,COM.OF FELONY	01/08/1997	12/18/199
			12/21/1998	COCAINE-SALE OR PURCHASE	04/06/1989	04/19/198
			12/21/1998	UTTERING FORGERY	03/29/1988	09/27/198
			12/21/1998	ESCAPE	09/30/1989	10/13/198
			12/21/1998	AGGRAV. ASSAULT/BATTERY	04/01/1991	07/15/199
			12/21/1998	ROBB. GUN OR DEADLY WPN	01/08/1997	12/18/199
			12/21/1998	ROBB. NO GUN/DDLY.WPN	03/29/1988	09/27/198
			12/21/1998	BURGLARY ASSAULT ANY PERSON	01/08/1997	12/18/199

Woodel, Thomas	H06832 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=H06832&TypeSearch=AI)	WM	01/28/1999	1ST DG MUR/PREMED. OR ATT.	12/31/1996	01/26/199
Dennis, Labrant	124607 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124607&TypeSearch=AI)	BM	03/25/1999	1ST DG MUR/PREMED. OR ATT.	04/13/1996	02/26/199
			03/25/1999	1ST DG MUR/PREMED. OR ATT.	04/13/1996	02/26/199
Jeffries, Sonny	X18736 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X18736&TypeSearch=AI)	WM	04/14/1999	1ST DG MUR/PREMED. OR ATT.	08/20/1993	01/22/199
Morris, Robert	550026 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=550026&TypeSearch=AI)	BM	05/04/1999	1ST DG MUR/PREMED. OR ATT.	09/01/1994	04/30/199
Ford, James	763722 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=763722&TypeSearch=AI)	WM	06/11/1999	1ST DG MUR/PREMED. OR ATT.	04/06/1997	06/03/199
			06/11/1999	1ST DG MUR/PREMED. OR ATT.	04/06/1997	06/03/199
* Evans, Paul	572349 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=572349&TypeSearch=AI)	WM	06/17/1999	1ST DG MUR/PREMED. OR ATT.	03/23/1991	06/16/199
			06/17/1999	BURG/N/ASSLT/OCC.STRUCT.	04/05/1990	10/17/199
			06/17/1999	BURG/DWELL/OCCUP.CONVEY	11/10/1994	10/19/199
			06/17/1999	SHOPLIFTING	04/05/1990	10/17/199
			06/17/1999	GRAND THEFT,300 L/5,000	11/11/1994	05/17/199
Overton, Thomas	911193 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=911193&TypeSearch=AI)	WM	07/13/1999	1ST DG MUR/PREMED. OR ATT.	08/22/1991	03/18/199
			07/13/1999	1ST DG MUR/PREMED. OR ATT.	08/22/1991	03/18/199
Smithers, Samuel	124639 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124639&TypeSearch=AI)	WM	07/15/1999	1ST DG MUR/PREMED. OR ATT.	05/12/1996	06/25/199
			07/15/1999	1ST DG MUR/PREMED. OR ATT.	05/28/1996	06/25/199
Huggins, John	059121 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=059121&TypeSearch=AI)	WM	08/05/1999	1ST DG MUR/PREMED. OR ATT.	06/09/1997	09/19/200
Taylor, John	J12116 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J12116&TypeSearch=AI)	WM	10/08/1999	1ST DG MUR/PREMED. OR ATT.	12/29/1997	10/07/199
* Davis, Adam	145267 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=145267&TypeSearch=AI)	WM	01/04/2000	1ST DG MUR/PREMED. OR ATT.	06/27/1998	12/17/199
			01/04/2000	GRAND THEFT,300 L/5,000	08/05/1997	03/09/199
			01/04/2000	GRAND THEFT,300 L/5,000	08/05/1997	08/28/199
			01/04/2000	TRESPASS PROPERTY ARMED	10/24/1997	03/09/199
			01/04/2000	CRIMINAL MISCHIEF/PROP.DAMAGE	10/24/1997	03/09/199
			01/04/2000	BURGUNOCCSTRUC/CV OR ATT.	08/05/1997	08/28/199
			01/04/2000	BURGUNOCCSTRUC/CV OR ATT.	08/05/1997	03/09/199
Conahan, Daniel	Y02046 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Y02046&TypeSearch=AI)	WM	01/10/2000	1ST DG MUR/PREMED. OR ATT.	01/27/1997	12/10/199
Looney, Jason	N00676 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=N00676&TypeSearch=AI)	WM	02/24/2000	1ST DG MUR/PREMED. OR ATT.	07/27/1997	02/18/200
			02/24/2000	1ST DG MUR/PREMED. OR ATT.	07/27/1997	02/18/200
* Hertz, Guerry	567668 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=567668&TypeSearch=AI)	WM	02/24/2000	1ST DG MUR/PREMED. OR ATT.	07/27/1997	02/18/200
			02/24/2000	1ST DG MUR/PREMED. OR ATT.	07/27/1997	02/18/200
			02/24/2000	BURGUNOCCSTRUC/CV OR ATT.	07/16/1995	02/18/200

				02/24/2000	ARSON WILLFUL DAMA.DWELLING	07/27/1997	02/18/200
				02/24/2000	BURG/N/ASSLT/OCC.STRUCT.	04/12/1995	05/24/199
				02/24/2000	BURG/N/ASSLT/OCC.STRUCT.	04/12/1995	05/15/199
				02/24/2000	BURG/N/ASSLT/OCC.STRUCT.	04/12/1995	08/25/199
				02/24/2000	BURGLARY,ARMED W/EXP. OR WEAPO	07/27/1997	02/18/200
				02/24/2000	BURGUNOCCSTRUC/CV OR ATT.	07/16/1995	08/25/199
				02/24/2000	BURGUNOCCSTRUC/CV OR ATT.	07/16/1995	05/24/199
				02/24/2000	ROBB. GUN OR DEADLY WPN	07/27/1997	02/18/200
				02/24/2000	AGG BATTERY INTENDED HARM	07/27/1997	01/05/200
				02/24/2000	THREATENS TO USE ANY FIREARM	07/27/1997	02/18/200
				02/24/2000	BURG/DWELL/OCCUP.CONVEY	03/17/1995	05/15/199
				02/24/2000	BURG/DWELL/OCCUP.CONVEY	03/17/1995	08/25/199
				02/24/2000	BURG/DWELL/OCCUP.CONVEY	03/17/1995	05/24/199
				02/24/2000	BURG/DWELL/OCCUP.CONVEY	03/17/1995	02/18/200
				02/24/2000	BURG/DWELL/OCCUP.CONVEY	04/12/1995	02/18/200
				02/24/2000	GRAND THEFT,300 L/5,000	04/12/1995	08/25/199
				02/24/2000	GRAND THEFT,300 L/5,000	04/12/1995	05/15/199
				02/24/2000	GRAND THEFT,300 L/5,000	04/12/1995	05/24/199
				02/24/2000	GRAND THEFT,300 L/5,000	04/12/1995	02/18/200
* Ault, Howard	664697 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=664697&TypeSearch=AI)	WM	03/15/2000	LEWD ASLT/SEX BAT VCTM<16	12/31/1995	11/19/1999
			03/15/2000	AGGRAVATED CHILD ABUSE	12/31/1995	11/19/1999
			03/15/2000	AGGRAVATED CHILD ABUSE	11/04/1996	03/13/200
			03/15/2000	AGGRAVATED CHILD ABUSE	11/04/1996	03/13/200
			03/15/2000	L/L, INDEC.ASLT CHILD U/16	12/31/1995	11/19/1999
			03/15/2000	RESISTING OFFICER W/VIOLEN.	10/02/1986	03/17/198
			03/15/2000	AGG BATTERY/W/DEADLY WEAPON	09/30/1986	08/17/198
			03/15/2000	BURGLARY ASSAULT ANY PERSON	05/15/1988	08/17/198
			03/15/2000	1ST DG MUR/PREMED. OR ATT.	11/04/1996	03/13/200
			03/15/2000	1ST DG MUR/PREMED. OR ATT.	11/04/1996	03/13/200
			03/15/2000	KIDNAP V<13/AGG.CHLD ABUSE	11/04/1996	03/13/200
			03/15/2000	KIDNAP V<13/AGG.CHLD ABUSE	11/04/1996	03/13/200
			03/15/2000	KIDNAP V<13/AGG.CHLD ABUSE	03/14/1994	11/19/1999
			03/15/2000	SEX BAT BY ADULT/VCTM LT 12	12/31/1995	11/19/1999
			03/15/2000	SEX BAT BY ADULT/VCTM LT 12	11/04/1996	03/13/200
			03/15/2000	SEX BAT BY ADULT/VCTM LT 12	11/04/1996	03/13/200
			03/15/2000	SEX BAT BY ADULT/VCTM LT 12	03/14/1994	11/19/1999
			03/15/2000	SEX BAT/PHYS HELPLESS RESIST	03/14/1994	05/31/199
			03/15/2000	SEX BAT/PHYS HELPLESS RESIST	03/14/1994	05/31/199

			03/15/2000	SEX BAT/ INJURY NOT LIKELY	05/15/1988	08/17/198
			03/15/2000	FALS.IMPRSN-NO 787.01 INT	03/14/1994	05/31/199
Nelson, Micah	535168 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=535168&TypeSearch=AI)	BM	03/22/2000	1ST DEG MUR,COM.OF FELONY	11/16/1997	03/17/200
Brown, Paul	V02093 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=V02093&TypeSearch=AI)	WM	04/19/2000	1ST DG MUR/PREMED. OR ATT.	11/04/1992	11/07/199
Hurst, Timothy	124669 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124669&TypeSearch=AI)	BM	05/02/2000	1ST DEG MUR,COM.OF FELONY	05/02/1998	04/26/20
Spann, Anthony	347463 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=347463&TypeSearch=AI)	BM	07/13/2000	1ST DG MUR/PREMED. OR ATT.	11/14/1997	06/23/20
Lawrence, Jonathan	898522 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=898522&TypeSearch=AI)	WM	08/16/2000	1ST DG MUR/PREMED. OR ATT.	05/07/1998	08/15/20
Philmore, Lenard	314648 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=314648&TypeSearch=AI)	BM	08/21/2000	1ST DG MUR/PREMED. OR ATT.	11/14/1997	07/21/200
Crain, Willie	096344 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=096344&TypeSearch=AI)	WM	09/14/2000	1ST DG MUR/PREMED. OR ATT.	09/10/1998	11/19/199
Rodgers, Jeremiah	123101 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=123101&TypeSearch=AI)	WM	11/22/2000	1ST DG MUR/PREMED. OR ATT.	05/07/1998	11/21/200
Grim, Norman	282008 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=282008&TypeSearch=AI)	WM	12/22/2000	1ST DG MUR/PREMED. OR ATT.	07/27/1998	12/21/200
Anderson, Fred	218693 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=218693&TypeSearch=AI)	BM	01/12/2001	1ST DG MUR/PREMED. OR ATT.	03/20/1999	01/11/200
Eaglin, Dwight	166224 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=166224&TypeSearch=AI)	WM	01/23/2001	1ST DG MUR/PREMED. OR ATT.	06/11/2003	03/31/200
			01/23/2001	1ST DG MUR/PREMED. OR ATT.	06/11/2003	03/31/200
Hutchinson, Jeffrey	124849 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124849&TypeSearch=AI)	WM	02/07/2001	1ST DG MUR/PREMED. OR ATT.	09/11/1998	02/06/20
			02/07/2001	1ST DG MUR/PREMED. OR ATT.	09/11/1998	02/06/20
			02/07/2001	1ST DG MUR/PREMED. OR ATT.	09/11/1998	02/06/20
Lynch, Richard	E08942 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=E08942&TypeSearch=AI)	WM	04/05/2001	1ST DG MUR/PREMED. OR ATT.	03/05/1999	04/03/20
			04/05/2001	1ST DG MUR/PREMED. OR ATT.	03/05/1999	04/03/20
* Conde, Rory	M25274 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=M25274&TypeSearch=AI)	WM	07/12/2001	1ST DG MUR/PREMED. OR ATT.	09/15/1994	04/03/20
			07/12/2001	1ST DG MUR/PREMED. OR ATT.	10/06/1994	04/03/20
			07/12/2001	1ST DG MUR/PREMED. OR ATT.	11/18/1994	04/03/20
			07/12/2001	1ST DG MUR/PREMED. OR ATT.	11/23/1994	04/03/20
			07/12/2001	1ST DG MUR/PREMED. OR ATT.	12/15/1994	04/03/20
			07/12/2001	1ST DG MUR/PREMED. OR ATT.	01/10/1995	03/07/20
			07/12/2001	SEX BAT/ WPN. OR FORCE	04/18/1995	02/13/199
			07/12/2001	ROBB. GUN OR DEADLY WPN	04/18/1995	02/13/199
			07/12/2001	KIDNAP;COMM.OR FAC.FELONY	04/18/1995	02/13/199
			07/12/2001	BURGLARY ASSAULT ANY PERSON	04/18/1995	02/13/199
Gill, Ricardo	105559 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=105559&TypeSearch=AI)	WM	07/20/2001	1ST DG MUR/PREMED. OR ATT.	07/24/2001	06/30/20

Johnston, Ray	927442 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=927442&TypeSearch=AI)	WM	08/24/2001	1ST DG MUR/PREMED. OR ATT.	02/06/1997	08/22/200
			08/24/2001	1ST DG MUR/PREMED. OR ATT.	08/19/1997	03/13/200
Dessaure, Kenneth	R05023 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=R05023&TypeSearch=AI)	BM	11/06/2001	1ST DG MUR/PREMED. OR ATT.	02/09/1999	10/26/200
Rogers, Shawn	166626 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=166626&TypeSearch=AI)	BM	04/10/2002	1ST DG MUR/PREMED. OR ATT.	03/30/2012	12/18/201
Douglas, Luther	125172 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=125172&TypeSearch=AI)	BM	06/14/2002	1ST DG MUR/PREMED. OR ATT.	12/25/1999	06/14/200
Wright, Tavares	H10118 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=H10118&TypeSearch=AI)	BM	06/14/2002	1ST DG MUR/PREMED. OR ATT.	04/21/2000	10/12/200
			06/14/2002	1ST DG MUR/PREMED. OR ATT.	04/21/2000	10/12/200
* Snelgrove, David	442564 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=442564&TypeSearch=AI)	WM	06/14/2002	1ST DG MUR/PREMED. OR ATT.	06/23/2000	06/13/200
			06/14/2002	1ST DG MUR/PREMED. OR ATT.	06/23/2000	06/13/200
			06/14/2002	BURGLARY ASSAULT ANY PERSON	06/23/2000	06/13/200
			06/14/2002	ROBB. GUN OR DEADLY WPN	06/23/2000	06/13/200
			06/14/2002	OBSTRUCT CRIME INVESTIGATION	01/24/1999	09/08/199
			06/14/2002	OBSTRUCT CRIME INVESTIGATION	01/24/1999	09/08/199
			06/14/2002	BURG/N/ASSLT/OCC.STRUCT.	11/06/1994	01/27/199
			06/14/2002	GRAND THEFT,$300 LESS &20,000	11/06/1991	12/05/199
			06/14/2002	GRAND THEFT MOTOR VEHICLE	11/05/1991	12/05/199
			06/14/2002	MISDEMEANOR	11/06/1994	01/27/199
Boyd, Lucious	699893 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=699893&TypeSearch=AI)	BM	06/25/2002	1ST DG MUR/PREMED. OR ATT.	12/05/1998	06/21/200
Everett, Paul	Q13157 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Q13157&TypeSearch=AI)	WM	01/13/2003	1ST DG MUR/PREMED. OR ATT.	11/02/2001	01/09/200
Floyd, Franklin	R30302 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=R30302&TypeSearch=AI)	WM	02/24/2003	1ST DG MUR/PREMED. OR ATT.	03/13/1989	11/22/200
Tanzi, Michael	K04389 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=K04389&TypeSearch=AI)	WM	04/11/2003	1ST DG MUR/PREMED. OR ATT.	04/25/2000	04/11/200
* Seibert, Michael	105669 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=105669&TypeSearch=AI)	WM	04/17/2003	KIDNAP;COMM.OR FAC.FELONY	05/12/1986	01/05/198
			04/17/2003	KIDNAP;COMM.OR FAC.FELONY	05/08/1986	01/05/198
			04/17/2003	1ST DG MUR/PREMED. OR ATT.	03/17/1998	03/24/200
			04/17/2003	1ST DG MUR/PREMED. OR ATT.	05/12/1986	01/05/198
			04/17/2003	GRAND THEFT MOTOR VEHICLE	05/08/1986	01/05/198
			04/17/2003	GRAND THEFT MOTOR VEHICLE	05/12/1986	01/05/198
			04/17/2003	BURGUNOCCSTRUC/CV OR ATT.	05/08/1986	01/05/198
* Murray, Gerald	291140 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=291140&TypeSearch=AI)	WM	06/26/2003	BURGLARY ASSAULT ANY PERSON	09/15/1990	06/26/200
			06/26/2003	BURGUNOCCSTRUC/CV OR ATT.	03/11/1988	12/12/198
			06/26/2003	BURGUNOCCSTRUC/CV OR ATT.	03/12/1988	03/22/198
			06/26/2003	AGG BATTERY/W/DEADLY WEAPON	10/23/1990	01/25/199

			06/26/2003	ESCAPE	11/22/1992	04/15/199
			06/26/2003	OBSOLETE DATA-BEFORE EST.CODES	05/26/1988	03/06/198
			06/26/2003	KIDNAP,ASSAULT OR TERRORIZE	05/25/1988	12/12/198
			06/26/2003	1ST DG MUR/PREMED. OR ATT.	09/15/1990	06/26/200
			06/26/2003	SEX BAT/ WPN. OR FORCE	09/15/1990	06/26/200
Allen, Scottie	B01314 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=B01314&TypeSearch=AI)	WM	08/05/2003	1ST DG MUR/PREMED. OR ATT.	10/02/2017	07/23/201
Reynolds, Michael	324170 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=324170&TypeSearch=AI)	WM	09/22/2003	1ST DG MUR/PREMED. OR ATT.	07/21/1998	09/19/200
			09/22/2003	1ST DG MUR/PREMED. OR ATT.	07/21/1998	09/19/200
* Schoenwetter, Randy	E20773 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=E20773&TypeSearch=AI)	WM	12/09/2003	AT.FLNY.MURD/782.04(3) OFF.	08/12/2000	12/05/200
			12/09/2003	1ST DG MUR/PREMED. OR ATT.	08/12/2000	12/05/200
			12/09/2003	1ST DG MUR/PREMED. OR ATT.	08/12/2000	12/05/200
			12/09/2003	BURGLARY,ARMED W/EXP. OR WEAPO	08/12/2000	12/05/200
* Williams, Ronnie	645118 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=645118&TypeSearch=AI)	BM	04/23/2004	L/L, INDEC.ASLT CHILD U/16	06/15/1982	07/01/198
			04/23/2004	L/L, INDEC.ASLT CHILD U/16	06/15/1982	10/28/198
			04/23/2004	1ST DG MUR/PREMED. OR ATT.	01/26/1993	04/16/200
			04/23/2004	2ND DEG.MURD,DANGEROUS ACT	09/12/1984	06/26/198
England, Richard	115574 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=115574&TypeSearch=AI)	HM	07/23/2004	1ST DG MUR/PREMED. OR ATT.	06/25/2001	07/23/200
* Johnson, Richard	K51342 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=K51342&TypeSearch=AI)	WM	08/12/2004	KIDNAP;COMM.OR FAC.FELONY	02/15/2001	08/09/200
			08/12/2004	SEX BAT/ WPN. OR FORCE	02/15/2001	08/09/200
			08/12/2004	1ST DG MUR/PREMED. OR ATT.	02/15/2001	08/09/200
			08/12/2004	GRAND THEFT MOTOR VEHICLE	11/08/1999	08/09/200
			08/12/2004	GRAND THEFT MOTOR VEHICLE	11/08/1999	05/24/200
			08/12/2004	GRAND THEFT MOTOR VEHICLE	11/08/1999	05/24/200
			08/12/2004	DUI-MISD.	11/08/1999	05/24/200
Taylor, William	111640 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=111640&TypeSearch=AI)	WM	10/07/2004	1ST DG MUR/PREMED. OR ATT.	05/25/2001	09/29/200
* Kopsho, William	122787 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=122787&TypeSearch=AI)	WM	04/08/2005	1ST DG MUR/PREMED. OR ATT.	10/27/2000	07/02/200
			04/08/2005	FALS.IMPRSN-NO 787.01 INT	07/23/1991	01/14/199
			04/08/2005	SEX BAT/COERCES BY THREAT	07/23/1991	01/14/199
			04/08/2005	SEX BAT/INJURY NOT LIKELY	07/23/1991	04/08/200
			04/08/2005	KIDNAP;COMM.OR FAC.FELONY	10/27/2000	07/02/200
* Frances, David	X33939 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X33939&TypeSearch=AI)	BM	05/13/2005	1ST DG MUR/PREMED. OR ATT.	11/06/2000	04/29/200
			05/13/2005	1ST DG MUR/PREMED. OR ATT.	11/06/2000	04/29/200
			05/13/2005	ROBB. NO GUN/DDLY.WPN	11/06/2000	04/29/200

* Smith, Corey	192202 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=192202&TypeSearch=AI)	BM	06/30/2005	CONSPIR.TO TRAFF.DRUGS	07/01/1994	03/24/200
			06/30/2005	CONSPIR.TO TRAFF.DRUGS	07/01/1994	03/24/200
			06/30/2005	CONS.TO VIO.RACKTEERING LAW	07/01/1994	03/24/200
			06/30/2005	CONS.TO VIO.RACKTEERING LAW	07/01/1994	03/24/200
			06/30/2005	ACCESSORY AFTER FACT	02/21/1992	05/20/199
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	12/01/1998	03/17/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	08/14/1995	03/24/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	08/21/1995	03/17/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	03/12/1997	03/24/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	07/24/1997	03/17/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	03/31/1998	03/24/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	03/31/1998	03/17/200
			06/30/2005	1ST DG MUR/PREMED. OR ATT.	06/01/1998	03/24/200
			06/30/2005	HOMICIDE,MANSL.CUL.NEGLI	08/27/1995	03/24/200
			06/30/2005	HOMICIDE,MANSL.CUL.NEGLI	07/23/1998	03/24/200
Beamon, Rocky	R22569 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=R22569&TypeSearch=AI)	WM	08/01/2005	1ST DG MUR/PREMED. OR ATT.	07/05/2012	01/28/201
Hojan, Gerhard	L49959 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=L49959&TypeSearch=AI)	WM	08/04/2005	1ST DG MUR/PREMED. OR ATT.	03/11/2002	08/02/200
			08/04/2005	1ST DG MUR/PREMED. OR ATT.	03/11/2002	08/02/200
Poole, Mark	H12548 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=H12548&TypeSearch=AI)	BM	08/29/2005	1ST DG MUR/PREMED. OR ATT.	10/12/2001	08/25/200
Rigterink, Thomas	H23012 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=H23012&TypeSearch=AI)	WM	10/18/2005	1ST DG MUR/PREMED. OR ATT.	09/24/2003	10/14/200
			10/18/2005	1ST DG MUR/PREMED. OR ATT.	09/24/2003	10/14/200
* Bevel, Thomas	J29642 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J29642&TypeSearch=AI)	BM	10/24/2005	1ST DG MUR/PREMED. OR ATT.	02/29/2004	10/21/200
			10/24/2005	1ST DG MUR/PREMED. OR ATT.	02/29/2004	10/21/200
			10/24/2005	1ST DG MUR/PREMED. OR ATT.	02/29/2004	10/21/200
Carter, Pinkney	127513 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=127513&TypeSearch=AI)	WM	12/27/2005	1ST DG MUR/PREMED. OR ATT.	07/24/2002	12/22/200
			12/27/2005	1ST DG MUR/PREMED. OR ATT.	07/24/2002	12/22/200
* Welch, Anthony	E02957 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=E02957&TypeSearch=AI)	WM	03/08/2006	1ST DG MUR/PREMED. OR ATT.	12/14/2000	03/07/200
			03/08/2006	1ST DG MUR/PREMED. OR ATT.	12/14/2000	03/07/200
			03/08/2006	ROBB. GUN OR DEADLY WPN	12/14/2000	03/07/200
			03/08/2006	PETIT-THEFT-MISD	11/29/1996	01/30/199
			03/08/2006	BURGLARY TOOLS-POSSESS	11/29/1996	01/30/199
			03/08/2006	BURGUNOCCSTRUC/CV OR ATT.	11/29/1996	01/30/199
			03/08/2006	GRAND THEFT MOTOR VEHICLE	12/14/2000	03/07/200
			03/08/2006	TRAFFIC IN STOLEN PROPERTY	12/14/2000	03/07/200

* Smith, Joseph	899500 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=899500&TypeSearch=AI)	WM	03/20/2006	AGG BATTERY INTENDED HARM	04/26/1993	09/29/199
			03/20/2006	OBT.SUB BY FRAUD OR ATT.	05/04/2000	11/20/200
			03/20/2006	OBT.SUB BY FRAUD OR ATT.	05/04/2000	09/28/20(
			03/20/2006	OBT.SUB BY FRAUD OR ATT.	05/04/2000	09/28/20(
			03/20/2006	OBT.SUB BY FRAUD OR ATT.	09/05/2001	11/20/200
			03/20/2006	COCAINE - POSSESSION	01/09/2003	03/06/20(
			03/20/2006	COCAINE - POSSESSION	01/09/2003	03/06/20(
			03/20/2006	COCAINE - POSSESSION	01/09/2003	03/15/200
			03/20/2006	HEROIN-POSS.LESS/10 GRAMS	03/31/1999	11/20/200
			03/20/2006	HEROIN-POSS.LESS/10 GRAMS	03/31/1999	03/01/20(
			03/20/2006	HEROIN-POSS.LESS/10 GRAMS	03/31/1999	11/30/200
			03/20/2006	HEROIN-POSS.LESS/10 GRAMS	03/31/1999	11/30/200
			03/20/2006	POSS.CONTROL.SUBS/OTHER	09/05/2001	11/20/200
			03/20/2006	SEX BAT BY ADULT/VCTM LT 12	02/01/2004	03/15/200
			03/20/2006	KIDNAP,ASSAULT OR TERRORIZE	02/01/2004	03/15/200
			03/20/2006	1ST DG MUR/PREMED. OR ATT.	02/01/2004	03/15/200
* Mosley, John	J30192 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J30192&TypeSearch=AI)	BM	07/03/2006	1ST DG MUR/PREMED. OR ATT.	04/22/2004	06/30/20(
			07/03/2006	1ST DG MUR/PREMED. OR ATT.	04/22/2004	06/30/20(
* Bailey, Robert	128135 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=128135&TypeSearch=AI)	WM	07/24/2006	1ST DG MUR/PREMED. OR ATT.	03/27/2005	04/11/200
			07/24/2006	ESCAPE	08/08/2005	07/21/200
			07/24/2006	AGG.BATT/LEO/FIRFGT/EMS/ETC.	03/07/2006	07/21/200
			07/24/2006	RESISTING OFFICER W/VIOLEN.	03/27/2005	04/11/200
			07/24/2006	CONTRABAND, CO DETENTN FAC	08/08/2005	07/21/200
			07/24/2006	CONTRABAND, CO DETENTN FAC	03/07/2006	07/21/200
* Victorino, Troy	898405 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=898405&TypeSearch=AI)	HM	09/22/2006	OBSTRUCT CRIME INVESTIGATION	08/03/2004	09/21/20(
			09/22/2006	TORTURES ANIMAL W/INTENT INFLI	08/05/2004	09/21/20(
			09/22/2006	GRAND THEFT MOTOR VEHICLE	12/07/1992	09/30/199
			09/22/2006	GRAND THEFT MOTOR VEHICLE	12/07/1992	11/03/199
			09/22/2006	GRAND THEFT MOTOR VEHICLE	01/07/1993	11/03/199
			09/22/2006	GRAND THEFT MOTOR VEHICLE	01/07/1993	09/30/199
			09/22/2006	GRAND THEFT MOTOR VEHICLE	04/02/1993	11/03/199
			09/22/2006	GRAND THEFT MOTOR VEHICLE	04/02/1993	09/30/199
			09/22/2006	GRAND THEFT MOTOR VEHICLE	03/27/1996	08/20/199
			09/22/2006	GRAND THEFT,$300 LESS &20,000	02/06/1993	11/03/199
			09/22/2006	GRAND THEFT,$300 LESS &20,000	02/06/1993	09/30/199
			09/22/2006	AGG BATTERY INTENDED HARM	03/27/1996	08/20/199

			09/22/2006	ARSON,WILLFUL DAMA.STRUCT.	12/07/1992	11/03/199
			09/22/2006	ARSON,WILLFUL DAMA.STRUCT.	12/07/1992	09/30/199
			09/22/2006	BURGUNOCCSTRUC/CV OR ATT.	03/19/1993	11/03/199
			09/22/2006	BURGUNOCCSTRUC/CV OR ATT.	03/19/1993	09/30/199
			09/22/2006	BURGLARY ASSAULT ANY PERSON	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	ABUSE OF HUMAN CORPSE	08/05/2004	09/21/200
Hunter, Jerone	V26165 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=V26165&TypeSearch=AI)	BM	09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
			09/22/2006	1ST DG MUR/PREMED. OR ATT.	08/05/2004	09/21/200
Wheeler, Jason	991988 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=991988&TypeSearch=AI)	WM	10/24/2006	1ST DG MUR/PREMED. OR ATT.	02/09/2005	10/23/200
Knight, Richard	L36345 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=L36345&TypeSearch=AI)	BM	03/30/2007	1ST DG MUR/PREMED. OR ATT.	06/28/2000	03/28/200
			03/30/2007	1ST DG MUR/PREMED. OR ATT.	06/28/2000	03/28/200
Simpson, Jason	301898 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=301898&TypeSearch=AI)	WM	03/30/2007	1ST DG MUR/PREMED. OR ATT.	07/15/1999	03/29/200
			03/30/2007	1ST DG MUR/PREMED. OR ATT.	07/15/1999	03/29/200
* Serrano, Nelson	129232 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=129232&TypeSearch=AI)	WM	06/28/2007	1ST DG MUR/PREMED. OR ATT.	12/03/1997	06/26/200
			06/28/2007	1ST DG MUR/PREMED. OR ATT.	12/03/1997	06/26/200
			06/28/2007	1ST DG MUR/PREMED. OR ATT.	12/03/1997	06/26/200
			06/28/2007	1ST DG MUR/PREMED. OR ATT.	12/03/1997	06/26/200
Santiagogonzalez, Angel	167421 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=167421&TypeSearch=AI)	HM	08/10/2007	1ST DG MUR/PREMED. OR ATT.	01/09/2014	04/13/201
Twilegar, Mark	Y32888 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Y32888&TypeSearch=AI)	WM	08/16/2007	1ST DG MUR/PREMED. OR ATT.	08/07/2002	08/14/200
Jackson, Michael	J34141 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J34141&TypeSearch=AI)	WM	08/30/2007	1ST DG MUR/PREMED. OR ATT.	07/08/2005	08/29/200
			08/30/2007	1ST DG MUR/PREMED. OR ATT.	07/08/2005	08/29/200
* Braddy, Harrel	406356 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=406356&TypeSearch=AI)	BM	10/18/2007	1ST DG MUR/PREMED. OR ATT.	09/14/1984	09/10/198
			10/18/2007	1ST DG MUR/PREMED. OR ATT.	11/06/1998	10/15/200
			10/18/2007	1ST DG MUR/PREMED. OR ATT.	11/06/1998	10/15/200
			10/18/2007	KIDNAP;COMM.OR FAC.FELONY	11/06/1998	10/15/200
			10/18/2007	KIDNAP;COMM.OR FAC.FELONY	11/06/1998	10/15/200

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			10/18/2007	KIDNAP;COMM.OR FAC.FELONY	09/14/1984	09/10/198
			10/18/2007	KIDNAP;COMM.OR FAC.FELONY	09/28/1984	09/23/198
			10/18/2007	KIDNAP;COMM.OR FAC.FELONY	10/05/1984	09/10/198
			10/18/2007	BURGUNOCCSTRUC/CV OR ATT.	06/12/1983	09/23/198
			10/18/2007	BURGUNOCCSTRUC/CV OR ATT.	06/12/1983	06/14/198
			10/18/2007	BURGLARY ASSAULT ANY PERSON	11/06/1998	10/15/200
			10/18/2007	BURGLARY,ARMED W/EXP. OR WEAPO	10/05/1984	09/10/198
			10/18/2007	ROBB. NO GUN/DDLY.WPN	09/14/1984	09/10/198
			10/18/2007	ROBB. GUN OR DEADLY WPN	10/05/1984	09/10/198
			10/18/2007	ROBB. GUN OR DEADLY WPN	09/28/1984	09/23/198
			10/18/2007	BURG/DWELL/OCCUP.CONVEY	09/28/1984	09/23/198
			10/18/2007	NEGLCT CHILD W/GR.BOD.HARM	11/06/1998	10/15/200
			10/18/2007	ESCAPE	09/14/1984	09/10/198
			10/18/2007	ESCAPE	09/25/1984	09/23/198
			10/18/2007	ESCAPE	11/08/1998	10/15/200
* Mclean, Derrick	996584 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=996584&TypeSearch=AI)	BM	12/06/2007	HOME-INVAS.ROBB.FA/DLY.WPN	11/24/2004	11/30/200
			12/06/2007	KIDNAP;COMM.OR FAC.FELONY	11/24/2004	11/30/200
			12/06/2007	ROBB. GUN OR DEADLY WPN	11/24/2004	11/30/200
			12/06/2007	ROBB. GUN OR DEADLY WPN	02/25/2002	02/03/20(
			12/06/2007	ROBB. GUN OR DEADLY WPN	12/25/2002	11/30/200
			12/06/2007	1ST DG MUR/PREMED. OR ATT.	11/24/2004	11/30/200
			12/06/2007	1ST DG MUR/PREMED. OR ATT.	11/24/2004	11/30/200
Brant, Charles	588873 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=588873&TypeSearch=AI)	WM	12/06/2007	1ST DG MUR/PREMED. OR ATT.	07/01/2004	11/30/200
* Durousseau, Paul	J19087 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J19087&TypeSearch=AI)	BM	12/14/2007	1ST DG MUR/PREMED. OR ATT.	07/26/1999	12/13/200
			12/14/2007	AGG ASSLT-W/WPN NO INTENT TO K	06/24/2001	07/25/20(
Zommer, Todd	349878 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=349878&TypeSearch=AI)	WM	02/26/2008	1ST DG MUR/PREMED. OR ATT.	04/09/2005	02/22/20(
Wade, Alan	J35401 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J35401&TypeSearch=AI)	WM	03/05/2008	1ST DG MUR/PREMED. OR ATT.	07/08/2005	03/04/20(
			03/05/2008	1ST DG MUR/PREMED. OR ATT.	07/08/2005	03/04/20(
* Cole, Tiffany	J35212 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J35212&TypeSearch=AI)	WF	03/07/2008	1ST DG MUR/PREMED. OR ATT.	07/08/2005	03/06/20(
			03/07/2008	1ST DG MUR/PREMED. OR ATT.	07/08/2005	03/06/20(
			03/07/2008	KIDNAP;COMM.OR FAC.FELONY	07/08/2005	03/06/20(
			03/07/2008	KIDNAP;COMM.OR FAC.FELONY	07/08/2005	03/06/20(
			03/07/2008	ROBB. NO GUN/DDLY.WPN	07/08/2005	03/06/20(
			03/07/2008	ROBB. NO GUN/DDLY.WPN	07/08/2005	03/06/20(
* Mcgirth, Renaldo	U33164 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=U33164&TypeSearch=AI)	BM	05/06/2008	FLEE LEO/NO REGARD	07/21/2006	05/05/20(

			05/06/2008	ROBB. GUN OR DEADLY WPN	07/21/2006	05/05/200
			05/06/2008	1ST DG MUR/PREMED. OR ATT.	07/21/2006	05/05/200
			05/06/2008	1ST DG MUR/PREMED. OR ATT.	07/21/2006	05/05/200
* Abdool, Dane	130335 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=130335&TypeSearch=AI)	WM	05/19/2008	1ST DG MUR/PREMED. OR ATT.	02/25/2006	05/12/200
* Banks, Donald	J29603 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J29603&TypeSearch=AI)	BM	08/18/2008	1ST DG MUR/PREMED. OR ATT.	03/09/2005	08/15/200
			08/18/2008	2ND DEG.MURD,DANGEROUS ACT	03/23/2005	03/10/200
			08/18/2008	ROBB. GUN OR DEADLY WPN	03/23/2005	03/10/200
			08/18/2008	AGG. BATTERY/65 YRS OR OLDER	03/23/2005	03/10/200
* Phillips, Galante	J03479 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J03479&TypeSearch=AI)	BM	09/22/2008	AGG BATTERY/W/DEADLY WEAPON	10/14/1996	12/17/199
			09/22/2008	COCAINE-SALE/MANUF/DELIV.	06/24/2002	11/20/200
			09/22/2008	GRAND THEFT,300 L/5,000	01/06/2006	02/27/200
			09/22/2008	1ST DG MUR/PREMED. OR ATT.	10/18/2005	09/19/200
			09/22/2008	ROBB. GUN OR DEADLY WPN	10/18/2005	09/19/200
* Kirkman, Vahteice	165328 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=165328&TypeSearch=AI)	BM	10/01/2008	ROBB. GUN OR DEADLY WPN	11/30/1995	10/01/200
			10/01/2008	ROBB. GUN OR DEADLY WPN	02/28/2006	10/25/201
			10/01/2008	ROBB. GUN OR DEADLY WPN	11/30/1995	04/23/199
			10/01/2008	ROBB. GUN OR DEADLY WPN	11/30/1995	01/06/200
			10/01/2008	AT.FLNY.MURD/782.04(3) OFF.	02/28/2006	10/25/201
			10/01/2008	1ST DG MUR/PREMED. OR ATT.	03/17/2006	04/29/201
			10/01/2008	1ST DG MUR/PREMED. OR ATT.	02/28/2006	10/25/201
			10/01/2008	FEL/DELI W/GUN/CONC WPN/AMMO	08/31/2005	09/08/200
			10/01/2008	AGG BATTERY/W/DEADLY WEAPON	11/30/1995	01/06/200
			10/01/2008	AGG BATTERY/W/DEADLY WEAPON	11/30/1995	04/23/199
			10/01/2008	AGG BATTERY INTENDED HARM	11/30/1995	10/01/200
			10/01/2008	BURGLARY,ARMED W/EXP. OR WEAPO	11/30/1995	04/23/199
			10/01/2008	BURGLARY,ARMED W/EXP. OR WEAPO	11/30/1995	01/06/200
			10/01/2008	BURGLARY ASSAULT ANY PERSON	11/30/1995	10/01/200
			10/01/2008	BURGUNOCCSTRUC/CV OR ATT.	01/06/1995	01/06/200
			10/01/2008	BURGUNOCCSTRUC/CV OR ATT.	11/06/1995	04/23/199
			10/01/2008	BURGUNOCCSTRUC/CV OR ATT.	11/05/1995	10/01/200
			10/01/2008	ARSON,WILLFUL DAMA.STRUCT.	06/11/2006	09/08/200
			10/01/2008	FLEE/ELUDE LEO-FELONY	10/13/2005	09/08/200
* Pham, Tai	953712 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=953712&TypeSearch=AI)	WM	11/17/2008	RESISTING OFFICER W/VIOLEN.	10/12/2006	08/19/200
			11/17/2008	BURG/DWELL/OCCUP.CONVEY	10/26/1992	10/26/199
			11/17/2008	BURGLARY ASSAULT ANY PERSON	10/22/2005	11/14/200

			11/17/2008	BATT.LEO/FIRFGT/EMS/ETC.	11/21/2006	01/22/200
			11/17/2008	BATT.LEO/FIRFGT/EMS/ETC.	10/12/2006	08/19/200
			11/17/2008	SIMPLEBATTERY-MISD	02/04/2004	08/18/200
			11/17/2008	1ST DG MUR/PREMED. OR ATT.	10/22/2005	11/14/200
			11/17/2008	1ST DG MUR/PREMED. OR ATT.	10/22/2005	11/14/200
			11/17/2008	KIDNAP;COMM.OR FAC.FELONY	10/22/2005	11/14/200
			11/17/2008	CHILD ABUSE-INJ/NEGLECT	02/02/2002	06/05/200
Allred, Andrew	130930 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=130930&TypeSearch=AI)	WM	11/21/2008	1ST DG MUR/PREMED. OR ATT.	09/24/2007	11/19/200
			11/21/2008	1ST DG MUR/PREMED. OR ATT.	09/24/2007	11/19/200
Partin, Phillup	185563 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=185563&TypeSearch=AI)	WM	12/02/2008	1ST DG MUR/PREMED. OR ATT.	07/31/2002	12/01/200
Mccray, Gary	J01369 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J01369&TypeSearch=AI)	BM	12/11/2008	1ST DG MUR/PREMED. OR ATT.	05/23/2004	12/10/200
			12/11/2008	1ST DG MUR/PREMED. OR ATT.	05/23/2004	12/10/200
			12/11/2008	1ST DG MUR/PREMED. OR ATT.	05/23/2004	12/10/200
			12/11/2008	1ST DG MUR/PREMED. OR ATT.	05/23/2004	12/10/200
Silvia, William	512579 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=512579&TypeSearch=AI)	WM	01/29/2009	1ST DG MUR/PREMED. OR ATT.	09/22/2006	01/28/200
* Hodges, Willie	P36814 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=P36814&TypeSearch=AI)	BM	02/18/2009	1ST DEG MUR,COM.OF FELONY	12/19/2001	02/12/200
Woodbury, Michael	124356 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=124356&TypeSearch=AI)	WM	02/21/2009	1ST DG MUR/PREMED. OR ATT.	09/22/2017	09/21/201
* Baker, Cornelius	V25581 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=V25581&TypeSearch=AI)	BM	03/05/2009	KIDNAP;COMM.OR FAC.FELONY	01/07/2007	03/04/200
			03/05/2009	1ST DG MUR/PREMED. OR ATT.	01/07/2007	03/04/200
			03/05/2009	HOME-INVAS.ROBB.FA/DLY.WPN	01/07/2007	03/04/200
			03/05/2009	BURGUNOCCSTRUC/CV OR ATT.	04/21/2006	05/17/200
			03/05/2009	FLEE LEO/NO REGARD	01/07/2007	03/04/200
Fletcher, Timothy	V14470 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=V14470&TypeSearch=AI)	WM	04/21/2009	1ST DG MUR/PREMED. OR ATT.	04/15/2009	10/12/201
Russ, David	358986 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=358986&TypeSearch=AI)	WM	05/14/2009	1ST DG MUR/PREMED. OR ATT.	05/07/2007	05/13/200
* Altersberger, Joshua	131596 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=131596&TypeSearch=AI)	BM	06/17/2009	1ST DG MUR/PREMED. OR ATT.	01/12/2007	06/15/200
* Patrick, Eric	197598 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=197598&TypeSearch=AI)	WM	10/21/2009	1ST DG MUR/PREMED. OR ATT.	09/25/2005	10/09/200
			10/21/2009	KIDNAP;COMM.OR FAC.FELONY	09/25/2005	10/09/200
			10/21/2009	CONTRABAND, CO DETENTN FAC	11/26/1997	04/17/199
			10/21/2009	BURG/DWELL/OCCUP.CONVEY	11/20/1997	04/17/199
			10/21/2009	BURGLARY TOOLS-POSSESS	10/26/1997	04/17/199
			10/21/2009	BURGUNOCCSTRUC/CV OR ATT.	10/26/1997	04/17/199
			10/21/2009	CARJACK W/FA,DEADLY WEAPON	11/25/1997	04/17/199
			10/21/2009	AGG BATTERY/W/DEADLY WEAPON	09/19/2005	10/05/200

			10/21/2009	ROBB. GUN OR DEADLY WPN	09/19/2005	10/05/200
			10/21/2009	ROBB. NO GUN/DDLY.WPN	09/25/2005	10/09/200
Gosciminski, Andrew	K54395 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=K54395&TypeSearch=AI)	WM	11/13/2009	1ST DG MUR/PREMED. OR ATT.	09/24/2002	11/06/200
Bright, Raymond	200047 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=200047&TypeSearch=AI)	BM	11/20/2009	1ST DG MUR/PREMED. OR ATT.	02/18/2008	11/19/200
			11/20/2009	1ST DG MUR/PREMED. OR ATT.	02/18/2008	11/19/200
* Hall, Donte	X45131 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X45131&TypeSearch=AI)	BM	12/10/2009	AT.FLNY.MURD/NOT 782.04(3)	09/09/2006	12/09/200
			12/10/2009	AT.FLNY.MURD/NOT 782.04(3)	09/09/2006	12/09/200
			12/10/2009	1ST DEG MUR,COM.OF FELONY	09/09/2006	12/09/200
			12/10/2009	1ST DEG MUR,COM.OF FELONY	09/09/2006	12/09/200
			12/10/2009	ROBB. GUN OR DEADLY WPN	09/09/2006	12/09/200
			12/10/2009	ROBB. GUN OR DEADLY WPN	09/09/2006	12/09/200
			12/10/2009	BURGLARY,ARMED W/EXP. OR WEAPO	09/09/2006	12/09/200
			12/10/2009	COCAINE - POSSESSION	12/23/2003	03/01/200
			12/10/2009	COCAINE-SALE/MANUF/DELIV.	11/18/2003	03/01/200
			12/10/2009	COCAINE-SALE/MANUF/DELIV.	02/13/2003	02/10/200
			12/10/2009	OTH.DRUG-SALE/MANUF/DELIV	03/15/2003	05/20/200
			12/10/2009	OTH.DRUG-SALE/MANUF/DELIV	12/06/2002	05/20/200
* Peterson, Robert	287224 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=287224&TypeSearch=AI)	WM	12/14/2009	COCAINE-PUR/POSS W/INT PUR.	10/11/1996	05/09/199
			12/14/2009	OBSTRUCT CRIME INVESTIGATION	08/08/2005	12/10/200
			12/14/2009	HALLUCINOGEN-OTHER-NON MARIJ	08/26/1985	09/26/198
			12/14/2009	1ST DG MUR/PREMED. OR ATT.	08/08/2005	12/10/200
King, Michael	132254 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=132254&TypeSearch=AI)	WM	12/14/2009	1ST DG MUR/PREMED. OR ATT.	01/17/2008	12/04/200
* Caylor, Matthew	Q23494 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Q23494&TypeSearch=AI)	WM	12/15/2009	SEX BAT/ WPN. OR FORCE	07/08/2008	12/11/200
			12/15/2009	1ST DG MUR/PREMED. OR ATT.	07/08/2008	12/11/200
			12/15/2009	AGGRAVATED CHILD ABUSE	07/08/2008	12/11/200
* Heyne, Justin	X23653 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X23653&TypeSearch=AI)	WM	12/18/2009	ROBB. WPN-NOT DEADLY	04/30/1999	06/04/200
			12/18/2009	ROBB. WPN-NOT DEADLY	04/30/1999	12/15/200
			12/18/2009	ROBB. WPN-NOT DEADLY	04/30/1999	12/15/200
			12/18/2009	1ST DG MUR/PREMED. OR ATT.	03/30/2006	12/17/200
			12/18/2009	1ST DG MUR/PREMED. OR ATT.	03/30/2006	12/17/200
			12/18/2009	1ST DG MUR/PREMED. OR ATT.	03/30/2006	12/17/200
* Kocaker, Genghis	479701 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=479701&TypeSearch=AI)	WM	02/02/2010	HOMICIDE,MANSL.CUL.NEGLI	04/04/1980	07/23/198
			02/02/2010	1ST DG MUR/PREMED. OR ATT.	08/31/2004	12/18/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/24/1990	01/02/199

			02/02/2010	ROBB. GUN OR DEADLY WPN	06/24/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/26/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/26/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/27/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/27/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/28/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/28/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/29/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	06/29/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	07/01/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	07/01/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	07/02/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	07/02/1990	11/12/200
			02/02/2010	ROBB. GUN OR DEADLY WPN	07/05/1990	01/02/199
			02/02/2010	ROBB. GUN OR DEADLY WPN	07/05/1990	11/12/200
			02/02/2010	ROBBERY-OTHER/OTHER STATE	04/04/1980	06/25/198
			02/02/2010	GRAND THEFT MOTOR VEHICLE	03/09/1990	01/02/199
			02/02/2010	GRAND THEFT MOTOR VEHICLE	04/04/1980	06/25/198
			02/02/2010	GRAND THEFT MOTOR VEHICLE	06/27/1990	01/02/199
Martin, David	J30258 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J30258&TypeSearch=AI)	WM	03/18/2010	1ST DEG MUR,COM.OF FELONY	03/11/2008	03/03/201
Sanchez-torrez, Hector	J40507 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J40507&TypeSearch=AI)	HM	04/08/2010	1ST DG MUR/PREMED. OR ATT.	09/09/2008	09/01/201
* Matthews, Douglas	V29877 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=V29877&TypeSearch=AI)	BM	08/13/2010	HOMICIDE,MANSL.CUL.NEGLI	02/20/2008	08/12/201
			08/13/2010	1ST DG MUR/PREMED. OR ATT.	02/20/2008	08/12/201
			08/13/2010	BURGLARY,ARMED W/EXP. OR WEAPO	02/20/2008	08/12/201
			08/13/2010	COCAINE - POSSESSION	08/17/2007	01/03/200
			08/13/2010	COCAINE - POSSESSION	08/17/2007	08/12/201
* Mcmillian, Justin	133220 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=133220&TypeSearch=AI)	BM	10/07/2010	BATT.LEO/FIRFGT/EMS/ETC.	08/02/2010	10/04/201
			10/07/2010	1ST DG MUR/PREMED. OR ATT.	01/11/2009	10/01/201
			10/07/2010	2ND DEG.MURD,DANGEROUS ACT	01/11/2009	10/01/201
* Calloway, Tavares	M03128 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=M03128&TypeSearch=AI)	BM	10/26/2010	KIDNAP;COMM.OR FAC.FELONY	01/21/1997	10/01/201
			10/26/2010	ROBB. GUN OR DEADLY WPN	01/21/1997	10/01/201
			10/26/2010	1ST DG MUR/PREMED. OR ATT.	01/21/1997	10/01/201
			10/26/2010	1ST DG MUR/PREMED. OR ATT.	01/21/1997	10/01/201
			10/26/2010	1ST DG MUR/PREMED. OR ATT.	01/21/1997	10/01/201
			10/26/2010	1ST DG MUR/PREMED. OR ATT.	01/21/1997	10/01/201
			10/26/2010	1ST DG MUR/PREMED. OR ATT.	01/21/1997	10/01/201

			10/26/2010	BURGLARY ASSAULT ANY PERSON	01/21/1997	10/01/201
			10/26/2010	BURGUNOCCSTRUC/CV OR ATT.	02/01/1995	05/13/199
			10/26/2010	RESISTING OFFICER W/VIOLEN.	02/02/1996	05/13/199
			10/26/2010	GRAND THEFT MOTOR VEHICLE	02/01/1995	05/13/199
			10/26/2010	CARRYING CONCEALED FIREARM	02/02/1996	05/13/199
Kaczmar, Leo	J20499 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J20499&TypeSearch=AI)	WM	11/15/2010	1ST DG MUR/PREMED. OR ATT.	12/12/2008	11/05/201
Mccoy, Thomas	D40377 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=D40377&TypeSearch=AI)	WM	11/19/2010	1ST DG MUR/PREMED. OR ATT.	04/10/2009	03/26/201
* Dubose, Rasheem	133428 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=133428&TypeSearch=AI)	BM	12/14/2010	1ST DEG MUR,COM.OF FELONY	07/26/2006	12/09/201
			12/14/2010	SHOOT/THROW MISSILE-BLDG/VEH.	07/26/2006	12/09/201
* Gonzalez, Leonard	768915 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=768915&TypeSearch=AI)	WM	02/18/2011	UTTERING FORGERY	12/01/1991	10/31/199
			02/18/2011	UTTERING FORGERY	12/01/1991	10/31/199
			02/18/2011	UTTERING FORGERY	12/02/1991	06/23/199
			02/18/2011	UTTERING FORGERY	12/02/1991	06/23/199
			02/18/2011	FORGERY/UTTERING	12/02/1991	10/31/199
			02/18/2011	FORGERY/UTTERING	12/02/1991	06/23/199
			02/18/2011	FORGERY/UTTERING	12/02/1991	06/23/199
			02/18/2011	FORGERY/UTTERING	12/01/1991	10/31/199
			02/18/2011	LARCENY/GRAND THEFT	12/02/1991	06/23/199
			02/18/2011	PETIT THEFT/3RD CONVICTION	04/22/1992	07/15/199
			02/18/2011	GRAND THEFT,$300 LESS &20,000	12/02/1991	06/23/199
			02/18/2011	GRAND THEFT,$300 LESS &20,000	12/01/1991	10/31/199
			02/18/2011	BURGUNOCCSTRUC/CV OR ATT.	12/02/1991	06/23/199
			02/18/2011	BURGUNOCCSTRUC/CV OR ATT.	12/01/1991	10/31/199
			02/18/2011	BURGUNOCCSTRUC/CV OR ATT.	12/01/1991	10/31/199
			02/18/2011	BURGUNOCCSTRUC/CV OR ATT.	12/01/1991	10/31/199
			02/18/2011	BURGUNOCCSTRUC/CV OR ATT.	12/01/1991	10/31/199
			02/18/2011	BURGUNOCCSTRUC/CV OR ATT.	12/01/1991	10/31/199
			02/18/2011	ASSAULT-OTHER	04/22/1992	07/15/199
			02/18/2011	HOME-INVAS.ROBB.FA/DLY.WPN	07/09/2009	02/17/201
			02/18/2011	ROBB. NO GUN/DDLY.WPN	04/22/1992	07/15/199
			02/18/2011	1ST DG MUR/PREMED. OR ATT.	07/09/2009	02/17/201
			02/18/2011	1ST DG MUR/PREMED. OR ATT.	07/09/2009	02/17/201
Hilton, Gary	133897 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=133897&TypeSearch=AI)	WM	04/22/2011	1ST DG MUR/PREMED. OR ATT.	12/01/2007	04/21/201
Davis, Leon	H27248 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=H27248&TypeSearch=AI)	BM	05/05/2011	1ST DG MUR/PREMED. OR ATT.	12/07/2007	12/30/201
			05/05/2011	1ST DG MUR/PREMED. OR ATT.	12/07/2007	12/30/201

			05/05/2011	1ST DG MUR/PREMED. OR ATT.	12/13/2007	04/29/201
			05/05/2011	1ST DG MUR/PREMED. OR ATT.	12/13/2007	04/29/201
Wilcox, Darious	444904 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=444904&TypeSearch=AI)	BM	05/19/2011	1ST DEG MUR,COM.OF FELONY	02/03/2008	05/16/201
Allen, Margaret	699575 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=699575&TypeSearch=AI)	BF	05/19/2011	1ST DEG MUR,COM.OF FELONY	02/08/2005	05/19/201
Smith, Terry	130985 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=130985&TypeSearch=AI)	BM	06/10/2011	1ST DEG MUR,COM.OF FELONY	06/05/2007	05/12/201
			06/10/2011	1ST DEG MUR,COM.OF FELONY	06/05/2007	05/12/201
Newberry, Rodney	120774 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=120774&TypeSearch=AI)	BM	07/28/2011	1ST DG MUR/PREMED. OR ATT.	12/28/2009	04/04/201
Herard, James	L88290 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=L88290&TypeSearch=AI)	BM	09/08/2011	1ST DG MUR/PREMED. OR ATT.	11/14/2008	01/23/201
* Brown, Thomas	D30662 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=D30662&TypeSearch=AI)	BM	10/31/2011	1ST DG MUR/PREMED. OR ATT.	06/18/2009	10/28/201
			10/31/2011	ROBB. NO GUN/DDLY.WPN	09/17/1999	10/04/200
* Campbell, John	D35843 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=D35843&TypeSearch=AI)	WM	12/30/2011	ROBB. NO GUN/DDLY.WPN	08/05/2010	03/19/201
			12/30/2011	ROBB. NO GUN/DDLY.WPN	08/07/2010	03/19/201
			12/30/2011	ROBB. NO GUN/DDLY.WPN	08/10/2010	03/19/201
			12/30/2011	AGG.ASSLT/LEO/FIREFGT/EMS/ETC.	08/11/2010	12/14/201
			12/30/2011	BURGUNOCCSTRUC/CV OR ATT.	01/01/2009	01/01/200
			12/30/2011	BURGUNOCCSTRUC/CV OR ATT.	08/03/2010	03/19/201
			12/30/2011	BURG/DWELL/OCCUP.CONVEY	05/13/2010	03/19/201
			12/30/2011	FLEE LEO/NO REGARD	08/11/2010	12/14/201
			12/30/2011	CRIMINAL MISCHIEF/PROP.DAMAGE	08/11/2010	12/14/201
			12/30/2011	TRAFFIC IN STOLEN PROPERTY	06/22/2010	03/19/201
			12/30/2011	GRAND THEFT,300 L/5,000	08/03/2010	03/19/201
			12/30/2011	1ST DG MUR/PREMED. OR ATT.	08/10/2010	03/19/201
			12/30/2011	AT.FLNY.MURD/782.04(3) OFF.	08/11/2010	12/14/201
Marquardt, Bill	U44139 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=U44139&TypeSearch=AI)	WM	03/15/2012	1ST DG MUR/PREMED. OR ATT.	03/15/2000	02/28/201
			03/15/2012	1ST DG MUR/PREMED. OR ATT.	03/15/2000	02/28/201
Sparre, David	J46231 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J46231&TypeSearch=AI)	WM	04/02/2012	1ST DEG MUR,COM.OF FELONY	07/08/2010	03/30/201
Sheppard, Billy	J18546 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J18546&TypeSearch=AI)	BM	04/02/2012	1ST DG MUR/PREMED. OR ATT.	07/20/2008	03/30/201
Calhoun, Johnny	Q26629 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Q26629&TypeSearch=AI)	WM	05/23/2012	1ST DG MUR/PREMED. OR ATT.	12/16/2010	05/18/201
Oliver, Terence	977097 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=977097&TypeSearch=AI)	BM	06/18/2012	1ST DG MUR/PREMED. OR ATT.	07/22/2009	06/15/201
			06/18/2012	1ST DG MUR/PREMED. OR ATT.	07/22/2009	06/15/201
* Martin, Arthur	436687 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=436687&TypeSearch=AI)	BM	08/06/2012	2ND DEG.MURD,DANGEROUS ACT	05/26/1997	12/13/200

			08/06/2012	1ST DG MUR/PREMED. OR ATT.	10/28/2009	08/03/201
			08/06/2012	FEL/DELI W/GUN/CONC WPN/AMMO	05/26/1997	12/13/200
			08/06/2012	THREATENS TO USE ANY FIREARM	06/13/1991	04/20/199
			08/06/2012	BURGLARY ASSAULT ANY PERSON	05/26/1997	12/13/200
			08/06/2012	ROBB. GUN OR DEADLY WPN	05/26/1997	12/13/200
			08/06/2012	ROBB. GUN OR DEADLY WPN	05/26/1997	12/13/200
			08/06/2012	ROBB. GUN OR DEADLY WPN	06/13/1991	04/20/199
Brown, Tina	155917 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=155917&TypeSearch=AI)	BF	10/03/2012	1ST DG MUR/PREMED. OR ATT.	03/24/2010	09/28/201
Middleton, Dale	801152 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=801152&TypeSearch=AI)	WM	10/25/2012	1ST DG MUR/PREMED. OR ATT.	07/28/2009	10/19/201
Cannon, Marvin	N08206 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=N08206&TypeSearch=AI)	BM	11/19/2012	1ST DG MUR/PREMED. OR ATT.	12/24/2010	11/15/2012
Davis, William	H17413 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=H17413&TypeSearch=AI)	WM	12/18/2012	1ST DG MUR/PREMED. OR ATT.	10/29/2009	12/17/2012
* Lebron, Joel	135556 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=135556&TypeSearch=AI)	BM	03/26/2013	1ST DG MUR/PREMED. OR ATT.	04/26/2002	01/31/201
			03/26/2013	1ST DG MUR/PREMED. OR ATT.	04/26/2002	01/31/201
			03/26/2013	KIDNAP;COMM.OR FAC.FELONY	04/26/2002	01/31/201
			03/26/2013	KIDNAP;COMM.OR FAC.FELONY	04/26/2002	01/31/201
			03/26/2013	ROBB. GUN OR DEADLY WPN	04/26/2002	01/31/201
			03/26/2013	ROBB. GUN OR DEADLY WPN	04/26/2002	01/31/201
			03/26/2013	SEX BAT/ WPN. OR FORCE	04/26/2002	01/31/201
Smith, Delmer	135769 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=135769&TypeSearch=AI)	WM	07/01/2013	1ST DG MUR/PREMED. OR ATT.	08/03/2009	05/28/201
Mullens, Khadafy	R17884 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=R17884&TypeSearch=AI)	BM	08/27/2013	1ST DG MUR/PREMED. OR ATT.	08/17/2008	08/23/201
			08/27/2013	1ST DG MUR/PREMED. OR ATT.	08/17/2008	08/23/201
* Jordan, Joseph	180632 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=180632&TypeSearch=AI)	WM	09/25/2013	FALS.IMPRSN-NO 787.01 INT	08/09/1990	06/18/199
			09/25/2013	ROBB. GUN OR DEADLY WPN	06/24/2009	09/23/201
			09/25/2013	1ST DEG MUR,COM.OF FELONY	06/24/2009	09/23/201
			09/25/2013	BURGUNOCCSTRUC/CV OR ATT.	10/01/1986	04/20/198
			09/25/2013	SX OFFNDR FAIL COMPLY PSIA	08/29/2001	08/20/200
			09/25/2013	SX OFFNDR FAIL COMPLY PSIA	08/29/2001	06/13/200
			09/25/2013	SX OFFNDR FAIL COMPLY PSIA	08/29/2001	06/13/200
			09/25/2013	SX OFFNDR FAIL COMPLY PSIA	08/25/2004	03/22/200
			09/25/2013	MARIJUANA-SALE/PURCHASE	02/13/1987	04/20/198
			09/25/2013	BARBITURATE-POSSESS	01/01/1988	04/16/198
			09/25/2013	GRAND THEFT,$300 LESS &20,000	10/01/1986	04/20/198
			09/25/2013	BURG/DWELL/OCCUP.CONVEY	01/01/1987	04/16/198
			09/25/2013	FEL/DELI W/GUN/CONC WPN/AMMO	06/19/1998	09/10/199

Jackson, Kim	135963 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=135963&TypeSearch=AI)	BM	10/02/2013	1ST DEG MUR,COM.OF FELONY	10/01/2004	10/01/201
* Okafor, Bessman	X46345 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X46345&TypeSearch=AI)	BM	10/18/2013	1ST DG MUR/PREMED. OR ATT.	09/10/2012	11/17/2015
			10/18/2013	1ST DG MUR/PREMED. OR ATT.	09/10/2012	11/17/2015
			10/18/2013	1ST DG MUR/PREMED. OR ATT.	09/10/2012	11/17/2015
Cozzie, Steven	135997 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=135997&TypeSearch=AI)	WM	10/18/2013	1ST DG MUR/PREMED. OR ATT.	06/16/2011	10/17/201
* Okafor, Bessman	X46345 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=X46345&TypeSearch=AI)	BM	10/18/2013	GRAND THEFT,300 L/5,000	08/10/2006	01/29/200
			10/18/2013	BURG/DWELL/OCCUP.CONVEY	08/10/2006	01/29/200
			10/18/2013	BURGLARY,ARMED W/EXP. OR WEAPO	09/10/2012	11/17/2015
			10/18/2013	BURGLARY ASSAULT ANY PERSON	05/09/2012	10/11/201
			10/18/2013	ROBB. GUN OR DEADLY WPN	05/09/2012	10/11/201
			10/18/2013	ROBB. GUN OR DEADLY WPN	05/09/2012	10/11/201
			10/18/2013	ROBB. GUN OR DEADLY WPN	05/09/2012	10/11/201
			10/18/2013	ROBB. GUN OR DEADLY WPN	05/09/2012	10/11/201
			10/18/2013	AGG ASSLT-W/WPN NO INTENT TO K	09/12/2005	05/02/200
* Bargo, Michael	U41472 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=U41472&TypeSearch=AI)	WM	12/16/2013	BURG/DWELL/OCCUP.CONVEY	07/06/2010	08/27/201
			12/16/2013	GRAND THEFT,300 L/5,000	07/06/2010	08/27/201
* Sexton, John	U21898 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=U21898&TypeSearch=AI)	WM	12/16/2013	GRAND THEFT,300 L/5,000	10/17/2004	11/16/200
			12/16/2013	1ST DG MUR/PREMED. OR ATT.	09/22/2010	12/13/201
* Bargo, Michael	U41472 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=U41472&TypeSearch=AI)	WM	12/16/2013	1ST DG MUR/PREMED. OR ATT.	04/17/2011	12/13/201
* Williams, Donald	U13479 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=U13479&TypeSearch=AI)	WM	03/03/2014	1ST DG MUR/PREMED. OR ATT.	10/18/2010	02/28/201
			03/03/2014	KIDNAP;HOLD RANSOM OR HOST.	10/18/2010	02/28/201
			03/03/2014	CARJACK W/O FA/DEAD WEAP	10/28/2000	11/05/200
			03/03/2014	CARJACK W/O FA/DEAD WEAP	10/28/2000	11/21/201
			03/03/2014	ROBB. NO GUN/DDLY.WPN	10/18/2010	02/28/201
Truehill, Quentin	148538 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=148538&TypeSearch=AI)	BM	05/19/2014	1ST DG MUR/PREMED. OR ATT.	04/02/2010	05/16/201
Morris, Dontae	T36280 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=T36280&TypeSearch=AI)	BM	06/03/2014	1ST DG MUR/PREMED. OR ATT.	05/18/2010	12/04/201
			06/03/2014	1ST DG MUR/PREMED. OR ATT.	06/29/2010	05/30/201
			06/03/2014	1ST DG MUR/PREMED. OR ATT.	06/29/2010	05/30/201
* Bradley, Brandon	E34418 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=E34418&TypeSearch=AI)	BM	07/09/2014	1ST DG MUR/PREMED. OR ATT.	03/06/2012	06/27/201
			07/09/2014	ROBB. NO GUN/DDLY.WPN	06/11/2008	03/02/200
			07/09/2014	ROBB. NO GUN/DDLY.WPN	03/06/2012	06/27/201
			07/09/2014	ROBB. NO GUN/DDLY.WPN	06/11/2008	07/08/201

			07/09/2014	BURGUNOCCSTRUC/CV OR ATT.	09/23/2007	05/28/200
			07/09/2014	BURGUNOCCSTRUC/CV OR ATT.	09/23/2007	03/02/200
			07/09/2014	BURGUNOCCSTRUC/CV OR ATT.	09/23/2007	07/08/201
			07/09/2014	GRAND THEFT O/20,000 L/$100,00	09/23/2007	07/08/201
			07/09/2014	GRAND THEFT O/20,000 L/$100,00	09/23/2007	03/02/200
			07/09/2014	RESISTING OFFICER W/VIOLEN.	03/06/2012	06/27/201
			07/09/2014	FLEE LEO/NO REGARD	03/06/2012	06/27/201
			07/09/2014	FLEE LEO/NO REGARD	04/18/2011	07/08/201
			07/09/2014	COCAINE - POSSESSION	05/26/2008	03/02/200
			07/09/2014	COCAINE - POSSESSION	05/26/2008	07/08/201
			07/09/2014	GRAND THEFT,300 L/5,000	09/23/2007	05/28/200
			07/09/2014	COCAINE-SALE/MANUF/DELIV.	09/30/2011	07/08/201
			07/09/2014	FEL/DELI W/GUN/CONC WPN/AMMO	09/30/2011	07/08/201
			07/09/2014	FEL/DELI W/GUN/CONC WPN/AMMO	04/18/2011	07/08/201
Craven, Daniel	V24323 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=V24323&TypeSearch=AI)	WM	09/02/2014	1ST DG MUR/PREMED. OR ATT.	06/28/2015	09/12/201
Tundidor, Randy	L97205 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=L97205&TypeSearch=AI)	WM	11/17/2014	1ST DG MUR/PREMED. OR ATT.	04/05/2010	11/07/201
Covington, Edward	R56925 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=R56925&TypeSearch=AI)	WM	06/01/2015	1ST DG MUR/PREMED. OR ATT.	05/10/2008	05/29/201
			06/01/2015	1ST DG MUR/PREMED. OR ATT.	05/10/2008	05/29/201
			06/01/2015	1ST DG MUR/PREMED. OR ATT.	05/10/2008	05/29/201
* Andres, Rafael	182201 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=182201&TypeSearch=AI)	WM	06/16/2015	1ST DG MUR/PREMED. OR ATT.	01/24/2005	05/06/201
			06/16/2015	2ND DEG.MURD,DANGEROUS ACT	03/09/1987	01/15/198
			06/16/2015	ROBB. GUN OR DEADLY WPN	01/24/2005	05/06/201
			06/16/2015	POSS.FIREARM BY FELON	10/01/1991	01/23/199
			06/16/2015	POSS.FIREARM BY FELON	10/01/1991	07/24/199
			06/16/2015	POSS.FIREARM BY FELON	10/01/1991	07/19/199
			06/16/2015	GRAND THEFT MOTOR VEHICLE	04/15/1993	07/24/199
			06/16/2015	GRAND THEFT,$300 LESS &20,000	05/24/1993	07/19/199
			06/16/2015	ARSON WILLFUL DAMA.DWELLING	01/24/2005	05/06/201
			06/16/2015	BURGLARY ASSAULT ANY PERSON	01/24/2005	05/06/201
Craft, Robert	C00181 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=C00181&TypeSearch=AI)	WM	07/20/2015	1ST DG MUR/PREMED. OR ATT.	05/16/2018	06/07/201
* Glover, Dennis	J53288 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=J53288&TypeSearch=AI)	BM	08/25/2015	1ST DG MUR/PREMED. OR ATT.	05/29/2012	08/14/201
* Davis, Barry	P29305 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=P29305&TypeSearch=AI)	BM	08/31/2015	1ST DG MUR/PREMED. OR ATT.	05/07/2012	08/25/201
			08/31/2015	1ST DG MUR/PREMED. OR ATT.	05/07/2012	08/25/201
			08/31/2015	BURGUNOCCSTRUC/CV OR ATT.	05/14/2012	08/25/201

			08/31/2015	BURGUNOCCSTRUC/CV OR ATT.	05/02/2006	04/16/200
			08/31/2015	BURG/DWELL/OCCUP.CONVEY	05/14/2012	08/25/201
			08/31/2015	GRAND THEFT MOTOR VEHICLE	05/07/2012	08/25/201
			08/31/2015	GRAND THEFT MOTOR VEHICLE	05/14/2012	08/25/201
			08/31/2015	FORGERY/UTTERING	05/19/2012	08/25/201
			08/31/2015	FORGERY/UTTERING	05/24/2012	08/25/201
			08/31/2015	FORGERY/UTTERING	05/26/2012	08/25/201
			08/31/2015	FAIL.TO APPEAR/FEL.BAIL	09/12/2005	11/15/200
			08/31/2015	FAIL.TO APPEAR/FEL.BAIL	09/12/2005	06/20/200
			08/31/2015	POSS.MARIJUANA OVR 20 GRAMS	04/06/2005	01/05/201
			08/31/2015	POSS.MARIJUANA OVR 20 GRAMS	04/20/2005	11/15/200
			08/31/2015	POSS.MARIJUANA OVR 20 GRAMS	04/20/2005	06/20/200
			08/31/2015	GRAND THEFT,300 L/5,000	05/02/2006	04/16/200
			08/31/2015	GRAND THEFT $5KL/$10K	05/14/2012	08/25/201
			08/31/2015	UTTER FORGED INSTRUMENT	05/24/2012	08/25/201
			08/31/2015	UTTER FORGED INSTRUMENT	05/19/2012	08/25/201
			08/31/2015	UTTER FORGED INSTRUMENT	06/09/2012	08/25/201
			08/31/2015	FRAUD-CREDIT-CARD	05/10/2012	08/25/201
Deviney, Randall	132862 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=132862&TypeSearch=AI)	WM	11/10/2015	1ST DG MUR/PREMED. OR ATT.	08/05/2008	10/14/201
* Tisdale, Eriese	W34427 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=W34427&TypeSearch=AI)	BM	05/02/2016	1ST DG MUR/PREMED. OR ATT.	02/28/2013	04/29/201
			05/02/2016	FEL/DELI W/GUN/CONC WPN/AMMO	02/28/2013	04/29/201
			05/02/2016	COCAINE - POSSESSION	10/12/2007	06/05/200
			05/02/2016	COCAINE - POSSESSION	10/12/2007	04/14/200
			05/02/2016	WILLFUL FLEE/ELUDE LEO	02/28/2013	04/29/201
			05/02/2016	AGG.ASSLT/LEO/FIREFGT/EMS/ETC.	02/28/2013	04/29/201
Wall, Craig	140726 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=140726&TypeSearch=AI)	WM	06/06/2016	1ST DG MUR/PREMED. OR ATT.	02/05/2010	06/03/201
			06/06/2016	1ST DG MUR/PREMED. OR ATT.	02/17/2010	06/03/201
Damas, Mesac	Y63399 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Y63399&TypeSearch=AI)	BM	10/30/2017	1ST DG MUR/PREMED. OR ATT.	09/17/2009	10/27/201
			10/30/2017	1ST DG MUR/PREMED. OR ATT.	09/17/2009	10/27/201
			10/30/2017	1ST DG MUR/PREMED. OR ATT.	09/17/2009	10/27/201
			10/30/2017	1ST DG MUR/PREMED. OR ATT.	09/17/2009	10/27/201
			10/30/2017	1ST DG MUR/PREMED. OR ATT.	09/17/2009	10/27/201
			10/30/2017	1ST DG MUR/PREMED. OR ATT.	09/17/2009	10/27/201
Bush, Sean	D24647 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=D24647&TypeSearch=AI)	BM	01/11/2018	1ST DG MUR/PREMED. OR ATT.	05/31/2011	12/21/201
Smiley, Benjamin	T72309 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=T72309&TypeSearch=AI)	BM	03/01/2018	1ST DEG MUR,COM.OF FELONY	04/16/2013	02/23/201

Smith, Donald	986205 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=986205&TypeSearch=AI)	WM	05/03/2018	1ST DG MUR/PREMED. OR ATT.	06/21/2013	05/02/201
Avsenew, Peter	K05966 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=K05966&TypeSearch=AI)	WM	09/04/2018	1ST DG MUR/PREMED. OR ATT.	12/23/2010	08/28/201
			09/04/2018	1ST DG MUR/PREMED. OR ATT.	12/23/2010	08/28/201
Colley, James	Y80029 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=Y80029&TypeSearch=AI)	WM	12/03/2018	1ST DG MUR/PREMED. OR ATT.	08/27/2015	11/30/201
			12/03/2018	1ST DG MUR/PREMED. OR ATT.	08/27/2015	11/30/201
Alcegaire, Johnathan	M61417 (/offenderSearch/detail.aspx?Page=Detail&DCNumber=M61417&TypeSearch=AI)	BM	03/13/2019	FELONY MURDER-NONSEX	01/06/2016	03/08/201
			03/13/2019	FELONY MURDER-NONSEX	01/06/2016	03/08/201
			03/13/2019	FELONY MURDER-NONSEX	01/06/2016	03/08/201

* SENTENCE PENDING REVIEW

About Us (http://www.dc.state.fl.us/about.html)

As Florida's largest state agency, and the third largest prison system in the country, FDC employs 24,000 members, incarcerates approximately 96,000 inmates and supervises nearly 166,000 offenders in the community.

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Organization (//www.dc.state.fl.us/org/orgchart.html)
Regulatory Plan (//www.dc.state.fl.us/pub/regulatory/2017-2018.pdf)
Victim Services (//www.dc.state.fl.us/vict/index.html)
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Tallahassee, FL 32399-2500

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Citizen Services (//www.dc.state.fl.us/citizen/index.html)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 19, 2019

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Appeal Number: 19-12929-P
Case Style: Gary Ray Bowles v. Governor, et al
District Court Docket No: 4:19-cv-00319-MW-CAS

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed published order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,

Plaintiff,

v. **Case No. 4:19cv319-MW/CAS**

RON DESANTIS, et al.,

Defendants.
_____/

ORDER DENYING MOTION FOR STAY OF EXECUTION[1]

Plaintiff Gary Ray Bowles, a prisoner under sentence of death and subject to an active death warrant, seeks an emergency stay of his execution, which is scheduled for August 22, 2019. ECF No. 5. Bowles's motion for stay is **DENIED**.

I

Bowles pleaded guilty to the 1994 murder of Walter Hinton and was sentenced to death. *Bowles v. State* (*Bowles II*), 804 So. 2d 1173, 1175 (Fla. 2001), *cert. denied*, *Bowles v. Florida*, 536 U.S. 930 (2002). On direct appeal, the Supreme Court of Florida vacated Bowles's sentence. *Bowles v. State* (*Bowles I*), 716 So. 2d 769 (Fla. 1998). On remand, Bowles was again sentenced

[1] This Court issues a truncated order to ensure Bowles has adequate time to appeal.

to death, and the Supreme Court of Florida affirmed. *Bowles II*, 804 So. 2d at 1175, 1184. Bowles unsuccessfully sought both state and federal postconviction relief. *Bowles v. State* (*Bowles III*), 979 So. 2d 182 (Fla. 2008); *Bowles v. Sec'y, Fla. Dep't of Corr.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert. denied*, 562 U.S. 1068 (2010).

As detailed in the Complaint, ECF No. 1 at 5-8, Bowles's childhood was characterized by abandonment, drug use, and extensive physical and sexual abuse. Bowles began to abuse alcohol and other intoxicants at age eight. ECF No. 1 at 7, ¶ 21. He alleges his adaptive deficits were obvious at around age thirteen and have continued throughout his life. ECF No. 1 at 8-9. Despite this, Bowles alleges he was never evaluated to determine whether he was intellectually disabled until 2017, at which point he was determined to have a full-scale IQ score of seventy-four on the Wechsler Adult Intelligence Scale (4th ed.), with a margin of error of plus-or-minus five points. ECF No. 1 at 9, ¶ 28.

Armed with this information, the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida (CHU)—which had been appointed in 2017 to represent Bowles pursuant to 18 U.S.C. § 3599—sought to litigate an intellectual disability claim on Bowles's behalf in Florida's state courts, alongside state-appointed postconviction counsel. ECF No. 1 at 10, ¶ 31 & 27, ¶ 62. In March 2018, while this claim was still pending, the then-Governor of Florida, Rick Scott, began clemency proceedings for Bowles. ECF

No. 1 at 11, ¶ 33. The Florida Commission on Offender Review (FCOR) appointed attorney Nah-Deh Simmons, a private practitioner, to represent Bowles in those clemency proceedings. ECF No. 1 at 23, ¶ 53.

CHU sought to intervene in the clemency process on Bowles's behalf in order to protect his rights in the ongoing state-court litigation of his intellectual disability claim. ECF No. 1 at 25-26. CHU requested leave to attend the clemency proceedings and offer information concerning Bowles's alleged intellectual disability, and also requested a postponement of the clemency proceedings until after the state court litigation of Bowles's intellectual disability claim was completed. ECF No. 1 at 29-34. All these requests were denied. On June 11, 2019, the present Governor of Florida, Ron DeSantis, denied clemency and signed a death warrant for Bowles.

On July 11, 2019, Bowles filed a complaint for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 which is presently before this Court, ECF No. 1, and moved for an emergency stay of his execution, ECF No. 5.

II

Bowles claims Defendants violated his section 3599 right to counsel by refusing to allow CHU to appear on his behalf in his clemency proceedings. He asks this Court to stay his execution until his section 1983 claim is resolved.

Section 3599 entitles a capital criminal defendant who is seeking federal postconviction relief but is not financially able "to obtain adequate

representation or investigative, expert, or other reasonably necessary services" to "the appointment of one or more attorneys and the furnishing of such other services" as specified in that statute. 18 U.S.C. § 3599(a)(2) (2018). Section 3599(e) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney [appointed pursuant to this section] shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

III

In a recent case, my colleague Judge Rodgers addressed a similar section 1983 claim concerning whether a prisoner under sentence of death and an active death warrant was entitled to a stay of execution pending determination of his claim that section 3599 entitled him to have federally appointed counsel appear on his behalf at his clemency proceeding. *Long v. DeSantis*, No. 4:19cv213-MCR-MJF (N.D. Fla. May 16, 2019) (order denying motion for stay). This Court incorporates that order by reference and adopts its reasoning.[2] This

[2] Although Bowles does not raise a Sixth Amendment claim in this action, *see generally* ECF Nos. 1, 4, 5, & 22 to the extent his pleadings could be interpreted liberally to raise a Sixth Amendment claim, this Court agrees with Judge Rodgers's order in *Long* that no Sixth Amendment right to counsel attaches to a state clemency proceeding.

Court writes further to explain its primary rationale for denying relief on Bowles's section 1983 claim.

Section 1983 provides a civil cause of action to redress the deprivation of rights, privileges, or immunities granted by the Constitution and laws of the United States by a person acting under the color of state law. 42 U.S.C. § 1983 (2018). To obtain relief pursuant to section 1983, a plaintiff must show "the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). To be entitled to a stay of execution, a party must show "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (quoting *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011)) (emphasis omitted). In the context of a motion to stay the impending execution of a condemned prisoner, this Court presumes the "irreparable injury" requirement is satisfied. *See in re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (reasoning that, given the finality of the death penalty, such harm is "self-evident").

To determine whether Bowles has shown a substantial likelihood of success on the merits, therefore, this Court must first determine whether section 3599 confers an enforceable federal right. Courts analyze whether a

statute creates a federal right enforceable through section 1983 by examining three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340-41 (internal marks and citations omitted).

It is beyond question that Congress intended section 3599 to benefit the individuals to whom attorneys are assigned under its auspices. Section 3599 is also not so vague and amorphous that courts will find its implementation problematic, or even difficult: it identifies a limited population (individuals who have been sentenced to death and are seeking federal postconviction relief) to whom its provisions apply, provides very specific qualifications for the counsel to be appointed, and lists with great specificity the type of proceedings in which such counsel is authorized to be involved. This Court therefore concludes section 3599 satisfies the first two elements of the *Blessing* standard to the extent necessary to justify issuance of a stay of execution.

Section 3599 does not, however, satisfy the third element of *Blessing*. By its plain terms, section 3599 does not place an obligation on the States at all. Instead, it places an obligation on the federal courts to appoint and compensate

postconviction counsel for indigent capital defendants. By providing that such counsel "shall represent" such defendants "throughout every subsequent stage of available judicial proceedings" including postconviction and, where applicable, "proceedings for executive or other clemency," section 3599 places a binding obligation on the defendant's federally appointed attorney. But at no point does section 3599 require state courts or executive bodies to allow the federally appointed attorney to appear and practice before them. Indeed, it is questionable whether such a statute would pass constitutional muster. *See Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984) (explaining that regulation of the bar is an important "sovereign function" of state government linked to the power to protect the public). To the extent section 3599(e) bears at all on a state's actions, it is a precatory statement that the state should allow the defendant's federally appointed counsel to appear in such proceedings. Because section 3599(e) does not place a binding obligation on the States, this Court concludes it does not create a federal right.[3]

Other courts have examined this issue in reverse. That is, courts have considered whether an attorney appointed pursuant to section 3599 was authorized to represent the defendant for a particular purpose, but not whether the defendant was entitled as a matter of federal law to have that

[3] Because section 3599 does not create a federal right to counsel in a state clemency proceeding, this Court need not address the adequacy of Bowles's clemency counsel.

attorney appear at a particular proceeding. In *Gary v. Warden*, 686 F.3d 1261, 1264 (11th Cir. 2012), the Eleventh Circuit considered whether a prisoner was entitled to receive funds pursuant to section 3599 for the assistance of counsel and certain experts rendered in the course of pursuing certain postconviction motions. In *Samayoa v. Davis*, No. 18-56047, 2019 WL 2864411, *3 (9th Cir. July 3, 2019), the Ninth Circuit considered whether section 3599 counsel's representation extended to a state clemency proceeding even though the state has separately appointed clemency counsel to represent that defendant. The Ninth Circuit concluded "[t]he availability of state appointment of clemency counsel is irrelevant to federally appointed counsel's ongoing representation of a death-row client in state clemency proceedings." *Id.* But neither *Gary* nor *Samayoa* addressed whether a state clemency board could be compelled to allow federally appointed counsel to appear and practice before it.

IV

It is important to understand what this Court is saying in this Order and what it is not. Clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," *Herrera v. Collins*, 506 U.S. 390, 412 (1993), and it is clearly in the public interest that the Clemency Board obtain as complete a picture as possible when considering whether to grant clemency. This interest is especially acute in the context of the death penalty. *See Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that

'death is different.'" (internal marks omitted)). Whether to grant clemency to Bowles is literally a matter of life and death. Given what is at stake, one would assume the Clemency Board would want to hear from the attorney most qualified to speak on the defendant's behalf and present the best information possible, leaving no stone unturned. It is unclear how excluding CHU from the clemency proceeding and instead appointing an attorney unfamiliar with Bowles's history and possible intellectual disability contributes to the integrity or reliability of the clemency determination; but that is not the issue presented before this Court. However troubling Defendants' decision to exclude CHU from the clemency proceeding may be, the law compels this Court to conclude section 3599 does not prevent Defendants from making that decision.

V

Bowles has not shown he is substantially likely to succeed on the merits of his section 1983 claim. Plaintiff's emergency motion for stay of execution, ECF No. 5, is therefore **DENIED**.[4]

SO ORDERED on July 19, 2019.

s/Mark E. Walker
Chief United States District Judge

[4] Although addressed at length by Defendants in their response, ECF No. 19, and by Bowles in his reply, ECF No. 22, this Court need not be detained by the claim that Bowles was dilatory in filing this action in light of its denial of relief on other grounds.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 19-12929 (DEATH PENALTY)

GARY RAY BOWLES,

Appellant,

v.

RON DeSANTIS, et. al.,

Appellees.

EMERGENCY MOTION FOR STAY OF EXECUTION PENDING APPEAL

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

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I. INTRODUCTION

Appellant Gary Ray Bowles is an intellectually disabled man who is scheduled to be executed by the State of Florida on August 22, 2019. Through his appointed federal counsel, the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida (CHU), Mr. Bowles has been attempting to obtain a merits determination of his intellectual disability—and his corresponding Eighth Amendment categorical exemption from the death penalty —since October 2017, long before the Governor signed a warrant for his execution in June 2019. After the Governor signed Mr. Bowles's death warrant, however, his state-court intellectually disability litigation was expedited, truncated, and summarily dismissed, based on a state procedural rule that allows Florida courts to refuse to even consider whether a death row prisoner is in fact intellectually disabled.

If the state court's decision stands, Mr. Bowles may be executed without any court considering on the merits whether he is in fact intellectually disabled, even though he has been pursuing that claim for two years in the state courts, and has proffered compelling supporting evidence. The state court's decision is currently on appeal to the Florida Supreme Court. *See* Fla. S. Ct. No. SC19-1184.

Although Mr. Bowles's intellectual disability claim itself is not before this Court, it is closely related to the issues in this appeal, regarding the violation of Mr. Bowles's federal rights during his state clemency proceedings. Given that Florida's

courts have been circumventing the Eighth Amendment by refusing to even review certain intellectual disability claims, Mr. Bowles's executive clemency proceedings should have acted as a critical safeguard. *See Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). In light of their expertise in Mr. Bowles's case and intellectually disability litigation, his appointed federal CHU counsel therefore attempted to formally participate in the clemency process, not only to provide critical information to the clemency board regarding Mr. Bowles's intellectual disability, but also to protect Mr. Bowles's rights, given that the Clemency Board was seeking a personal interview of Mr. Bowles, an intellectually disabled man, outside the presence of the very attorneys who were conducting his intellectual disability litigation. But Florida's state clemency officials inexplicably barred the CHU from formally participating in the proceedings, and refused to allow CHU counsel to be present at the interview. As a result, the safeguard of clemency was comprised for Mr. Bowles.[1]

[1] As even the district court recognized below, "one would assume the Clemency Board would want to hear from the attorney most qualified to speak on the defendant's behalf and present the best information possible, leaving no stone unturned . . . . [i]t is unclear how excluding the CHU from the clemency proceeding and instead appointing an attorney unfamiliar with Bowles's history and possible intellectual disability contributes to the integrity or reliability of the clemency determination." District Court (D.Ct.) ECF No. 25 at 9 (the district court went on to conclude, however, "but that is not the issue presented before this Court.").

Counsel unfamiliar with Mr. Bowles's complex case, background, and unique vulnerabilities due to his intellectual disability could not have performed adequately in clemency proceedings. When Florida's Clemency Board decided to retain such inadequate counsel—a private lawyer with no death penalty experience who was paid a flat $10,000 fee—while simultaneously barring Mr. Bowles's federal CHU counsel from participating in the clemency proceedings, it was akin to Mr. Bowles having no counsel in the proceedings at all. Mr. Bowles was "left to navigate the sometimes labyrinthine clemency process from [his] jail cell[], relying on limited resources and little education in a final attempt at convincing the government to spare [his life]." *Hain v. Mullin*, 436 F.3d 1168, 1175 (10th Cir. 2006).

This is a result that Congress sought specifically to avoid in enacting 18 U.S.C. § 3599, the federal statute under which Mr. Bowles's federal CHU counsel was appointed, and it is not a result the federal courts should tolerate. *See, e.g.*, *Harbison v. Bell*, 556 U.S. 180, 194 (2009) ("In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system.") (internal citation omitted). Mr. Bowles's 42 U.S.C. § 1983 action below, filed in the Northern District of Florida, therefore sought to vindicate Mr. Bowles's federal § 3599 rights, consistent with Congress's intent. The present appeal in this Court involves the district court's erroneous denial of Mr. Bowles's motion

to stay his execution in order for his § 1983 action to receive full merits consideration, without a looming death warrant.

Just as Mr. Bowles's § 1983 action itself should not be hastily litigated under warrant, the novel and complex issues in the present appeal should not be decided in a truncated fashion. In this motion, Mr. Bowles respectfully requests that this Court stay his scheduled August 22, 2019, execution, and allow this appeal to proceed to full briefing and argument without the exigencies of a death warrant.

II. BACKGROUND

In March 2018, clemency proceedings were initiated for Mr. Bowles. The Florida Commission on Offender Review (FCOR) privately contracted with clemency counsel for the purpose of those proceedings, without first notifying Mr. Bowles or his § 3599 counsel. The clemency counsel retained for Mr. Bowles had never represented an individual facing the death penalty at any stage of the proceedings—trial, appellate, postconviction, or habeas—nor was he qualified under Florida law to do so. He had never represented a client in intellectual disability-related proceedings, nor did he have any experience or training in litigating intellectual disability claims. Pursuant to the terms of his contract, he did not have funding for experts or investigation, and had not been trained in how to investigate and prepare a professionally appropriate clemency presentation.

Mr. Bowles's federal § 3599 counsel, the CHU, attempted to intervene and assist already-retained clemency counsel in representing Mr. Bowles throughout his clemency proceedings. The CHU was obligated to intervene because Mr. Bowles had pending intellectual disability litigation in state court, he was at particular risk for miscommunication during the clemency process due to his intellectual disability, the CHU was the only counsel who knew Mr. Bowles's case and were familiar with his intellectual disability claim, and § 3599 imposed a statutory obligation on the CHU to represent him in those proceedings. However, FCOR and the Governor's Office prohibited § 3599 counsel from representing Mr. Bowles or meaningfully participating in the process. On June 11, 2019, while Mr. Bowles's intellectual disability claim was still pending in the Florida trial court, the Governor signed a warrant for his execution, and it was only at that point that Mr. Bowles was notified, for the first time, that his clemency proceedings were concluded and denied.

On July 11, 2019, Mr. Bowles filed a 42 U.S.C. § 1983 action in the Northern District of Florida, based on Defendant-Appellees' refusal to allow his federally appointed counsel to meaningfully participate in the clemency proceedings, along with a motion to stay his scheduled August 22, 2019, execution. District Court (D.Ct.) ECF Nos. 1, 5. On July 19, 2019, the district court denied the stay motion. D.Ct. ECF No. 25. On August 1, 2019, Mr. Bowles filed a notice of appeal to this

Court, D.Ct. ECF No. 27, seeking immediate review of the district court's denial of the stay motion, *see, e.g.*, 28 U.S.C. § 1292(a)(1).[2]

Mr. Bowles now moves to stay his scheduled execution pending the disposition of this appeal, the seriousness and complexity of which should include merits briefing and oral argument in the ordinary course, and should not be truncated under threat of an imminent execution.

III. A STAY PENDING APPEAL IS APPROPRIATE HERE

A. A Stay Pending Appeal is Appropriate for Substantial Questions

This case meets the criteria for a stay pending appeal. Stays of execution can be appropriate for § 1983 actions. *See, e.g.*, *Hill v. McDonough*, 547 U.S. 573, 584 (2006). While such stays are an "equitable remedy" and not "a matter of right," they can be appropriate on a case-by-case basis. *Id.*; *see also Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) ("[T]he traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules."). Generally, a stay of execution is a form of injunctive relief with identical elements to the elements for preliminary injunctions. *See Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013). This similarity is because "similar concerns arise whenever a

[2] Prior to the notice of appeal, and transfer of jurisdiction to this Court, Defendant-Appellees moved in the district court to dismiss Mr. Bowles's § 1983 complaint. *See* D.Ct. ECF No. 26.

court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Where a stay is sought pending the resolution of an appeal, courts also consider whether the issues raised in the appeal are "substantial," non-frivolous, and whether any federal appellate court has previously considered the issue. *See*, *e.g.*, *Goode v. Wainwright*, 670 F.2d 941, 942 (11th Cir. 1982) (concluding that issues raised by an appeal were substantial, had not been decided by any federal appellate courts, and warranted a stay); *Collins v. Kemp*, 792 F.2d 987, 989 (11th Cir. 1986) (noting the non-frivolous nature of the issues being appealed and granting a stay); *see also Jones v. Commissioner, Ga. Dept. of Corr.*, 811 F.3d 1288, 1293 (11th Cir. 2016) (noting in analyzing whether a stay was appropriate whether other federal circuit courts had considered the question posed by the plaintiff).

"Indeed, when moving for a stay pending appeal, a showing on the latter three factors [injury to the moving party, lack of substantial injury to the non-moving party, and the public interest will not be adversely affected] that is 'heavily tilted' in favor of a stay may compensate for a showing on the first factor that is 'substantial' without necessarily showing that success on the merits is 'probable.'" *Sierra Club v. United States Army Corps of Engineers*, No. 3:05-cv-362, 2007 WL 402830, *1 (M.D. Fla. Feb. 1, 2007) (quoting *Ruiz v. Estelle*, 650 F. 2d 555, 565-66 (5th Cir. 1981)). "In such a case, it can be enough to show that 'a serious legal question is

presented' even if success is not mathematically probable, but only if the other factors 'weigh heavily' in favor of granting the stay." *Id.*; *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1146 (2019) (Sotomayor, J., dissenting) (noting that when deciding whether to stay an execution, "the equities in a death penalty case will almost always favor the prisoner so long as he or she can show *a reasonable probability* of success on the merits") (emphasis added).

B. Mr. Bowles's Suit Presents Substantial Issues of First Impression for this Circuit

Mr. Bowles's suit presents substantial issues of first impression for this Circuit. Mr. Bowles alleged in his § 1983 complaint, appendix, and supporting memorandum of law, that his § 3599 rights were violated when Defendant-Appellees barred his § 3599 counsel from representing him in his clemency proceedings, and forced him to proceed with inadequate counsel. While his related stay of execution was denied, *see* D.Ct. ECF No. 25, his allegations have not received the benefit of discovery or other development through the ordinary course of litigation.

The issues raised by Mr. Bowles's suit are serious and compelling. Necessarily at issue in Mr. Bowles's suit is whether Defendant-Appellees' claims that Mr. Bowles's § 3599 counsel "may never appear as clemency counsel," because the State of Florida retains new private counsel, regardless of the qualification or adequacy of that state-furnished counsel, are accurate as a matter of federal law. *See* D.Ct. ECF No. 19 at 19. Such a reading of the relevant legal landscape highlights

why this is such a critical question, and why a circuit split has emerged over whether state-furnished counsel can supersede an individual's rights under § 3599. As Mr. Bowles explained below, the Ninth Circuit has indicated that the availability of state-furnished counsel is irrelevant for § 3599 purposes, *see Samayoa v. Davis*, No. 18-56047, 2019 WL2864411 at *3 (9th Cir. July 3, 2019), while the Sixth Circuit has held that adequate state-furnished counsel makes an individual ineligible for representation under § 3599, *see Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). Those Circuits, in analyzing the same statute and authority found in *Harbison v. Bell*, reached different conclusions that directly implicate the substantial questions raised by Mr. Bowles's suit. Moreover, these are questions of first impression in this Circuit that could result in important guidance for the clemency proceedings of death-sentenced individuals in Florida.

This question of statutory interpretation is not merely academic for Mr. Bowles, given the nexus with his intellectual disability claim. Mr. Bowles was left with only his state-furnished counsel, who had no death penalty experience or qualifications, affirmatively waived any investigative, expert, or other fees associated with his representation, failed to speak with any lay or expert witnesses or seek Mr. Bowles's full case file, was unfamiliar with Mr. Bowles's background, and took none of the necessary precursors to a competent clemency presentation. Because of Defendant-Appellees' actions in excluding Mr. Bowles's § 3599 counsel,

the issue of Mr. Bowles's intellectual disability went substantively unaddressed, with only superficial references by his state-retained counsel during the clemency presentation, which themselves showed that he was unfamiliar with Mr. Bowles's intellectual disability and background.

Moreover, the deficiency in Mr. Bowles's clemency presentation came not only from what was omitted from the presentation, but from what was injected into the proceedings. Namely, Mr. Bowles was repeatedly questioned by FCOR about matters bearing on his pending intellectual disability litigation, outside the presence of § 3599 counsel who represents him in that litigation, and FCOR actively denigrated that litigation, and whether Mr. Bowles had any disability at all. In no way did Mr. Bowles have a clemency proceeding that would allow for a meaningful or thoughtful consideration of his intellectual disability.

Clemency, and Mr. Bowles's suit herein, is a matter of life or death. Mr. Bowles's suit poses a "substantial" question, which is not frivolous, and is a question of first impression for this Court. These factors should weigh in favor of granting a stay for full consideration of Mr. Bowles's appeal.

C. Mr. Bowles Meets the Requirements for a Stay of his Execution Pending this Appeal

i. Mr. Bowles's Appeal has a Substantial Likelihood of Success

The ultimate issues in this case are whether Mr. Bowles, a man with intellectual disability, having had counsel appointed to him under § 3599, had a

federal right to that counsel's representation in clemency proceedings, and whether that right was violated by Defendant-Appellees' actions. The narrower issue in the present appeal is whether the district court abused its discretion in refusing to grant a stay of Mr. Bowles's scheduled August 22, 2019, execution to allow his § 1983 action to be litigated in the ordinary course, without the threat of a death warrant.[3]

The district court in this case issued a ruling limited only to whether § 3599 creates a federal right and is thereby enforceable through a § 1983 action. *See* D.Ct. ECF No. 25 at 6-7. Specifically, the district court found that while § 3599 met the first two elements of the test for § 1983 enforceability, as delineated by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), it failed the third element because the statute "does not place an obligation on the States at all." D.Ct. ECF No. 25 at 6. Instead, the district court found, § 3599 only created an obligation for the appointed attorney. *Id*. at 7. Moreover, the district court found, § 3599 does not "require state courts or executive bodies to allow the federally appointed attorney to appear and practice before them." *Id*.

Mr. Bowles has a substantial likelihood of success on appeal—or at least a reasonable probability, *see Sierra Club*, 2007 WL 402830 at *1, and *Bucklew*, 139

[3] Mr. Bowles's arguments herein are limited to the appropriateness of a stay pending the appeal of the district court's denial of his stay motion. Orders on such motions are reviewed under an abuse of discretion standard by this Court. *See, e.g.*, *DeYoung v. Owens*, 646 F.3d 1319, 1324 n. 2 (11th Cir. 2011). Because of the nature of this motion, it should not be considered full briefing on the underlying issues.

S. Ct. at 1146 (Sotomayor, J., dissenting)—because the district court's analysis regarding the enforceability of § 3599 through § 1983 was legally incorrect, and would result in a miscarriage of justice in this case. Section 3599 necessarily creates an obligation on the states as to who is counsel for the beneficiaries of the statute (those death-sentenced individuals with § 3599 counsel appointed). Section 3599(e)'s requirement that attorneys appointed under subsection (a)(2), "[u]nless replaced by similarly qualified counsel . . . *shall represent* the defendant throughout every subsequent stage of available judicial proceedings, including . . . proceedings for executive or other clemency" does not contain the exception that the district court suggests—namely, that states can choose to ignore this mandatory right given to death-sentenced individuals with § 3599 counsel. If there was such an exception to the requirement of counsel in those necessarily state proceedings, Congress would have said so. *See In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (noting that "[w]here Congress knows how to say something but chooses not to, its silence is controlling") (internal quotation omitted). The "shall" language of § 3599(e) is mandatory, weighing in favor of rights creation. *See Kingdomware Techs., Inc. v. United States*, 5136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

In interpreting whether § 3599 created a federal right, the district court ignored the intersection between the mandatory language about who counsel is and for what

proceedings, and the fact that Congress was specifically intending to reach *state* clemency proceedings. This interpretation is bolstered by Supreme Court's reading of § 3599 in *Harbison*. When the State in *Harbison* argued that "clemency proceedings" did not include state clemency, the Court called such a reading "not convincing," and said "[t]o the contrary, the reference to 'proceedings for executive or other clemency,' § 3599(e) (emphasis added), reveals that Congress intended to include state clemency proceedings within the statute's reach." *Harbison*, 556 U.S. at 186-87. *Harbison* plainly found that § 3599 included state clemency proceedings because of how distinct such proceedings are from other state proceedings that may be subsequent in time to federal habeas. *Compare Harbison*, 556 U.S. at 187 (finding state clemency plainly within § 3599's reach), *with id*. at 188 (noting that a state retrial would not necessarily be within the reach of § 3599).

The language of § 3599 is mandatory about who counsel is, and *Harbison* reads this statute as directing that § 3599 counsel is to serve as clemency counsel, regardless of any state-furnished counsel, in a state clemency proceeding. This is an obligation on the states to recognize, or at least not preclude, the formal participation of said § 3599 counsel as clemency counsel, and thus should be sufficient to establish the third *Blessing* factor.[4]

[4] Federal district courts have interpreted § 3599 as conferring enforceable rights for the purposes of ensuring meaningful § 3599 representation in state clemency in other settings. *See, e.g.*, Order, *Cook v. Ryan*, No. 97-cv-146, D.Ct. ECF No. 111

Moreover, the district court's reading of § 3599 as non-binding on the states as to who a litigant's counsel is, after that counsel is rightfully appointed, would lead to absurd and arbitrary results. In no other context can a state court to refuse to hear from a death-sentenced litigant's counsel simply because of the origin of their representation. State clemency proceedings are specifically delineated as within the obligations for representation created by § 3599. To find that a state could arbitrarily refuse to hear from counsel properly representing their client under § 3599, for no reason logically related to the proceeding, would make § 3599's directive for counsel appointed under it meaningless. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' . . . We are thus 'reluctant to treat statutory terms as surplusage' in any setting.") (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); *Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 131 (D. S.C. 1994) ("Although a court generally should read a statute as literally written, courts will reject such a reading if it would render the statute meaningless, produce absurd results, or defeat the plain legislative intention.") (citations omitted).

(D. Ariz. Apr. 16, 2010) (granting motion for order regarding a state prison allowing an expert retained by § 3599 counsel to have a contact visit with the client for clemency purposes); Order, *King v. Ryan*, No. 98-cv-01277, D.Ct. ECF No. 112 (D. Ariz. May 3, 2010) (same).

For this motion, Mr. Bowles is only required to show that his likelihood of success in his appeal is "substantial" or that he has a "reasonable probability" of success. His request for a stay is bolstered by the fact that his suit presents an issue of first impression, and that reasonable jurists in federal appellate courts who have considered similar issues have disagreed. Mr. Bowles has made this showing, and is entitled to a stay pending the resolution of his appeal in the ordinary course.[5]

ii. Mr. Bowles Meets the Remaining Requirements for a Stay

A stay is warranted where four factors are satisfied: "(1) [the applicant] has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Mann*, 713 F.3d at 1310 (quoting *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011)). As discussed above, *see supra* section (III)(C)(i), Mr. Bowles has shown that he has a substantial likelihood of success in this case.

The district court's order below recognizes that Mr. Bowles meets the remaining three requirements for a stay of execution, and the same analysis holds for this appeal. Regarding the second factor, the district court's order acknowledged

[5] While Mr. Bowles has argued herein that the district court's reading of § 3599 and *Harbison* was wrong as to whether a federal right was created for § 1983 purposes, he need not conclusively establish that now, and the limited nature of this stay motion should not be assumed to contain a full and fair briefing of the issue.

that the injury for Mr. Bowles here is a "matter of life and death." D.Ct. ECF No. 25 at 9. Without a stay, Mr. Bowles will be executed before this litigation can proceed in the ordinary course, and his injury is presumptive. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident."); *Ferguson v. Warden, Fla. State Prison*, 493 F. App'x 22, 26 (11th Cir. 2012) (Wilson, J., concurring) ("As a general rule, in the circumstance of an imminent execution, this court presumes the existence of irreparable injury.").

Regarding the third factor, as Mr. Bowles argued below and the district court's order does not dispute, a stay in this case would not harm Defendant-Appellees. The resolution of his appeal—while not reasonably possible in the 21 days between the filing of this motion and his execution—would cause only brief delay for the State of Florida. Defendant-Appellees would not suffer financial or other hardship from the issuance of a stay to allow the Court to evaluate the violation of Mr. Bowles's federal statutory rights. Where an individual's claim underlying a motion for a stay of execution could mean further proceedings—like a new clemency proceeding—that weighs heavily against a State's interest in the person's imminent execution. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("Moreover, contrary to the State's contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of

Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment.").

With regard to the fourth factor, there is no adverse interest to the public in granting a stay. The district court agreed that "it is clearly in the public interest that the Clemency Board obtain as complete a picture as possible when considering whether to grant clemency," D.Ct. ECF No. 25 at 8; *see also Ray v. Commissioner, Ala. Dept. of Corrs.*, 915 F. 3d 689, 701-02 (11th Cir. 2019) ("Of course, neither Alabama nor the public has any interest in carrying out an execution in a manner that violates the command of the Establishment Clause or the laws of the United States."). Indeed, the public has an affirmative interest in individuals having access to the "safeguard" of our death penalty system: clemency. *See, e.g., Herrera*, 506 U.S. at 411-12; *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 768 (E.D. Va. 2001).

The public's interest in this case is especially in favor of Mr. Bowles, because he has so far been procedurally barred from having his intellectual disability considered by any state or federal court, and the State of Florida has argued affirmatively that he may not receive a merits review of this claim in either forum. Clemency is potentially Mr. Bowles's only chance to address this procedural injustice. *See, e.g., Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015); *Sanborn v. Parker*, No. 99-678-C, 2011 WL 6152849, at *1 (W.D. Ky. Dec. 12, 2011). The

public has a strong interest in ensuring that the procedural and substantive unfairness of Mr. Bowles's death sentence was adequately addressed in clemency.

The public and the judiciary have a heightened interest in ensuring the procedural and moral application of punishment in cases such as Mr. Bowles's, because, as the long-held maxim goes, death is different. *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."). The public interest is best served by ensuring that all death-sentenced individuals have meaningful access, in line with their federal rights, to the safeguard of clemency procedures in their state.

IV. CONCLUSION

For the reasons detailed above, Mr. Bowles respectfully requests that a stay of his scheduled August 22, 2019, execution be granted so that the appeal of the denial of a stay in his 42 U.S.C. § 1983 action can be considered without the imminent threat of Mr. Bowles's death.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted Rule 32(f) and Rule 27(a)(2)(B), this document contains 4,500 words.

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/s/ Terri Backhus
Terri Backhus

CERTIFICATE OF SERVICE

This document was served through the CM/ECF system on Assistant Attorney General Charmaine Millsaps, at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, on August 2, 2019.

/s/ Terri Backhus
Terri Backhus

Attachments

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,

Plaintiff,

v. **Case No. 4:19cv319-MW/CAS**

RON DESANTIS, et al.,

Defendants.
_____/

ORDER DENYING MOTION FOR STAY OF EXECUTION[1]

Plaintiff Gary Ray Bowles, a prisoner under sentence of death and subject to an active death warrant, seeks an emergency stay of his execution, which is scheduled for August 22, 2019. ECF No. 5. Bowles's motion for stay is **DENIED**.

I

Bowles pleaded guilty to the 1994 murder of Walter Hinton and was sentenced to death. *Bowles v. State* (*Bowles II*), 804 So. 2d 1173, 1175 (Fla. 2001), *cert. denied*, *Bowles v. Florida*, 536 U.S. 930 (2002). On direct appeal, the Supreme Court of Florida vacated Bowles's sentence. *Bowles v. State* (*Bowles I*), 716 So. 2d 769 (Fla. 1998). On remand, Bowles was again sentenced

[1] This Court issues a truncated order to ensure Bowles has adequate time to appeal.

to death, and the Supreme Court of Florida affirmed. *Bowles II*, 804 So. 2d at 1175, 1184. Bowles unsuccessfully sought both state and federal postconviction relief. *Bowles v. State* (*Bowles III*), 979 So. 2d 182 (Fla. 2008); *Bowles v. Sec'y, Fla. Dep't of Corr.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert. denied*, 562 U.S. 1068 (2010).

As detailed in the Complaint, ECF No. 1 at 5-8, Bowles's childhood was characterized by abandonment, drug use, and extensive physical and sexual abuse. Bowles began to abuse alcohol and other intoxicants at age eight. ECF No. 1 at 7, ¶ 21. He alleges his adaptive deficits were obvious at around age thirteen and have continued throughout his life. ECF No. 1 at 8-9. Despite this, Bowles alleges he was never evaluated to determine whether he was intellectually disabled until 2017, at which point he was determined to have a full-scale IQ score of seventy-four on the Wechsler Adult Intelligence Scale (4th ed.), with a margin of error of plus-or-minus five points. ECF No. 1 at 9, ¶ 28.

Armed with this information, the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida (CHU)—which had been appointed in 2017 to represent Bowles pursuant to 18 U.S.C. § 3599—sought to litigate an intellectual disability claim on Bowles's behalf in Florida's state courts, alongside state-appointed postconviction counsel. ECF No. 1 at 10, ¶ 31 & 27, ¶ 62. In March 2018, while this claim was still pending, the then-Governor of Florida, Rick Scott, began clemency proceedings for Bowles. ECF

No. 1 at 11, ¶ 33. The Florida Commission on Offender Review (FCOR) appointed attorney Nah-Deh Simmons, a private practitioner, to represent Bowles in those clemency proceedings. ECF No. 1 at 23, ¶ 53.

CHU sought to intervene in the clemency process on Bowles's behalf in order to protect his rights in the ongoing state-court litigation of his intellectual disability claim. ECF No. 1 at 25-26. CHU requested leave to attend the clemency proceedings and offer information concerning Bowles's alleged intellectual disability, and also requested a postponement of the clemency proceedings until after the state court litigation of Bowles's intellectual disability claim was completed. ECF No. 1 at 29-34. All these requests were denied. On June 11, 2019, the present Governor of Florida, Ron DeSantis, denied clemency and signed a death warrant for Bowles.

On July 11, 2019, Bowles filed a complaint for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 which is presently before this Court, ECF No. 1, and moved for an emergency stay of his execution, ECF No. 5.

II

Bowles claims Defendants violated his section 3599 right to counsel by refusing to allow CHU to appear on his behalf in his clemency proceedings. He asks this Court to stay his execution until his section 1983 claim is resolved.

Section 3599 entitles a capital criminal defendant who is seeking federal postconviction relief but is not financially able "to obtain adequate

representation or investigative, expert, or other reasonably necessary services" to "the appointment of one or more attorneys and the furnishing of such other services" as specified in that statute. 18 U.S.C. § 3599(a)(2) (2018). Section 3599(e) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney [appointed pursuant to this section] shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

III

In a recent case, my colleague Judge Rodgers addressed a similar section 1983 claim concerning whether a prisoner under sentence of death and an active death warrant was entitled to a stay of execution pending determination of his claim that section 3599 entitled him to have federally appointed counsel appear on his behalf at his clemency proceeding. *Long v. DeSantis*, No. 4:19cv213-MCR-MJF (N.D. Fla. May 16, 2019) (order denying motion for stay). This Court incorporates that order by reference and adopts its reasoning.[2] This

[2] Although Bowles does not raise a Sixth Amendment claim in this action, *see generally* ECF Nos. 1, 4, 5, & 22 to the extent his pleadings could be interpreted liberally to raise a Sixth Amendment claim, this Court agrees with Judge Rodgers's order in *Long* that no Sixth Amendment right to counsel attaches to a state clemency proceeding.

Court writes further to explain its primary rationale for denying relief on Bowles's section 1983 claim.

Section 1983 provides a civil cause of action to redress the deprivation of rights, privileges, or immunities granted by the Constitution and laws of the United States by a person acting under the color of state law. 42 U.S.C. § 1983 (2018). To obtain relief pursuant to section 1983, a plaintiff must show "the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). To be entitled to a stay of execution, a party must show "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (quoting *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011)) (emphasis omitted). In the context of a motion to stay the impending execution of a condemned prisoner, this Court presumes the "irreparable injury" requirement is satisfied. *See in re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (reasoning that, given the finality of the death penalty, such harm is "self-evident").

To determine whether Bowles has shown a substantial likelihood of success on the merits, therefore, this Court must first determine whether section 3599 confers an enforceable federal right. Courts analyze whether a

statute creates a federal right enforceable through section 1983 by examining three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340-41 (internal marks and citations omitted).

It is beyond question that Congress intended section 3599 to benefit the individuals to whom attorneys are assigned under its auspices. Section 3599 is also not so vague and amorphous that courts will find its implementation problematic, or even difficult: it identifies a limited population (individuals who have been sentenced to death and are seeking federal postconviction relief) to whom its provisions apply, provides very specific qualifications for the counsel to be appointed, and lists with great specificity the type of proceedings in which such counsel is authorized to be involved. This Court therefore concludes section 3599 satisfies the first two elements of the *Blessing* standard to the extent necessary to justify issuance of a stay of execution.

Section 3599 does not, however, satisfy the third element of *Blessing*. By its plain terms, section 3599 does not place an obligation on the States at all. Instead, it places an obligation on the federal courts to appoint and compensate

postconviction counsel for indigent capital defendants. By providing that such counsel "shall represent" such defendants "throughout every subsequent stage of available judicial proceedings" including postconviction and, where applicable, "proceedings for executive or other clemency," section 3599 places a binding obligation on the defendant's federally appointed attorney. But at no point does section 3599 require state courts or executive bodies to allow the federally appointed attorney to appear and practice before them. Indeed, it is questionable whether such a statute would pass constitutional muster. *See Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984) (explaining that regulation of the bar is an important "sovereign function" of state government linked to the power to protect the public). To the extent section 3599(e) bears at all on a state's actions, it is a precatory statement that the state should allow the defendant's federally appointed counsel to appear in such proceedings. Because section 3599(e) does not place a binding obligation on the States, this Court concludes it does not create a federal right.[3]

Other courts have examined this issue in reverse. That is, courts have considered whether an attorney appointed pursuant to section 3599 was authorized to represent the defendant for a particular purpose, but not whether the defendant was entitled as a matter of federal law to have that

[3] Because section 3599 does not create a federal right to counsel in a state clemency proceeding, this Court need not address the adequacy of Bowles's clemency counsel.

attorney appear at a particular proceeding. In *Gary v. Warden*, 686 F.3d 1261, 1264 (11th Cir. 2012), the Eleventh Circuit considered whether a prisoner was entitled to receive funds pursuant to section 3599 for the assistance of counsel and certain experts rendered in the course of pursuing certain postconviction motions. In *Samayoa v. Davis*, No. 18-56047, 2019 WL 2864411, *3 (9th Cir. July 3, 2019), the Ninth Circuit considered whether section 3599 counsel's representation extended to a state clemency proceeding even though the state has separately appointed clemency counsel to represent that defendant. The Ninth Circuit concluded "[t]he availability of state appointment of clemency counsel is irrelevant to federally appointed counsel's ongoing representation of a death-row client in state clemency proceedings." *Id.* But neither *Gary* nor *Samayoa* addressed whether a state clemency board could be compelled to allow federally appointed counsel to appear and practice before it.

IV

It is important to understand what this Court is saying in this Order and what it is not. Clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," *Herrera v. Collins*, 506 U.S. 390, 412 (1993), and it is clearly in the public interest that the Clemency Board obtain as complete a picture as possible when considering whether to grant clemency. This interest is especially acute in the context of the death penalty. *See Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that

'death is different.'" (internal marks omitted)). Whether to grant clemency to Bowles is literally a matter of life and death. Given what is at stake, one would assume the Clemency Board would want to hear from the attorney most qualified to speak on the defendant's behalf and present the best information possible, leaving no stone unturned. It is unclear how excluding CHU from the clemency proceeding and instead appointing an attorney unfamiliar with Bowles's history and possible intellectual disability contributes to the integrity or reliability of the clemency determination; but that is not the issue presented before this Court. However troubling Defendants' decision to exclude CHU from the clemency proceeding may be, the law compels this Court to conclude section 3599 does not prevent Defendants from making that decision.

V

Bowles has not shown he is substantially likely to succeed on the merits of his section 1983 claim. Plaintiff's emergency motion for stay of execution, ECF No. 5, is therefore **DENIED**.[4]

SO ORDERED on July 19, 2019.

s/Mark E. Walker
Chief United States District Judge

[4] Although addressed at length by Defendants in their response, ECF No. 19, and by Bowles in his reply, ECF No. 22, this Court need not be detained by the claim that Bowles was dilatory in filing this action in light of its denial of relief on other grounds.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA McCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD, Chairman, Commissioner,
Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
Commission Investigator Supervisor,
Florida Commission on Offender Review,
in her official capacity.

CIVIL ACTION NO._____

EMERGENCY
INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

EMERGENCY MOTION FOR A STAY OF EXECUTION

I. Introduction

Simultaneously with this motion for a stay of execution of his Florida death sentence, Plaintiff Gary Ray Bowles filed an action pursuant to 42 U.S.C. § 1983, and a memorandum of law in support of that complaint. In these materials, Mr. Bowles has proffered facts that satisfy each of the elements necessary for a stay of execution. Thus, in this motion, Mr. Bowles respectfully moves for a stay of his scheduled August 22, 2019, execution pending the disposition of his § 1983 claims.

II. Mr. Bowles's Federal Statutory Rights Have Been Violated, and he Meets the Requirements for a Stay of Execution Pending the Resolution of his 42 U.S.C. § 1983 Action.

A stay of execution of a death sentence is a form of injunctive relief, with identical elements. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (announcing the elements for injunctive relief). A stay is warranted where four factors are satisfied: "(1) [the applicant] has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013) (quoting *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011)).

Mr. Bowles has alleged in his § 1983 complaint, appendix, and supporting memorandum of law, that his § 3599 rights were violated when Defendants barred his § 3599 counsel from representing him in his clemency proceedings, and forced

him to proceed with inadequate counsel. In effect, Mr. Bowles had no counsel within the meaning of § 3599 for this critical proceeding, which the United States Supreme Court has called a "safeguard[]" for capital cases. *Herrera v. Collins*, 506 U.S. 390, 427 (1993). Where a capital litigant is deprived of § 3599 counsel for an authorized proceeding, "[a] stay [of execution] is needed to make [his] right to [§ 3599] counsel meaningful." *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016).

As detailed below, Mr. Bowles has proffered facts that satisfy each of the elements required for a stay. This case presents such a "rare circumstance," *Battaglia*, 824 F.3d at 474, where a death-sentenced individual was denied meaningful representation under § 3599, justifying a stay of execution. As such, Mr. Bowles should be granted a stay pending this Court's resolution of these claims.

A. The Cause of Action has a Substantial Likelihood of Success

The issue in this case is whether Mr. Bowles, a man with intellectual disability, having had counsel appointed to him under § 3599, had a federal right to that counsel's representation in clemency proceeding, and whether that right was violated by Defendants' actions as they related to Mr. Bowles's clemency. This is a question of first impression in this Court and the Eleventh Circuit, and one that has a substantial likelihood of success. *See e.g.*, *Samayoa*, 2019 WL2864411 at *3-4 (accepting the arguments made herein).

Mr. Bowles not only did not have § 3599 counsel present at his critical clemency interview, but he did not have *any* "adequate representation" in his clemency proceedings due to Defendants' actions. The attorney who represented Mr. Bowles in clemency had never handled a death penalty case, was not death-qualified under Florida law, had no specialized training in death penalty cases, had no training or expertise regarding intellectual disability, and was denied the assistance of § 3599 co-counsel and expert witnesses at Mr. Bowles's clemency interview. As discussed above, these inadequacies were obvious: Mr. Bowles's FCOR-retained counsel was unfamiliar with his case, did no investigation, and prepared only a five-page clemency "petition" on Mr. Bowles's behalf that was riddled with factual inaccuracies and was nearly identical to the petition he submitted for another client years earlier, even misidentifying Mr. Bowles as that same client. *See supra* section (II)(B)(iv). Mr. Bowles's federal statutory rights were thus violated during his clemency proceedings.

Additionally, the need for adequate counsel was particularly pronounced in Mr. Bowles's case. Mr. Bowles has an intellectual disability—a condition which, when properly explained, is likely to be compelling in clemency proceedings, as individuals with intellectual disability are ineligible for execution under Constitutional law and our societal standards of decency due to a longstanding consensus that they have a lessened culpability. *See, e.g.*, *Atkins v. Virginia*, 536

U.S. 304, 320-21 (2002). But with unqualified, inadequate counsel, Mr. Bowles's intellectual disability was not properly explained, and his decision-makers were left unaware that individuals with intellectual disability "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321.

Mr. Bowles has presented a detailed factual record of communications and other documents delineating the violations that occurred in this case. Appendix to Complaint. Mr. Bowles's arguments above, and his factual support in his Complaint and attachments, constitute a substantial showing of the violation, and show a "substantial likelihood of success" on this issue.

B. Mr. Bowles Will Suffer Irreparable Injury—Death—If No Injunction is Issued

In this case, the injury Mr. Bowles faces is clear: he will be executed unless this Court issues a stay, and he will have been executed without ever having a clemency proceeding in which he had access to his federally protected statutory rights. This injury is presumptive. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident."); *Ferguson v. Warden, Fla. State Prison*, 493 F. Appx 22, 26 (11th Cir. 2012) (Wilson, J., concurring) ("As a general rule, in the circumstance of an imminent execution, this court presumes the existence of irreparable injury.").

C. A Stay Would Not Harm Defendants

Mr. Bowles has been on Florida's death row since the 1990s. He has been eligible for clemency since exhaustion of his initial appeals, when his conviction and sentence were upheld by the Eleventh Circuit in 2010. Defendants waited more than seven years after such time to initiate clemency proceedings for Mr. Bowles. Because there is no meaningful transparency in the clemency process in Florida, it is impossible to know when (or if) a determination was made as to Mr. Bowles's clemency before the signing of his warrant for execution on June 11, 2019.

Defendants would not suffer any financial or other hardship from the issuance of a stay to allow the Court to evaluate the violation of Mr. Bowles's federal statutory rights. Where an individual's claim underlying his desire for a stay of execution could mean further proceedings—as here, a new clemency proceeding—that weighs heavily against a State's interest in the person's imminent execution. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("Moreover, contrary to the State's contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment.").

D. A Stay Would Not Be Adverse to Public Interest in This Case

The public has an interest in individuals having access to the "safeguard" of our death penalty system: clemency. Clemency has long been regarded as the "safeguard" for capital cases. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 768 (E.D. Va. 2001) (referring to clemency as a "historic remedy employed to prevent a miscarriage of justice where the judicial process has been exhausted.").

Clemency is frequently the last forum for a death-sentenced individual. *See, e.g.*, *Harbison*, 556 U.S. at 196 ("[T]he sequential enumeration [of clemency at the end of the appeals process] suggests an awareness that clemency proceedings are not as divorced from judicial proceedings as the Government submits."). Executive clemency is frequently the only place in which an individual can make some claims, including, for instance, claims of actual innocence. *See, e.g.*, *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999) ("[W]hen available, state clemency proceedings provide the proper forum to pursue claims of actual innocence based on new facts . . . . Virginia has such an executive clemency process available to Royal . . . . Thus, we cannot grant Royal the requested habeas relief based simply on his assertion of actual innocence due to newly discovered evidence."); *Wilson v. Lawrence County*,

154 F.3d 757, 761 (8th Cir. 1998) (referring to clemency as a "fail-safe" with a "history . . . replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.").

Additionally, due to procedural bars and the increasing complexity of litigation as time goes on, clemency is sometimes the only way to have other unfairness or injustices in the application of the death penalty addressed. *See, e.g.*, *Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015) ("But clemency is different than litigation, even if similar issues are raised . . . [the Governor] may decide that clemency is warranted even if [the applicant] could not meet a particular legal standard for mitigation in court."); *Sanborn v. Parker*, No. 99-678-C, 2011 WL 6152849, at *1 (W.D. Ky. Dec. 12, 2011) (noting that because "a bid for clemency is not reliant upon or restricted to matters argued before the courts and is not restricted to cases where the guilt of the petitioner is in doubt," evidence of a petitioner's "neuropsychological state, including whether or not he has some sort of brain damage or abnormality, is indeed relevant to his clemency petition, even though [he] was twice judged competent to stand trial."). There are many examples of clemency being used to correct injustices that do not relate to innocence. *See* Clemency, Death Penalty Information Center.[1]

[1] Available at https://deathpenaltyinfo.org/clemency?did=126&scid=13 (last visited July 10, 2019).

Moreover, clemency has been granted regularly on the basis of intellectual disability alone, or in cases in which low IQ was a major factor in the consideration of clemency. For example, Missouri Governor Mel Carnahan, cited death row inmate Bobbie Shaw's intellectual disability, and the jury's lack of knowledge about these disabilities at the time of sentencing, when granting Mr. Shaw clemency; Nevada Governor Kenny C. Guinn, who granted clemency to Thomas Nevius on the basis of Nevius's intellectual disability; Louisiana Governor Murphy Foster, who granted clemency to Herbert Welcome on the basis of intellectual disability; Virginia Governor Timothy Kaine, who cited intellectual disability as one of the factors he considered when granting clemency to Percy Walton; Ohio Governor John Kasich, who considered John Eley's limited mental capacity as a factor in his decision to grant clemency; President Barack Obama, who granted clemency to Abelardo

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A few of the examples of a state using its clemency power to correct procedural or other unfairness include: Governor Richard Celeste of Ohio, who selected eight death row inmates for clemency based on factors such as mental health and intellectual disability; Virginia Governor Terry McAuliffe, who in 2017 granted clemency to death-sentenced inmate William Burns due to his pervasive mental illness and incompetence; Ohio Governor John Kasich, who in 2018 granted clemency to death-sentenced Raymond Tibbetts on the basis of his powerful mitigation and "fundamental flaws in the sentencing phase of his trial" that prevented his jury from "making an informed decision about whether Tibbetts deserved the death penalty."; and Governor Greg Abbott, who commuted Thomas Whitaker's death sentence due in part to proportionality concerns, since the triggerman had not received the death penalty.

Arboleda Ortiz, an inmate with claims of intellectual disability. *See* Clemency, Death Penalty Information Center.[2]

The public has an interest in ensuring that the procedural and substantive unfairness of Mr. Bowles's death sentence was adequately addressed in clemency. Mr. Bowles, who has intellectual disability, was sentenced to death prior to the United States Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically banning the execution of individuals with intellectual disability) and *Hall v. Florida*, 572 U.S. 701 (2014) (disavowing a strict IQ score cutoff and mandating that individuals with scores in a qualifying range be given the opportunity to present evidence of their intellectual disability). Mr. Bowles's intellectual disability was only investigated and subsequently litigated by his § 3599 counsel.

Correcting procedural injustices is particularly important in Mr. Bowles's case. Mr. Bowles raised his intellectual disability, a life-long condition, for the first time in 2017. Since that time, clemency proceedings have been initiated against Mr. Bowles, a warrant was signed for his execution, and recently, the Duval County Circuit Court denied Mr. Bowles an evidentiary hearing on his intellectual disability claim, siding with the argument of the State. Moreover, the State argued in the case management hearing for this claim that Mr. Bowles is barred from filing anything in

[2] Available at https://deathpenaltyinfo.org/clemency?did=126&scid=13 (last visited July 10, 2019).

federal court on his intellectual disability. *See* App. at 274 ("Bowles has had his first habeas petition. To file a second one, he would have to go to the Eleventh Circuit. The Eleventh Circuit has held that we will not entertain successive habeas petitions based on Hall vs. Florida."). Thus, even according to the State, clemency was *the only forum* for Mr. Bowles to get any kind of merits review or treatment of his intellectual disability claim, and thus to correct the procedural injustice of his alleged failure to timely file his intellectual disability claim, which is a categorical bar to his execution.

Whereas clemency is supposed to be a curative safeguard for uncorrected legal injustices, the violations of Mr. Bowles's right to § 3599 counsel instead compounded the injustice. Mr. Bowles's clemency counsel, having no experience with intellectual disability litigation in a death penalty context, having conducted no investigation with regard to Mr. Bowles's intellectual disability, and having consulted with no experts regarding Mr. Bowles's intellectual disability, was unable to make any meaningful presentation to FCOR or the Clemency Board regarding this ground for mercy—which, if the State is successful in blocking merits review of his claim in state court, would be the only forum Mr. Bowles has for consideration of a categorical bar to execution.

The public and the judiciary have a heightened interest in ensuring the procedural and moral application of punishment in cases such as Mr. Bowles's,

because, as the long-held maxim goes, death is different. *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."). The public interest is best served by ensuring that all death-sentenced individuals have meaningful access, in line with their federal rights, to the safeguard of clemency procedures in their state. This public interest is heightened in the case of Mr. Bowles, who had no meaningful opportunity before or during his clemency to present evidence that his intellectual disability rendered him ineligible for the death penalty. It is in the public interest to ensure that the State of Florida maintains clemency's important safeguard function.

III. The Issue Presented in This Suit Was Not Resolved by Judge Rodgers's Recent Order Denying a Clemency-Related Stay of Execution in *Long*

Judge M. Casey Rodgers of this District recently found, in her consideration of a clemency-related motion for a stay of execution in another case, that 18 U.S.C. § 3599 did not create an enforceable right, *see Long v. Sec'y, Fla. Dep't. of Corrs.*, No. 4:19-cv-213, ECF No. 13 at 13-14 (N.D. Fla. May 16, 2019), and that even if it did, the plaintiff in that case did not have such a right in state clemency proceedings because Florida had otherwise furnished him counsel, *see id.*, ECF No. 13 at 16. Judge Rodgers's order in *Long*, however, is not dispositive in this case.

There is no meaningful discussion in the *Long* order as to why § 3599 does not create an enforceable federal right apart from the conclusory finding that "Long has cited no case in which a court has determined that § 3599 creates a federal right

enforceable against state actors under § 1983[.]" *Id*., ECF No. 13 at 14.[3] Instead, the *Long* order relies heavily its interpretation of the "adequacy" provision of § 3599, and the United States Court of Appeals for the Sixth Circuit opinion in *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). *Id*., ECF No. 13 at 16; *see also id*., ECF No. 15 (order denying Long's motion for reconsideration, noting: "[R]elief was denied on grounds that Long had no substantial likelihood of success on the merits because he had 'adequate representation' available, 18 U.S.C. § 3599(a)(2), through McClellan, his state appointed attorney."). As the Ninth Circuit recently explained, however, this reasoning relies on a misreading of *Harbison* and § 3599.

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[3] It should be noted that Florida's highly unusual clemency counsel scheme, which provides for the private contracting of counsel for clemency by an agency integral in the clemency process, has only been in existence since 2014, when the Florida legislature passed Fla. Stat. 940.031. Before that, Florida circuit courts were responsible for appointing clemency counsel for death-sentenced individuals, and thus there was another forum apart from § 1983 for any clemency related concerns. Such a forum no longer exists.

As a historical note, the bill that resulted in this change was a sweeping change to Florida's clemency scheme to remove all judicial involvement in ensuring death-sentenced persons had clemency counsel. *See* H.B. No. 5303, 23rd Leg., 2nd Reg. Sess. (Fla. 2014) ("An act relating to counsel in proceedings for executive clemency; amending ss. 27.51 and 27.511, F.S.; deleting provisions concerning the power of a trial court to appoint the public defender, office of criminal conflict and civil regional counsel, or other attorney in proceedings for relief by executive clemency; correcting cross-references; amending s. 27.5303, F.S.; deleting provisions concerning the appointment of a public defender or attorney by the court to represent an indigent defendant in death penalty executive clemency proceedings; amending s. 27.5304, F.S.; deleting provisions concerning compensation of an appointed attorney representing a defendant in executive clemency proceedings; creating s. 940.031, F.S.; providing for clemency counsel representation of defendants in executive clemency proceedings; providing for compensation . . .").

As the Ninth Circuit found in *Samayoa*, "[t]he availability of state appointment of clemency counsel is irrelevant to federally appointed counsel's ongoing representation of a death-row client in state clemency proceedings." *Samayoa v. Davis*, No. 18-56047, 2019 WL2864411 at *3 (9th Cir. July 3, 2019) (internal quotation omitted). Instead, a plain reading of § 3599 instructs that counsel appointed under that subsection are obligated (noting the mandatory language of "*shall*" in § 3599(e)) to continue representation through all subsequent proceedings, and specifically state clemency proceedings. Thus, the Ninth Circuit concluded, counsel "authorized under § 3599(e) [should] continue to represent Samayoa in his California clemency petition, regardless of any provisions under California law regarding state appointment of clemency counsel." *Id*. at *4.

The Ninth Circuit's opinion in *Samayoa* and the Sixth Circuit's opinion in *Irick* cannot be reconciled, and the Eleventh Circuit has issued no guidance on the issue herein. Even the *Long* order's reference to the Eleventh Circuit's citation to *Irick* was misplaced. *See Long*, ECF No. 13 at 17. The *Long* order noted that in *Lugo v. Sec'y, Fla. Dep't of Corr*., 750 F.3d 1198, 1214 (11th Cir. 2014), the Eleventh Circuit said that *Irick* reading of § 3599 "makes good sense." But the Eleventh Circuit's reference to *Irick* was limited to *Irick*'s reasoning concerning competency proceedings, not state clemency proceedings. *See Lugo*, 750 F.3d at 1214 (citing and quoting *Irick*: "[E]ven if § 3599 would otherwise apply to Irick's *state post-*

conviction proceedings, he would not be eligible for federal funding because state law affords him 'adequate representation.'" (emphasis added)).

Moreover, that the Eleventh Circuit was only making a limited reference is supported by the context of the citation in the *Lugo* opinion. In *Lugo*, the Eleventh Circuit was discussing whether § 3599 counsel could "assist [] in the pursuit and exhaustion of his state postconviction remedies, including the filing of motions for state collateral relief." *Lugo*, 750 F.3d at 1213. Such motions are not ordinarily subsequent for the purposes of § 3599(e), and are not specifically delineated in the statute, unlike clemency proceedings.

The Eleventh Circuit has not spoken on the issue in Mr. Bowles's case, and their cursory reference to *Irick*, in discussing an issue wholly separate from state clemency proceedings, should not persuade this Court one way or the other in determining the issue presented here. Additionally, the *Irick* decision itself is fundamentally flawed, and relies on a misreading of *Harbison*. The *Irick* opinion is based on misapplied dicta from *Harbison* taken from the Court's discussion of the hypothetical scenario where federally appointed counsel might be obligated to represent a defendant at a retrial following the issuance of a writ. *See Harbison*, 556 U.S. at 189. The full quote in *Harbison* reads:

> The Government suggests that reading § 3599(e) to authorize federally funded counsel for state clemency proceedings would require a lawyer who succeeded in setting aside a state death sentence during postconviction proceedings to represent her client during an ensuing

> state retrial. We do not read subsection (e) to apply to state-court proceedings that follow the issuance of a federal writ of habeas corpus. When a retrial occurs after postconviction relief, it is not properly understood as a "subsequent stage" of judicial proceedings but rather as the commencement of new judicial proceedings. Moreover, subsection (a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation. States are constitutionally required to provide trial counsel for indigent defendants. Thus, when a state prisoner is granted a new trial following § 2254 proceedings, his state-furnished representation renders him ineligible for § 3599 counsel until the commencement of new § 2254 proceedings.

Id. Thus, the opinion in *Harbison* does not, as *Irick* suggests, support the proposition that the availability of state-furnished counsel in *a subsequent stage* authorized under § 3599(e), like state clemency proceedings, disqualifies counsel from representing their client. *Harbison* was analyzing the applicability of § 3599 to fund counsel for a retrial—which is indisputably not an ordinary "subsequent stage" as contemplated by § 3599(e). *Harbison*'s notation that § 3599 would not fund a state proceeding not contemplated as subsequent by § 3599(e) is not disputed by Mr. Bowles in the least, and is simply not relevant here.

In relying on a misreading of *Harbison*, the *Irick* decision is thus fundamentally flawed, and its error should not be perpetuated by other courts. *Cf. Samayoa v. Davis*, No. 18-56047, 2019 WL2864411 at *3-4 (9th Cir. July 3, 2019) (explicitly rejecting *Irick* and noting its misreading of *Harbison*); *Mickey v. Davis*, No. 93-00243, 2018 WL 3659298, *4 (N.D. Cal. Aug. 2, 2018) (rejecting the

reasoning of *Irick* after examining the context of the language from *Harbison* and finding it to be inapposite as applied to appointment of clemency counsel).

However, even if Mr. Bowles's § 3599 counsel's ability to represent Mr. Bowles in his state clemency proceedings was affected by the availability of state-furnished counsel, the *Long* order would still not be dispositive in this case because Mr. Bowles's case is factually distinguishable from Mr. Long's case. Judge Rodgers's order in *Long* acknowledged that § 3599(a)(2) requires *adequate* representation be provided by states, *Long*, ECF No. 13 at 16, and she reaffirmed that view in her order denying a motion for reconsideration of the denial of Mr. Long's stay motion, *id.*, ECF No. 15 at 2. Mr. Bowles has alternatively argued in his suit that even if state-furnished counsel could replace § 3599 counsel, that § 3599 still operates to ensure that any substituting representation is "adequate."

Here, Mr. Bowles did not have adequate representation—and certainly had representation that fell short even of Mr. Long's clemency representation. For example, in discussing Mr. Long's counsel and finding him adequate, Judge Rodgers noted: "McClellan was on Florida's list of clemency attorneys, he appeared at the clemency interview and gave a presentation in Long's absence discussing his brain injuries, and in his 28 years of practice, he had tried death penalty cases." *Id.*, ECF No. 15 at 2. In contrast, Mr. Bowles's counsel, Mr. Simmons, had never handled a death penalty case at any stage, had no familiarity with death penalty law, and no

familiarity with intellectual disability litigation in the death penalty context. Mr. Bowles's counsel had also only been in practice for eleven years, less than half the time of Mr. Long's counsel.

That Mr. Bowles had inadequate counsel was also evident in his clemency proceedings, in which Mr. Simmons failed to correct material misstatements by FCOR during his clemency interview, allowed Mr. Bowles to be subjected to questioning about his ongoing intellectual disability litigation, and submitted an Application for Executive Clemency that was nearly word-for-word identical to that of another death-sentenced individual, Stephen Booker, and contained numerous factual inaccuracies, including misidentifying Mr. Bowles as Mr. Booker. Unlike in Mr. Long's case where his brain injuries were discussed by his clemency counsel, in Mr. Bowles's case, Mr. Simmons said absolutely nothing specific about Mr. Bowles's known intellectual disability. If there is any meaning to the "adequate" representation requirement Judge Rodgers discussed in *Long*, Mr. Bowles's clemency counsel does not meet any reasonable adequacy metric. Thus, because Mr. Bowles's counsel was far more inadequate than Mr. Long's, and because the Long order was not a decision on the merits of these issues and relied on a flawed reading of relevant authority, it is not dispositive here.

IV. Conclusion

For the reasons detailed above, and in his accompanying complaint and memorandum of law, Mr. Bowles respectfully requests that a stay of his scheduled August 22, 2019, execution be granted so that his 42 U.S.C. § 1983 action can be considered without the imminent threat of Mr. Bowles's death.

Respectfully submitted,
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By Counsel

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

GARY RAY BOWLES,

Plaintiff,

v.

CASE NO.: 4:19-cv-319-MW-CAS
CAPITAL CASE

RON DESANTIS,
Governor of Florida,
in his official capacity, et al.,

Defendants.

_____/

RESPONSE TO MOTION FOR STAY OF EXECUTION

On July 11, 2019, Bowles, a Florida death row inmate with an active death warrant, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a 42 U.S.C. § 1983 action, raising a claim regarding the CHU-N not being allowed to appear as clemency counsel. Bowles argues that the Florida Commission on Offender Review's refusal to allow his federal habeas counsel, the CHU-N, to participate in the clemency interview as clemency co-counsel violated his Sixth Amendment right to counsel and his federal statutory right to counsel in 18 U.S.C. § 3599. He

insists that Florida has made clemency a "critical stage" to which the constitutional right to counsel attaches. He also claims that § 3599 entitles federal habeas counsel to appear as clemency counsel, regardless of whether the State provides clemency counsel or not. Bowles also filed an emergency motion for a stay of the execution based on his pending § 1983 action. This is the Defendants' response to the motion to stay.[1]

Bowles must establish four factors to be granted a stay of execution including a showing of a substantial likelihood of success on the merits of his § 1983 action. But Bowles fails three of the four factors including the showing of a substantial likelihood of success on the merits because there is no likelihood of success on the merits of his right to clemency counsel claim. There is no Sixth Amendment right to clemency counsel under controlling Eleventh Circuit precedent and there is no statutory right under § 3599 for federal habeas counsel to appear as state clemency counsel when the State provides clemency counsel under controlling United States Supreme Court precedent. Indeed, the § 1983 action is due to be dismissed for failure to state a claim. Therefore, the motion for stay should be denied.

Alternatively, the motion for stay of the execution should be denied because the CHU-N was dilatory in filing the § 1983 action. Under both United States Supreme Court and Eleventh Circuit precedent, there is a "strong equitable

[1] This is the response of all named Defendants.

presumption" against granting a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. The CHU-N waited nearly a year after the clemency interview and then waited a month after the warrant was signed to file this § 1983 action. Therefore, the presumption against a stay arises.

Facts regarding state clemency

On March 22, 2018, the Florida Commission on Offender Review entered into an agreement with Nah-Deh Simmons to represent Bowles as clemency counsel. (Appendix at 7-17). On March 26, 2018, Clemency Investigation Research Specialist S. Michelle Whitworth wrote a letter to Gary Bowles informing him the clemency interview was scheduled for August 2, 2018. (Appendix at 20).

On March 28, 2018, Commission Investigator Russ Gallogly wrote a letter to Billy Nolas, Chief of the Capital Habeas Unit of the Northern District, soliciting any comments in support of commutation of the death sentence. (Appendix at 21). On June 21, 2018, Chief of the CHU-N, Billy Nolas, on official Federal Public Defender letterhead, wrote a letter to the Florida Commission on Offender Review, which also signed by state postconviction co-counsel Francis Shea and clemency counsel Nah-Deh Simmons. (Appendix at 26-34). The letter highlighted the claim that Bowles is intellectually disabled; informed the Commission of the pending intellectual disability litigation in the state trial court; and urged the Commission

to postpone clemency review until that litigation was completed. (Appendix at 26, 29-30). The letter also recounted Bowles' unstable childhood and teenage years as a homeless prostitute. (Appendix at 27-29).

On June 22, 2018, Kelsey Peregoy of the CHU-N wrote an email to Jack Heekin of the Governor's Office requesting the clemency interview be postponed until the state litigation on intellectual disability was completed. (Appendix at 35). The email insisted that the clemency interview would "unnecessarily complicate and interfere" with the court proceedings on intellectual disability. (Appendix at 35). On the same day, June 22, 2018, Heekin emailed back denying the request to postpone the clemency interview. (Appendix at 35). Heekin explained that Bowles had been appointed "separate legal counsel to represent him in the clemency proceedings" to avoid any such complication and interference with the ongoing litigation in state court. (Appendix at 35). Heekin concluded the email by informing federal habeas counsel: "You are welcome to submit any materials in support of inmate Bowles' request for clemency which will be given full consideration." (Appendix at 35).

On July 22, 2018, Kelsey Peregoy of the CHU-N wrote an email to Michelle Whitworth asking the Clemency Board and the Commission to reconsider their decision prohibiting federal habeas counsel, the CHU-N, from representing Bowles as clemency co-counsel. (Appendix at 37). The email acknowledged that the CHU-N had been "working with" clemency counsel Simmons on clemency matters.

(Appendix at 37). The CHU-N stated that because Bowles was intellectually disabled, their assistance was "crucial" to clemency review. (Appendix at 37).

The email referred to an attached letter. (Appendix at 37). The attached letter was dated July 26, 2018, was written on Federal Public Defender letterhead, and was signed by both clemency counsel Simmons and federal habeas counsel Nolas. (Appendix at 38-41). The attached letter referred to a letter, written on July 23, 2018, by clemency counsel Simmons informing the Commission that federal habeas counsel, the CHU-N "would jointly appear and conduct" the clemency interview. (Appendix at 38). Clemency counsel Simmons' letter referred to Dr. Toomer, a psychologist retained by the CHU-N as part of the state court intellectual disability litigation, who diagnosed Bowles with intellectual disability. (Appendix at 38). The attached letter stated that S. Michelle Whitworth of the Commission had informed clemency counsel Simmons that neither the CHU-N nor Dr. Toomer would be allowed to participate in, or be present for, the clemency interview. (Appendix at 38). The attached letter acknowledged that the CHU-N and clemency counsel Simmons "have worked cooperatively" on clemency and that the clemency petition was "jointing created" by the CHU-N and clemency counsel Simmons. (Appendix at 39, 40). The attached letter insisted that the "clemency presentation would suffer without the assistance of the CHU" and that clemency counsel Simmons "cannot provide adequate representation without the CHU." (Appendix at 41). The attached letter stated that clemency counsel Simmons, as

well as Bowles himself, "desires the CHU's presence" at the clemency interview. (Appendix at 41). The attached letter insisted that under 18 U.S.C. § 3599 Bowles had a federal statutory right to the assistance of federal habeas counsel in state clemency proceedings. (Appendix at 39-41). The attached letter also insisted that Bowles had a due process right to "the knowledge and resources of the CHU" in state clemency proceedings. (Appendix at 40). The attached letter concluded with a plea to reconsider the decision not to allow the CHU-N to be clemency co-counsel and not to allow the testimony of Dr. Toomer at the upcoming clemency interview. (Appendix at 41).

On July 30, 2018, S. Michelle Whitworth of the Commission responded to the email again denying the request for the CHU-N to act as clemency co-counsel. (Appendix at 42). The email concluded by again informing the CHU-N that: "Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration." (Appendix at 42).

Clemency counsel Simmons submitted an application for clemency to the Governor. (Appendix at 133-140). The application referred to Bowles' claim of intellectual disability. (Appendix at 139).

On August 2, 2018, the Commission conducted the clemency interview at Union Correctional Institution. (Appendix at 47-105). Bowles was present and answered numerous questions. (Appendix at 53, 58-104). Bowles was represented by clemency counsel Simmons at the interview but his federal habeas counsel, the

CHU-N, were not present. (Appendix at 48, 50). Clemency counsel Simmons discussed intellectual disability with the Commission and stated his intention to submit additional material regarding intellectual disability after the interview. (Appendix at 54-56). During the interview, a member of the panel referred to Department of Corrections' assessment by a psychiatrist including an intellectual disability assessment that concluded that he had no significant impairments. (Appendix at 58).

On September 12, 2018, following the clemency interview, the CHU-N wrote a letter to the Commission requesting a "supplemental" clemency interview at which the CHU-N would be allowed to represent Bowles as clemency counsel. (Appendix at 106-111). The letter acknowledged that any clemency materials should be submitted within 45 days of the clemency interview. (Appendix at 106). Instead of submitting clemency materials, such as Dr. Toomer's intellectual disability report, the CHU-N's letter complained about the timing of the clemency proceedings. (Appendix at 106-107). The CHU-N's letter again insisted that, under 18 U.S.C. § 3599, Bowles had a federal statutory right to the assistance of federal habeas counsel in state clemency proceedings. (Appendix at 107). The letter, quoting *Chavez v. Sec'y, Fla. Dept. of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014), took the position that the CHU-N had an obligation under that statute to represent Bowles during the state clemency. (Appendix at 107). The letter referred to a July 23, 2018, email informing the Commission that two CHU-N attorneys,

Kimberly Sharkey and Kelsey Peregoy, as well as Dr. Toomer, who diagnosed Bowles with intellectual disability, would be present for the clemency interview. (Appendix at 108). Clemency counsel Simmons was informed via a phone call that neither of the two CHU-N attorneys nor Dr. Toomer would be allowed to attend the clemency interview. (Appendix at 108). The letter stated that neither of the CHU-N attorneys nor the expert were allowed to participate in the clemency interview. (Appendix at 108). The letter then complained that information about intellectual disability was not "fully presented" at the clemency interview. (Appendix at 109). The letter also complained that Bowles was questioned during the clemency interview about his intellectual functioning without the presence of counsel who were "the most informed about his intellectual disability." (Appendix at 109-110). The letter asserted that Bowles was denied his right to clemency counsel of his choice by the exclusion of the CHU-N from the clemency interview. (Appendix at 110). The CHU-N's letter urged the Commission and Clemency Board to conduct a supplemental clemency interview at which the CHU-N would be allowed to represent Bowles as clemency counsel and present intellectual disability testimony. (Appendix at 110-111). So, instead of submitting written materials regarding intellectual disability, the CHU-N requested a second clemency interview to present live testimony regarding intellectual disability.

On June 11, 2019, S. Michelle Whitworth wrote a letter to state clemency counsel Simmons informing him that the Governor had denied Bowles' clemency

application. (Appendix at 148).

Sixth Amendment right to counsel and clemency

There are only minimal due process limits on state actors in the clemency context. For example, they may not flip a coin to decide whether to grant clemency and they may not deny a defendant access to the clemency process. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (concluding that "some ***minimal*** procedural safeguards apply to clemency" and observing that judicial intervention "might" be warranted if a state official flipped a coin to determine whether to grant clemency or where the State arbitrarily denied a prisoner "any" access to its clemency process) (emphasis in original); *Gissendaner v. Comm'r, Ga. Dept. of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015) (affirming the dismissal of a § 1983 action alleging a due process violation when the warden prohibited staff from speaking with clemency counsel in support of the clemency application, for failure to state a claim because due process does not prevent state officials from limiting access to prison staff citing *Wellons v. Comm'r, Ga. Dept. of Corr.*, 754 F.3d 1268 (11th Cir. 2014)); *Gissendaner*, 794 F.3d at 1333 (Jordan, J., concurring) (agreeing the allegations do not state a due process claim under *Wellons*); *Hand v. Scott*, 888 F.3d 1206, 1208 (11th Cir. 2018) (noting the "broad discretion of the executive to carry out a standardless clemency regime" citing *Beacham v. Braterman*, 300 F.Supp. 182 (S.D. Fla. 1969), *affirmed*, 396 U.S.

12 (1969)). The Eleventh Circuit has rejected both due process and Eighth Amendment attacks on purely discretionary pardon regimes. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983); *Hand v. Scott*, 888 F.3d 1206, 1208 (11th Cir. 2018) (observing of the holding in *Smith v. Snow*, if a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature). The Eleventh Circuit has also rejected a due process challenge to Florida's clemency process as applied to a capital defendant. *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013) (denying a motion for stay of execution because the capital defendant did not establish a substantial likelihood of success on the merits of his claim that he was denied access to a second clemency proceeding).

But Bowles does not allege that any of the named defendants tossed a coin to make their decision regarding clemency or that he was denied access to the clemency process. Indeed, he admits that he was given access to Florida's clemency process and also admits that he was given a clemency attorney during that clemency process. Bowles' claim is only that he was not allowed to have his federal habeas counsel act as clemency co-counsel during the clemency proceedings.

But there is no Sixth Amendment right to clemency counsel. *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995) (stating: "no constitutional right exists to counsel in clemency hearings" citing *Coleman v. Thompson*, 501 U.S. 722,

756-57 (1991)); *Barbour v. Haley*, 471 F.3d 1222, 1231 (11th Cir. 2006) ("The Sixth Amendment applies only to criminal proceedings" citing *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974)); *Gardner v. Garner*, 383 Fed. Appx. 722, 728 (10th Cir. 2010) (before Tacha, Tymkovich, and Gorsuch) (explaining that there is no right to clemency counsel because the "constitutional right to the effective assistance of counsel does not extend beyond direct appeal" and the availability of federally funded habeas counsel under § 3599 to represent capital defendants in state clemency proceedings did not create a constitutional right to effective clemency counsel).

The CHU argues that because Florida mandates clemency that somehow is the equivalent of making clemency a "critical stage" of the prosecution for purposes of the Sixth Amendment right to counsel. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical stages' of the criminal proceedings" quoting *United States v. Wade*, 388 U.S. 218, 227-28 (1967)). But, contrary to opposing counsel's assertion, clemency is not a critical stage and therefore, there is no Sixth Amendment right to counsel during clemency.

The entire concept of "critical stage" is limited to proceedings before and during the prosecution; it does not extend beyond the trial to postconviction proceedings, much less to clemency proceedings. The United States Supreme Court has defined a critical stage as "any stage of the ***prosecution***, formal or

informal, in court or out, where counsel's absence might derogate from the accused's right to a ***fair trial***." *United States v. Wade*, 388 U.S. 218, 226 (1967) (emphasis added). Neither state postconviction proceedings nor federal habeas proceedings are critical stages of a trial for the simple reason the trial and sentencing are long over before any of these proceedings take place. Indeed, the direct appeal is over before the state postconviction proceedings or federal habeas proceedings begin. *Hernandez v. Sec'y, Fla. Dept. of Corr.*, 408 Fed. Appx. 316, 318 (11th Cir. 2011) (holding the oral argument in the direct appeal was not a critical stage citing *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986)).

Once the trial and direct appeal are completed, the Sixth Amendment right to counsel ends. *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (holding there is no federal constitutional right to postconviction counsel); *Murray v. Giarratano*, 492 U.S. 1 (1989) (applying *Finley* to capital defendants); *Barbour v. Haley*, 471 F.3d 1222, 1230 (11th Cir. 2006) (stating that *Finley*, *Giarratano*, and *Coleman* clearly establish that death-sentenced inmates have no federal constitutional right to postconviction counsel and rejecting a right to a "lesser form of legal assistance"). That logic is even more true of clemency proceedings. Not only are the trial and direct appeal completed prior to clemency but both the state postconviction and federal habeas proceedings are completed as well before the clemency proceedings begins in Florida.

Furthermore, clemency is an executive function, not a judicial function.

Clemency, which is not even a form of judicial review, cannot be a "critical stage" of the prosecution for purposes of the Sixth Amendment right to counsel because it is entirely distinct and separate from the prosecution.

There is no case holding, or even hinting, that a State providing a clemency process automatically makes clemency a critical stage for purposes of the Sixth Amendment right to counsel. Opposing counsel certainly does not cite any case that stands for such a proposition. Bowles has no Sixth Amendment right to clemency counsel.

And even when the Sixth Amendment right to counsel applies, there is no constitutional right to counsel of the defendant's choice of counsel at public expense, much less a right to co-counsel of choice at public expense. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (noting the Sixth Amendment right to counsel of choice does not extend to indigent defendants citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989)). The United States Supreme Court has specifically stated, in a § 3599 case, that Congress did not confer "capital habeas petitioners with the right to counsel of their choice" by enacting this statute. *Christeson v. Roper*, 135 S.Ct. 891, 893-94 (2015). There is no Sixth Amendment right to clemency counsel of choice.

There is no Sixth Amendment right to clemency counsel. The Eleventh Circuit's precedent of *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995), completely forecloses this claim. A plaintiff may not premise a § 1983 action on

a constitutional right that does not exist under the controlling precedent.

Right to counsel under § 3599

Alternatively, Bowles asserts he has a statutory right, under 18 U.S.C. § 3599, for his federal habeas counsel to appear in state clemency proceedings. The problem with this assertion, of course, is that the United States Supreme Court has said otherwise.

In *Harbison v. Bell*, 556 U.S. 180, 183 (2009), the United States Supreme Court held that 18 U.S.C. § 3599 authorizes federal habeas counsel to represent death row inmates in state clemency proceedings. Harbison was a Tennessee death row inmate who requested clemency counsel in the state court but the Tennessee Supreme Court held that state law does not authorize the appointment of clemency counsel. *Id.* at 182. Tennessee took no position on the question of whether § 3599 authorized federal habeas counsel to represent a death row inmate in state clemency proceedings. *Id.* at 184, 192, n.9.

The *Harbison* Court, relying on the language of the "Counsel for financially unable defendants" statute, 18 U.S.C. § 3599, noted that death row inmates are statutorily entitled to counsel in § 2254 federal habeas proceedings and concluded the statutory language indicated that appointed federal habeas counsel's authorized representation included state clemency proceedings. *Harbison*, 556 U.S. at 186. The *Harbison* Court also noted that a district court has the

discretion, under the "other appropriate motions and procedures" provision of § 3599(e), to allow federally paid habeas counsel to exhaust a claim in state court. *Id.* at 190, n.7. The *Harbison* Court, however, emphasized that § 3599 provides for counsel "***only*** when a state petitioner is unable to obtain adequate representation." *Id.* at 189 (emphasis added). The Supreme Court explained that "state-furnished representation renders him ***ineligible*** for § 3599 counsel." *Id.* (emphasis added). So, according to the United States Supreme Court in *Harbison*, if a State provides counsel for a proceeding, § 3599 does not allow federal habeas counsel to appear in that proceeding.

The Eleventh Circuit has repeatedly stated that federal habeas counsel may not appear as counsel in state court proceedings, if the state provides counsel. The Eleventh Circuit explained that a district court may appoint federal habeas counsel to exhaust a claim in state court but "***only*** where the petitioner is unable to obtain adequate legal representation in state court." *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014), *cert. denied, Lugo v. Jones*, 135 S.Ct. 1171 (2015) (emphasis added). The Eleventh Circuit concluded that Congress' purpose in enacting § 3599 was "to aid state capital prisoners in seeking *federal* habeas relief in *federal* court," not "to provide counsel, at federal expense, to state prisoners engaged in state proceedings." *Id.* at 1214 (emphasis in original) (quoting *King v. Moore*, 312 F.3d 1365, 1368 (11th Cir. 2002)). The *Lugo* court noted that federally funded habeas counsel appearing in state postconviction

litigation "not only would increase the cost of implementing § 3599 enormously," but also "would have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases." *Id.*

In *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1277 (11th Cir. 2012), the Eleventh Circuit held a federal habeas petitioner was not entitled to federal funds to pay for experts in state court litigation. The *Gary* Court also found no abuse of discretion in the district court's refusal to authorize federal funds for experts to testify at the state clemency hearing. *Id.* at 1268-69. The *Gary* Court discussed the "sound policy reasons why Congress would not provide for federally-funded counsel in independent state court proceedings." *Id.* at 1278. The *Gary* majority noted the comity concerns and significant practical problems that would arise. Such funding would "raise troubling federalism concerns." *Id.* "Providing court-appointed counsel to prisoners challenging their convictions in state court after they have been denied § 2254 relief would put the district courts in the position of overseeing, and thus indirectly managing, counsel's performance in the state court proceeding." *Id.* The *Gary* Court noted that authorizing federal habeas counsel to litigate in state court would mean that federal interference with state courts would be "inevitable." *Id.* The *Gary* majority concluded that § 3599 does not provide for the appointment of counsel to prosecute the state postconviction motion pending in state court. *Id.* at 1279.

The Sixth Circuit has also held that a capital defendant is not eligible for

federal funding under § 3599 in various state court proceedings because the capital defendant had a right to counsel under state law. *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). Irick filed a motion in federal court requesting authorization under § 3599 for federal habeas counsel to represent him in state court to reopen his state postconviction proceedings; in his competency-to-be-executed state court proceedings; and in his state clemency proceedings. *Id.* at 290. The district court granted the motion as to clemency because Tennessee did not provide clemency counsel but denied the motion as to the other state court proceedings, ruling that § 3599 applies only when adequate representation is unavailable. *Id.* at 291.

The Sixth Circuit agreed. *Irick*, 636 F.3d at 291. The Sixth Circuit noted that the Supreme Court in *Harbison*, arrived at its holding that federal habeas counsel could appear in state clemency proceedings only after noting that state law did not authorize the appointment of clemency counsel. *Id.* The Sixth Circuit noted that the *Harbison* Court emphasized that "§ 3599](a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation." *Id.* The Sixth Circuit noted that Irick had a statutory right under Tennessee law to appointed counsel in these other proceedings. *Id.* at 292 (citing Tennessee statutes). So, the Sixth Circuit reasoned, "even if § 3599 would otherwise apply to Irick's state post-conviction proceedings, he would not be eligible for federal funding because state law affords him adequate representation." *Id.* at 292 (citing *Harbison*, 556 U.S. at 188). The Sixth Circuit also explained a defendant who

cannot qualify for federally appointed counsel under subsection (a) has no claim to counsel under subsection (e). *Id.* at 291, n.2.

The Sixth Circuit held that because "state law provides Irick with adequate counsel, we hold that he is not entitled to representation pursuant to § 3599." *Irick*, 636 F.3d at 290. The Sixth Circuit rejected Irick's argument that § 3599 funding should be available because his federal habeas counsel were "already familiar with his case" reasoning that, as long as Tennessee provides adequate representation, Irick's arguments that his federal habeas counsel are more qualified was "of no import under § 3599." *Id.* at 292. The Eleventh Circuit has cited *Irick* with approval. *Lugo*, 750 F.3d at 1214.

Bowles is simply not eligible for federal habeas counsel to appear as clemency counsel under § 3599 according to the United States Supreme Court's decision in *Harbison* and the Eleventh Circuit's decisions in *Lugo* and *Gary*, as well as under the logic of the Sixth Circuit's decision in *Irick*.

Furthermore, the existence of the funding statute § 3599 does not create any additional rights or any authority for federal courts to interfere in the state clemency process. *Baze v. Parker*, 632 F.3d 338, 345-46 (6th Cir. 2011) (rejecting an argument that § 3599 creates enforcement powers over the state clemency process, explaining that the appointment and funding of federal counsel for a state clemency proceeding under § 3599 is not "bundled with jurisdiction to oversee the state clemency proceeding itself"). Federal courts lack the authority

to tell state executives which attorneys may or may not represent a capital defendant during state clemency proceedings and § 3599 did not create such powers. Indeed, this type of argument raises the very comity concerns highlighted by the *Gary* majority.

Because the State of Florida provided clemency counsel to Bowles, federal habeas counsel is disqualified under § 3599 from appearing as clemency counsel or as clemency co-counsel. In the words of the *Harbison* Court, because Florida provided clemency counsel, Bowles is "ineligible for § 3599 counsel." *Harbison*, 556 U.S. at 189. The CHU may never appear as clemency counsel because Florida provides clemency counsel to capital defendants.[2]

A plaintiff may not premise a § 1983 action on an interpretation of a federal statute that the United States Supreme Court has rejected. The statutory claim in the § 1983 action is contrary to the United States Supreme Court's decision in *Harbison*.

Motions to stay a execution

A court may grant a preliminary injunction, including a stay of execution,

[2] Florida's clemency statute does not create a right to clemency counsel but it allows the Clemency Board to appoint clemency counsel to capital defendants and it is the standard practice to do so. § 940.031(1)-(3), Fla. Stat. (2018); *Babb v. State*, 92 So.3d 281 (Fla. 5th DCA 2012) (holding a different public defender's office can be appointed as state clemency counsel citing § 27.51(5)(a), Fla. Stat. (2011)).

only if: 1) there is a substantial likelihood of success on the merits; (2) he will suffer irreparable injury; 3) the stay will not substantially harm the other litigant; ***and*** 4) the stay would not be adverse to the public interest. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). Bowles must establish all four factors, not merely one or two of the factors. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (holding that inmate seeking a stay of execution "must satisfy ***all*** of the requirements for a stay, including a showing of a significant possibility of success on the merits") (emphasis added); *cf. Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011) ("Because Valle has failed to show a substantial likelihood of success on the merits, we need not address the other three requirements for issuance of a stay of execution."). And it is Bowles that has the burden of establishing all of these factors. *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013) (stating that the defendant "bears the burden of establishing that he is entitled to a stay of execution" and denying a stay).

As to the first factor, Bowles has no chance of success on the merits, much less a substantial one. As explained above, in detail with citations to controlling caselaw, there is no constitutional right to clemency counsel nor any statutory right to clemency counsel under § 3599 when the state provides clemency counsel. The § 1983 action should be dismissed for failure to state a claim because both the constitutional and statutory arguments are directly contrary to controlling precedent. The claim of a constitutional right to counsel is controlled

by *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995), and the claim of a statutory right to counsel under § 3599 is controlled by *Harbison*, *Lugo,* and *Gary*. A § 1983 action that is due to be dismissed cannot be a valid basis for a motion to stay. *Jones v. GDCP Warden*, 815 F.3d 689, 702 (11th Cir. 2016) (denying a stay on the basis that there was not a substantial likelihood of success on the merits and explaining that a motion that should be dismissed necessarily means there is not a substantial likelihood of success on the merits of that motion). Bowles fails the first factor.

As to the third factor, a stay will substantially harm the State by interfering with its sovereign power to enforce its valid criminal judgments. *In re Blodgett*, 502 U.S. 236, 239 (1992) (noting the concern that the State of Washington has "sustained severe prejudice" by the 2½-year stay of execution which "prevented Washington from exercising its sovereign power to enforce the criminal law"). As the Eleventh Circuit has observed, the Supreme Court has unanimously instructed courts, on multiple occasions, in considering whether to grant a stay of execution to be "sensitive to the State's strong interest in enforcing its criminal judgment without undue interference from the federal courts" and that federal courts "can and should protect States from dilatory or speculative suits." *Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016). The Eleventh Circuit in *Brooks* rejected the argument that the equities favor a stay because the defendant will suffer irreparable harm if he is executed, whereas the State will only suffer the

minimal inconvenience of having to postpone his hearing, due to the lengthy period of time since the murder occurred. *Id.* at 825 ("After all, Brooks raped and murdered Jo Deann Campbell on December 31, 1992, and he was convicted of three counts of capital murder by a jury and sentenced to die for his crimes in 1993."). The murder in this case occurred in November of 1994 which is nearly 25 years ago. Bowles fails the third factor.

As to the fourth factor, it is not in the public interest to stay the execution. In the words of the United States Supreme Court, when faced with a capital inmate with a scheduled execution who sought a stay to pursue a § 1983 action, which, like this one, amounted "to little more than an attack on settled precedent," the people of the State and the surviving victims "deserve better." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). It is not in the public interest to delay an execution of a serial killer so that he can pursue a totally frivolous § 1983 action that is "little more than an attack on settled precedent" and a pretty feeble attack at that. Bowles fails the fourth factor.

Bowles fails three of the four factors for granting a stay of execution and therefore, the stay should be denied.

Furthermore, there is a "strong equitable presumption" against granting a stay of an execution where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). As Justice Thomas recently observed, granting a stay

of execution in the face of unexplained delays "only encourages the proliferation of dilatory litigation strategies" that the Supreme Court has "recently and repeatedly sought to discourage." *Price v. Dunn*, 139 S.Ct. 1533, 1538 (2019) (Thomas, J., concurring in the denial of certiorari with Alito, J., and Gorsuch, J., joining). The clemency interview that is the basis for the § 1983 action occurred on August 2, 2018, but the CHU did not file this § 1983 action until over 11 months later on July 11, 2019. And even more telling, the CHU waited a full month after the Governor signed the warrant to file this § 1983 action. The "strong equitable presumption" against a stay applies to this case due to these delays and is a second, independent reason to deny the motion for stay.

Caselaw on motions to stay and clemency counsel claims

In *Banks v. Sec'y, Fla. Dept. of Corr.*, 592 Fed. Appx. 771, 773 (11th Cir. 2014), the Eleventh Circuit affirmed a district court's denial of a motion to stay an execution. Banks filed a § 1983 action, three days before his scheduled execution, raising various claims including a claim that the clemency board violated due process because it is composed of elected politicians; a claim that he was denied his clemency counsel of choice because his postconviction counsel was not statutorily allowed to represent him in the clemency proceedings; a claim that his clemency counsel was ineffective; and a claim that Florida's clemency process was unconstitutional because no death-sentenced inmate had been granted clemency

in Florida in over 31 years. *Id.* at 773. The district court dismissed the § 1983 action and denied a motion for stay of execution. *Id.* at 772.

The Eleventh Circuit observed that for a claim of alleged violations of due process or equal protection in a clemency proceeding to succeed, the violation must be grave, such as flipping a coin to determine whether to grant clemency or the arbitrary denial of a prisoner to any access of the State's clemency process. *Banks*, 592 Fed. Appx. at 773. But, the Eleventh Circuit noted, the allegations regarding clemency counsel being raised were not sufficient to establish that Florida's clemency process was arbitrary as a coin flip or that he was denied access to that process and therefore, the district court did not abuse its discretion in denying the motion for a stay of the execution. *See also id.* at 774 (Martin, J., concurring) (agreeing that the claim attacking Florida's clemency process did not show a violation of due process).

In *Gardner v. Garner*, 383 Fed. Appx. 722 (10th Cir. 2010) (before Tacha, Tymkovich, and Gorsuch), the Tenth Circuit concluded that a Utah death row inmate, with a scheduled execution, "wholly failed to demonstrate a cognizable challenge to the clemency proceedings" and on that basis denied the stay of execution. *Id.* at 726. Gardner filed a § 1983 action raising, among other claims, a claim that the Utah Board of Pardons and Parole denied him meaningful representation by his clemency counsel by refusing to allow clemency counsel to present two witnesses via videotape. While the Board ultimately allowed the

videotaped testimony, Gardner argued that the original denial and late notice of reversal of the decision to allow the videotape testimony the day before the clemency hearing interfered with his clemency counsel's preparation and ineffectiveness. *Id.* at 728. The Tenth Circuit rejected the claim because the "constitutional right to the effective assistance of counsel does not extend beyond direct appeal," even if state law provides for the appointment of counsel in later proceedings. *Id.* The Tenth Circuit relied on cases holding there is no constitutional right to postconviction counsel including *Coleman v. Thompson*, 501 U.S. 722, 752 (1991), to determine there is no right to clemency counsel. *Id.* at 728-29 & n.7. The Tenth Circuit rejected the notion that the availability of federal habeas counsel to act as clemency counsel in state clemency proceedings somehow created a right to clemency counsel or a right to effective clemency counsel. *Id.* at 729. The Tenth Circuit concluded that there was no legal foundation for such a claim. *Id.*

In *Long v. DeSantis*, 4:19-cv-213-MCR-MJ (N.D. Fla. May 16, 2019 - order of M. Casey Rodgers) (Doc. #13), a federal district court denied a motion to stay an execution concluding that the § 1983 action challenging federal habeas counsel's ability to act as co-counsel in state clemency proceedings did not establish a substantial likelihood of success on the merits. Doc. #13 at 2, 11, 23. Long filed a § 1983 action claiming he had both a Sixth Amendment right to have his federal habeas counsel to appear as clemency co-counsel during the state

clemency proceedings and a statutory right under18 U.S.C. § 3599 for his federal habeas counsel to appear as clemency co-counsel. *Id.* at 10.

In *Long*, the Florida Commission on Offender Review appointed clemency counsel to represent Long during the clemency proceedings. *Long*, 4:19-cv-213, Doc. #13 at 4. Federal habeas counsel, Robert Norgard and the Capital Habeas Unit of the Middle District of Florida (CHU-M), sent a letter to the Florida Commission on Offender Review seeking to participate in the state clemency proceedings. *Id.* at 5. Clemency counsel appointed by the Commission joined in the request to allow the CHU-M to be clemency co-counsel. *Id.* at 5-6. The Commission denied the CHU-M's request to formally participate in the clemency proceedings but informed federal habeas counsel that anyone was permitted to submit materials in support of clemency which would be given "full consideration." *Id.* The clemency interview was held six months after the appointment of clemency counsel but Long, on the advice of federal habeas counsel, refused to appear. *Id.* at 6. Clemency counsel, however, made a presentation at the interview highlighting Long's brain injuries, criminal history, and military service. After a warrant was signed, federal habeas counsel filed a § 1983 challenging their exclusion from the clemency interview. *Id.* at 1, 7.

The district court first explained the law regarding clemency. *Long*, 4:19-cv-213, Doc. #13 at 7-8. The district court observed that Due Process rights regarding clemency was limited to notice and an opportunity to participate in an

interview. *Id.* at 8 (citing *Gissendaner v. Comm'r, Ga. Dept. of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015) (stating that only extreme circumstances in clemency violate due process)). The district court also noted that there is no constitutional right to clemency counsel, much less a constitutional right to clemency co-counsel of choice. *Id.* (citing *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995) (citing *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991)). The district court described Florida's clemency process including the statute that allows for, but does not mandate, the appointment of clemency counsel. *Id.* at 9 (citing § 940.031(1), (3), Fla. Stat.).

The district court noted that a federal statute, 18 U.S.C. § 3599, provides federal habeas counsel for capital defendants including capital habeas defendants convicted in state court. *Long*, 4:19-cv-213, Doc. #13 at 9. The statute allows federal habeas counsel to represent those capital defendants in subsequent state court proceedings including state clemency proceedings. *Id.* (citing *Harbison*). The district court discussed whether the statute, § 3599, created a "unambiguous" federal right for purposes of § 1983. *Id.* at 11-14 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002)). The district court noted that "Long has cited no case in which a court has determined that § 3599 creates a federal right enforceable against state actors under § 1983, requiring the state to permit federally appointed counsel to appear in a state clemency proceeding." *Id.* at 14.

The district court observed that contrary to broadly recognizing a federal

right under § 3599 that federal habeas counsel must be allowed to appear in all clemency proceedings, the Supreme Court in *Harbison v. Bell*, 556 U.S. 180, (2009), recognized § 3599 counsel would not provide representation, such as representation at state clemency proceedings, in every case. *Long*, 4:19-cv-213, Doc. #13 at 14-15 (citing *Harbison*, 556 U.S. at 188 (appointed counsel is not expected to provide each service enumerated in subsection (e) for every client)). "Instead, the Court explained that the federal representation was intended to 'fill a gap' in circumstances, such as clemency proceedings, where states are not constitutionally required to provide counsel." *Id.* at 15 (citing *Harbison*, 556 U.S. at 191). The district court observed that authorizing federal habeas counsel to appear in state clemency proceedings is "a far cry from recognizing an enforceable right to have federal counsel appear." *Id.* The district court noted that the *Harbison* case involved the scope of federal habeas counsel representation under § 3599 "in the context of a state clemency system that did not authorize the appointment of counsel so the state had no position or interest in the issue." *Id.* at 16, n.12. The district court also noted that the *Harbison* Court did not discuss whether the statute creates a private cause of action for a federal right enforceable against a state actor. *Id.* at 16, n.12. The district court concluded that "nothing in *Harbison* or § 3599 unambiguously confers an enforceable federal right in all clemency proceedings to have federally appointed counsel appear in conflict with a state's process, and especially not where the state process provides counsel." *Id.*

at 15. The district court noted that the *Harbison* Court also explained that § 3599(e) would not require federally appointed counsel to represent a defendant awarded a retrial in state court because states are constitutionally required to provide counsel for indigent defendants at trial. *Id.* at 17, n.13 (citing *Harbison*, 556 U.S. at 189). The district court observed that this statement in *Harbison* "lends support for the conclusion that there is no federal right to federally funded counsel under § 3599 where counsel is otherwise provided." *Id.* at 17, n.13.

The district court observed that recognizing a right of federal habeas counsel to appear in state clemency proceedings "would require the state to accept the appearance of federal counsel in clemency proceedings, overriding the state's discretion and conflicting with the state's own procedure, potentially raising serious federalism concerns." *Long*, 4:19-cv-213, Doc. #13 at 15-16. The district court also observed that creating such a right could "potentially give rise to conflicting advice between federal counsel and state counsel and disrupt the state process." *Id.* at 16. The district court concluded that § 3599 did not create a federal right enforceable in a § 1983 action. *Id.*

The district court stated that even assuming a federal right existed, it would not apply to Long. *Long*, 4:19-cv-213, Doc. #13 at 16. Relying on the text of § 3599, the district court observed that a capital petitioner is only eligible for the federally funded representation under the statute if he is not able to obtain representation. "Section 3599(a)(2) provides that an indigent habeas petitioner is

eligible for federally funded representation if unable to obtain adequate representation." *Id.* at 16. The district court reasoned that a capital defendant's ability "to obtain adequate representation" materially changed when the state provided counsel. *Id.* at 18. The district court again noted that "Florida's clemency process authorizes the clemency board to appoint private counsel to represent a person sentenced to death" and that the Commission had, in fact, appointed clemency counsel. *Id.* (citing Fla. Stat. § 940.031). The district court reasoned that this "eliminated any need for the federally appointed counsel to fill the gap recognized in *Harbison*" and ruled the appointment of clemency counsel "rendered Long ineligible for federal representation in clemency under § 3599(a)(2)." *Id.* The district court rejected the argument that the availability of clemency counsel was irrelevant and that § 3599(e) applied because the statute "does not speak to the impact of the availability of a state court attorney in a state proceeding." *Id.* at 17-18 & n.14.

The district court also relied on the Sixth Circuit case of *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011), noting Sixth Circuit affirmed the denial of authorization for federal funding for counsel's representation of a capital habeas petitioner in a state court competency-to-be-executed proceeding because state law provided counsel. *Long*, 4:19-cv-213, Doc. #13 at 16. "As explained by the Sixth Circuit, based on the structure of § 3599, a defendant who cannot qualify for federally appointed counsel under subsection (a) has no claim to counsel under subsection

(e)." *Id.* (quoting *Irick*, 636 F.3d at 291 & n.2). The district court noted that the Sixth Circuit had declined "to obligate the federal government to pay for counsel in state proceedings where the state itself has assumed that obligation." *Id.* at 17 (quoting *Irick*, 636 F.3d at 291). The district court observed that the Eleventh Circuit in *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014), had agreed with the Sixth Circuit's decision in *Irick*. *Id.* at 17. The district court noted that in *Lugo*, the Eleventh Circuit had rejecting a claim that § 3599 entitles a state prisoner to federally paid counsel in subsequent state postconviction proceedings, noting that such an expansive reading of the statute would greatly "increase the cost of implementing § 3599" and "would have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases." *Id.*

The district court reasoned that the argument basically amounted to a claim that Long was entitled to clemency counsel of his choice. *Long*, 4:19-cv-213, Doc. #13 at 19. The district court ruled that Long was not entitled to clemency counsel of his choice. *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). The district court explained that there is no federal "guaranty to the best possible" clemency attorney. *Id.* at 19, n.16.

The district court rejected the argument that state clemency counsel was inadequate. *Long*, 4:19-cv-213, Doc. #13 at 19. The district court reasoned that § 3599 involved "a mere eligibility standard" but did not create a ineffectiveness

standard. The district court also noted that clemency counsel McClellan was qualified to be on Florida's registry list of clemency counsel which amounted to adequate representation. *Id.* The district court additionally noted that "nothing prevents" the federal habeas counsel from "passing relevant information" to state-appointed clemency counsel, as, in fact, occurred in the case. *Id.* at 19, n.16.

The district court also rejected any Sixth Amendment right to counsel based on the argument that clemency is a critical stage. *Long*, 4:19-cv-213, Doc. #13 at 20. The district court observed that Long offered "no support" for his critical stage argument and the district court could find none. *Id.* at 20. The district court reasoned that critical stage jurisprudence related to steps in a criminal prosecution, such as pretrial lineups or preliminary hearings, that are "concerned with adjudicating the guilt or innocence of a defendant." *Id.* at 21 (citing cases). The district court concluded the fact that Florida's clemency proceeding is a necessary step to obtaining a death warrant "does not elevate" clemency to a critical stage. *Id.* at 22 (citing *Gardner v. Garner*, 383 Fed. Appx. 722, 728-29 (10th Cir. 2010)). The district court noted that clemency remains "a discretionary process" that is "ultimately about mercy," not guilt or innocence. *Id.* at 22-23. The district court found Long's critical stage argument was "unavailing." *Id.* at 22.

The district court noted the Supreme Court precedent that there is no constitutional right to counsel in state postconviction proceedings. *Long*, 4:19-cv-213, Doc. #13 at 21 (citing *Finley* and *Giarratano*). The district court reasoned

that because clemency was even more discretionary than postconviction proceedings, that there was no constitutional right to counsel in clemency either. *Id.* at 22 (citing *White v. Singletary*). The district court observed that when there is no right to counsel, there is no right to effective counsel. *Id.* at 21 (citing *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982)). The district court concluded that the Sixth Amendment right to clemency counsel claim was "futile" because it "would not be cognizable." *Id.* at 23.

The district court denied the motion for stay of execution finding no substantial likelihood of success on the merits. *Long*, 4:19-cv-213, Doc. #13 at 23; *id.* at 11 (citing *Hill v. McDonough*, 547 U.S. 573, 584 (2006), and *DeYoung v. Owens*, 646 F.3d 1319 (11th Cir. 2011)); *id.* at 2.

Alternatively, the district court also denied the stay because of the delay in filing the § 1983 action. *Long*, 4:19-cv-213, Doc. #13 at 23-24. The district court relied on the "strong equitable presumption" against granting a stay of an execution where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Id.* at 23 (citing *Hill* and *Nelson*). The district court observed that Long had waited until two weeks before his execution to file the § 1983 action even though the claim, based on the date of the clemency interview, had been available for over seven months. *Id.* at 23-24.

Here, as in *Long*, the motion for stay of execution should be denied for the same reasons. Here, as in *Long*, there is no Sixth Amendment right to clemency

counsel. Here, as in *Long*, the claim basically amounts to a claim that Bowles is entitled to clemency counsel of his choice. But there is no Sixth Amendment right to appointed counsel of choice, much less a Sixth Amendment right to appointed clemency counsel of choice. Regarding the statutory right to counsel under § 3599, here, as in *Long*, no "enforceable federal right" exists under § 3599. But even if there was an enforceable federal right, as in *Long*, the appointment of state clemency counsel rendered Bowles "ineligible for federal representation in clemency under § 3599(a)(2)." As in *Long*, the statute did not created a "guaranty to the best possible" clemency attorney. And, as in *Long*, "nothing prevented" the federal habeas counsel from "passing relevant information" to state-appointed clemency counsel.[3] Here, as in *Long*, federal habeas counsel was allowed to

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[3] The district court noted the apparent benefit of "maintaining the continuity of counsel" by having federal habeas counsel, who had accumulated a great deal of knowledge about the capital defendant and the case, represent the capital defendant in state clemency proccedings. *Id.* at 19, n.16. But this ignores the benefit of a fresh set of legal eyes. New clemency counsel may take a different approach or see the mitigation in a different light. Indeed, Florida usually prohibits state postconviction counsel from acting as state clemency counsel largely for that purpose and to avoid ethical dilemmas. *Muhammad v. State*, 132 So.3d 176, 198, n14 (Fla. 2013) (noting the valid legal grounds to remove postconviction counsel from acting as clemency counsel citing § 27.711(11), Fla. Stat. (2011), and *Darling v. State*, 45 So.3d 444, 455 (Fla. 2010)); *cf. Christeson v. Roper*, 135 S.Ct. 891, 894 (2015) (holding federal habeas counsel should have been substituted with different habeas counsel to argue equitable tolling because original habeas counsel "cannot reasonable be expected to denigrate their own performance"). Ethical dilemmas can arise from the different roles of habeas counsel and clemency counsel. For example, the CHU-N complains about Bowles answering questions at the clemency interview but an inmate is likely to lose any chance of clemency being granted to him by refusing to answer any questions. But appointing a different attorney as clemency counsel can solve much of that

submit material in support of clemency to the Florida Commission on Offender Review. The CHU-N was informed weeks before the clemency interview in two different emails that they could provide information and background materials, including information regarding Bowles' intellectual functioning, such as Dr. Toomer's written report, to the Commission which would be given "full consideration." But the CHU-N refused to do so. Instead, the CHU-N insisted on a second clemency interview at which they would be allowed to represent Bowles as clemency counsel and be allowed to present Dr. Toomer's live testimony.[4] That

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dilemma. And, regardless of which side has the better policy view of federal habeas counsel also acting as clemency counsel, the Supreme Court's decision in *Harbison* simple prohibits federal habeas counsel from being clemency counsel, regardless of their greater knowledge of the case, when the State appoints clemency counsel, as Florida does.

[4] While the CHU does not actually seem to be making a claim that the failure to allow Dr. Toomer to testify live at the clemency interview was a violation of due process in the § 1983 action, there was no due process violation. There is no due process right to present live testimony at a clemency hearing. The right of confrontation and the right to present witnesses are limited to trials and do not apply to other proceedings, such as clemency interviews. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 567-70 (1974); *Baxter v. Palmigiano*, 425 U.S. 308, 315-22 (1976). Furthermore, written submissions satisfy the "opportunity to be heard" aspect of due process. *Brown v. Braxton*, 373 F.3d 501, 502 (4th Cir. 2004) (holding due process was not violated where an inmate was not permitted to present live testimony of another inmate but was allowed to present the other inmate's written statement at a disciplinary hearing). Indeed, most federal appeals are decided by circuit courts of appeals solely on the written submission, *i.e.*, briefs, with no oral argument permitted including many direct appeals of criminal convictions. Fed. R. App. P. 34(2). This standard appellate practice does not violate due process.

Here, the CHU was repeatedly informed that they could submit written material in support of the clemency application, including intellectual disability expert reports, which would be "fully considered." The CHU refused to do so. That was their choice and, no doubt, part of their litigation strategy for this § 1983

the CHU-N chose not to pass the relevant information regarding intellectual disability to clemency counsel Simmons or, more importantly, to the Commission via written submissions belies the validity of the intellectual disability claim as well as the claim regarding the ineffectiveness of clemency counsel Simmons in handling the intellectual disability presentation.

Here, as in *Long*, both the Sixth Amendment right to clemency counsel claim and the statutory § 3599 claim are "futile" and not "cognizable" and therefore, there is no likelihood of success on the merits, much less a substantial likelihood. And, here, as in *Long*, because there is no substantial likelihood of success on the merits, a stay of execution is not warranted.

And, here, as in *Long*, the delay in bringing the § 1983 action, both before and after the warrant was signed, gives rise to a "strong equitable presumption" against granting a stay. Indeed, the delay between the clemency interview and the filing of the § 1983 action in this case was longer than the delay in *Long*. The CHU-N waited nearly a year after the clemency interview and then waited a month after the warrant was signed to file this § 1983 action. The delay is a second independent reason to deny the stay. Here, as in *Long*, the motion for stay of execution should be denied.

Accordingly, the motion for a stay of execution should be denied.

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action, but it was not a violation of due process. The Commission's refusal to allow Dr. Toomer to testify live at the clemency interview is not a violation of due process.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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COUNSEL FOR ALL DEFENDANTS[5]

[5] Undersigned counsel, after consultation, represents all named defendants.

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I HEREBY CERTIFY that the foregoing RESPONSE TO MOTION FOR STAY OF EXECUTION is 9,237 words which is over the 8,000 word limit in Northern District of Florida local rule 7.1(f) but the response will be accompanied by a motion to accept the enlarged response.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO MOTION FOR STAY OF EXECUTION has been furnished by CM/ECF to **TERRI BACKHUS**, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org; **SEAN T. GUNN**, 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 33301; phone: (850) 942-8818; email: sean_gunn@fd.org this 17th day of July, 2019.

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA MCCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD, Chairman, Commissioner,
Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
Commission Investigator Supervisor,
Florida Commission on Offender Review,
in her official capacity.

CASE NO. 4:19-CV-319-MW-CAS

EMERGENCY
INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

REPLY IN SUPPORT OF
MOTION FOR A STAY OF EXECUTION

I. Mr. Bowles Has Met the Requirements for a Stay of Execution

As Mr. Bowles discussed in his Motion for Stay of Execution (ECF No. 5), he meets the four requirements for a stay in this case. In response, Defendants concede that Mr. Bowles will suffer irreparable injury, and argue primarily that his claim for relief fails because it has "no chance of success on the merits," ECF No. 19 at 20.

However, because Defendants fundamentally misunderstand Mr. Bowles's claims for relief, as well as misread *Harbison v. Bell*, 556 U.S. 180 (2009), 18 U.S.C. § 3599, and Eleventh Circuit precedent, this Court should not be persuaded by these arguments on the likelihood of success[1] of Mr. Bowles's claim for relief.

Furthermore, Defendants have waived any arguments to the contrary on the adequacy of Mr. Bowles's state-retained counsel by failing to respond to any of the fact-specific information Mr. Bowles pleaded, which should be taken as true. *See, e.g., Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1334 (11th Cir. 2013). As discussed further herein, because Defendants have made no persuasive

[1] In some instances, a motion for a stay may be granted even when the movant has not met the threshold of "substantial likelihood of success on the merits." *See Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018) (acknowledging in the context of a motion to stay execution that although a "petitioner face[d] an uphill battle on the merits," on balance with the other three factors, a stay was still appropriate); *see also In Re EMI Resorts, Inc.*, 2010 WL 11506117, *1 (S.D. Fla. 2010) (granting motion to stay pending appeal upon lesser showing of substantial case on the merits because "the [question] at bar is a complex and novel question that has not yet been clearly addressed by the Eleventh Circuit.").

arguments on the merits of Mr. Bowles's claim and waived other responses, his motion for a stay of his imminent execution should be granted.

II. Defendants Misconstrue Mr. Bowles's Claim for Relief

Defendants wrongly characterize Mr. Bowles's § 1983 action as arguing that his "Sixth Amendment right to counsel" was violated, and that clemency is a "critical stage" to which the constitutional right to counsel attaches. ECF No. 19 at 1-2. Defendants also wrongly argue that Mr. Bowles's claim should fail because his due process rights were preserved by Florida's clemency procedure, and because he was not entitled to counsel of his choice. *Id*. at 10, 13. These arguments are irrelevant to the § 1983 action before this Court.

Mr. Bowles does not contend that the Sixth Amendment applies to clemency, or that clemency is a critical stage of prosecution for such purposes. Mr. Bowles's claim does not rely on the Due Process Clause, nor does he rely on arguments concerning counsel of choice. As his complaint, memorandum of law, and emergency stay motion make clear, Mr. Bowles's claim is that Defendants violated his federal *statutory* right, codified in § 3599, to representation by his appointed federal counsel, or at least other "adequate" counsel within the meaning of the statute, in his state capital clemency proceedings. *See* ECF Nos. 1, 4, 5. Defendants' arguments concerning matters not at issue in this case should be disregarded.

III. Defendants Misread *Harbison* and Eleventh Circuit Precedent

Defendants maintain that *Harbison* held that "if a State provides counsel for a proceeding, § 3599 does not allow federal habeas counsel to appear in that proceeding," and that "[t]he Eleventh Circuit has repeatedly stated that federal habeas counsel may not appear as counsel in state court proceedings if the state provides counsel," ECF No. 19 at 15-16. Defendants assert that "[Mr.] Bowles is simply not eligible for federal habeas counsel to appear as clemency counsel under § 3599 according to the United States Supreme Court's decision in *Harbison* and the Eleventh Circuit's decisions in *Lugo* [*v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198 (11th Cir. 2014)] and *Gary* [*v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261 (11th Cir. 2012)], as well as under the logic of the Sixth Circuit's decision in *Irick* [*v. Bell*, 636 F.3d 289 (6th Cir. 2011)]." ECF No. 19 at 18. Defendants conclude that Mr. Bowles's "claim of a statutory right to counsel under § 3599 is controlled by *Harbison*, *Lugo*, and *Gary*." ECF No. 19 at 21.

Defendants misread *Harbison* and Eleventh Circuit precedent. *Harbison* does not provide, as Defendants contend, that state-retained clemency counsel renders an individual ineligible for clemency representation by their *already appointed* § 3599 counsel. As Mr. Bowles explained in his stay motion, the lone reference in *Harbison* to state-retained counsel replacing § 3599 counsel concerns the hypothetical scenario proposed by the State concerning whether § 3599 counsel would be obligated to

represent their client in a retrial that comes "subsequent" to federal habeas for § 3599(e) purposes. *See* ECF No. 5 at 15-16.

Defendants, just as the Sixth Circuit did in *Irick*, divorce the quote "state-furnished representation renders him ineligible for § 3599 counsel," *Harbison*, 556 U.S. at 189, from its proper context. *Harbison*'s proper reading is that § 3599 counsel is obligated to continue to represent clients for those events delineated in § 3599(e) that occur "subsequent" to federal habeas, but not state postconviction or trial proceedings that are not ordinarily "subsequent" within the meaning of the statute. *See* ECF No. 15-16. Clemency is specifically listed in § 3599(e) as a "subsequent" event. *See Harbison*, 556 U.S. at 189.

As the Ninth Circuit recently recognized, the Sixth Circuit in *Irick* applied the same misreading of *Harbison* as Defendants. *See Samayoa v. Davis*, No. 18-56047, 2019 WL 2864411, *3 (9th Cir. July 3, 2019) (calling the reasoning of *Irick* "unpersuasive" and noting that "[n]owhere in the [*Harbison*] Court's statement on the question on certiorari or in its discussion of the case did it condition the scope of § 3599(e) on the state's failure to provide clemency counsel.").

Defendants' response does not even address Mr. Bowles's arguments concerning the Ninth Circuit's proper interpretation of *Harbison* in *Samayoa*, or the Sixth Circuit's flawed in reasoning in *Irick*, and responses to those arguments should be considered waived at this point. *Cf. Egidi v. Mukamai*, 571 F.3d 1156, 1163 (11th

Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in a reply brief are deemed waived.").

In addition, Defendants' contention that the Eleventh Circuit's decisions in *Lugo* and *Gary* are dispositive (or authoritative) in this action is misplaced. As Mr. Bowles explained in his stay motion, *Lugo* was not a case concerning state clemency proceedings, the opinion's reference to *Irick* was cursory, and the § 3599 discussion was limited to successive state postconviction proceedings, which—unlike clemency—are not "subsequent" for § 3599(e) purposes. *See* ECF No. 5 at 14-15. Defendants did not respond to any of Mr. Bowles's arguments concerning *Lugo*.

Defendants also misread the Eleventh Circuit's decision in *Gary*. In that case, Gary had two attorneys appointed under § 3599, who represented him in federal habeas, and continued to represent him through clemency in Georgia, until his clemency was denied. *Gary*, 686 F.3d at 1263. After clemency was denied, the Georgia Supreme Court stayed Gary's execution pending his successive litigation of a motion for DNA testing and motion for a new trial, in which his § 3599 counsel continued to represent him. *Id*. at 1264. On appeal, the Eleventh Circuit considered the district court's denial of motion for funds to pay experts for his clemency hearing, a partial denial of payment for his § 3599 counsel's services in litigating the motion for a new trial, and the denial of a motion for funds to pay an expert for the DNA motion. *Id*.

While *Gary* did discuss funding for experts in state clemency, Defendants' references to—and quotes from—*Gary* are misleading. In their Response, Defendants characterize *Gary* as only about the denial of funding for experts in clemency, ECF No. 19 at 16, and give the impression that the quotes concerning federal funding and representation in state proceedings are related to the clemency ruling. But that is not what *Gary* says. The quotes Defendants use to support their contention that the *Gary* Court had federalism concerns and concerns over the use of federal funds in state proceedings were not about clemency at all, but rather about Gary's attempts to receive funding for his successive DNA motion and successive motion for a new trial that were litigated in Georgia state courts. *Compare* ECF No. 19 at 16, *with* Gary, 686 F.3d at 1277-78. In fact, the *Gary* Court explicitly *distinguished* clemency from any other state proceedings:

> Clemency proceedings and hearings on DNA motions are fundamentally different types of proceedings and should be treated differently for purposes of § 3599(a)(2). A clemency proceeding, by its nature, will typically occur subsequent to the prisoner's unsuccessful collateral attack on the constitutional validity of his conviction or death sentence. . . . The "fail safe in our criminal justice system," *Herrera v. Collins*, 506 U.S. 390, 415 [] (1993) (internal quotation marks omitted), clemency is a proceeding of last resort for a prisoner before execution. It is, therefore, a unique species of proceeding that is typically subsequent to the conclusion of a § 2254 proceeding.

Gary, 686 F.3d at 1275. The only reason that the *Gary* Court upheld the denial of federal funds for use in clemency, under an abuse of discretion standard, was because "Gary failed to show that the experts' personal appearances before the Board were

'reasonably necessary' to enable his attorneys to adequately to represent him," *id*. at 1269, not due to any concerns about federalism or federal court oversight of state proceedings. Like *Lugo*, the Eleventh Circuit's decision in *Gary* does not concern state clemency or clemency representation, and is not dispositive (or arguably even relevant) to the issues in Mr. Bowles's case.

Given *Irick* and *Samayoa*, it is clear that a circuit split has developed on the interpretation of whether the existence of state-retained counsel can make an individual with other properly appointed § 3599 counsel no longer eligible for § 3599 representation in subsequent proceedings under § 3599(e). *Compare Irick*, 636 F.3d at 291-92, *with Samayoa*, 2019 WL 2864411 at *3. The Eleventh Circuit has no precedent that is dispositive to the issues raised in Mr. Bowles's suit. Because *Irick* was wrongly decided and based on a misreading of *Harbison* and § 3599, *see* ECF No. 4 at 10-14, and there is no otherwise controlling precedent in the Eleventh Circuit, this Court should be instructed by *Samayoa* and a plain reading of *Harbison*.

IV. To the Extent That the Existence of State-Retained Clemency Counsel is Relevant to Mr. Bowles's Claim, Defendants Ignore Mr. Bowles's Arguments Regarding § 3599's Adequacy Provision

As Mr. Bowles has explained, the availability of state-retained clemency counsel is not relevant to his right to § 3599 counsel's representation in clemency proceedings. *See* ECF No. 4 at 11-14; *see also Samayoa*, 2019 WL 2864411 at *3. However, to the extent that the existence of state-retained counsel is relevant to Mr.

Bowles's claim, his memorandum of law explains why § 3599(a)(2) at least requires that any replacement counsel is "adequate" to provide representation in capital clemency proceedings. *See* ECF No. 4 at 15-20. Defendants' answer completely omits, and thereby waives, any response to Mr. Bowles's statutory "adequacy" arguments.

Tellingly, Defendants do not make *any* fact specific arguments that Mr. Bowles's state-retained counsel was "adequate" to provide representation in a capital clemency proceeding for purposes of § 3599.

Instead, Defendants advance the extreme position that § 3599 counsel "may never appear as clemency counsel because Florida provides clemency counsel to capital defendants." ECF No. 19 at 19. But this erroneous view is not supported by a plain reading of § 3599(a)(2) ("any defendant who is or becomes financially unable to obtain *adequate* representation"), or even by the cases Defendants cite, *see*, *e.g.*, *Irick*, 636 F.3d at 292 ("The relevant consideration under § 3599 is whether a state affords *adequate* representation.") (both emphases added).

Even in discussing Judge M. Casey Rodgers's May 16, 2019 order denying a clemency-related motion for a stay of execution in *Long v. Sec'y, Fla. Dep't. of Corrs.*, No. 4:19-cv-213, ECF No. 13 (N.D. Fla. May 16, 2019), Defendants suggest that *any* clemency counsel provided by Florida automatically constitutes "adequate representation" for purposes of federal law. ECF No. 19 at 30. This is not an accurate

characterization of Judge Rodgers's ruling in *Long*,[2] and is wrong on the merits. As Mr. Bowles has explained, adequacy determinations must take into account fact-specific information about the appropriateness of a particular counsel as well as the needs of a particular case or client. *See* ECF No. 4 at 15-20. Florida's provision of any state-funded clemency counsel is not, by itself, sufficient for § 3599 purposes.

In this case, Mr. Bowles's state-retained clemency counsel, Mr. Simmons, could not and did not serve as adequate counsel for the purposes of § 3599. Mr. Simmons was not qualified to represent capital defendants at any stage, *see* Complaint, ECF No. 1 at ¶ 53, had no experience with death penalty law or intellectual disability in the capital context, *id*. at ¶ 78, waived all access to any funding for investigative or expert services before knowing anything about Mr. Bowles's case, *id*. at ¶¶ 54-55, did not know anything about Mr. Bowles's particular vulnerabilities due to his intellectual disability and traumatic background, did not conduct an independent investigation, and was not provided with any guidance or required to complete any training in order to provide capital clemency representation, *id*. at ¶¶ 50-51, 54-55.

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[2] In fact, on reconsideration in *Long*, Judge Rodgers specifically clarified her reading of the adequacy requirement, stating that: "Long's claim that the Court read 'adequate' out of § 3599(a)(2) is not accurate. The Court fully recognized that a petition is only eligible under subsection (a)(2) if 'adequate representation' is not otherwise available but found nothing supported his claim that [Long's clemency counsel] was not 'adequate.'" *Long*, ECF No. 15 at 2.

Mr. Simmons's inadequacy is evident from what thin record is available of the clemency proceedings. Mr. Simmons failed to correct material factual inaccuracies during Mr. Bowles's clemency interview, *id*. at ¶ 78, failed to intercede when FCOR asked Mr. Bowles direct questions about his pending intellectual disability litigation or related diagnoses, *id*. at ¶¶ 78-79, and then turned in an "Application for Executive Clemency" that was less than eight double-spaced pages, was largely copied word for word from another death-sentenced individual's application, misidentified Mr. Bowles as that individual, contained obvious factual inaccuracies, and failed to tailor arguments to Mr. Bowles or his intellectual disability, *id*. at ¶ 82.

Defendants' response ignores all of these relevant and fact-specific concerns about the adequacy of state-retained counsel that Mr. Bowles was provided. Defendants should be considered to have waived such responses.

V. This Suit Does Not Intrude on Florida's State Clemency Scheme

Defendants argue that concerns over comity and federalism should prevent this Court from enforcing Mr. Bowles's § 3599 rights. *See* ECF No. 19 at 16, 19, 29. But concerns over comity and federalism do not control all outcomes. Under the circumstances presented here, it is appropriate for this Court to enforce Mr. Bowles's federal rights. Doing so will not intrude on Florida's state clemency scheme.

Section 1983 actions were designed for precisely the relief Mr. Bowles seeks: federal enforcement of a federal right due to the violation of that right by state actors. Such actions necessarily implicate some level of federalism and comity, as they seek to vindicate federal rights within state systems. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (noting in the context of a § 1983 action: "The concept [of Federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments[.]"). However, that federalism or comity concerns exist is not itself sufficient for a federal court in a § 1983 action to decline to enforce a federal right in a state system; federal courts are charged only with being sensitive to state interests, not abandoning the enforcement of a federal right.

In this case, Mr. Bowles has simply asked for this Court to enforce his federal rights as provided in § 3599. Mr. Bowles has not argued that Florida's scheme for providing clemency representation is unconstitutional, nor that it cannot be used in cases in which a death-sentenced person has § 3599 counsel. The issue in this case is much narrower: Mr. Bowles was entitled by federal statute to his already-appointed § 3599 counsel's continued representation in state clemency, regardless of whether the state provided additional counsel. Defendants violated his rights by

interfering with and *preventing* his § 3599 counsel's efforts to serve as either clemency counsel or co-counsel. Mr. Bowles does not ask this Court to indicate what Florida's clemency scheme *should* be or do, but only what its actors, such as Defendants, *may not* do—violate his federal rights. This is particularly important in Mr. Bowles's case, where depriving him the involvement of his § 3599 counsel left him uniquely vulnerable with no attorney present who understood his intellectual disability or his ongoing litigation regarding this disability.[3] Defendants' collective actions prevented the vindication of Mr. Bowles's federal rights, and thus deprived Mr. Bowles of his § 3599 right to adequate counsel in state clemency proceedings.

VI. Mr. Bowles Was Not Dilatory in Filing This Action

Defendants wrongly argue that Mr. Bowles was dilatory in filing this action, which occurred just one month after the Governor simultaneously denied clemency

[3] Defendants suggest that the *Harbison* Court's discussion concerning the value of continuity of § 3599 counsel in state clemency proceedings, *Harbison*, 556 U.S. at 193, creates an "ethical dilemma," and that Mr. Bowles's § 3599 counsel had some sort of ethical conflict because of their representation of Mr. Bowles in his intellectual disability litigation from advocating for him in clemency on this basis. *See* ECF No. 19 at 34-35 n. 3. However, in making this argument, Defendants seemingly concede Mr. Bowles's point: because § 3599 counsel had done the investigation and developed the intellectual disability evidence, *they were the only ones who could advocate on this basis*. Defendants' attempts to portray this as an ethical dilemma miss the point because this is the exact reason Mr. Bowles repeatedly cited that his § 3599 counsel was the only counsel that could *adequately* represent him in clemency due to his unique vulnerabilities and litigation posture.

and signed a warrant for his execution, and six weeks before his scheduled execution date of August 22, 2019. ECF No. 19 at 23.

Defendants misunderstand when this action accrued for the purposes of timeliness. It is well-settled in the Eleventh Circuit that "[a] cause of action under [42 U.S.C. §§ 1983 and 1985] will not accrue, and thereby set the limitations clock running, until the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003); *see also McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008).

Here, Mr. Bowles did not have a complete cause of action—i.e., Defendants violated his rights by interfering with clemency representation by his § 3599 counsel—until his clemency proceedings ended, which was not until June 11, 2019. Defendants' violation continued for the duration of the clemency proceedings. That clemency representation overlapped completely with the duration of the clemency proceedings was by the design of the Defendants due to the Rules of Executive Clemency and the terms of the contract of his privately retained clemency counsel, which contractually bound him to represent Mr. Bowles until clemency was denied. *See* Appendix to Complaint, ECF No. 1-1 at 11, ¶ 8.

This action was filed just weeks later, and well before Mr. Bowles's scheduled execution date of August 22, 2019. Under the circumstances presented, Mr. Bowles

could not be reasonably expected to file this action materially earlier. Mr. Bowles was diligent, not dilatory, in the timely filing this action.[4]

VII. Conclusion

The Court should stay Mr. Bowles's scheduled August 22, 2019, execution and consider his § 1983 claim without the imminent threat of a state death warrant.

[4] It is also worth noting that Defendants misrepresent Judge Rodgers's dilatoriness finding in *Long*. While Defendants contend that Judge Rodgers "[a]lternatively . . . denied the stay because of the delay in filing the § 1983 action," ECF No. 19 at 33, that was not the basis of her denial. As she clarified on reconsideration, the denial was based on his "likelihood of success on the merits," and noted that "even if the Court erred in finding Long could have brought suit earlier challenging the exclusion of his § 3599 counsel, the result would have been the same." *Long*, ECF No. 15 at 1-2. Thus, Judge Rodgers did not alternatively deny Long's action on dilatoriness grounds, as Defendants suggest, and further, Mr. Long filed only two weeks prior to his execution, whereas Mr. Bowles has filed six weeks from his scheduled execution.

Respectfully submitted,
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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing reply was electronically served on this date, July 19, 2019, to the defendants in this matter through the ECF system.

/s/ Terri Backhus
Terri Backhus

CERTIFICATE OF COMPLIANCE

This reply does not comply with the 3,200 word limit in Local Rule 7.1(I), excluding those portions exempted by Local Rule 7.1(F), because it is 3,576 words, but it will be accompanied by an unopposed motion to accept the enlarged response.

/s/ Terri Backhus
Terri Backhus

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

CASE NO. 19-12929-P

CAPITAL CASE

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

GARY RAY BOWLES,

Plaintiff,

v.

RON DeSANTIS,
Governor of Florida, *et al.*

Defendants.

_____/

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO.: 4:19-cv-319-MW-CAS

RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

On August 2, 2019, Bowles, a Florida death row inmate with an active warrant, represented by the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N), 20 days before his scheduled execution, filed

an emergency motion to stay the execution in this Court. Bowles seeks a stay of execution to litigate his 42 U.S.C. § 1983 civil rights action challenging whether his federal habeas counsel must be allowed, under 18 U.S.C. § 3599, to appear formally as clemency counsel during the state clemency process.

Bowles, however, does not establish all of the five factors that he must to warrant a stay of execution. He has little to no likelihood of success on the merits because the underlying § 1983 action fails to state a claim for relief. As the Defendants explained in their motion to dismiss, the statute at issue, 18 U.S.C. § 3599, does not create a federal right enforceable in § 1983 actions and the Defendants are all entitled to qualified immunity. Additionally, the State and the public have an interest in the finality of criminal judgments and granting a stay undermines those interests. Furthermore, the delay in bringing the § 1983 action is an independent reason to deny the stay. Even though the CHU-N was denied permission to formally appear as clemency counsel over a year ago, the CHU-N waited until a warrant was signed to file the § 1983 action in the district court. Stays should not be granted when the inmate intentional waits until a warrant is signed to bring the suit. For these reasons, a stay should not be granted.

Litigation in district court

On July 11, 2019, Bowles filed a 42 U.S.C. § 1983 civil rights action challenging whether he has a statutory right under 18 U.S.C. § 3599 for his federal habeas counsel to appear formally as clemency counsel during the state clemency process regardless of the state providing clemency counsel. *Bowles v. DeSantis*, 4:19-cv-319-MW-CAS (N.D. Fla. 2019) (Doc. #1). Bowles also filed a memorandum of law in support of his clemency counsel claim. (Doc. #4). Bowles argued that the Florida Commission on Offender Review's refusal to allow his federal habeas counsel, the CHU-N, to formally participate in the clemency interview as clemency co-counsel violated his federal statutory right to counsel in § 3599. Bowles also filed a motion to stay in the district court. (Doc. #5).

The district court ordered the Defendants to respond to the motion to stay. On July 17, 2019, the Defendants filed a response to the motion to stay. (Doc. #19). The Defendants discussed the controlling precedent of *Harbison v. Bell*, 556 U.S. 180 (2009), *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014), and *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1277-78 (11th Cir. 2012). (Doc. #19 at 14-16). The Defendants also relied on the Sixth Circuit cases of *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011), and *Baze v. Parker*, 632 F.3d 338, 345-46 (6th Cir. 2011). (Doc. #19 at 16-19). The Defendants also discussed at length the district

court's order in *Long v. DeSantis*, 4:19-cv-213-MCR-MJ (N.D. Fla. May 16, 2019), which had addressed this same clemency counsel claim. (Doc. #19 at 25-36). Additionally, the Defendants discussed the factors that a capital inmate must establish to have a motion for stay of execution be granted and how Bowles failed to establish many of those factors. (Doc. #19 at 19-23).

On July 19, 2019, the district court denied the motion to stay. (Doc. #25). The district court concluded that § 3599 does not create a federal right that is enforceable in a § 1983 action. (Doc. #25 at 7). The district court concluded that "Bowles has not shown he is substantially likely to succeed on the merits of his section 1983 claim" and denied the motion to stay. (Doc. #25 at 9). The district court discussed the Eleventh Circuit's decision in *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261 (11th Cir. 2012), and the Ninth Circuit's decision in *Samayoa v. Davis*, 928 F.3d 1127 (9th Cir. 2019), but noted that neither decision "addressed whether a state clemency board could be compelled to allow federally appointed counsel to appear and practice before it." (Doc. #25 at 8).[1]

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[1] The district court improperly discounted the relevance of *Gary* and *Samayoa*. While Bowles' § 1983 action is one step beyond the threshold question of whether § 3599 authorizes federal habeas counsel to appear as state clemency counsel when the state appoints state clemency counsel, and presents the next question of whether § 3599 ***mandates*** rather than permits federal habeas counsel to appear as state clemency counsel regardless of whether the state appoints state clemency counsel. Indeed, Bowles' § 1983 action is two steps beyond the threshold question because the CHU-N was allowed to appear informally as clemency co-counsel by being permitted

On July 24, 2019, the Defendants filed a motion to dismiss on three grounds: 1) failure to state a claim because there is no federal right, enforceable under § 1983, to clemency counsel when the state provides clemency counsel; 2) qualified immunity applies to all named Defendants because there is no clearly established law requiring the appointment of federal habeas counsel as clemency counsel when the state provides clemency counsel; and 3) the *in forma pauperis* § 1983 action is frivolous. (Doc. #26). The motion to dismiss is still pending in the district court.

On August 2, 2019, the CHU-N filed an appeal of the district court's denial of the motion to stay. (Doc. #28). On August 2, 2019, the CHU-N also filed a motion to stay in this Court. This is the Defendants' response to the motion for stay.

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to submit any written material in support of the clemency application including any expert reports on intellectual disability. Being limited to a written presentation is not being "excluded" from the clemency proceedings. Indeed, being limited to a written presentation is exactly the role most appellate attorneys are limited to because most federal appeals are decided solely on the briefs without oral argument. So, Bowles' § 1983 action actually presents the question of whether § 3599 mandates federal habeas counsel be permitted to ***formally*** appear as state clemency counsel regardless of whether the state appoints state clemency counsel. The district court misunderstood that one is a threshold question to the other questions. If § 3599 does not authorize habeas counsel to appear in state proceedings if the state provides counsel, then the next questions of forcing state officials to accept federal habeas counsel formally as state counsel never occurs. So, whether § 3599 even permits federal habeas counsel to act as state counsel when the state provides counsel is a threshold question. But the United States Supreme Court answered that threshold question in *Harbison v. Bell*, 556 U.S. 180, 189 (2009), when it stated that if a state provides counsel, the capital defendant is "ineligible" for § 3599 counsel. The district court ignored this language from *Harbison*.

Stays of execution

Recently, in *Long v. Sec'y, Fla. Dept. of Corr.*, 924 F.3d 1171, 1176-77 (11th Cir. 2019), *cert. denied*, *Long v. Inch*, 139 S.Ct. 2635 (2019), this Court held that the district court did not abuse its discretion in declining to stay Long's execution. *Id*. at 1176. Long sought a stay of execution to litigate his § 1983 action challenging Florida's lethal injection protocol. This Court first explained that a capital defendant "is not entitled to a stay of execution 'as a matter of course' simply because he brought a § 1983 claim." *Id*. (quoting *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006)). "Instead, a stay of execution is an equitable remedy and all of the rules of equity apply." *Long*, 924 F.3d at 1176 (citing *Rutherford v. Crosby*, 438 F.3d 1087, 1092 (11th Cir. 2006), *vacated on other grounds*, *Rutherford v. McDonough*, 547 U.S. 1204 (2006)). And, "equity must take into consideration the State's strong interest in proceeding with its judgment" as well as "an inmate's attempt at manipulation." *Long*, 924 F.3d at 1176 (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal*., 503 U.S. 653, 654 (1992)). This Court in *Long* explained that, before granting a stay of execution, a court must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Id*. (citing *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). This Court in *Long* noted that 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." *Id*. (citing *Nelson*, 541 U.S. at 650). This Court observed that Long's case was "not one of the extreme exceptions in which a last-minute stay should be entered, but instead is within the norm where the "strong equitable presumption against the grant of a stay applies." *Id*. at 1177 (quoting *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019), and *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). The *Long* Court noted that the United States Supreme Court had reiterated the importance of these principles three times this year. *Id*. at 1176-77 (citing and discussing *Dunn v. Ray*, 139 S.Ct. 661 (2019), *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019), and *Dunn v. Price*, 139 S.Ct. 1312 (2019)).

To be entitled to a stay of execution, Bowles must establish five factors: 1) he has a substantial likelihood of success on the merits; 2) he will suffer irreparable injury unless the stay issues; 3) the stay would not substantially harm the other litigant; and 4) if issued, the stay would not be adverse to the public interest. *Gissendaner v. Comm'r, Ga. Dept. of Corr*., 779 F.3d 1275, 1280 (11th Cir. 2015) (listing these four factors); *Muhammad v. Sec'y, Fla. Dept. of Corr.*, 739 F.3d 683, 688 (11th Cir. 2014). Additionally, Bowles must establish: 5) there was no delay in bringing the action. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Crowe v. Donald*, 528 F.3d

1290, 1292 (11th Cir. 2008) (observing that before a court grants a stay of execution, it must consider the relative harms to the parties, the likelihood of success on the merits, and the extent to which the inmate has delayed unnecessarily in bringing the claim citing *Nelson*). It is Bowles' burden to establish all these factors. *Gissendaner*, 779 F.3d at 1280 (stating that a stay of execution is "appropriate only" if the inmate establishes all four of these factors); *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013) (stating that "Mann bears the burden of establishing that he is entitled to a stay of execution" and denying a stay).

But Bowles cannot establish the first factor, the third factor, the fourth factor, or the fifth factor. Bowles fails four of the five factors including the critical first factor of substantial likelihood of success on the merits and the critical fifth factor of not being dilatory in bringing the § 1983 action.

Substantial likelihood of success on the merits

First, Bowles must established that he has a substantial likelihood of success on the merits. Bowles has little to no chance of success on the merits, much less a substantial one.

The underlying § 1983 civil rights action should be dismissed because § 3599 did not create an enforceable federal right, as the district court has already determined,

and because all of the named Defendants are entitled to qualified immunity, as the Defendants explained in the motion to dismiss. (Doc. #26).

Federal right under § 3599

The federal statute at issue, 18 U.S.C. § 3599, does not create an enforceable federal right under § 1983. To be a proper basis for a § 1983 action, the federal statute must "unambiguously" confer the right to sue based on it. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (rejecting the notion that case law permits "anything short of an unambiguously conferred right to support a cause of action brought under § 1983"). As this Court has explained, the plaintiff in a § 1983 action "must assert the violation of a federal ***right***, not merely a violation of federal ***law.***" *Burban v. City of Neptune Beach, Fla.*, 920 F.3d 1274, 1278 (11th Cir. 2019) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original) and affirming the dismissal of a § 1983 action for failure to state a claim because the federal statute at issue did not give rise to a federal right enforceable under § 1983). And all three of the factors in *Blessing* must be established including the third factor which is that the text of the statute "be couched in mandatory, rather than precatory, terms." *Burban*, 920 F.3d at 1279 (quoting *Blessing*, 520 U.S. at 340-41). And even then a remedy under § 1983 must not be impliedly foreclosed. *Burban*, 920 F.3d at 1279.

Congress must "speak with a clear voice" and "manifest an 'unambiguous' intent to confer individual rights in the statute at issue before federal funding provisions will be read to provide a basis for private enforcement." *31 Foster Children v. Bush*, 329 F.3d 1255, 1268 (11th Cir. 2003) (affirming the dismissal of the § 1983 action for failure to state a claim because the statute at issue did not create an enforceable federal right citing *Gonzaga Univ.*, 536 U.S. at 280). The Eleventh Circuit noted in 2003 that only twice since the decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), had the Supreme Court held that spending legislation gave rise to rights enforceable via § 1983. *31 Foster Children*, 329 F.3d at 1268.

The statute at issue here, § 3599, is also a funding statute. Therefore, § 3599 does not create a federal right enforceable via § 1983, as the Defendants asserted in their pending motion to dismiss. (Doc. #26 at 3-8).

United States Supreme Court precedent regarding § 3599

Alternatively, even if § 3599 created an enforceable federal right in general, it does not create any rights when a state provides counsel under the controlling precedent of *Harbison v. Bell*, 556 U.S. 180 (2009). In *Harbison*, the United States Supreme Court held that 18 U.S.C. § 3599 authorizes federal habeas counsel to represent death row inmates in state clemency proceedings. *Id*. at 183. Harbison was

a Tennessee death row inmate who requested clemency counsel in the state court but the Tennessee Supreme Court held that state law does not authorize the appointment of clemency counsel. *Id*. at 182. Tennessee took no position on the question of whether § 3599 authorized federal habeas counsel to represent a death row inmate in state clemency proceedings. *Id*. at 184, 192, n.9.

The *Harbison* Court, relying on the language of the "Counsel for financially unable defendants" statute, 18 U.S.C. § 3599, noted that death row inmates are statutorily entitled to counsel in § 2254 federal habeas proceedings and concluded the statutory language indicated that appointed federal habeas counsel's authorized representation included state clemency proceedings. *Harbison*, 556 U.S. at 186. The *Harbison* Court also noted that a district court has the discretion, under the "other appropriate motions and procedures" provision of § 3599(e), to allow federally paid habeas counsel to exhaust a claim in state court. *Id*. at 190, n.7. The *Harbison* Court, however, emphasized that § 3599 provides for counsel "***only*** when a state petitioner is unable to obtain adequate representation." *Id*. at 189 (emphasis added). The Supreme Court wrote that "state-furnished representation renders him ***ineligible*** for § 3599 counsel." *Id*. (emphasis added).

So, according to the United States Supreme Court in *Harbison*, if a state provides counsel for a proceeding, § 3599 does not allow federal habeas counsel to appear in

that proceeding. Under *Harbison*, because Florida provided clemency counsel, Bowles is "ineligible" for § 3599 counsel and his federal habeas counsel is not authorized under § 3599 to appear as state clemency counsel.

Opposing counsel attempts to evade these clear statements in *Harbison* by treating these statements in *Harbison* as dicta. The CHU-N argues that the United States Supreme Court made these statements regarding being ineligible for § 3599 counsel as part of a discussion regarding any possible retrial if federal habeas relief was granted which was only a hypothetical. *Harbison*, 556 U.S. at 189; (Doc. #5 at 15-16); (Doc. #22 at 4-5). The CHU-N refers to these statements from the High Court as "misapplied dicta." (Doc. #5 at 15).

These statements from the Supreme Court regarding § 3599 providing for counsel "only when a state petitioner is unable to obtain adequate representation" and being "ineligible for § 3599 counsel" if the state provides counsel, while not the direct holding of *Harbison*, were part of the reasoning of the Court rather than mere dicta. These statements were not an aside in a footnote. Lower courts should follow the reasoning of the highest court in the land. And, even if these statements are viewed as pure dicta, lower courts should follow dicta from the United States Supreme Court, especially dicta regarding the proper scope of a federal statute, for, as this Court has observed, "there is dicta and then there is dicta, and then there is Supreme Court

dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). Indeed, many other circuit courts treat Supreme Court dicta as authoritative and controlling.[2] Regardless of the label applied to these statements, the United States Supreme Court interpreted § 3599 as only applying if the state does not provide counsel and this Court, as well as the district court, should follow that interpretation.

Furthermore, this Court has quoted these exact statements from *Harbison* with approval. *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014)

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[2] *See, e.g.*, *Cuevas v. United States*, 778 F.3d 267, 272-73 (1st Cir. 2015) (stating that "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement" quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991)); *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181, n.2 (4th Cir. 2012) (explaining even if the statements are dicta, "we cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court"); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298, n.3 (4th Cir. 2004) (stating that carefully considered language of the Supreme Court, even if technically dicta generally must be treated as authoritative); *United States v. Morgan*, 572 Fed.Appx. 292, 301 (6th Cir. 2014) (determining that Supreme Court dicta was "controlling" in the case because lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale" citing *Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 607 F.3d 439, 447-48 (6th Cir. 2010), and other cases); *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017) (explaining we are "bound by Supreme Court dicta almost as firmly as by the Courts' outright holdings, particularly when the dicta is recent and not enfeebled by later statements"); *cert. denied*, *Ferrellgas Partners, L.P. v. Morgan-Larson, LLC*, 138 S.Ct. 647 (2018); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) ("We are bound by Supreme Court dicta almost as firmly as by the Courts' outright holdings, particularly when the dicta is recent and not enfeebled by later statements").

(explaining that a district court may appoint federal habeas counsel to exhaust a claim in state court but "***only*** where the petitioner is unable to obtain adequate legal representation in state court" quoting *Harbison*, 556 U.S. at 189-90 (emphasis added) and observing that it was unlikely that Congress intended to supplant the state-court systems for the appointment of postconviction counsel "when it authorized the appointment of federal counsel to aid state capital prisoners in seeking *federal* habeas relief in *federal* court" (emphasis in original); *see also Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1278 (11th Cir. 2012) (noting the "sound policy reasons why Congress would not provide for federally-funded counsel in independent state court proceedings"); *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989) (denying a mandamus and holding the predecessor statutes, 21 U.S.C. § 848(q) and 18 U.S.C. § 3006A, did not authorize the appointment of counsel for state postconviction proceedings). The § 1983 action is due to be dismissed based on *Harbison*.

Opposing counsel relies on the circuit split between the Sixth Circuit's case of *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011), and the Ninth Circuit's case of *Samayoa v. Davis*, 928 F.3d 1127 (9th Cir. 2019). (Doc. #5 at 14). But a circuit split does not alter this Court's holding in *In re Lindsey* or statements in *Lugo* and *Gary* regarding the issue. This Court has cited and quoted *Irick* with approval, not *Samayoa*. *Lugo*,

750 F.3d at 1214. Nor does the Ninth Circuit's refusal to follow *Harbison* mean that this Court should do likewise. This Court should follow *Harbison*.

The § 1983 action does not state a claim for relief. A § 1983 action with a United States Supreme Court case against it is not legally viable. Because Bowles' civil rights action fails to state a claim, it does not have a substantial likelihood of success on the merits. Bowles does not meet the first, and one of the two most determinative factors, for being granted a stay of execution.

Irreparable injury

Second, Bowles must establish that he will suffer irreparable injury unless the stay issues. There is some controversy regarding the second factor of irreparable injury. *Ferguson v. Sec'y, Fla. Dept. of Corr.*, 493 Fed.Appx. 22, 26 (11th Cir. 2012) (Carnes, J., concurring) (observing, in a § 1983 action challenging Florida's lethal injection protocol, that where the underlying claim does not directly challenge the death sentence, a movant has not necessarily established an irreparable injury); *but see Ferguson*, 493 Fed.Appx. at 26 (Wilson, J., concurring) (taking the position that the irreversible nature of the death penalty makes the injury irreparable by definition but agreeing that a stay should be denied because the inmate could not establish a substantial likelihood of success on the merits); *but see In re Holladay*, 331 F.3d

1169, 1177 (11th Cir. 2003) ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident.").

Bowles' § 1983 action is a challenge to Florida's process for the appointment of clemency counsel that does not attack the validityof his death sentence in any manner. Bowles is only challenging the way the state clemency proceedings were conducted, not the death sentence itself. Bowles' death sentence will remain in place regardless of the outcome of his § 1983 action; it is only his clemency interview that is at issue. Bowles, at most, will get a new clemency interview, not a new penalty phase. There is a disconnect to granting a stay of the execution when the claim is tangential to the sentence itself. So, under the reasoning of Judge Carnes' concurring opinion in *Ferguson*, Bowles does not meet the second factor.

But, even assuming that Bowles automatically meets the second factor under the reasoning of *In re Holladay*, the other factors remain and outweigh the second factor especially when the underlying § 1983 is not a challenge to the conviction or the sentence. Bowles must establish all five factors, not just one.

Substantial harm to the other litigant

Third, Bowles must establish that a stay would not substantially harm the State.

As this Court has observed, each "delay, for its span, is a commutation of a death sentence to one of imprisonment." *Ferguson v. Sec'y, Fla. Dept. 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)). So, a stay turns a death sentence into a life sentence for the length of its duration.

There is substantial harm to the State when its executions are cancelled. *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006) (observing that both "the State and the victims of crime have an important interest in the timely enforcement of a sentence"); *Crowe v. Donald*, 528 F.3d 1290, 1292 (11th Cir. 2008) (explaining "the State's interest in effectuating its judgment remains significant"). As the United States Supreme Court recently observed regarding the protracted litigation in a capital case where the murder occurred in 1996 and the defendant had filed a § 1983 action "just days before his scheduled execution," the people of the state and the surviving victims of the murder "deserve better." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). This murder occurred in 1994, which was two years before the murder in *Bucklew*. Here, as in *Bucklew*, the people of Florida and the surviving victims "deserve better" than to have the execution stayed for a § 1983 action with Supreme Court precedent against it.

Bowles does not meet the third factor for being granted a stay of execution.

Adverse to the public interest

Fourth, Bowles must establish that a stay would not be adverse to the public interest. A delay of this execution would be adverse to the public interest in the finality of criminal judgments. Unwarranted delays undermine the deterrent effect of the death penalty. As the United States Supreme Court has observed, without finality, "the criminal law is deprived of much of its deterrent effect" and that only "with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). And the Supreme Court has noted in the very context of stays of executions to litigate § 1983 actions, both "the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006); *Crowe v. Donald*, 528 F.3d 1290, 1292 (11th Cir. 2008) (noting the victims of crime "have an important interest in the timely enforcement of a sentence" citing *Hill*). Hinson's family and the families of Bowles' other murder victims have been waiting for nearly 25 years for justice to be done. Again, the people of the state of Florida and the surviving victims "deserve better." *Bucklew*, 139 S.Ct. at 1134.

Bowles does not meet the fourth factor for being granted a stay of execution.

Delay in bring the action

Fifth, Bowles must establish that he did not delay in bringing his § 1983 action which he cannot do. Bowles delayed in bringing the § 1983 action that he seeks a stay to litigate, when he could have litigated the matter without a stay, if he had brought the suit in a timely manner.

The United States Supreme Court has explained that a court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *see also Crowe v. Donald*, 528 F.3d 1290, 1292 (11th Cir. 2008) (explaining that before a court grants a stay, it must consider the relative harms to the parties, the likelihood of success on the merits, and the extent to which the inmate has delayed unnecessarily in bringing the claim). The *Nelson* Court noted that "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." *Nelson*, 541 U.S. at 650; *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (explaining equity weighs against a stay when a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay); *Grayson v. Allen*, 491 F.3d 1318, 1326 & n.4 (11th Cir. 2007) (observing that if Grayson "truly had intended to challenge

Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule").

Recently, in *Long v. Sec'y, Fla. Dept. of Corr.*, 924 F.3d 1171, 1176-77 (11th Cir. 2019), *cert. denied*, *Long v. Inch*, 139 S.Ct. 2635 (2019), this Court held that the district court did not abuse its discretion in denying a stay of execution. Long sought a stay of execution to litigate his § 1983 action challenging Florida's lethal injection protocol. This Court explained that "Long engaged in inexcusable delay in bringing the claims, which is enough to deny him the equitable remedy of a stay." *Id*. This Court highlighted Long's delay in bringing the § 1983 action noting that Florida adopted its current protocol two years and four months ago but Long waited until his execution was scheduled to file the § 1983 action challenging that protocol. Long attempted to use several of Florida's recent executions to excuse the delay but this Court concluded that "a delay of five months, fifteen months, or eighteen months is too long." *Id*. at 1177.

Bowles could have filed this § 1983 action over a year ago, in July of 2018, when he was first informed that his federal habeas counsel, CHU-N, would not be permitted to be clemency counsel at the clemency interview. Bowles offers no explanation for why he waited until his execution was scheduled to bring his § 1983 action

challenging Florida's clemency process for the appointment of state clemency counsel. Here, as in *Long*, the delay of over a year is "too long." And, here, as in *Long*, a stay should not be granted when the defendant filed the § 1983 action only after the warrant was signed.

Bowles does not meet the fifth factor, which is the other of the two most determinative factor, for being granted a stay of execution.

Bowles has not established all five factors as he must do for a stay of execution. He fails the first, third, fourth, and fifth factors. And he fails the two most critical factors which are a substantial likelihood of success on the merits and a lack of delay.

Accordingly, the stay should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ *Charmaine Millsaps*
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COUNSEL FOR DEFENDANTS

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I hereby certify that this response contains 5,080 words, according to Wordperfect's document information, which is under the 5,200 word limit. The font is 14 point Times New Roman as specified by 11th Cir. R. 32-4.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION has been furnished by CM/ECF to TERRI BACKHUS, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org; SEAN T. GUNN, 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 33301; phone: (850) 942-8818; email: sean_gunn@fd.org this 9th day of August, 2019.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Assistant Attorney General

CERTIFICATE OF INTERESTED PERSONS

I HEREBY CERTIFY that the following is a list of all persons interested in the outcome of this case:

Terri Backhus, Chief of the Capital Habeas Unit of the Office of the Public Defender of the Northern District of Florida (CHU-N), state postconviction co-counsel and federal habeas counsel

Gary Ray Bowles, plaintiff below, Appellant

Ron DeSantis, Governor of Florida, named Defendant

Melinda Coonrod, Chairman, Florida Commission on Offender Review, named Defendant

Nikki Fried, Commissioner of Agriculture of Florida, on the Clemency Board, named Defendant

Julia McCall, Coordinator, Office of Executive Clemency, named Defendant

Charmaine Millsaps, Assistant Attorney General, State of Florida, counsel for all named Defendants

Honorable Ashley Moody, Attorney General of Florida, on the Clemency Board named Defendant

Billy Nolas, former chief of the CHU-N, former state postconviction co-counsel and former federal habeas counsel

Jimmy Patronis, Chief Financial Officer of Florida, on the Clemency Board, named Defendant

Nah-Deh Simmons, state clemency counsel

Honorable Mark Walker, District Judge, Northern District of Florida

Susan Michelle Wentworth, Commission Investigator Supervisor, Florida Commission on Offender Review, named Defendant

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 19-12929 (DEATH PENALTY)

GARY RAY BOWLES,

Appellant,

v.

RON DeSANTIS, et. al.,

Appellees.

REPLY TO RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

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

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I. Defendants Invent a Fifth Stay Factor and Misrepresent Mr. Bowles's Diligence in Filing the Underlying Action

Defendants-Appellees ("Defendants") wrongly argue that Mr. Bowles "must establish five factors" to be entitled to a stay of execution. Response to Emergency Motion for Stay of Execution ("Response") at 7. In addition to the widely understood four-factor stay test, *see, e.g.*, *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013), Defendants erroneously assert that Mr. Bowles "must establish . . . there was no delay in bringing the action." Response at 7; *see also id*. at 19 ("[Mr.] Bowles must establish that he did not delay in bringing his § 1983 action which he cannot do.").

Under this Court's precedent, there are only four stay factors: substantial likelihood of success on the merits, irreparable injury, no substantial harm to the other litigant, and not adverse to the public interest—as even the cases cited by Defendants note. *Mann*, 713 F.3d at 1310; *see also* Response at 7-8 (case parentheticals noting the four factors required for a stay). Using these factors, this Court has previously granted stays of execution. *See, e.g.*, *Ray v. Commissioner, Ala. Dept. of Corrs*., 915 F. 3d 689, 701-02 (11th Cir. 2019) (granting stay in 42 U.S.C. § 1983 appeal); *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (granting stay and leave to file second federal habeas petition based on intellectual disability).

Defendants' contention that there exists a fifth factor—that Mr. Bowles affirmatively establish there was "no delay" in the filing of his underlying § 1983 action—is not supported by this Court's stay precedent, and contorts traditional

equitable law regarding dilatoriness. An appellate court's consideration of dilatoriness in bringing an underlying action, for purposes of a stay of execution on appeal, is limited to whether there was an "attempt at manipulation," *Gomez v. United States Dist. Ct. for N. Dist. Of Cal.*, 503 U.S. 653, 654 (1992), or the litigant "delayed unnecessarily," *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). As even the cases Defendants cite hold, this is not an additional "factor" for a stay, but a separate equity consideration to prevent abusive litigation. *See, e.g., Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (discussing dilatoriness in the context of the court's "equitable powers," not as an element of stay analysis).

No matter what legal standard is applied, Mr. Bowles did not delay filing his action. A § 1983 litigant does not have a cause of action until "they have suffered the injury that forms the basis of their complaint and [know] who has inflicted the injury." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003). By arguing that Mr. Bowles should have filed his complaint in July 2018, *see* Response at 20, Defendants misunderstand the "basis of [Mr. Bowles's] complaint." *Id*. The allegations in the complaint concern Defendants' ongoing efforts, from July 2018 until clemency was denied on June 11, 2019, to deny Mr. Bowles his appointed 18 U.S.C. § 3599 counsel's meaningful participation throughout his clemency process. Mr. Bowles could not have filed his action until he was notified, on June 11, 2019, when a

warrant was signed for his execution, that his clemency process had concluded. Only then had Mr. Bowles been injured. He filed his § 1983 action just weeks later.

It also bears emphasis that Mr. Bowles, whose action was filed a full six weeks before his scheduled execution, had no control over filing his complaint under an active death warrant. Defendants decided to inform him of the denial of clemency and schedule his execution at the same time. Mr. Bowles has not exhibited "unjustified delay," *Bucklew*, 139 S. Ct. at 1134, at any point in this litigation.

II. Defendants Misapply the Four Correct Stay Factors

A. In Assessing Mr. Bowles's Likelihood of Success on the Merits, Defendants Fail to Engage With Any of His Substantive Arguments

Defendants generally argue that Mr. Bowles does not have a substantial likelihood of success on the merits of this appeal because, as the district court ruled, § 3599 does not create an enforceable right under § 1983. *See* Response at 8-15.[1]

[1] Defendants also make brief reference to qualified immunity, but the response contains no substantive discussion regarding that issue, and this Court should therefore disregard it. *See Four Seasons Hotel and Resorts, B.V. v. Consorcio Barr, S.A.*, 377 F. 3d 1164, 1167 n. 4 (11th Cir. 2004) ("We now take the opportunity to join the many other Circuits that have rejected the practice of incorporating by reference arguments made to district courts, and we hold that [Defendant-Appellee] has waived the arguments it has not properly presented for review."). Even if this Court were to reach the issue, there is no qualified immunity for § 1983 defendants in an action like Mr. Bowles's, which seeks only declaratory and injunctive relief. *Ratliff v. DeKalb County, Ga.*, 62 F.3d 338, 340 n.4 (11th Cir. 1995) ("[Q]ualified immunity is only a defense to personal liability for monetary awards resulting from government officials performing discretionary functions, qualified immunity may not be effectively asserted as a defense to a claim for declaratory or injunctive relief.").

But while Defendants point approvingly to the district court's ruling, they fail to engage with Mr. Bowles's substantive arguments challenging that reasoning on appeal, which were detailed in his stay motion in this Court. *See* Emergency Motion for Stay of Execution Pending Appeal at 10-15. And Defendants' likelihood-of-success arguments reflect only loose ties to the actual issues before this Court on appeal. Defendants do not specify which, if any, of the three *Blessing v. Freestone*, 520 U.S. 329 (1997), factors they believe § 3599 fails to meet. Given that the district court found that § 3599 meets the first two *Blessing* factors, *see* District Court (D.Ct.) ECF No. 25 at 6, and Defendants do not argue otherwise, *see, e.g.*, *Thomas v. Buckner*, 697 F. App'x 682, 682 n.1 (11th Cir. 2017) (addressing waiver of arguments), this Court should consider only the applicability of the third *Blessing* factor to § 3599 for purposes of this appeal and stay motion. Defendants' response fails to address why Mr. Bowles's arguments challenging the district court's conclusion on the third *Blessing* factor cannot succeed on appeal.

Defendants tellingly fail to respond substantively to Mr. Bowles's primary argument that the district court's reading of § 3599—as non-binding on the states as to who clemency counsel is—would lead to absurd results. Defendants do not address Mr. Bowles's argument that, if the provision in § 3599(e) that counsel *shall* represent their clients in clemency is mandatory, this binds states to recognize counsel, otherwise that portion of the statute would be meaningless. *See United*

States v. Forey-Quintero, 626 F.3d 1323, 1327 (11th Cir. 2010) ("A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless . . .") (internal citation omitted). The distinction Mr. Bowles has argued—that by telling one actor, § 3599 counsel, what they *must* do within state clemency proceedings, the statute is necessarily telling other actors where they *may not* interfere, and thus imposing an obligation not to do so—demonstrates why Mr. Bowles meets the third *Blessing* factor.

In analyzing whether a statute is enforceable in § 1983, other courts have reasoned similarly on this very question. *See, e.g., Coastal Counties Workforce, Inc. v. LePage*, 284 F. Supp.3d 32, 51 (D. Maine 2018) (although language in a statute provided for what local areas "may" do, it "still imposes a mandatory obligation," because that necessarily means it "places that mandatory obligation *on other actors not to interfere* with the local areas' ability.") (emphasis added). Defendants do not attempt to refute Mr. Bowles's argument that the statute's mandatory language creates an obligation on the states to recognize, or at least not preclude, federal appointed counsel's representation in such proceedings.

Instead, Defendants advance a series of irrelevant arguments that do not bear on whether Mr. Bowles's appeal is substantial enough to justify delaying his execution. Defendants make two cursory points with reference to § 3599: (1) § 3599 should not be enforceable through § 1983 because it is a "funding statute," Response

at 10, and (2) "even if § 3599 created an enforceable federal right," it could not do so in Florida because Florida provides clemency counsel, *id*. at 10-15.

On the first point, Defendants admit that funding statutes have been previously held enforceable in § 1983 actions, Response at 10, and provide no support for why § 3599 should be distinguished from other enforceable funding statutes. On the second point, Defendants go far beyond the district court's holding, which did not consider or make factual findings regarding whether Mr. Bowles's state-retained clemency counsel was "adequate" to replace § 3599 counsel. *See* D.Ct. ECF No. 25 at 7 n. 5. This Court should not deny a stay on the basis of facts the district court did not develop or consider. *Cf. Arthur v. Thomas*, 674 F.3d 1257, 1260-61 (11th Cir. 2012) (noting that denials of stays of execution were affirmed on factual grounds only "with the benefit of extensive fact-finding made by the district court at evidentiary hearings conducted in both cases.").[2]

Defendants own arguments, including that the district court "improperly discounted" the circuit split in this case, Response at 4 n. 1, actually highlight the

[2] Defendants also seem to argue, in passing and in an initial footnote, that Mr. Bowles was not denied § 3599 counsel as a factual matter because said counsel were able to make a "written presentation" to clemency officials. Response at 4-5 n. 1. Again, this argument is beyond the scope of the district court's order, which made no factual findings as to whether the restrictions of Mr. Bowles's counsel constituted a denial of his § 3599 rights. This Court should not rule on facts pleaded by Mr. Bowles in his complaint, which have not been developed in the district court.

important questions presented in action, and provide additional justification for a stay so this appeal can proceed in the ordinary course.

B. Defendants' Continued Insistence that Mr. Bowles's Execution Is Not Irreparable Harm is Wrong Under This Court's Precedent

Defendants continue to insist in this litigation that there is "some controversy" regarding whether an execution constitutes an irreparable injury. Response at 15. However, this Court's binding precedent routinely presumes such injury when faced with an imminent execution. *See In re Holladay*, 331 F.3d at 1177 ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident."). The Court should explicitly reject the Florida Attorney General's notion that an inmate's execution is not an irreparable injury for stay purposes.

C. Defendants Misapply the Remaining Factors

The remaining two stay factors—that a stay would not "substantially harm" Defendants, and would not be "adverse" to the public interest, *see Mann*, 713 F.3d at 1310—weigh in favor of Mr. Bowles. Defendants' arguments to the contrary—that a stay would substantially harm the defendants because Mr. Bowles's crimes occurred in 1994, Response at 17, and a stay is adverse to the public's interest "in the finality of criminal judgments," *id*. at 18—ring hollow.

With regard to harm to Defendants, it is wrong to promote timely enforcement of death sentences using the date of the underlying crime. The intervening time between the date of a crime and the signing of a death warrant, in general and

certainly in this case, is primarily spent in litigation that is a matter of right designed to protect our justice system from unconstitutional executions. The timing of this litigation is not up to the litigant, it is up to the courts, and is frequently affected by things having nothing to do with the litigant.

To measure whether Defendants would suffer "substantial harm" from a stay using the date of Mr. Bowles's 1994 crime makes little sense, given that misconduct by the State resulted in Mr. Bowles's original death sentence being vacated and a new penalty phase ordered by the Florida Supreme Court, *Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998), and that his appeals and initial postconviction review did not conclude until 2010, *see Bowles v. Sec'y, Fla. Dep't of Corrs.*, 608 F.3d 1313 (11th Cir. 2010), *cert denied*, 562 U.S. 1068 (2010). In fact, Florida's legislature required that these matters be resolved, in exactly the manner in which Mr. Bowles went about them, prior to the signing of a warrant for his execution. *See* Fla. Stat. § 922.052(2)(a)(1).

While the State and victims' families have an interest in the conclusion of capital litigation, their interest does not outweigh the proper resolution of appropriate legal challenges. The appropriate question is not whether the State or victim's family would be harmed, but whether a short stay would "substantially harm" the specific defendants in this case. *See Mann*, 713 F.3d at 1310. As Mr. Bowles has explained, it would not cause a substantial harm to Governor DeSantis and the other defendants

for this Court to issue a brief stay in order to properly resolve the questions of first impression in this appeal.

Although the public has a general interest in the finality of judgments, Defendants fall short of showing how a brief stay would be "adverse" to the public interest, especially where, as here, it could mean an individual is spared execution. Defendants have given this Court no reason to depart from the district court's finding that "it is clearly in the public interest that the Clemency Board obtain as complete a picture as possible when considering whether to grant clemency," D.Ct. ECF No. 25 at 8. *See also Ray*, 915 F. 3d at 701-02 ("Of course, neither Alabama nor the public has any interest in carrying out an execution in a manner that violates the command of the Establishment Clause or the laws of the United States.").

In balancing the potential harm to the defendants in this case, and the public's interest in claims like Mr. Bowles's being litigated without the exigencies of an active death warrant, this Court should come down on the side of granting a brief stay of execution. Defendants will not suffer substantial harm from a brief stay pending appeal, and the Court's consideration of the issues Mr. Bowles has raised without a looming execution date would advance, not impede, the public interest.

III. Conclusion

For the reasons above and in his stay motion, Mr. Bowles respectfully requests that a stay of his scheduled August 22, 2019, execution be granted.

Respectfully submitted,

Gary Ray Bowles
By Counsel

/s/ Terri Backhus
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Counsel for Mr. Bowles

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted under Rule 32(f) and Rule 27(a)(2)(B), this document contains 2,430 words.

This document complies with the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5), and the type-style requirements of Rules 27(d)(1)(E) and 32(a)(6), because this document has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Terri Backhus
Terri Backhus

CERTIFICATE OF SERVICE

This document was served through the CM/ECF system on Assistant Attorney General Charmaine Millsaps, at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com, on August 13, 2019.

/s/ Terri Backhus
Terri Backhus

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA McCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD,
Chairman, Commissioner, Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
a/k/a S. Michelle Whitworth a/k/a Michelle Whitworth,
Commission Investigator Supervisor, Florida Commission on Offender Review, in her official capacity.

CIVIL ACTION NO._____

EMERGENCY
INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

42 U.S.C. § 1983 COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

I. NATURE OF ACTION

1. This is a civil action brought under 42 U.S.C. § 1983 for violations of Plaintiff Gary Ray Bowles's federal statutory rights under 18 U.S.C. § 3599.

2. Mr. Bowles seeks injunctive relief in the form of a stay of his August 22, 2019, scheduled execution pending the completion of an executive clemency process that comports with federal law, and declaratory relief that Defendants violated his federal rights.

II. PARTIES TO THE COMPLAINT

PLAINTIFF

3. Gary Ray Bowles is a prisoner on Florida's death row, pursuant to his 1999 death sentence originating from Duval County, Florida. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), *cert denied*, *Bowles v. Florida*, 536 U.S. 930 (2002). He is a citizen of the United States and a resident of the State of Florida. On June 11, 2019, Governor Ron DeSantis informed Mr. Bowles that his clemency was denied and signed a warrant for Mr. Bowles's execution, setting it for August 22, 2019, at 6:00 p.m. at Florida State Prison, in Raiford, Florida.

DEFENDANTS

4. Defendant Ron DeSantis is the Governor of Florida and the head of the Clemency Board. He is sued in his official capacity.

5. Defendant Jimmy Patronis is the Chief Financial Officer of Florida and thus by statute a member of the Clemency Board. He is sued in his official capacity.

6. Defendant Ashley Moody is the Attorney General of Florida and thus a member of the Clemency Board. She is sued in her official capacity.

7. Defendant Nikki Fried is the Commissioner of Agriculture of Florida and thus a member of the Clemency Board. She is sued in her official capacity.

8. Defendant Julia McCall is the Coordinator of the Office of Executive Clemency. She is responsible, in part, for contracting with state clemency counsel. She is sued in her official capacity.

9. Defendant Melinda Coonrod is the Chairman of the Florida Commission on Offender Review, the agency that facilitates the clemency process on behalf of the Clemency Board, including the private contracting of clemency counsel. She is sued in her official capacity.

10. Defendant Susan Michelle Whitworth (also known as S. Michelle Whitworth and Michelle Whitworth) is the Commission Investigator Supervisor of the Florida Commission on Offender Review. Ms. Whitworth is the primary source of communication, and seemingly, decision-making for capital clemency purposes, acting on behalf of the Florida Commission on Offender Review and the Clemency Board. She is sued in her official capacity.

II. JURISDICTION AND VENUE

JURISDICTION

11. This action arises under federal statute and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and § 1343(a)(3). This action is brought pursuant to 42 U.S.C. § 1983. This Court has the authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. § 2201(a), § 2202, and Federal Rule of Civil Procedure 65.

VENUE

12. Pursuant to 28 U.S.C. § 1391(b), venue is appropriate in the Northern District of Florida because the majority of Defendants live and work in this District, and the actions and decisions giving rise to this suit occurred in this District.

III. STATEMENT OF FACTS[1]

13. This complaint concerns the clemency proceedings of Gary Ray Bowles, a death-sentenced individual in the State of Florida with a scheduled execution date of August 22, 2019. Clemency has long been regarded as the ultimate act of grace or mercy, and in the capital context, it is the difference between life and death. Given the gravity of the clemency process for Mr. Bowles and the tremendous deficiencies in his clemency presentation—including the absence

[1] In addition to providing this statement of facts, Mr. Bowles submits simultaneously with this complaint an appendix of relevant documents. Materials in this appendix will be cited to as "App. at [page]."

of many of the basic facts about his life and exclusion of expert or lay witness testimony regarding Mr. Bowles's life-long intellectual disability—a brief recitation of his life history is warranted prior to the specific facts giving rise to the violations of his rights this action concerns.

A. Gary Ray Bowles's Life

14. Gary Ray Bowles was born on January 25, 1962, in Virginia, as the second child of Frances Carol Bowles and Franklin William Bowles. Franklin, like most of his family, abused alcohol. Franklin died unexpectedly while seventeen year-old Frances was pregnant with Mr. Bowles. Frances was emotionally unstable prior to Franklin's death, and devastated afterward.

15. Following Mr. Bowles's birth, Frances moved herself, Mr. Bowles, and Mr. Bowles's older brother Frank (now deceased), to Illinois to live with her sister. Less than ten months later, she remarried Bill Fields, with whom she had two additional children, Pamela (born in 1963) and David (born in 1968).

16. In approximately 1965, when Mr. Bowles was three years old, Frances abandoned Frank and Mr. Bowles at their paternal grandmother's home in West Virginia. When Mr. Bowles was approximately six years old, his grandmother's health declined, and two of his paternal aunts put Mr. Bowles and Frank onto a bus and sent them, alone, from West Virginia to Illinois where Frances and Bill were living.

17. From the age of six onward, Mr. Bowles was neglected by Frances and abused by Bill. Frances had succumbed to alcoholism and disappeared in the evenings with a variety of men—often for days at a time. She left Mr. Bowles to run around in the streets without supervision. Bill, who resented his non-biological children, beat Mr. Bowles daily, at length, with any objects he could find. As a result of the abuse, Mr. Bowles was briefly removed from the home and lived with a police officer, but he was soon returned home.

18. When Mr. Bowles was approximately eight years old, he was sexually abused for the first time by an older male. Two years later, Frances and Bill separated, and Frances remarried an even more abusive man named Chet Hodges, who was also an alcoholic. He beat Mr. Bowles with a hammer and rock, until Mr. Bowles's eyes were swollen shut and his neck was lacerated.

19. Frances struggled with mental health issues and her own victimization at Chet's hands. She attempted suicide. Throughout this time, she continued to neglect Mr. Bowles, who often stayed outside the home, in a nearby abandoned house, the detached garage, or with others. Mr. Bowles frequently lacked access to heat in the winter in Illinois, running water, and was forced to find his own food.

20. During this time, Mr. Bowles's intellectual deficits became obvious. While his peers began to develop the capacity for abstract thought, Mr. Bowles's

thought process remained concrete. He failed grades. He was placed into special education.

21. Between the ages of eight and ten, Mr. Bowles was introduced to substance abuse through his brother, Frank. Mr. Bowles drank alcohol and smoked marijuana, and used inhalants like glue, paint, and gasoline to the point of hospitalization at twelve years old.

22. When Mr. Bowles was thirteen years old, Chet beat him particularly severely, until Mr. Bowles's brother and brother-in-law fought him off. Mr. Bowles told his mother Frances she needed to choose between Chet and Mr. Bowles. Frances chose Chet, and Mr. Bowles left home for good.

23. After Mr. Bowles left home, he was repeatedly sexually victimized by older men. The first time he was sexually assaulted after leaving home was by a middle-aged male stranger he encountered while hitchhiking. Mr. Bowles, with no money and no ability to get a job due to his young age and impaired intellectual functioning, was forced to prostitute himself in order to obtain food and shelter.

24. To cope with his ongoing sexual trauma, Mr. Bowles continued to abuse drugs and alcohol. His impairments permeated even the darkest aspects of his life—others would have to purchase his drugs for him, because he was unable to properly count money. Mr. Bowles remained homeless, largely unemployed

aside from prostitution and occasional temporary labor positions, and was transient. He never returned to school after leaving home at thirteen years old.

25. Mr. Bowles's deficits were obvious to those around him. He was impulsive, but lacked malice; he had no concept that his actions could negatively impact others. He did not plan for the future, only his present needs. He was forgetful, gullible, naïve, and prone to victimization because he was easily taken advantage of. He was immature and did not understand social nuances. He had deficits in his language skills, could not keep up in conversations, and would stare blankly as though he couldn't understand what was happening around him. His memory was poor. These impairments were more pronounced in novel or stressful situations.

26. Even as an adult, Mr. Bowles relied on others to take care of him. He was unable to independently perform tasks necessary for daily living, such as effectively utilizing public transportation, counting and using money, or seeking employment. His inability to support himself perpetuated the vicious cycle of his prostitution and dependence on older men to care for him.

27. Mr. Bowles was unable to navigate the world, and relied upon others to take care of him in exchange for their sexual exploitation of his body. This came at a high emotional cost to Mr. Bowles, contributed to his eventual diagnosis

of Posttraumatic Stress Disorder (PTSD), and contributed to the events for which he is incarcerated today.

28. Although Mr. Bowles's intellectual deficiencies are not new, as prior psychological testing in his criminal case revealed, he was never assessed for intellectual disability until 2017. Specifically, in 2017, Mr. Bowles was administered the Wechsler Adult Intelligence Scale (4th ed.) (WAIS-IV) and received a full-scale IQ score of 74. With the standard error of measurement applied, his actual IQ score may be as low as 69—over two deviations below the mean. In combination with his history of lifelong adaptive deficits, which were largely uninvestigated until 2017 and 2018, he was recently diagnosed by two separate medical professionals with intellectual disability.

B. Relevant Procedural History of Mr. Bowles's Death Sentence

29. Mr. Bowles pleaded guilty to first-degree murder in Duval County, Florida in 1996. The state court imposed the death sentence, which was affirmed by the Florida Supreme Court on direct appeal. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), *cert denied*, *Bowles v. Florida*, 536 U.S. 930 (2002).[2]

[2] Mr. Bowles's current death sentence is the result of a resentencing proceeding. After his initial penalty phase in 1996, 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 v. Florida*, 136 S.Ct. 616 (2016), 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

30. Mr. Bowles was denied state postconviction relief. *Bowles v. State*, 979 So. 2d 182 (Fla. 2008). In 2008, Mr. Bowles, filed a petition for federal habeas corpus relief under 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 Corr.*, No. 3:08-cv-791, ECF No. 1 (M.D. Fla.). The District Court denied the petition, *id*. at ECF No. 18, and the Eleventh Circuit affirmed. *Bowles v. Sec'y, Fla. Dep't of Corr.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert denied* 562 U.S. 1068 (2010).

31. On September 26, 2017, the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida (CHU), filed an unopposed motion for appointment pursuant to 18 U.S.C. § 3599. *Bowles v. Sec'y, Fla. Dep't of Corr.*, No. 3:08-cv-791, ECF No. 32 (M.D. Fla.). On September 27, 2017, Judge Henry Lee Adams, Jr. of the United States District Court for the Middle District of Florida entered an order granting the CHU's motion. *Id*., ECF No. 33. On December 5, 2017, the CHU then filed an unopposed motion to appear in Mr. Bowles's state court proceedings to litigate his intellectual disability for the first time. *Id*., ECF No. 34. On December 6, 2017, the district court granted his request. *Id*., ECF No. 35.

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in allowing the State to introduce prejudicial evidence, and thus vacated Mr. Bowles's death sentence and remanded for a new sentencing hearing. *Id.* at 773. Mr. Bowles's current sentence resulted.

32. At the time of Mr. Bowles's death sentence, *Atkins v. Virginia*, 536 U.S. 304 (2002), had not yet recognized the Eighth Amendment's prohibition of executing individuals with intellectual disabilities. At the time of Mr. Bowles's initial postconviction litigation, Florida courts only allowed intellectual disability claims for individuals with IQ scores of 70 and below. This bright-line IQ score cutoff was recognized as unconstitutional in *Hall v. Florida*, 134 S. Ct. 1986 (2014). On October 19, 2017, less than one year after *Walls v. State*, 213 So. 3d 340 (Fla. 2016), made *Hall* retroactive in Florida, Mr. Bowles filed a successive motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, arguing that his execution would violate the Eighth Amendment because he is intellectually disabled.

33. The Governor of Florida—through Florida Commission on Offender Review and pursuant to Florida's executive clemency scheme—initiated clemency proceedings for Mr. Bowles in March 2018, while his intellectual disability litigation was still pending. Again, while this litigation was still pending, Mr. Bowles was notified that clemency was denied at the same time he was notified of the signing of his death warrant, on June 11, 2019.

C. Professional Guidelines and Standards For Capital Clemency Counsel

34. In 2003, the American Bar Association (ABA) promulgated the Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty

Cases,[3] which have since been recognized as a guide on reasonable representation for death-sentenced individuals. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) ("[W]e have long referred [to the ABA standards] as guides to determining what is reasonable."). Guideline 10.15.2 specifically notes that attorneys representing individuals in capital clemency proceedings should undertake, minimally, the following duties:

> A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.
> B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.
> C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.
> D. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

See Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.2 (Duties of Clemency Counsel), p. 176 (2003).

35. Under the ABA's clemency counsel guideline, 10.15.2(B), clemency counsel is directed to conduct an investigation pursuant to Guideline 10.7. Guideline 10.7 states:

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[3] Available at: https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/ (last visited June 23, 2019).

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
   1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
   2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B.
   1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
   2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 (Investigation), p. 103 (2003).

36. Additionally, in the commentary to the guideline on the Duties of Clemency Counsel, the ABA specifically notes, "[a]s Subsection B emphasizes, further investigation is critical at this phase." Commentary, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.2, p. 177 (2003). Further, the commentary emphasizes discovering and utilizing "personal characteristics of the condemned, such as youth, mental

illness, spousal abuse, or cultural barriers" to convince clemency decision-makers that clemency is appropriate in a particular case. *Id*.

37. Apart from the ABA Guidelines, other professional guidance exists for the representation of capital clients in the clemency process. In 2018, the ABA's Capital Clemency Resource Initiative (CCRI) released a guide entitled *Representing Death-Sentenced Prisoners in Clemency*, in which there is specific guidance for clemency attorneys who did not serve as prior counsel, which states,

> As a newly appointed attorney in a capital clemency case, you will need to do considerable catching up on your client's life history, details of the crime, and the procedural history of the case before you will feel comfortable deciding which aspects are most important to present in clemency . . . it is vital to familiarize yourself with your client's case record and the unique traits of the jurisdiction in which you are operating as soon as possible[.]

Representing Death-Sentenced Prisoners in Clemency, p. 32 (2018). This guide also directs clemency attorneys to the importance of investigation pursuant to Guideline 10.7, *see* p. 35, and for clemency attorneys to carefully consider such investigative steps like Defense-Initiated Victim Outreach (DIVO), *see* p. 69, speaking with jurors where applicable, *see* p. 78, interviewing a client's family, friends, teachers or former classmates, religious leaders or other prisoners they have been incarcerated with, *see* 93-94. It also provides specific guidance on clemency presentations and petitions

involving specific legal or forensic issues in a client's case, and for client-specific characteristics like mental illness or intellectual disability, *see* p. 125-130.

38. With respect to developing clemency presentations for clients with mental illness, this guide says specifically: "Because the scientific, medical understanding of many mental illnesses and disabilities is changing rapidly—and because many clients arrive at clemency with less-than-perfect prior representation—*you also should not assume that the relationship between your client's mental illness or disability and the crime has been effectively explored*. . . . . In representing a client with mental illness or disability at clemency, remember that this phase of the case is your last opportunity to present the most comprehensive, up-to-date, and holistic picture of your client and to explore the impact that mental illness or other disability has had on his life." *See id*. at p. 127 (emphasis added).

39. The CCRI specifically advises Florida clemency counsel to consider whether their client was sentenced under a jury-recommendation and judge-sentencing scheme. "An argument during clemency that your client was sentenced under a statute that has since been found unconstitutional, or under circumstances that would not have resulted in a death sentence today, may be extremely compelling and may . . . go directly to questions of fairness, arbitrariness, and

proportionality in the imposition of a death sentence have often resonated with decision makers in considering clemency." *See id*. at p. 86.

40. In addition, CCRI also provides on its website a wealth of information and professional guidance for attorneys on meaningfully representing death-sentenced individuals in clemency proceedings.[4]

D. Rules and Statutes Governing Clemency Proceedings For Death-Sentenced Individuals in Florida

41. Clemency in Florida is derived both from the Florida Constitution and state statute. *See* Fla. Const. Art. IV, sec. 8(a) ("Except in cases of treason and in cases where impeachment results in conviction, the governor may . . . with the approval of two members of the cabinet . . . commute punishment . . . ."); Fla. Stat. 940.01 (same). All clemency is governed by the Rules of Executive Clemency,[5] which was created by the Clemency Board, and was last amended in 2011. The Clemency Board is comprised of the Florida Governor and members of the Governor's Cabinet. Presently, the Clemency Board is comprised of Florida Governor Ron DeSantis, Chief Financial Officer Jimmy Patronis, Attorney General Ashley Moody, and Commissioner of Agriculture Nikki Fried.

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[4] *See* https://www.capitalclemency.org/ (last visited June 23, 2019).

[5] Available at: https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf (last visited on June 27, 2019).

42. Within the Rules of Executive Clemency, there are 19 rules. However, only a select few apply to clemency for capital inmates. *See* Rule 15, Rules of Executive Clemency (2011) ("This Rule applies to all cases where the sentence of death has been imposed. The Rules of Executive Clemency, except Rules 1, 2, 3, 4, 15 and 16 are inapplicable to cases where inmates are sentenced to death."). The rules that apply to capital clemency include Rule 1 ("Statement of Policy"), Rule 2 ("Administration"), Rule 3 ("Parole and Probation"), Rule 4 ("Clemency"), Rule 15 ("Commutation of Death Sentences") and Rule 16 ("Confidentiality of Records and Documents").

43. Rule 15 is the operative rule for the mechanics of clemency for capital inmates in Florida. Rule 15 provides that in all cases in which death has been imposed, the Florida Parole Commission (now known as the Florida Commission on Offender Review (FCOR)), conducts an "investigation into all factors relevant to the issue of clemency and provide[s] a final report to the Clemency Board." *See* Rule 15(B). This investigation begins "at such time as designated by the Governor" or if there has been "no such designation . . . immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals . . . ." Rule 15(C).

44. The rules provide for FCOR's investigation:

> The investigation shall include, but not be limited to, (1) an interview with the inmate, who may have clemency counsel present, by the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; (3) an interview, if possible, with the presiding judge and; (4) an interview, if possible, with the defendant's family.

Rule 15(B). When a clemency investigation is initiated, FCOR also provides notice to the Office of the Attorney General's Bureau of Advocacy and Grants, which in turn solicits "written comments from the victims of record." Rule 15(B).

45. Rule 15 additionally provides that "[c]ases investigated under previous administrations may be reinvestigated at the Governor's discretion." Rule 15(C).

46. Under Rule 15, after an investigation is "concluded," FCOR prepares a "final report on their findings and conclusions," which must include: "(1) any statements made by the defendant, and defendant's counsel, during the course of the investigation; (2) a detailed summary from each Commissioner who interviewed the inmate; and (3) information gathered during the course of the investigation." Rule 15(D). This report is then sent to "all members of the Clemency Board within 120 days of the commencement of the investigation, unless the time period is extended by the Governor." Rule 15(D).

47. While a capital inmate is given the opportunity for a clemency "interview" before FCOR, *see* Rule 15(B), the inmate is not entitled to a clemency

"hearing" before the Clemency Board. Rule 15(E). A clemency hearing is only set if "any member of the Clemency Board requests a hearing within 20 days of the transmittal of the final report to the Clemency Board," Rule 15(E), or if the Governor sets such a hearing, Rule 15(F). A capital clemency inmate, upon request, is entitled to a copy of the transcript of the clemency interview. Rule 15(G). Likewise, a transcript of the clemency interview is available upon request to the state attorney or the victim's family. Rule 15(G).

48. Apart from the transcript of the clemency interview, a capital inmate is not entitled to see any other materials generated in the clemency process, including statements given by their former attorney at trial, their trial prosecutor, their trial judge, their own family members, or the victim's family members, which are gathered as part of the clemency investigation conducted by FCOR (*see* Rule 15(B)). Likewise, capital inmates are not entitled to see the final report generated by FCOR and presented to the Clemency Board, nor are they notified when such report has been transmitted.

49. By statute, the Clemency Board "may appoint private counsel to represent a person sentenced to death for relief by executive clemency . . . ." Fla. Stat. § 940.031(1). This statute went into effect on July 1, 2014. The statute provides that private counsel retained by the Clemency Board can be compensated at an amount "not to exceed $10,000, for attorney fees and costs incurred in

representing the person for relief by executive clemency . . . .” Fla. Stat. § 940.031(2). This compensation is “paid out of the General Revenue Fund from funds budgeted to [FCOR].” Fla. Stat. § 940.031(2). The statute states it “does not create a statutory right to counsel” in clemency proceedings. Fla. Stat. § 940.031(3).

50. While § 940.031 provides for a method of retaining and compensating attorneys who represent individuals in capital clemency proceedings, it does not prescribe any qualifications for such attorneys. Pursuant to a public records request under Florida law, on April 25, 2018, an official solicitation for capital clemency counsel was obtained from FCOR, in addition to a “Clemency Counsel Appointment” application for capital clemency. *See* App. at 1-6. The application, which is less than two pages in length, asks only for biographical information and for the applicant to check all that apply from the following list:

- ☐ I am a member in good standing with the Florida Bar.
- ☐ I have read the qualifications herein and agree to these qualifications.
- ☐ I am familiar with the fees, costs and expense provisions set by law, including the fee limitations prescribed in § 940.031, Fla. Stat.
- ☐ I will not solicit compensation from the inmate I am appointed to represent.
- ☐ I will notify the Clemency Coordinator of any formal complaint filed by the Florida Bar against me, any non-confidential agreements entered into between myself and the Florida Bar, and any claim of ineffective assistance of

counsel that has been set for a hearing before a judge or magistrate.

- ☐ I agree to be readily accessible to the inmate and to meet the inmate in person, prepare for and attend the Clemency interview before the Parole Commission at death row, file a clemency petition on behalf of the inmate, and attend a clemency hearing before the Governor and Cabinet, if scheduled.
- ☐ I am familiar with the Rules of Executive Clemency, including Rule 15 as it related to Commutation of Death Sentences, and I will adhere to the Rules.
- ☐ I will cooperate and abide by the contract entered into between the Florida Parole Commission and me for performance of services under this agreement.
- ☐ I agree to continue representing the inmate until my services are no longer required by the Board of Executive Clemency.

App. at 5. No other qualifications exist for capital clemency representation, either by statute in Florida or by practice in the contracting conducted by the Office of Executive Clemency or FCOR.

51. To qualify as capital clemency counsel in Florida, attorneys are neither required to be qualified under Fla. Stat. § 27.710, which provides for the "certification of minimum requirements" of attorneys permitted to represent death-sentenced individuals in postconviction and collateral proceedings (along with Fla. Stat. § 27.704(2)), nor are they required to be qualified under the Florida Rules of Criminal Procedure, Rule 3.112(k), which describes the qualifications for lead counsel in postconviction proceedings for individuals facing the death penalty. In fact, Florida law actually *prohibits* such qualified

counsel who are actively representing a death-sentenced client in postconviction to participate in capital clemency. *See* Fla. Stat. § 27.711(11) ("An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing proceeding, a proceeding commenced under chapter 940 [Executive Clemency], a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings."). Indeed, no qualifications exist for attorneys permitted to represent individuals in capital clemency that require them to have any knowledge of criminal law or the law surrounding the death penalty. Further, they are not required to complete any training or continuing legal education, and they need not have ever represented any client in a civil or criminal matter before undertaking the representation of a death-sentenced individual.

52. While clemency is an executive function in Florida, the Florida Legislature has statutorily prescribed that an individual's death sentence cannot be carried out without the undertaking of the "clemency process." Specifically, although the legislature has empowered the Governor to initiate, with the signing of a warrant, the execution of a death-sentenced individual, the Governor is only

permitted to issue such a warrant if "the executive clemency process has concluded . . . ." *See* Fla. Stat. § 922.052(b), (c).

E. Mr. Bowles's Clemency Proceeding

53. In March of 2018, S. Michelle Whitworth, on behalf of FCOR, contacted attorney Nah-Deh Simmons, and inquired whether he would be willing to be retained by FCOR to represent Gary Ray Bowles in clemency proceedings. Mr. Simmons is a private practitioner. He is not qualified to represent death-sentenced individuals in postconviction proceedings (or at any other stage) pursuant to the criteria prescribed by Florida law. App. at 18-19.

54. In March of 2018, using an official email address, either Ms. Whitworth or Julia McCall sent Mr. Simmons a contract to be retained to represent Mr. Bowles's in clemency proceedings. Mr. Simmons was contacted by both Ms. McCall and Ms. Whitworth during the process of contracting with FCOR. Mr. Simmons signed this contract for Mr. Bowles's clemency representation before he met with Mr. Bowles and before he was given any materials on Mr. Bowles's case or his related medical and mental health issues. App. at 7-17. Prior to signing the contract, Mr. Simmons knew nothing about Mr. Bowles, his case, his legal representation, or that he had pending litigation in state court regarding intellectual disability.

55. This contract required that Mr. Simmons agree to waive any compensation in excess of the $10,000 provided by Fla. Stat. § 940.031. *See* App. at 11-13. Payment of the $10,000, under the terms of the contract, would be entitled to Mr. Simmons upon his performance of the only three requirements of clemency representation in Florida: "A statement advising of the date and location of the in-person meeting with the client . . . $2,000; A statement advising that Attorney/Legal Entity personally attended the clemency interview and provided legal representation to the Client . . . $5,000; [and] A written statement, brief or memorandum . . . $3,000." App. at 10. Nothing in the contract required or directed Mr. Simmons to know, comply, or be bound by professional standards in clemency representation, such as those promulgated by the ABA.

56. On March 19, 2018, Mr. Simmons signed the contract. App. at 17. On March 22, 2018, Mr. Simmons was sent a copy of the fully executed contract for Mr. Bowles's clemency representation via email. App. at 7-17.

57. On March 26, 2018, Mr. Bowles was notified by letter from FCOR that clemency proceedings had been initiated against him. In that same letter, he was informed that his clemency counsel would be Mr. Simmons, and that his clemency interview had been set for August 2, 2018. App. at 20. Mr. Bowles

was never informed prior to this letter that clemency counsel was being "appointed" or privately retained on his behalf.

58. On March 26, 2018, the same day Mr. Bowles was notified of the clemency proceedings initiated upon him, and that clemency counsel was retained by FCOR to represent him, his 18 U.S.C. § 3599 counsel, the CHU, also learned of the initiation of clemency proceedings regarding Mr. Bowles. Like Mr. Bowles, the CHU had not been informed of the initiation of clemency proceedings prior to the private retention of attorney Nah-Deh Simmons. Further, the CHU only learned of Mr. Simmons by name when they obtained a copy of the letter sent to Mr. Bowles, not from FCOR.

59. Months prior to initiation of Mr. Bowles's clemency proceedings, the CHU had been appointed as federal counsel for Mr. Bowles under § 3599. *Bowles v. Sec'y, Fla. Dept. of Corr*., No. 3:08-cv-791, ECF No. 33 (M.D. Fla. Sep. 27, 2017). Subsequent to the CHU's federal appointment, the federal district judge assigned to Mr. Bowles's 28 U.S.C. § 2254 litigation authorized the scope of the CHU's § 3599 representation to extend to formal involvement as co-counsel in Mr. Bowles's state intellectual disability litigation. *Id.*, ECF No. 36 (M.D. Fla. Dec. 6, 2017). When the CHU learned of the initiation of Mr. Bowles's clemency proceedings, the CHU quickly attempted to intervene in the clemency process as § 3599 counsel in order to protect Mr. Bowles's

federal rights, particularly given Mr. Bowles's vulnerabilities and the pending state court intellectual disability litigation.

60. On March 28, 2018, FCOR Investigator Russell Gallogly contacted § 3599 counsel via email, informed § 3599 counsel of the clemency proceedings for the first time, and requested a response. App. at 21-25. By asking for a response Mr. Gallogly was asking § 3599 counsel to provide information to him about their current client for a proceeding related to his death sentence, not in any capacity as clemency counsel. *Id.* Mr. Gallogly stated that § 3599 counsel had "plenty of time" to respond. App. at 25.

61. On May 1, 2018, § 3599 counsel contacted Mr. Gallogly by phone and informed him that Mr. Bowles had pending state court litigation regarding a claim of intellectual disability. Mr. Bowles's § 3599 counsel inquired about how to obtain a stay of Mr. Bowles's clemency proceedings pending resolution of his intellectual disability litigation in state court. Mr. Gallogly referred § 3599 counsel to Ms. Whitworth. On May 3, 2018, § 3599 counsel spoke to Ms. Whitworth via phone about obtaining a stay of Mr. Bowles's clemency proceedings. Mr. Bowles's § 3599 counsel informed Ms. Whitworth that Mr. Bowles had pending state court litigation regarding a claim of intellectual disability. Ms. Whitworth stated that a request to postpone the clemency proceedings must come in writing to her, and she

would send it to the Governor's Office. Ms. Whitworth instructed § 3599 counsel that the presentation of any information they had gathered as § 3599 counsel would be accepted by FCOR generally, as FCOR claimed it considered anything submitted by anyone, but requests related to postponement or substantive matters regarding Mr. Bowles's clemency proceedings would only be accepted through Mr. Simmons, rather than § 3599 counsel.

62. On June 21, 2018, Mr. Simmons, Mr. Bowles's § 3599 counsel the CHU, and Mr. Bowles's state appointed counsel at that time, attorney Francis Jerome Shea, submitted a letter with abbreviated clemency information to FCOR (and the Governor's Office, care of FCOR) on Mr. Bowles's behalf. App. at 26-32. The information contained therein alerted FCOR to Mr. Bowles's pending state court intellectual disability litigation, and implored FCOR to stay or delay the upcoming clemency proceedings until Mr. Bowles's intellectual disability claim had been resolved. The letter noted that Mr. Bowles's pending intellectual disability litigation in state court would, if successful, exempt him from execution and render clemency proceedings unnecessary. App. at 26. The letter also noted that a more meaningful clemency presentation could be provided after Mr. Bowles's evidence of intellectual disability was developed

and presented in state court proceedings, and that without this information, the clemency proceeding would be incomplete. App. at 26.

63. Simultaneously with the June 21, 2018 letter, § 3599 counsel jointly filed a written request to the Clemency Board requesting that the interview be postponed until the resolution of Mr. Bowles's intellectual disability claim. App. at 33-34. This request highlighted the fact that, due to Mr. Bowles's pending state court litigation, "Mr. Bowles cannot make a full clemency presentation, including the evidence of his intellectual disability. Mr. Bowles's clemency interview and proceedings will be more meaningful after he is able to develop evidence of his disability in the Circuit Court." App. at 33. As the letters to FCOR and the Governor's office noted, intellectual disability is a compelling factor in considering clemency—however, it would be inappropriate to question Mr. Bowles or others about this factor, given that it was the subject of ongoing outside litigation and a transcript of the clemency interview would be available to the State Attorney's Office pursuant to the Rules of Executive Clemency. For instance, it would have been inappropriate for a mental health or other expert to independently evaluate Mr. Bowles in preparation for clemency, due to the possible implications for his ongoing state court litigation. App. at 26.

64. As § 3599 counsel, the CHU recognized that Mr. Bowles would be uniquely vulnerable in the scheduled clemency proceedings due both to the substantive fact of his intellectual disability, *see Atkins*, 536 U.S. at 321 (noting that individuals with intellectual disability "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes"), and the procedural quagmire created by forcing Mr. Bowles to—for the sake of seeking mercy in clemency proceedings—show his hand to opposing counsel in his state court litigation, who would receive a copy of the clemency interview transcript. *See* Rule 15(G), Rules of Executive Clemency.

65. On June 22, 2018, upon instructions from Ms. Whitworth, § 3599 counsel contacted the Governor's Office to request postponement of Mr. Bowles's clemency interview pending resolution of his intellectual disability claim. Mr. Bowles's § 3599 counsel noted that "Mr. Bowles has strong evidence that he is intellectually disabled and ongoing litigation is currently pending on this issue in the circuit court, and proceeding with a clemency interview at this point in time would unnecessarily complicate and interfere with Mr. Bowles's court proceedings." App. at 35. The request was denied less than three hours later in an email from Jack Heekin, which stated as justification for the denial: "The clemency process is wholly separate and distinct from the successive legal challenges to his death sentence(s), and inmate Bowles has been

appointed separate legal counsel to represent him in the clemency proceedings." App. at 35. Attorney Simmons interpreted this to mean that "the Board will only consider communications from [him]." App. at 139-140.

66. Having been denied the opportunity to directly advocate for Mr. Bowles as § 3599 counsel, CHU attempted to protect Mr. Bowles's state and federal rights by assisting Mr. Simmons as best they could. Over the next month, § 3599 counsel remained in contact with Mr. Simmons, and attempted to assist him in preparing for Mr. Bowles's clemency interview. Mr. Simmons did not have funding to retain experts, so § 3599 counsel prepared to assist at the clemency interview and present their own expert to provide FCOR with information regarding Mr. Bowles's intellectual disability. App. at 37-41. § 3599 counsel, aware that the State Attorney's Office would receive a transcript of the clemency interview, prepared to attend the clemency interview to protect Mr. Bowles's rights as they pertained to his ongoing intellectual disability litigation. App. at 41. As Mr. Simmons was unfamiliar with the facts and procedural posture of Mr. Bowles's state court litigation, § 3599 counsel's presence would both help to ensure that the clemency interview would not negatively impact Mr. Bowles's state court intellectual disability claim, and help FCOR to have a full picture of Mr. Bowles's life history and intellectual disability.

67. Information that § 3599 counsel had uncovered but Mr. Simmons was unaware of included that Mr. Bowles's entire lifespan—from the time he was *in utero*—was characterized by risk factors for intellectual disability. His mother's emotional instability while pregnant, lack of prenatal care, and unsteady diet while pregnant predisposed Mr. Bowles for intellectual disability before he even entered the world. App. at 189, 196. This initial vulnerability was compounded by Mr. Bowles's childhood, which was marked by his mother's emotional and physical neglect and abandonment; his stepfathers' severe physical violence toward Mr. Bowles and his mother; and his sexual victimization in the form of anal rape at the age of nine. App. at 189-90, 196. Adding to Mr. Bowles's risk factors was an early introduction to substance abuse: alcohol, marijuana, and so many inhalants that Mr. Bowles had to be hospitalized at the age of twelve. App. at 190, 196.

68. Mr. Simmons also did not know, and thus did not mention in the clemency interview, that Mr. Bowles's academic performance declined once he reached an age where children are expected to transition from concrete to abstract thinking. He was placed in special education, but his performance continued to decline until he eventually left school in the eighth grade. App. at 190-91, 197. He was slow, distracted, needed instructions repeated, and did not know what to do if plans changed or a novel situation was introduced. App. at 191.

69. These impairments were just as pronounced once Mr. Bowles left home at the age of thirteen, to escape increasingly brutal attacks from his stepfather. Mr. Bowles was transient and worked primarily as a prostitute from the age of thirteen, because he could not perform most job tasks and was unable to otherwise meet his basic needs of food and occasional shelter. Even when he received money from selling his body, Mr. Bowles relied upon others to assist him with the logistics of caring for himself, such as using transportation and using his money to obtain food and shelter. App. at 191-93. He did not know how to count change, give the right amount of money, open a bank account, or save money. App. at 192-93. He was described as intellectually slow, easily confused, childlike, spaced out, immature, and directionless. App. at 192. He did not communicate well.

70. On July 23, 2018, Mr. Simmons notified FCOR that § 3599 counsel would be present at the clemency interview, and that Dr. Jethro Toomer, an experienced psychologist and expert on intellectual disability retained by § 3599 counsel, would also appear to offer information to FCOR concerning Mr. Bowles's intellectual disability. The next day, on July 24, 2018, Mr. Simmons received a phone call from Ms. Whitworth informing him that neither § 3599 counsel nor Dr. Toomer would be allowed to attend or

participate in the clemency presentation. Neither Ms. Whitworth nor FCOR ever communicated with § 3599 counsel directly concerning this prohibition.

71. On July 26, 2018, after being instructed by Rana Wallace of FCOR to direct all future communication regarding Mr. Bowles's clemency to Ms. Whitworth, § 3599 counsel submitted a letter joined by Mr. Simmons to Ms. Whitworth via email describing Mr. Bowles's right to representation in clemency by § 3599 counsel, as well as the importance of § 3599 counsel's participation due to Mr. Bowles's unique litigation posture with respect to his claim of intellectual disability. In the email, § 3599 counsel and Mr. Simmons stated "Our client is intellectually disabled, and our assistance is crucial to his ability to communicate effectively to the Commissioners and ultimately the Clemency Board." App. at 37. The joint letter stated:

> FCOR and the Clemency Board would benefit from a joint presentation from Mr. Bowles's retained clemency counsel Mr. Simmons and the CHU. The CHU has had extensive contacts with Mr. Bowles, has developed a productive working relationship with him, and has invested hundreds of hours developing never-before-found evidence of Mr. Bowles's intellectual disability and a fuller narrative of his life history.

App. at 40.

72. On July 30, 2018, Ms. Whitworth emailed Mr. Simmons and § 3599 counsel, stating that the joint request had been denied. App. at 42. Mr. Bowles's § 3599 counsel responded to the email on the same date, asking whether Ms.

Whitworth had made the decision to prohibit § 3599 counsel and Dr. Toomer from participating in the clemency interview, or if there had been additional decision-makers. Mr. Bowles's§ 3599 counsel requested the name of each individuals contributed to the decision to prohibit § 3599 counsel and Dr. Toomer's participation. App. at 44. Ms. Whitworth never responded to § 3599 counsel's written query.

73. On August 2, 2018, FCOR and Mr. Simmons appeared at Union Correctional Institution, where Mr. Bowles was incarcerated, to conduct the clemency interview. Mr. Bowles was also present. In attendance at the clemency interview, apart from Mr. Simmons and Mr. Bowles, were several representatives of the State: Richard Davison, Vice-Chair, Commissioner, FCOR; David Wyant, Commissioner, FCOR; S. Michelle Whitworth, Commission Investigator Supervisor, FCOR; J. Steven Dawson, Capital Punishment Research Specialist, FCOR; and Alec Yarger, Director, Legislative Affairs, FCOR. App. at 47-48.

74. Mr. Simmons began his presentation by stating:

> Mr. Bowles currently still has pending litigation in Duval County on his intellectual disability…[CHU], I've had the opportunity to speak with him regarding the pending litigation, and we have submitted some information regarding that pending litigation in writing and they are most familiar with his case as it relates to that issue. We did ask for him to be present during this hearing. However, that was denied.

> …
>
> I'm going to give a brief synopsis of what we're asking here from the board as it relates to clemency, as it relates to his intellectual disability, and where we are in that process. And because of where we are in that process there will be a request to submit further information down the line that's going to come in writing, and also after that litigation is potentially concluded we can actually have a full presentation to the board. I would like to present to the board what the clemency will be requested based upon Mr. Bowles's intellectual disability.

App. at 50-51.

75. Mr. Davison then stated that FCOR's clemency report would be "based upon what's in our files and what's gathered here today during the interview. And so anything that may or may not come from pending litigation, unless that litigation is resolved prior to the completion of my recommendation, it will not be included." App. at 51.

76. Mr. Simmons asked Mr. Bowles a handful of questions, pertaining to whether Mr. Bowles had been overwhelmed around the time of the crime and throughout his legal proceedings, and whether he was remorseful. Mr. Simmons then attempted to explain intellectual disability to FCOR, stating there were three prongs to a diagnosis: "an IQ test that is done to determine whether or not a person can be mentally disabled"[6] which leads to "the next

[6] "Mentally disabled" is not an appropriate term of art to describe intellectual disability. Intellectual disability was formerly referred to as "mental retardation."

step to see if there is any deficits of that" and "once that individual falls into one of those phase in regards to those deficits, they then would test him for evidence of when that onset of that intellectual disability actually occurred." App. at 54. The entirety of his presentation regarding intellectual disability as it pertains to Mr. Bowles specifically was as follows:

> When it comes to intellectual disability people have several disorders and some of the disorders were exhibited by Mr. Bowles during the timeframe that these incidents that occurred actually happened here in prison. And he is significantly impaired by his intellectual functioning. He also has those deficits and during his life those deficits came out in various different ways. And because they weren't caught or because he wasn't in a position to where he was able to get help, he didn't get that help and ultimately from a young age because of where he was and actually, you know, being homeless he actually ended up in prison on several occasions ultimately leading to us being here to where he has these sentences as we speak.
>
> Before his arrest in the case he had been struggling with many aspects of his life. He wasn't really able to keep a job for an extended period of time. He always was dependent on individuals to actually take care of him….What we are asking for from the clemency board is, because there has been litigation and Mr. Bowles is intellectually disabled, we're asking for mercy based upon his intellectual disability.
>
> App. at 55-56.

77. Throughout Mr. Simmons's presentation, he alluded multiple times to information he would later present:

> [W]hat I am going to be submitting afterwards is going to further explain Mr. Bowles's qualification for that intellectual disability

> and where it put him in his life to get potentially in the position that he was in that actually got him right here.

App. at 54-55.

> What I plan on doing in regards to supplement what his intellectual disability is and what we're trying to do with regards to actually help Mr. Bowles, I would actually submit in writing a long history of Mr. Bowles's history and ask him where he is in that process.

App. at 55-56.

> And like I said previously, I don't know the timeframe between the decision of what the board is going to make, but because there is this pending litigation and we would have an opportunity to supplement in writing to the board information regarding that, I will definitely supplement my information to the board regarding that that I'm able to gather in between now and then. And also during the timeframe if there is any information from that litigation I will definitely supplement it to any hearings.

App. at 56.

78. Because the only counsel familiar with Mr. Bowles's case, his § 3599 counsel, had been excluded from Mr. Bowles's clemency interview, FCOR heard none of the information § 3599 counsel had uncovered regarding Mr. Bowles's background and impairments. FCOR's purposeful exclusion of Mr. Bowles's § 3599 counsel hamstrung Mr. Simmons, who was not, and could not, give a meaningful clemency presentation with his lack of experience in death penalty litigation, lack of training regarding intellectual disability, lack of familiarity with Mr. Bowles's case, and lack of resources to investigate and

present experts to educate FCOR about intellectual disability as it applied to Mr. Bowles. The deleterious effect was notable from the clemency interview itself when, presented with no specific lay or expert information regarding Mr. Bowles's intellectual disability, Mr. Davison stated to Mr. Bowles:

> And I know that the issue of intellectual disability has been raised by your counsel, that's currently being litigated, but that is outside of the normal appellate process that has already been concluded in the legal system. So that's something in addition to. But in the assessment that was done, both psychiatric and psychological, there was a determination that you displayed no significant impairment in your ability to adjust within the institutional environment and that you did not exhibit any symptoms of mental disorder and that specifically included the question of intellectual disability. And so that report that was prepared by the psychiatrist that did your evaluation I'm going to presume going forward is correct, that there are no significant impairments.

App. at 57-58. Mr. Davison's statement was incorrect—Dr. Elizabeth McMahon, the evaluator Mr. Davidson was referring to, had never assessed Mr. Bowels for intellectual disability. App. at 231. However, Mr. Simmons did nothing to counter these erroneous presumption—he did not know he should, and he did not have the requisite familiarity with Mr. Bowles's case to do so. The other doctors mentioned by FCOR, Drs. Daniel Sprehe and A.G. Gonzalez, did not evaluate for intellectual disability. Their assessments were one-page competency determinations from 1982 with no bearing on Mr.

Bowles's intellectual disability. For the remainder of Mr. Bowles's clemency, intellectual disability was not substantively discussed by Mr. Simmons.

79. Mr. Bowles was repeatedly questioned by FCOR about matters bearing on his pending state court intellectual disability litigation, outside the presence of § 3599 counsel who represents him in that litigation:

> And is there anything that you did subsequent to killing Mr. Hinton that would show that you had any sort of remorse for killing him? Is there anything that you did that would demonstrate that? . . . Did you do anything after killing him that would show any sort of remorse or compassion or human response to the fact that you just killed this person?

App. at 63-64.

> Okay. And I know your counsel is arguing intellectual disability and stuff like that and I understand that, but how did you know if you got these two forms of ID you could go down to the DMV and get you a fake ID made?

App. at 74.

> And so my question, the last thing…is do you, Gary Ray Bowles, have any regard for human life? . . . How is that regard for human life demonstrated in the murders? . . . Isn't it a clear disregard for human life?

App. at 101.

When Mr. Bowles struggled to comprehend FCOR's questioning, he was perceived as changing his story:

> I'm having a little bit of difficulty reconciling what you just said a few moments before that…That's the statement you made here to Mr. Wyant…and so I'm having difficulty reconciling that

> general statement…So this is the first time I'm hearing that explanation, Mr. Bowles, because, you know, that's why I went back to ask the question again.

App. at 77-78.

Moreover, Mr. Bowles was questioned repeatedly about his remorse, and whether he knew right from wrong:

> So I want to be very clear that at the time that you dropped the 40 to 50-pound brink on [the victim's] head, you're telling me at that time you were not able to distinguish right from wrong?

App. at 93.

80. On September 12, 2018, in keeping with prior communications from FCOR and the Governor's Office that Mr. Simmons should be responsible for Mr. Bowles's clemency litigation, § 3599 counsel submitted a letter to Mr. Simmons to be filed in conjunction with his final clemency submission on Mr. Bowles's behalf. App. at 106-11. In this letter, § 3599 counsel objected to FCOR and the Clemency Board barring the CHU, Mr. Bowles's § 3599 counsel, from meaningfully representing Mr. Bowles in his clemency proceedings and noted Mr. Bowles's federal statutory rights were violated by FCOR and Clemency Board's actions in doing so. App. at 106-11. Further, the letter noted that the clemency interview and presentation was deficient because an adequate clemency presentation, which would include expert assistance concerning Mr. Bowles's intellectual disability and trauma history,

had not been completed. App. at 109. Additionally, the letter noted that the CHU had been working with psychologist Dr. Toomer, who determined that Mr. Bowles had intellectual disability, to create a meaningful clemency presentation. App. at 108. Yet, the opportunity to present this was denied by FCOR and the Clemency Board's exclusion of CHU and Dr. Toomer from the clemency presentation:

> Mr. Bowles's FCOR-retained clemency attorney could not – and should not have been expected to – answer questions about Mr. Bowles's intellectual disability, a diagnosis he was not aware of until the CHU contacted him. Further, Mr. Bowles himself should not have been placed in a position in which he was expected to cure his clemency counsel's deficiency…[N]o one involved in his diagnosis or litigation was allowed to participate in the interview, and the Board and interviewers were not properly educated on the nuances of an intellectual disability diagnosis for someone like Mr. Bowles…Without an informed foundation, lay people can attribute some of an intellectually disabled person's behavior as willful disregard, laziness, or antisocial.
>
> [Questions about Mr. Bowles's intellectual disability and prior mental health evaluations] could not be answered accurately, as his counsel who is litigating his intellectual disability was barred from the interview; the questions also placed Mr. Bowles in a precarious position.
>
> In no other circumstance within the justice system is an individual, let alone an intellectually disabled individual, subjected to questions about pending litigation without the presence and assistance of the attorney who represents him in that matter.

App. at 109-10.

81. The same letter implored FCOR and the Clemency Board to hold a supplemental clemency proceeding that did not violate Mr. Bowles's rights and would allow his § 3599 counsel to represent him and have the necessary time throughout Mr. Bowles's state court proceedings to develop the intellectual disability information needed to make a meaningful clemency presentation. App. at 109-11. The letter specifically noted: "Allowing the CHU to advocate for its client, Mr. Bowles, would enable the Board and FCOR to hear directly from the CHU's witnesses or experts on the subject. This is the only way FCOR and the Board can fully consider Mr. Bowles's intellectual disability." App. at 111.

82. Prior to October 28, 2018, Mr. Simmons submitted his Application for Executive Clemency on behalf of Mr. Bowles to FCOR. *See* App. at 133-40. The Application was less than eight double-spaced pages from title to signature, contained multiple typographical and formatting errors, incorrectly stated that Mr. Bowles had been sentenced to death in 1994 and had been on death row for over thirty years (App. at 134), and twice identified Mr. Bowles as "Mr. Booker" (App. at 133, 134). Mr. Simmons's Application for Executive Clemency on Mr. Bowles's behalf was almost entirely copied and pasted from a previous application Mr. Simmons had prepared for death-sentenced client Stephen Booker. App. at 133-40 and 141-47. The only

reference Mr. Simmons's Application made to Mr. Bowles's intellectual disability was:

> As the Board was formally notified in the initial clemency submission on June 22, 2018, Mr. Bowles is intellectually disabled. His intellectual disability is the subject of pending circuit court litigation. I do not represent Mr. Bowles in his intellectual disability litigation, and I am not familiar with the issues involved in such litigation. I have needed the assistance of the Capital Habeas Unit (CHU) of the Federal Public Defender's office, Mr. Bowles's counsel in the intellectual disability litigation, to present critical information to the Board. However, the CHU was not allowed to participate in Mr. Bowles's clemency interview, which hindered the presentation of information regarding Mr. Bowles's intellectual disability and life history.

App. at 139.

83. Stating "I understand that the Board will only consider communications from me," Mr. Simmons attached to his submission the letter from CHU and his own request that Mr. Bowles receive a new clemency proceeding that allowed CHU and its experts to participate. App. at 139-40.

84. FCOR and the Clemency Board did not respond to the requests of Mr. Simmons and CHU's request for a new clemency proceeding that would comply with Mr. Bowles's federal statutory rights. They likewise did not respond to the concerns raised in Mr. Simmons's final Application for Executive Clemency.

85. On June 11, 2019, Mr. Simmons was notified by letter from S. Michelle Whitworth, Coordinator of the Office of Executive Clemency, that "the Governor" denied clemency for Mr. Bowles.[7] App. at 148. The letter states that it is a signed death warrant which "concludes the clemency process." App. at 148.

86. On June 11, 2019, the Governor of Florida, Ron DeSantis, signed a warrant for Mr. Bowles's execution, setting it for August 22, 2019. App. at 149-52.

IV. CAUSE OF ACTION[8]

Defendants violated Mr. Bowles's federal statutory right to representation by adequate counsel in state clemency proceedings under 18 U.S.C. § 3599.

87. Mr. Bowles hereby incorporates the facts in paragraphs 13 - 86 of this complaint.

88. This cause of action is supported by and incorporates by specific reference Mr. Bowles's Memorandum of Law, submitted simultaneously with this complaint, and the arguments and authority set forth therein.

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[7] It is unclear when the denial formally occurred, and thus whether Governor DeSantis, or his predecessor, former Governor Rick Scott, is responsible for the denial. Clemency proceedings were initiated for Mr. Bowles under former Governor Scott's administration.

[8] This complaint provides the factual background and basis for the cause of action herein. Simultaneously with this complaint, Mr. Bowles has filed a separate memorandum of law, outlining the legal support for his positions, in addition to a motion for a stay of execution, so that this Court may consider the same.

89. A federal statutory right exists where Congress speaks with a clear voice and manifests an unambiguous intent. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

90. Title 18 U.S.C. § 3599 creates a federal statutory right to counsel. *See* 18 U.S.C. § 3599(2) ("In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services . . . .") (emphasis added).

91. Once § 3599 counsel is appointed, they are statutorily mandated to continue in the representation of their death-sentenced client "*[u]nless replaced by similarly qualified counsel* upon the attorney's own motion or upon motion of the defendant . . . ." 18 U.S.C. § 3599(e). Counsel's representation under § 3599 includes:

> *[E]very subsequent stage of available judicial proceedings*, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and *shall also* represent the defendant in such competency proceedings and *proceedings for executive or other clemency* as may be available to the defendant.

18 U.S.C. § 3599(e) (emphasis added).

92. The United States Supreme Court has already spoken on the question of whether § 3599 authorizes participation in state clemency proceedings: by its plain text, it clearly does. *Harbison v. Bell*, 556 U.S. 180, 186-87 (2009).

93. Mr. Bowles first had counsel appointed under § 3599 by the District Court for the Middle District of Florida on September 27, 2017, when the Court appointed CHU to represent Mr. Bowles pursuant to that federal statute. *See supra* ¶ 59; *Bowles v. Sec'y, Fla. Dept. of Corr.*, No. 3:08-cv-791, ECF No. 33 (M.D. Fla. Sep. 27, 2013). Soon after, the district court authorized Mr. Bowles's § 3599 counsel to appear in state court on his behalf to litigate the matter of his intellectual disability. *See supra* ¶ 71; *Id.*, ECF No. 36 (M.D. Fla. Dec. 6, 2017).

94. Mr. Bowles's § 3599 counsel conducted investigation and litigation regarding his intellectual disability months prior to the initiation of his clemency proceedings. *See supra* ¶¶ 58, 59.

95. Defendants, specifically the Clemency Board, the Office of Executive Clemency, and FCOR, actually or constructively knew of Mr. Bowles's § 3599 counsel prior to their private retaining of clemency counsel, Mr. Simmons. By their own rules, FCOR is charged with specifically tracking the cases of death-sentenced individuals, including in the appropriate federal

district court and the United States Court of Appeals for the Eleventh Circuit. *See* Rule 15(C), Rules of Executive Clemency (2011) ("[FCOR's] Capital Punishment Research Specialist shall routinely monitor and track death penalty cases beyond direct appeal for this purpose."). Defendants FCOR and/or the Office of Executive Clemency, acting on behalf of the Clemency Board, retained private clemency counsel without first notifying or consulting with Mr. Bowles or CHU. *See supra* ¶¶ 54, 57, 58.

96. Section 3599, which entitled Mr. Bowles to CHU's participation in state clemency proceedings, prescribes specifically that CHU not only *can* participate in such representation, but *must*, until either Mr. Bowles or § 3599 counsel files a motion for substitution, *and a similarly-qualified replacement attorney is appointed*. *See* 18 U.S.C. § 3599 (e); *see also Harbison*, 556 U.S. at 188. No such substitution motion has ever been filed by the CHU, and no similarly qualified or adequate counsel was given to Mr. Bowles in his § 3599 counsel's stead.

97. Defendants, through the responses given by Ms. Whitworth of FCOR, denied repeated requests for Mr. Bowles's § 3599 counsel to participate, attend, and correspond with FCOR and the Clemency Board on behalf of Mr. Bowles in Mr. Bowles's clemency proceedings. *See supra* ¶¶ 65, 66, 72, 80. An

intellectual disability expert retained by § 3599 counsel was similarly prohibited by FCOR from participating in the clemency proceedings.

98. As a result of Defendants' actions, Mr. Bowles was, without being provided adequate and similarly qualified replacement counsel, denied his federal statutory right to participation of his § 3599 counsel in his state clemency proceedings, which are a statutorily required precursor to the carrying out of his death sentence under Florida law. *See* Fla. Stat. § 922.052.

99. The refusal to allow § 3599 counsel's representation had a grievous effect on Mr. Bowles's clemency proceedings. Mr. Bowles was forced to proceed in this critical stage of his death-sentence litigation with counsel who had no training in matters of intellectual disability, had never handled a death penalty case, and would not have been qualified to represent him in any other death penalty proceeding (trial, appeal, post-conviction, or habeas) in the state of Florida. *See supra* ¶¶ 53, 54, 78. Not only was Mr. Bowles's clemency counsel unqualified, his presentation was plainly inadequate under professional standards for such representation. *See supra* ¶¶ 76, 77, 78, 81.

100. Because of the actions of Defendants detailed above throughout Mr. Bowles's clemency process, Mr. Bowles had an impermissibly inadequate clemency presentation. His clemency attorney, Mr. Simmons, did no independent investigation of his case or life history, and acknowledges this

fact and the resulting deficiencies in his clemency presentation himself. Further, many of the basic facts of Mr. Bowles's life went undeveloped at the clemency presentation and interview, including his childhood of neglect and abuse, teenage homelessness and prostitution, and nearly lifelong substance abuse. *See, e.g.*, *supra* ¶¶ 14-28 (brief history of Mr. Bowles's life). Most notably, the clemency presentation included next to no information regarding intellectual disability as it pertains to Mr. Bowles. *See supra* ¶¶ 75-77. The harm is apparent from transcript of the clemency interview, where, without having been presented with specific information to the contrary, Mr. Davison stated an intent to proceed under the presumption that Mr. Bowles had no mental health or intellectual impairments, and suggested that Mr. Bowles had a lack of remorse. *See supra* ¶¶ 78, 79.

101. Defendants' actions barring Mr. Bowles's § 3599 counsel from participating in his clemency proceedings in the absence of any other adequate, similarly qualified counsel resulted in a clemency proceeding that was woefully inadequate for any capital client—but particularly a client with intellectual disability who thus far has been denied the procedural safeguards of capital postconviction and habeas litigation as they pertain to intellectual disability. See *supra* ¶¶ 53-86. Defendants' collective actions frustrated the purpose of §

3599 and ultimately denied the already vulnerable Mr. Bowles vindication of his federal statutory right to adequate counsel.

V. REQUEST FOR RELIEF

102. Plaintiff, Mr. Bowles, requests that this Court declare that Defendants interfered with his federal right, in the absence of adequate, similarly qualified replacement counsel, to be represented in clemency proceedings by his existing counsel appointed under 18 U.S.C. § 3599.

103. Mr. Bowles requests that this Court issue a preliminary injunction, prohibiting Defendants from executing him until this Court has had the opportunity to fully consider this complaint and allow this suit to proceed in the ordinary course. This serious claim should not be decided in the context of an active death warrant, particularly when Mr. Bowles's pending intellectual disability litigation, which is a crucial framework within which to understand this complaint, has not yet been resolved.

104. Mr. Bowles requests that this Court grant a permanent injunction, barring Defendants from executing him until a clemency proceeding occurs that complies with federal law.

VI. CERTIFICATION

105. I, Terri Backhus, attorney for Plaintiff in the above-entitled action, being duly sworn, state that to the best of my knowledge and belief, the facts sets forth in this Complaint are true and correct.

Respectfully submitted,
Gary Ray Bowles
By Counsel

/s/ Terri Backhus
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA McCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD,
Chairman, Commissioner, Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
a/k/a S. Michelle Whitworth a/k/a Michelle Whitworth,
Commission Investigator Supervisor, Florida Commission on Offender Review, in her official capacity.

CIVIL ACTION NO._____

EMERGENCY
INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

MEMORANDUM OF LAW IN SUPPORT OF
42 U.S.C. § 1983 COMPLAINT AND STAY MOTION

I. Introduction

Plaintiff Gary Ray Bowles, through counsel, files this memorandum of law in support of his concurrently filed 42 U.S.C. § 1983 complaint and motion for a stay of execution of his state death sentence. For the reasons below and in Mr. Bowles's complaint and stay motion, this Court should stay Mr. Bowles's execution, which is currently scheduled for August 22, 2019, at 6:00 p.m. This Court should further declare that Defendants have violated Mr. Bowles's federal rights, and enjoin the State of Florida from proceeding with the execution before providing Mr. Bowles a new state clemency proceeding that comports with federal law.

II. Cause of Action: Defendants Violated Mr. Bowles's Federal Statutory Right to Representation in State Clemency Proceedings

As alleged in the complaint, Mr. Bowles is an intellectually disabled man who, to this day, has never had the opportunity to fully present an Eighth Amendment claim based on his intellectual disability, including during his trial, appeal, state postconviction, federal habeas, and clemency proceedings. Mr. Bowles has had counsel appointed under 18 U.S.C. § 3599 since 2017—the Office of the Federal Public Defender for the Northern District of Florida, Capital Habeas Unit (CHU). The CHU has also been judicially authorized since 2017 to extend its § 3599 representation to Mr. Bowles's current intellectual disability litigation in state court.

In March 2018, clemency proceedings were initiated for Mr. Bowles. The Florida Commission on Offender Review (FCOR) privately contracted with

clemency counsel for the purpose of those proceedings, without first notifying Mr. Bowles or his § 3599 counsel. The clemency counsel retained for Mr. Bowles had never represented an individual facing the death penalty at any stage of the proceedings—trial, appellate, postconviction, or habeas—nor was he qualified under Florida law to do so. He had never represented a client in intellectual disability-related proceedings, nor did he have any experience or training in litigating intellectual disability claims. Pursuant to the terms of his contract, he did not have funding for experts or investigation, and had not been trained in how to investigate and prepare a professionally appropriate clemency presentation.

Already statutorily authorized to represent Mr. Bowles in clemency proceedings, § 3599 counsel, the CHU, attempted to intervene and assist already-retained clemency counsel in representing Mr. Bowles throughout his clemency proceedings because Mr. Bowles had pending intellectual disability litigation, and was at particular risk for miscommunication during the clemency process due to his intellectual disability. However, FCOR and the Governor's Office prohibited § 3599 counsel from representing Mr. Bowles or meaningfully participating in the process. Defendants violated Mr. Bowles's federal statutory right to representation in state clemency by disallowing his § 3599 counsel from intervening to protect his federal rights, and barring his § 3599 counsel from his clemency interview, which ensured that he did not have adequate counsel for those proceedings.

A. 18 U.S.C. § 3599 Creates an Enforceable Federal Right to Counsel in Florida's Clemency Scheme

i. Congress Intentionally Created a Federal Right in § 3599

In Florida, executive clemency proceedings are required under state law before an execution warrant can be signed by the Governor. *See* Fla. Stat. § 922.052. Congress intentionally created a federal right that should have allowed the CHU to meaningfully participate in Mr. Bowles's state-law executive clemency proceedings.

18 U.S.C. § 3599 provides for the appointment and funding of capital habeas counsel and lays out the circumstances under which that representation extends to state clemency proceedings, including where there is no other "adequate" counsel:

> (2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, *any defendant* who is or becomes financially unable to obtain *adequate representation* or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> [. . .]
>
> (e) *Unless replaced by similarly qualified counsel* upon the attorney's own motion or upon motion of the defendant, each attorney so appointed *shall represent the defendant throughout every subsequent stage of available judicial proceedings*, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and *shall also represent the defendant* in such competency proceedings *and proceedings for executive or other clemency* as may be available to the defendant.

18 U.S.C. § 3599(a)(2), (a)(2)(e) (emphasis added).

"Once federal counsel is appointed under § 3599, that attorney's representation extends 'throughout every subsequent state of available judicial proceedings,' including 'all available postconviction process' in state and federal court (such as state clemency proceedings), *until 'replaced by similarly qualified counsel.'*" *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014) (quoting and citing § 3599(e) and *Harbison v. Bell*, 556 U.S. 180, 185-88 (2009)) (emphasis added).

42 U.S.C. § 1983 protects federal rights originating from both the United States Constitution and federal statutes. *Gonzaga University v. Doe*, 536 U.S. 273, 279 (2002). Although not every federal statute creates a federal right, *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), Mr. Bowles's cause of action relies on § 3599, a federal law that does confer a federal right for purposes of § 1983.

There is no "blanket approach" to determining when a federal statute has created a federal right. *See Blessing*, 520 U.S. at 343; *Gonzaga*, 536 U.S. at 294. But the Eleventh Circuit has provided the following guidance:

> The Supreme Court has set forth three requirements that must be met before a federal statute will be read to confer a right enforceable under § 1983: (1) Congress must have intended that the provisions in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial resources; and (3) the provision

> giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

31 Foster Children v. Bush, 329 F.3d 1255, 1269 (11th Cir. 2003) (citing *Blessing*, 520 U.S. at 340–41).

In assessing congressional intent, courts should focus on whether there are "unambiguously conferred rights," not just benefits or interests, evident from the statutory text. *31 Foster Children*, 329 F.3d at 1269 (citing *Gonzaga*, 536 U.S. at 283). A right is unambiguously conferred when, for example, a statute's text is phrased in terms of the person to whom the right is given, rather than in terms of regulating an individual or agency. *See, e.g.*, *Gonzaga*, 536 U.S. at 284 ("For a statute to create such private rights, its text must be '*phrased in terms of the persons benefited*.'") (internal citation omitted, emphasis added).

Other considerations, the Eleventh Circuit has explained, are whether the statute's text "(1) contains 'rights-creating' language that is individually focused; (2) addresses the needs of individual persons being satisfied instead of having a system wide or aggregate focus; and (3) lacks an enforcement mechanism through which an aggrieved individual can obtain review." *31 Foster Children*, 329 F.3d at 1270.

The text of § 3599 defines a particular subclass of persons: individuals who are "seeking to vacate or set aside a death sentence," are in a postconviction posture seeking relief pursuant to 28 U.S.C. §§ "2254 or 2255," and are "financially unable to obtain *adequate* representation." 18 U.S.C. § 3599(a)(2) (emphasis added). The

text is not a prohibition or regulation of an entity; it is phrased specifically "in terms of the persons benefitted." *Gonzaga*, 536 U.S. at 284.

The rights in the statute are not "vague," but rather specifically defined as "the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)." 18 U.S.C. § 3599(a)(2). The statute specifies rights, including "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). Under Supreme Court and Eleventh Circuit precedent, those factors weigh in favor of rights creation. *See 31 Foster Children*, 329 F.3d at 1269 (noting the second *Blessing* factor requires that "the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial resources.").

Also consistent with precedent regarding creation of federal rights, *see id.*, the statute uses "mandatory" language in describing the benefit—here, representation by adequate counsel. 18 U.S.C. § 3599(a)(2) (using mandatory "shall be entitled" language regarding the defined class); *see also 31 Foster Children*, 329 F.3d at 1269 (noting the third *Blessing* factor requires that "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms").

As courts have recognized, the text of § 3599 covers not only representation in § 2254 proceedings, but also representation by the same counsel in state clemency

proceedings. *Harbison v. Bell*, 556 U.S. 180, 186-87 (2009) ("[T]he reference to 'proceedings for executive or other clemency' in § 3599(e) . . . reveals that Congress intended to include state clemency proceedings within the statute's reach."); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 474 (3rd Cir. 2015) (finding that, where clemency proceedings are subsequent to federal habeas, "§ 3599(e) [requires] the district court to appoint an attorney, already appointed for purposes of seeking federal habeas relief, to represent the petitioner in those proceedings as well"). Courts have interpreted § 3599's language as making counsel's participation in clemency proceedings mandatory. *See, e.g.*, *Battaglia v. Stephens*, 824 F.3d 470, 474 (5th Cir. 2016) ("[A]ttorneys appointed under § 3599 are *obligated* to represent their clients in state clemency proceedings.") (emphasis added).

This is consistent with Congress's legislative intent. As the Supreme Court has recognized, the purpose of § 3599 giving death-sentenced individuals federally funded counsel specifically for state clemency proceedings indicates that Congress "recognized the importance of such process to death-sentenced prisoners . . . ." *Harbison*, 556 U.S. at 193. This reading of *Harbison* and Congress's intent has been expounded upon by Justice Sotomayor, who noted in a statement respecting an application for stay of execution and denial of certiorari: "When Congress authorized federally funded counsel to represent clients in clemency proceedings, it

plainly 'did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.'" *Holiday v. Stephens*, 136 S. Ct. 387, 387 (2015) (Sotomayor, J.) (quoting *Harbison*, 556 U.S. at 194).

Congress's intent to include state clemency proceedings in § 3599 representation is further evidenced by the practical sense it makes for counsel who is already intimately familiar with the often complex history of a capital case to continue into state clemency proceedings. *See, e.g.*, *Harbison*, 556 U.S. at 193 ("Subsection (e) emphasizes continuity of counsel, and Congress likely appreciated that federal habeas counsel are well positioned to represent their clients in the state clemency proceedings that typically follow the conclusion of § 2254 litigation.").

This understanding of Congress's intent is also consistent with United States Courts guidance. *See* Guide to Judiciary Policy, Vol. 7 Defender Services, Part A Guidelines for Administering the CJA and Related Statutes (hereinafter "Guide to Judiciary Policy"), Chapter 6, § 680.10.10 ("*A new appointment for clemency representation is not necessary* since, under 18 U.S.C. § 3599(e), each attorney appointed to represent the defendant for habeas corpus proceedings under 28 U.S.C. § 2254, unless replaced by similarly qualified counsel, 'shall also represent the

defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.") (emphasis added).[1]

Federal courts have indicated the same, and further found that because after appointment under § 3599 representation in subsequent proceedings is mandatory, counsel does not need to go to a federal district court for approval to participate in state clemency proceedings. *See, e.g., Wilkins v. Davis*, 832 F.3d 547, 558 (5th Cir. 2016) ("[§ 3599 counsel] acted within the authorized scope of her appointment; she represented Wilkins in 'available post-conviction process' . . . including . . . 'proceedings for executive or other clemency,' as authorized by § 3599. [§ 3599 counsel] did not need to seek reauthorization from the district court before representing Wilkins in these subsequent proceedings.").

For those reasons, 18 U.S.C. § 3599 creates a federal right. And, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284. Here, Mr. Bowles has a federal right to representation under § 3599 that includes such representation in state clemency proceedings. That right is enforceable in this § 1983 action.

[1] Available at: https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-680-clemency (last visited on July 10, 2019).

ii. Availability of State Court Counsel is Irrelevant to Federally Appointed Counsel's Ongoing Representation under § 3599

Although Florida's clemency scheme provides for the private retaining of state counsel for clemency, *see* Fla. Stat. 940.031, that does not affect Mr. Bowles's § 3599 rights, which specifically include representation by his § 3599 counsel in clemency, *Harbison*, 556 U.S. at 185. None of the relevant provisions of § 3599 depend on the availability of state counsel. The text of the statute—as well as the statute's title—refers to a defendant's "financial" inability to secure counsel as the *sole* eligibility criteria for appointment under section (a)(2). Once counsel is appointed under this section, the plain text of the statute in section (e) provides that the representation will continue in clemency and other proceedings.

The Eleventh Circuit has not directly addressed the issues Mr. Bowles raises here. However, a recent decision of the Ninth Circuit is instructive. *See Samayoa v. Davis*, No. 18-56047, 2019 WL2864411 (9th Cir. July 3, 2019). In *Samayoa*, the Ninth Circuit considered an appeal of a district court's denial of a motion to appoint additional clemency counsel pursuant to § 3599. *Id*. at * 2. Specifically, Samayoa's pro bono federal counsel had moved in the district court for the appointment of additional counsel because "he 'ha[d] never done a clemency proceeding and needs the expertise of an agency accustomed to such a process,'" and noted that he needed help with completing "a full clemency investigation and petition, as well as the filing of petitions under *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ford v. Wainwright*,

477 U.S. 399 (1986)." *Id*. at *1 (internal citations omitted). The federal district court, however, denied this motion for appointment, "concluding that because California provides for state-appointed clemency counsel, 'Petitioner does not appear to qualify for the appointment of federal counsel under § 3599(a)(2).'" The district judge reasoned that Samayoa must direct his request to the California Supreme Court, who had previously appointed clemency counsel. *Id*. at * 2.

On appeal, the State argued that Samayoa was not entitled to clemency counsel being appointed under § 3599 because "the district court can appoint additional counsel under § 3599 *only if* Samayoa can show 'he is unable to obtain adequate representation from the state to pursue executive clemency.'" *Id*. at *3 (emphasis added). The Ninth Circuit rejected the argument and reasoning of the State, instead finding that under a "straightforward reading of § 3599(e)," as in *Harbison*, "[t]he availability of state appointment of clemency counsel is irrelevant to federally appointed counsel's ongoing representation of a death-row client in state clemency proceedings." *Id*. at *3 (internal quotation omitted).

As Mr. Bowles has likewise argued, *see supra* section (II)(A)(i), the Ninth Circuit emphasized the mandatory language of § 3599(e), which says that an attorney appointed under the federal statute "*shall* represent the defendant" in subsequent proceedings, including clemency. *Id*. (emphasis in original) (internal citation omitted). "This language does not invite a blanket exception if the state also

provides for clemency counsel." *Id*. at *3. Thus, Samayoa's federal counsel was "authorized under § 3599(e) to continue to represent Samayoa in his California clemency petition, regardless of any provisions under California law regarding state appointment of clemency counsel." *Id*. at *4. Further, the Ninth Circuit found that the existence of state-provided counsel also did "not bar the district court from appointing additional counsel simply because a defendant can obtain representation through other sources." *Id*. at *5.

The Ninth Circuit's opinion in *Samayoa* also explicitly rejected the reasoning of the Sixth Circuit in *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). *Irick* held that a death-sentenced Tennessee prisoner's federal counsel could not receive funding under § 3599 because Tennessee law provided for counsel in state competency proceedings. *Irick*, 636 F.3d at 290.[2]

The Ninth Circuit called the reasoning of *Irick* "unpersuasive," and found that "[n]owhere in the [*Harbison*] Court's statement of the question on certiorari or in its discussion of the case did it condition the scope of § 3599(e) on the state's failure to provide clemency counsel." *Samayoa*, 2019 WL 2864411 at *3. *Samayoa*, while the first Court of Appeals to reject the reasoning of *Irick*, was not the first federal court

[2] Although not dispositive in this case, this is also the authority that Judge M. Casey Rodgers relied on in her order denying a motion for a stay of execution based on different clemency issues in *Long v. Sec'y, Fla. Dep't. of Corrs.*, No. 4:19-cv-213, ECF No. 13 at 16-18 (N.D. Fla. May 16, 2019).

to do so. *See, e.g.*, *Mickey v. Davis*, No. 93-00243, 2018 WL 3659298, *4 (N.D. Cal. Aug. 2, 2018) (rejecting the reasoning of *Irick* after examining the context of the language from *Harbison* and finding it to be inapposite as applied to appointment of clemency counsel).

Samayoa's reading, as Mr. Bowles has argued, was confirmed by the *Harbison* Court's emphasis on the continuity of counsel. *Samayoa*, 2019 WL 2864411 at *4 ("*Harbison*'s emphasis on the importance of continuity of counsel is particularly salient here, confirming that continuing representation by habeas counsel under § 3599(e) *should not depend on* whether a State simultaneously provides for the appointment of clemency counsel.") (emphasis added).

There is little support for the notion that Congress intended to make the unavailability of state-appointed counsel a second, unstated criteria for eligibility under § 3599. Indeed, federal courts have been instructed to interpret § 3599 counsel's role in clemency in the opposite way, and such courts have contemplated the existence and operation of § 3599 counsel in state clemency proceedings as wholly separate from any state furnished counsel. For example, in the Guide to Judiciary Policy, in order for § 3599 counsel to withdraw from clemency representation, they must make a motion in federal district court. *See* § 680.10.20, Guide to Judiciary Policy.

The Guide to Judiciary Policy further instructs: "Upon granting a motion to withdraw, unless the defendant is represented by similarly qualified counsel or representation is waived by the defendant, *the court must appoint counsel* to represent the defendant for any available clemency proceedings." *Id*. Thus, consistent with what Mr. Bowles has argued herein, the triggering mechanism for replacement in state clemency proceedings of § 3599 counsel is *not* the operation of state law, but a motion to withdraw by § 3599 counsel or the defendant. *See* 18 U.S.C. § 3599(e) ("Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant . . .").

Here, a federal court had already properly concluded that Mr. Bowles was "financially unable to obtain adequate representation" and so appointed the CHU. *See* Complaint at ¶ 31. That was then, and is now, the only criteria for the appointment of counsel under § 3599. The next question, then, is whether the *scope* of that representation includes clemency proceedings. The text of section (e) clearly and unambiguously answers that question in the affirmative. *See Harbison,* 556 U.S. at 185 (finding that the "plain language of the statute dictates the outcome of this case."). Thus, Mr. Bowles had a federal right to the representation of his already appointed § 3599 counsel in his state clemency proceedings.

iii. Even if Some State-Retained Clemency Counsel Could Proceed Entirely Without § 3599 Counsel's Participation, State Counsel Must Be At Least Be "Adequate" Under Federal Law, Particularly in an Intellectual Disability Case

As discussed above, the availability of state-retained clemency counsel was irrelevant to Mr. Bowles's § 3599 right to the CHU's meaningful participation in his state clemency proceedings. *See* supra section (II)(A)(ii). However, even if state-retained counsel could proceed entirely without § 3599 counsel's participation in the clemency proceedings, the particular state-retained counsel must at least be "adequate" within the meaning of § 3599, particularly in an intellectual disability case like Mr. Bowles's. In this case, state-retained counsel was inadequate for purposes of § 3599, and therefore Mr. Bowles had a right to his § 3599 counsel's representation in the state clemency proceedings.

a. Adequacy is a Case-by-Case Determination

Adequacy for purposes of § 3599 is not a direct corollary with the concept of attorney effectiveness addressed in cases analyzed under *Strickland v. Washington*, 466 U.S. 668 (1984). Section 3599 adequacy analysis requires prospective consideration of what constitutes appropriate professional legal assistance in any specific case, rather than a backward-looking analysis of whether what has already happened constituted constitutionally adequate representation.

Courts have historically made case-by-case determinations of adequacy that look at the totality of circumstances rather than utilizing an articulated definition of

what is adequate. *See United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971) (in § 3006 context, what is necessary to an adequate defense is "not susceptible of arbitrary articulation but can best be developed on a case by case basis.").

On numerous occasions, courts within in the Eleventh Circuit have given effect to term "adequate" in considering § 3599 counsel. The Eleventh Circuit itself has recognized that § 3599 requires *adequate* representation, not any representation. *See, e.g.*, *Gore v. Crews*, 720 F.3d 811, 814 n. 1 (11th Cir.2013) (noting that if "state court counsel is not providing *representation adequate* to exhaust his state court remedies . . . a district court could 'determine, in its discretion, that it is necessary for court-appointed counsel to exhaust a claim in state court in the course of her federal habeas representation[.]'") (quoting *Gary v. Warden*, 686 F. 3d 1261, 1277 (11th Cir. 2012)) (emphasis added).

District courts conduct adequacy inquiries by looking to case-specific factors. *See, e.g.*, *Hutchinson v. Jones*, No. 3:13-cv-00128-MW, ECF No. 69 (N.D. Fla.) (Walker, J.) (authorizing the [§ 3599 counsel] to appear as co-counsel to state court counsel, who submitted an affidavit indicating he was in need of the [§ 3599 counsel's] assistance); *Stephens v. Sec'y, Fla. Dep't of Corrs.*, No. 3:08-cv-00260-TJC-JRK, ECF No. 28 (M.D. Fla.) (Corrigan, J.) (authorizing [§ 3599 counsel] to appear as state court co-counsel); *Foster v. Attorney Gen., State of Fla.*, No. 6:06-cv-00648-JA-KRS, ECF No. 58 (M.D. Fla.) (Antoon, J.) (authorizing [§ 3599

counsel] to exhaust claim under *Hall* in state court as co-counsel); *Reese v. Sec'y, Fla. Dep't of Corrs.*, No. 3:09-cv-1145-J-25MCR, ECF No. 37 (M.D. Fla.) (Adams, J.) (denying motion to appoint § 3599 co-counsel and permit such counsel to exhaust a claim in state court because there had been no showing of "infirmities or circumstances, like age, health, unfamiliarity with the law, or a conflict of interest, hindering or preventing [counsel] from *adequately* representing his client in state court without the assistance of [§ 3599 co-counsel].") (emphasis added).

If any state-retained counsel can totally replace § 3599 counsel for state clemency proceedings, their representation must be "adequate," and the meaning of adequacy is guided by case-specific factors.

b. Adequacy Must Consider Attorney Qualifications, the Needs of the Case, and the Needs of the Particular Defendant—Particularly the Intellectually Disabled

Any adequacy inquiry must take into account the attorney's qualifications, any special circumstances of the case, and the needs of a particular defendant. For example, in *Kirkpatrick v. J.C. Bradford & Co.*, a civil class action case, the Eleventh Circuit noted that adequacy inquiries often involve the question of whether counsel is "qualified, experienced, and generally able to conduct the proposed litigation[.]" 827 F.2d 718, 726 (11th Cir. 1987) (citing *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985)) (examining adequacy in the context of Fed. R. Civ. P. 23).

Also relevant to determining whether a particular counsel is adequate are the circumstances of the case as well as any collateral litigation. This is reflected in the Supreme Court's opinion in *Harbison*, which noted that Congress intended for federal habeas counsel to continue representation into clemency and other proceedings precisely because counsel who are already familiar with the case are better situated to provide competent advocacy. The Court held that "subsection (e) emphasizes *continuity* of counsel" in recognition of the fact that counsel who already familiar with the underlying case "are well positioned to represent their clients in the state clemency proceedings." *Harbison*, 556 U.S. at 193 (emphasis added).

Mr. Bowles had such counsel available to him—namely, his § 3599 counsel, who had investigated and developed voluminous information related to his intellectual disability. Any counsel would have to have had a mastery of this information in order to provide "adequate" representation in clemency, where Mr. Bowles's intellectual disability was a critical argument for mercy.

Intellectual disability investigation and litigation necessarily includes a thorough review of past and current mental health expert evaluations, a thorough investigation of a defendant's life history, including speaking with witnesses, collecting and reading voluminous records, and a detailed understanding of the case resulting in their death sentence along with all other interactions in the criminal justice system. Moreover, effectively representing someone with an intellectual

disability requires particular sophistication, as such defendants have a limited ability to comprehend their legal situation, communicate effectively with counsel or a decision-maker, or to understand and accurately answer questions.

It is inappropriate for a defendant with pending intellectual disability litigation who is represented by counsel to be questioned about that litigation outside the presence of the attorney(s) representing him in that matter—particularly when, as in Mr. Bowles's case, the defendant desires the presence of his counsel, the defendant is intellectually disabled and prone to difficulty with comprehension and communication, and a transcript of any statements the defendant makes is disclosed to the State Attorney's Office pursuant to Florida's Rules of Executive Clemency. *See* Rule 15(G). In no other proceeding would such questioning be allowed outside the presence of representing counsel. Clemency should be no different.

In cases where the condemned man has an intellectual disability, like Mr. Bowles, the need for adequate counsel is particularly compelling. Individuals with intellectual disabilities are uniquely vulnerable and unable to navigate through the criminal justice system like other offenders. *See Hall v. Florida*, 572 U.S. 701, 709 (2014); *Atkins*, 536 U.S. at 320-21. Because they "may be less able to give meaningful assistance to their counsel[,]" *Atkins*, 536 U.S. at 320, counsel's adequacy is of paramount importance. This is especially true in the clemency context, where demonstration of remorse is an important consideration to decision-

makers. *See* Complaint at ¶¶ 79, 101. Individuals with intellectual disability "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321. To prevent these misimpressions, individuals with intellectual disability especially need the assistance of experienced counsel familiar with intellectual disability as it relates to the death penalty. Mr. Bowles was denied his federal right to such assistance here.

B. Defendants Violated Mr. Bowles's Federal Rights By Prohibiting His § 3599 Counsel From Meaningfully Participating in His State Clemency Proceedings Despite State-Retained Clemency Counsel's Inadequacy

Defendants violated Mr. Bowles's federal right to adequate representation in clemency in two respects. First, Defendants interfered with § 3599 counsel's representation of Mr. Bowles in clemency proceedings by refusing to recognize his § 3599 counsel as clemency counsel or co-counsel, and barring § 3599 counsel from the clemency interview. Second, Defendants' actions resulted in Mr. Bowles having inadequate clemency counsel, both because his § 3599 counsel was excluded, and because the counsel FCOR retained, Mr. Simmons, was not adequate. These actions violated Mr. Bowles's federal rights.

i. Mr. Bowles's § 3599 Counsel was Barred From Representing Him or Meaningfully Participating in Clemency Proceedings

Representation is not merely a symbolic gesture consisting of an appointment order and nothing else. *See Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("The

Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."). It includes advocacy before the tribunal charged with rendering a decision, and that is precisely what was denied here. *See, e.g.*, *Herring v. New York*, 422 U.S. 853, 858 (1975) (holding that denying counsel a closing argument was the equivalent of the denial of counsel, as it impacted "a basic element of the adversary factfinding process"); *Ferguson v. Georgia*, 365 U.S. 570, 594 (1961) (state law prohibiting counsel from questioning testifying defendant on direct examination was unconstitutional interference with the "guiding hand of counsel" in a situation where the high stakes "might alone render [defendant] utterly unfit to give his explanation properly and completely").

Defendants, through their collective actions, violated Mr. Bowles's § 3599 rights. The CHU was not notified that outside counsel had been retained to represent Mr. Bowles in clemency proceedings until after Mr. Simmons's contract with FCOR had been formally executed. *See* Complaint at ¶ 60. Upon notification, the CHU immediately informed FCOR that Mr. Bowles had pending state court litigation regarding his intellectual disability, and attempted to intervene as counsel for Mr. Bowles in order to protect his rights throughout the clemency proceedings and to protect his pending intellectual disability litigation in state court. *See* Complaint at ¶¶ 59, 61, 62, 63, 65.

Defendants consistently rebuffed these attempts. They refused to postpone Mr. Bowles's clemency proceedings pending resolution of his state intellectual disability litigation. Complaint at ¶ 65. They refused to allow the CHU to attend or participate in Mr. Bowles's clemency interview, despite the fact that the CHU had informed FCOR that they were concerned Defendants may question Mr. Bowles about his intellectual disability and related evaluations, which was the subject matter of the ongoing litigation in which the CHU represented Mr. Bowles. Complaint at ¶ 70. And, they refused to allow the CHU to act as clemency co-counsel by directly submitting information or making requests to FCOR and the Clemency Board, which forced the CHU instead to submit everything through Mr. Bowles's inadequate clemency counsel. Complaint at ¶¶ 61, 65.

Because Mr. Bowles already had § 3599 counsel, and that § 3599 counsel was obligated to represent him in state clemency proceedings as a matter of federal right, it was improper for FCOR to interfere with appointed counsel's representation of their client. In so doing, they denied Mr. Bowles his § 3599 counsel at a critical stage in which he was entitled to have their representation. *See, e.g.*, *Mickey v. Davis*, No. 93-00243, 2018 WL 3659298, at *4 (N.D. Cal. Aug. 2, 2018) ("[C]lemency 'is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted . . . . [W]e have called it 'the fail safe' in our criminal justice system.' . . . [A]ppointing . . . co-counsel will allow petitioner to receive adequate

representation during a critical stage of his proceedings.") (internal citation omitted). Defendants' actions prevented Mr. Bowles's only adequate counsel from providing crucial assistance, leaving him with no adequate counsel at all.

ii. Mr. Bowles's Ongoing Litigation and his Intellectual Disability-Related Deficits Made him Uniquely Vulnerable and in Need of his § 3599 Counsel

Mr. Bowles was uniquely vulnerable going into his clemency interview, because he had active litigation pending in state court regarding a claim of intellectual disability. Success on the merits of the intellectual disability claim would exempt Mr. Bowles from execution. *See Atkins*, 536 U.S. at 321; *see also, e.g.*, *Hall v. Florida*, 572 U.S. 701 (2014).

To prevail on the merits of an intellectual disability claim, the claimant must show "significantly subaverage intellectual functioning, deficits in adaptive functioning . . . and onset of these deficits during the developmental period." *Hall*, 572 U.S. at 710 (citations omitted). One significant danger faced by individuals raising a claim of intellectual disability is a decision-maker's "place[ment of] undue emphasis on adaptive strengths, and regard[ing] risk factors for intellectual disability as evidence of the absence of intellectual disability." *Moore v. Texas*, 137 S. Ct. 1039, 1052 n.9 (2017)*; see also Brumfield v. Cain*, 135 S.Ct. 2269, 2281 (2015) (noting that individuals with intellectual disability may exhibit "strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they

otherwise show an overall limitation.") (internal quotation omitted). Counsel's duty in intellectual disability litigation is to educate courts and ensure that dramatic societal stereotypes of intellectual disability do not dominate an evaluation that should place high regard on scientific and medical opinions.

As Mr. Bowles's § 3599 counsel warned FCOR and the Clemency Board, there is no other circumstance within the justice system which would allow an individual with intellectual disability to be subjected to questions about pending litigation without the presence and assistance of the attorney representing him in that litigation. *See* Complaint at ¶ 80. Additionally, the CHU warned FCOR and the Clemency Board that a transcript of the clemency interview would be available to Mr. Bowles's adversary in his intellectual disability litigation. *See* Complaint at ¶ 47; Executive Rules of Clemency, Rule 15(G). Without counsel knowledgeable about Mr. Bowles's background and intellectual disability litigation, prejudicial questions and statements in a proceeding purporting to be "wholly separate" from Mr. Bowles's intellectual disability litigation could infect that litigation. *See* Complaint at ¶ 65.

Mr. Bowles's § 3599 counsel additionally notified FCOR and the Clemency Board that their presence was necessary to protect Mr. Bowles's rights and assist him in communicating during the clemency interview. As lay and expert witnesses have observed, Mr. Bowles is forgetful, gullible, naïve, and does not understand

social nuances. *See* Complaint at ¶ 25. He has deficits with regard to language skills, and cannot keep up in conversations. *Id.* His impairments are more pronounced in new and stressful situations. *Id.* His deficits were likely to impair his ability to understand or answer questions posed to him in the clemency interview, hinder a demonstration of remorse. Additionally, individuals with intellectual disability often attempt to "mask" their deficits,[3] so Mr. Bowles may pretend to understand questions or concepts that he does not actually comprehend. Counsel who had experience with intellectual disability generally, was familiar with Mr. Bowles's specific impairments and life history, and had established a trust and rapport with him, was crucial to Mr. Bowles's ability to effectively communicate during his clemency interview.

iii. Even if State-Retained Counsel Could Replace § 3599 Counsel, Mr. Bowles's Clemency Counsel was Not an Adequate Substitute

Even if § 3599 provided that federally appointed counsel could be replaced by state-retained counsel for the purposes of clemency, FCOR-retained attorney Nah-Deh Simmons was not adequate or "similarly qualified counsel" and his representation could not replace that of Mr. Bowles's § 3599 counsel under the circumstances. Mr. Simmons had no experience with death penalty cases, and no

[3] *See* American Association on Intellectual and Developmental Disabilities (AAIDD), *Intellectual Disability: Definition, Classification and Systems of Supports*, p. 51-52 (11th ed. 2010).

training regarding or experience litigating intellectual disability. Moreover, he had previously waived any access to funding for investigative, expert, or other assistance, before learning anything about Mr. Bowles cases, and remained inadequately familiar with his case through the proceedings. Unsurprisingly, Mr. Simmons's representation, therefore, did not approach professional standards for the representation of clients in capital clemency proceedings.

1. Mr. Simmons is Not Qualified to Represent Individuals Facing the Death Penalty

FCOR has nearly no requirements, other than a Florida bar license, for an attorney to qualify to represent individuals in clemency proceedings in Florida. *See* Complaint at ¶ 50. FCOR does not have any requirements that ensure an attorney charged with such representation has any familiarity with death penalty law or even criminal law, and does not require they abide by any guidelines, attend any continuing education, or direct them in any manner to professional guidance regarding capital clemency representation. *See* Complaint at ¶ 51.

Mr. Bowles's retained clemency counsel, Mr. Simmons, does not meet and never has met the qualifications under Florida's criminal rules to represent individuals facing the death penalty at any stage. *See* Complaint at ¶ 53, *see also* Fla. Stat. § 27.704(2); Florida Rules of Criminal Procedure, Rule 3.112(k). He has never handled a death penalty case at any stage of the trial, appeal, postconviction, or habeas processes. Over the course of his representation as clemency counsel, he was

given no specific training with regard to clemency, and given no specific guidance on how to perform an adequate clemency investigation and presentation.

2. Mr. Simmons Affirmatively Waived Access to Additional Funding or Resources

Mr. Simmons, by virtue of his contract with FCOR, placed himself under financial and time constraints that made conducting a professionally appropriate clemency investigation impossible. The terms of the contract for Mr. Bowles's clemency representation, as drafted and authorized by Defendants and signed by Mr. Simmons, prescribed that upon performance of three specific events, his clemency counsel was entitled to the entire statutory amount of $10,000, authorized under Fla. Stat. § 940.031(2). *See* Complaint at ¶ 55. Within the contract, Mr. Simmons agreed to waive any further compensation before knowing anything about Mr. Bowles's case, meeting Mr. Bowles, or speaking with his current counsel. *See* Complaint at ¶¶ 54, 55. Thus, he waived any additional resources before ever learning that Mr. Bowles was intellectually disabled, or about his pending litigation. Moreover, the contract's fixed cap meant that any expense or cost associated with meaningful clemency representation would have had to come from Mr. Simmons himself—a considerable burden for such a solo private practitioner.

Concerns about the pitting of a client's representation against an attorney's financial bottom line is why the American Bar Association (ABA) Guidelines strongly discourage the use of flat rate payments, such as the one that Mr. Simmons

signed for Mr. Bowles's representation. *See* Laura Schaefer, *The Ethical Argument for Funding in Clemency: The "Mercy" Function and the ABA Guidelines*, 46 Hofstra L. Rev. 1257, 1272 (2018) (quoting ABA Guidelines, at 984-88 (Commentary to Guideline 9.1, Funding and Compensation)). This is of considerable concern for ensuring adequate representation in any case, much less for a capital client. *See, e.g.*, *id*. at 1272-73 ("[An] explicit cap on funding does not even differentiate between attorney's hours and expenses specific to the case . . . . As a result, attorneys are actually expected to use the money provided for clemency representation as their own compensation, rather than to ensure a clemency case is properly investigated and presented.").

At best, Mr. Simmons signed a contract that necessarily pitted his profits against the tools of adequate representation; at worst, he waived any access to such without knowing anything about Mr. Bowles's case or clemency needs.

3. Mr. Simmons Lacked Familiarity with Mr. Bowles's Case and Ongoing Litigation

The presence or assistance of counsel is meaningless if counsel is not sufficiently knowledgeable about issues in the case. *See Lamb v. State*, 202 So.3d 118, 120 (Fla. 5th DCA 2016) (failure to become familiar with a case is grounds for an ineffective assistance of counsel claim). Despite repeated efforts to secure more time to prepare for Mr. Bowles's clemency interview, Mr. Simmons was given less than five months from when he was retained to his clemency presentation. Mr.

Simmons could not adequately prepare in the time allotted, as Mr. Bowles's case included an ample and undeveloped history of childhood risk factors for—and lifelong evidence of—intellectual disability, and Mr. Simmons could not obtain and review all of the necessary materials prior to the scheduled hearing.[4] He spoke with no lay witnesses, and no expert witnesses. He did not review the entire trial or postconviction file. And, he did not have the benefit of a developed record from any state court proceedings regarding Mr. Bowles's intellectual disability, which were pending prior to and throughout Mr. Bowles's clemency proceedings.

Counsel who was not fully aware of Mr. Bowles's complex case, background, and unique vulnerabilities due to his disability could not have performed adequately in clemency proceedings. Indeed, retaining inadequate counsel was akin to not providing counsel at all. It was hardly better than Mr. Bowles being "left to navigate the sometimes labyrinthine clemency process from [his] jail cell[], relying on limited resources and little education in a final attempt at convincing the government to spare [his life]." *Hain v. Mullin*, 436 F.3d 1168, 1175 (10th Cir. 2006).

[4] It is unclear what, if any, files Mr. Simmons had on Mr. Bowles, as he did not request any files from the CHU, did not request any from the State Archives, and the CHU has the originals of all of the files of prior counsel.

4. Mr. Simmons's Representation Did Not Even Approach Professional Standards

That clemency is a matter of grace and varies among states does not mean there are no professional standards for clemency representation. In 2003, the American Bar Association promulgated the Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, which have since been recognized as a guide on reasonable representation for death-sentenced individuals. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) [hereinafter ABA Guidelines]; *see also Wiggins v. Smith*, 539 U.S. 510, 523 (2003) ("[W]e have long referred [to ABA standards] as guides to determining what is reasonable."). ABA Guideline 10.15.2 requires that, minimally, competent representation in clemency requires an independent investigation in line with ABA Guideline 10.7. *See* Complaint at ¶ 35. It also advises that attorneys representing individuals in capital clemency proceedings should "tailor[] the presentation to the characteristics of the particular client, case and jurisdiction." ABA Guideline 10.15.2(C).

Here, Mr. Simmons was unable to "tailor" his presentation to the individual characteristics of Mr. Bowles or his case. *See* ABA Guideline 10.15.2(C). He did not conduct a clemency investigation consistent with the ABA Guidelines. *See* ABA Guideline 10.7. He did not conduct *any* independent investigation to support his clemency presentation, or speak with any experts. While the guidelines are not

binding in determining the efficacy of counsel in any setting, they do provide a guide as to how minimally competent representation should look. The representation Mr. Bowles received in clemency did not even approach that standard.

iv. That Mr. Bowles had Inadequate Counsel is Evident in his Deficient Proceedings

Because Mr. Simmons had no death penalty experience or qualifications, affirmatively waived any investigative, expert, or other fees associated with his representation, failed to speak with any lay or expert witnesses or seek Mr. Bowles's full case file, and was unfamiliar with Mr. Bowles's background, none of the necessary precursors to a competent clemency presentation were taken by Mr. Simmons. This—coupled with FCOR's refusal to allow § 3599 counsel to represent Mr. Bowles and present their own clemency expert regarding intellectual disability, Dr. Jethro Toomer, *see* Complaint at ¶ 70, 80—had a profound effect on Mr. Bowles's clemency representation.

During the clemency interview, Mr. Simmons himself acknowledged how his unfamiliarity with Mr. Bowles's case and FCOR's exclusion of § 3599 counsel hamstrung Mr. Bowles's clemency presentation when he told FCOR that he had intended for § 3599 counsel to appear with him and present Dr. Toomer's testimony regarding intellectual disability. Complaint at ¶ 74. Indeed, the issue of Mr. Bowles's intellectual disability went substantively unaddressed, with only superficial references by his counsel during the clemency presentation that themselves showed

Mr. Simmons was unfamiliar with Mr. Bowles's intellectual disability and background, and no expert or lay testimony introduced.

This was devastating to Mr. Bowles's clemency process, as it left him without an advocate who could help FCOR understand that individuals with intellectual disability "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321 The deleterious impact was especially pronounced in Mr. Bowles's clemency interview, where he appeared to struggle to understand the questions posed to him by Mr. Simmons and members of FCOR. Complaint at ¶ 79. Apparent from the interview is the pitfall that many individuals with intellectual disability experience—their intellectual and adaptive limitations cause them to be erroneously perceived as lacking remorse. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 709 (2014); *Atkins*, 536 U.S. at 321. Yet, because Mr. Simmons was untrained in issues of intellectual disability, inexperienced with death penalty litigation, and Defendants prevented the assistance of § 3599 counsel who were familiar with these issues and had an expert prepared to speak at the clemency interview, FCOR and the Clemency Board went into their decision-making process uneducated.

Because Defendants forced Mr. Bowles to proceed into clemency without adequate representation, he was deprived of the chance to offer up a meaningful presentation of his life history and intellectual disability as grounds for mercy. The

problem was twofold: (1) information regarding Mr. Bowles's life and intellectual disability—which was crucial to a determination of whether clemency was appropriate in Mr. Bowles's case—was never presented during the clemency interview; and (2) the final Application for Executive Clemency submitted by Mr. Simmons was factually inaccurate and did not meet professional standards.

With regard to information missing from the clemency interview, Mr. Simmons never presented the fact that Mr. Bowles had the odds stacked against him since before his birth. He was born into an emotionally and unstable family marked by alcoholism and deprivation, was abandoned by his mother at the age of three, and when he was finally reunited with her at the age of six, he was neglected by her and physically abused by her string of husbands. He was sexually abused beginning at the age of eight, and introduced to drugs, alcohol, and inhalants between the ages of eight and ten, resulting in hospitalization. *See* Complaint at ¶¶ 14-19, 21.

Compounding these adversities were Mr. Bowles's intellectual and adaptive deficits, which began in his childhood. He was unable to think abstractly, and fell behind his peers in school. Records suggest he was placed in special education, but he still could not keep up and received failing grades. *See* Complaint at ¶ 20.

At the age of thirteen, Mr. Bowles was beaten to a life-threatening degree by his stepfather. When his mother refused to take protective action for Mr. Bowles's sake, he left home and—unable to find traditional employment due to his young age

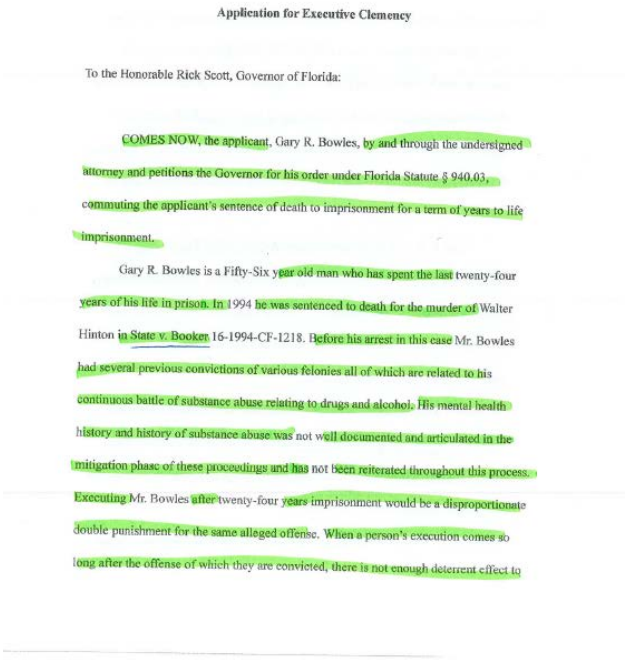
and low intellectual functioning—was forced to sell his body as a child prostitute in order to obtain food and shelter. He was transient, repeatedly sexually victimized by older men, and unable to navigate the world on his own. His dependence on others made it impossible to escape the cycle of sexual victimization, which furthered Mr. Bowles's trauma and led him to self-medicate symptoms of post-traumatic stress disorder with drugs and alcohol. *See* Complaint at ¶¶ 22-27.

Mr. Bowles's deficits were severe and obvious. He was forgetful, gullible, naïve, immature, socially inept, impulsive, and lacked a sense of consequences for his actions. *See* Complaint at ¶ 25. He had impaired language skills, could not keep up in conversations, struggled with memory, and could not perform day-to-day tasks such as utilizing public transportation, using money, or seeking employment. *See* Complaint at ¶¶ 26-27. He had no formal system of social support, and nearly every day of his life was a struggle to survive.

As mentioned above, not only was this information not presented during Mr. Bowles's clemency interview/presentation, but it was also omitted from the markedly unprofessional Application for Executive Clemency submitted by Mr. Simmons. *See* Complaint at ¶ 81. Indeed, the Application submitted by Mr. Simmons was less than eight double-spaced pages in length from title to signature, and rife with typographical, formatting, and substantive errors.

Over 1,300 of its approximately 1,825 words were copied and pasted directly from death-row inmate Stephen Booker's Application for Executive Clemency, including two instances where Mr. Bowles was erroneously identified as "Mr. Booker" and a notation that Mr. Bowles had been on death row for over thirty years (which was true of Mr. Booker, but not Mr. Bowles). Elsewhere in the application, Mr. Simmons indicated that Mr. Bowles had been on death row since 1994, though Mr. Bowles had not even pled guilty until 1996.[5]

[5] Included in the Appendix to the Complaint, on pages 133 to 147, are copies of both the clemency application for Mr. Booker as well as the application for Mr. Bowles, with the identical sentences—nearly the entire application—highlighted. For example, images of the first page of each application are included below:

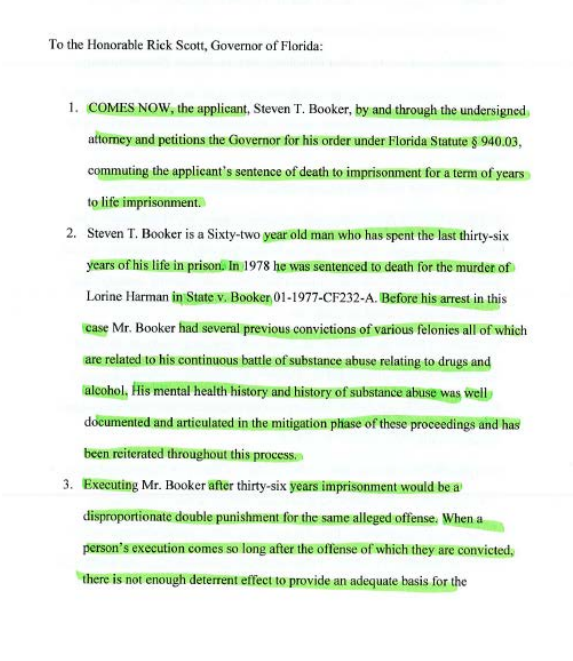


Application for Executive Clemency

To the Honorable Rick Scott, Governor of Florida:

COMES NOW, the applicant, Gary R. Bowles, by and through the undersigned attorney and petitions the Governor for his order under Florida Statute § 940.03, commuting the applicant's sentence of death to imprisonment for a term of years to life imprisonment.

Gary R. Bowles is a Fifty-Six year old man who has spent the last twenty-four years of his life in prison. In 1994 he was sentenced to death for the murder of Walter Hinton in State v. Booker 16-1994-CF-1218. Before his arrest in this case Mr. Bowles had several previous convictions of various felonies all of which are related to his continuous battle of substance abuse relating to drugs and alcohol. His mental health history and history of substance abuse was not well documented and articulated in the mitigation phase of these proceedings and has not been reiterated throughout this process. Executing Mr. Bowles after twenty-four years imprisonment would be a disproportionate double punishment for the same alleged offense. When a person's execution comes so long after the offense of which they are convicted, there is not enough deterrent effect to



Application for Executive Clemency

To the Honorable Rick Scott, Governor of Florida:

1. COMES NOW, the applicant, Steven T. Booker, by and through the undersigned attorney and petitions the Governor for his order under Florida Statute § 940.03, commuting the applicant's sentence of death to imprisonment for a term of years to life imprisonment.
2. Steven T. Booker is a Sixty-two year old man who has spent the last thirty-six years of his life in prison. In 1978 he was sentenced to death for the murder of Lorine Harman in State v. Booker 01-1977-CF232-A. Before his arrest in this case Mr. Booker had several previous convictions of various felonies all of which are related to his continuous battle of substance abuse relating to drugs and alcohol. His mental health history and history of substance abuse was well documented and articulated in the mitigation phase of these proceedings and has been reiterated throughout this process.
3. Executing Mr. Booker after thirty-six years imprisonment would be a disproportionate double punishment for the same alleged offense. When a person's execution comes so long after the offense of which they are convicted, there is not enough deterrent effect to provide an adequate basis for the

Instead of "tailoring the presentation to the characteristics of the particular client, case and jurisdiction[,]" ABA Guideline 10.15.2(C), Mr. Simmons offered identical justification to Mr. Booker's application when asserting that clemency was appropriate for Mr. Bowles. Namely, Mr. Simmons relied on sweeping arguments such as the unfairness of executing someone who has spent a lengthy time on death row, vague invocation of remorse and rehabilitation, and only passing mention of substance abuse, mental health, and disadvantaged backgrounds (none of which was tailored to Mr. Bowles—including the phrase, copied from Mr. Booker's application: "His formal education came through the streets. During his journey he became addicted to alcohol and drugs."). App. to Complaint at 137-38. No mention of Mr. Bowles's traumatic life history was made, other than the descriptor "came from an impoverished disadvantaged background" (also copied from Mr. Booker's application), App. to Complaint at 145. No substantive reference was made to Mr. Bowles's intellectual disability, other than the following language which reinforces Mr. Simmons's utter unfamiliarity with Mr. Bowles's case and condition:

> As the Board was formally notified in the initial clemency submission on June 22, 2018, Mr. Bowles is intellectually disabled. His intellectual disability is the subject of pending circuit court litigation. I do not represent Mr. Bowles in his intellectual disability litigation, and I am not familiar with the issues involved in such litigation. I have needed the assistance of the Capital Habeas Unit (CHU) of the Federal Public Defender's office, Mr. Bowles's counsel in the intellectual disability litigation, to present critical information to the Board. However, the CHU was not allowed to participate in Mr. Bowles's clemency

> interview, which hindered the presentation of information regarding Mr. Bowles's intellectual disability and life history.

Complaint at ¶ 82. Mr. Simmons's submission on Mr. Bowles's behalf did not come close to the tailored advocacy envisioned by ABA Guideline 10.15.2(C), and was not a professionally competent submission by any standard. As a result, FCOR and the Clemency Board had no meaningful information with which to make an informed, thoughtful decision regarding whether Mr. Bowles deserved mercy.

The deficiency in Mr. Bowles's clemency presentation came not only from what was omitted from his clemency presentation, but from what was injected into the proceeding. Namely, Mr. Bowles was repeatedly questioned by FCOR about matters bearing on his pending intellectual disability litigation, outside the presence of § 3599 counsel who represents him in that litigation, and FCOR actively denigrated that litigation, and whether Mr. Bowles had any disability at all. *See* Complaint at ¶¶ 78, 79. Questions about Mr. Bowles's intellectual disability and prior mental health evaluations could not be answered accurately or in a way that protected Mr. Bowles's pending state court intellectual disability litigation, because the counsel representing Mr. Bowles in that litigation was barred from the interview. This left Mr. Bowles, already vulnerable due to his limited intellectual functioning, in an even more precarious position because he had no access to the attorneys involved in his pending litigation, and a transcript of that questioning is, pursuant to the Rules of Executive Clemency, made available to the State Attorney's Office—

an entity with an adversarial interest in Mr. Bowles's state intellectual disability litigation. Yet, that is precisely what occurred in Mr. Bowles's clemency interview.

For instance, David Wyant of FCOR asked Mr. Bowles how, if he was intellectually disabled, he knew how to obtain a fake ID by bringing two pieces of identification to the DMV. This placed undue emphasis on what Mr. Bowles was capable of doing, rather than recognizing that adaptive strengths coexist with weaknesses and properly focusing on what Mr. Bowles was not capable of doing. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015); *Moore*, 137 S. Ct. at 1052, n. 9. FCOR Vice-Chair Richard Davison also asked Mr. Bowles if he remembered speaking with past mental health evaluators Dr. Daniel Sprehe, Dr. A.G. Gonzalez, and Dr. Elizabeth McMahon. Complaint at ¶ 78. Mr. Davison stated on the record:

> But in the assessment that was done, both psychiatric and psychological, there was a determination that you displayed no significant impairment in your ability to adjust within the institutional environment and that you did not exhibit any symptoms of mental disorder **and that specifically included the question of intellectual disability**. And so that report that was prepared by the psychiatrist that did your evaluation I'm going to presume going forward is correct, that there are no significant impairments.

Complaint at ¶ 78 (emphasis added). Mr. Davison's statement was factually inaccurate. Dr. McMahon, who evaluated Mr. Bowles in relation to his capital case, *prior to the Supreme Court's ruling in Atkins*, never evaluated Mr. Bowles for intellectual disability. *See* Complaint at ¶ 78. The two other evaluators Mr. Davison mentioned, Drs. Sprehe and Gonzalez, did not evaluate Mr. Bowles in the context of

his death penalty case, and their reports had no bearing on intellectual disability—they were one-page competency determinations from completely unrelated felony charges in 1982. Mr. Simmons, unfamiliar with Mr. Bowles's case and therefore his evaluating experts, did nothing to correct these factual inaccuracies.

Mr. Davison also questioned Mr. Bowles about whether he knew right from wrong. *See* Complaint at ¶ 79. This, too, was an inappropriate line of questioning and demonstrated that FCOR had not been presented with sufficient information regarding Mr. Bowles's intellectual disability. Individuals with intellectual disability "frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Atkins*, 536 U.S. at 318. Individuals with intellectual disability may "meet the law's requirements for criminal responsibility" but must not be executed because, due to their deficits, "they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 321; *see also Burgess v. Commissioner, Alabama Dep't of Corrs.*, 723 F.3d 1308, 1317 (11th Cir. 2013). Mr. Simmons, lacking experience with claims of intellectual disability, did not address these concepts.

C. Defendants Acted Under Color of State Law When They Violated Mr. Bowles's Federal Rights

Defendants acted under color of state law when they violated Mr. Bowles's federal § 3599 rights. "In order to be entitled to relief under s 1983, the plaintiff must show (a) that the defendant deprived him of a right secured to him by the Constitution or federal law and (b) that *the deprivation occurred under color of state law*." *Brown v. Miller*, 631 F.2d 408, 411 (5th Cir. 1980) (citations omitted) (emphasis added). "Color of law means 'pretense of law,' and it does not necessarily mean under authority of law." *United States v. Picklo*, 190 F. App'x 887, 888 (11th Cir. 2006) (quoting *United States v. Jones*, 207 F.2d 785, 786-87 (5th Cir. 1953)). Actions that fall into "under color of state law" need not be specifically authorized by law. *See, e.g.*, *Brown*, 631 F.2d at 411 ("Action taken 'under color of' state law is not limited only to that action taken by state officials pursuant to state law."). Even when a defendant acts illegally, it can still be an action under color of state law. *Picklo*, 190 F. App'x at 888. "Determining whether a defendant acted under color of law involves an assessment of the totality of the circumstances." *Id.* (citing *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1303-04 (11th Cir. 2001)).

Defendants S. Michelle Whitworth and Julia McCall acted under state authority pursuant to Fla. Stat. § 940.031 when they retained Mr. Simmons as clemency counsel without first ascertaining whether Mr. Bowles already had counsel appointed under § 3599. Complaint at ¶ 54. The contract they sent and executed

specifically created a contractual relationship between Mr. Simmons and FCOR, a state entity. *See* Complaint at ¶¶ 50, 54-56. Defendant Melinda Coonrod, the Chairman and a Commissioner of FCOR, is appointed by the Florida Governor and Cabinet, and was confirmed by the Florida Senate. Ms. Coonrod is ultimately in charge of the use of general funds of FCOR, out of which clemency counsel is paid. *See* Fla. Stat. § 940.031 (providing for "compensation to be paid out of the General Revenue Fund from funds budgeted to [FCOR]"). Ms. Whitworth conducted FCOR's correspondence with clemency counsel, was his primary point of contact at FCOR, and communicated the denials of requests made by Mr. Bowles's § 3599 counsel to FCOR. When Mr. Bowles's § 3599 counsel tried to intervene in the proceedings and explain the federal law and concerns regarding Mr. Bowles's rights, Ms. Whitworth disregarded those concerns. *See* Complaint at ¶¶ 65, 72.

Because of the secrecy of the clemency process, and the inability of § 3599 counsel or clemency counsel to have substantive communications with anyone other than Ms. Whitworth, it is unclear whether Ms. Whitworth was the decision-maker, whether other officials at FCOR were, or whether the Clemency Board and/or the Governor made the critical decisions affecting Mr. Bowles's rights. Regardless of whether Ms. Whitworth was the messenger or the decision-maker, her decisions were under the authority of FCOR's role in the clemency process and are imputed to the Governor and other members of the Clemency Board that are named

defendants in this action. Further, Ms. Whitworth's notification of the existence of § 3599 counsel for Mr. Bowles, who was ready, willing, able, qualified, and statutorily authorized to participate in state clemency proceedings, is imputed to FCOR and the Clemency Board.

Each of the named defendants in this case participated in the denial of Mr. Bowles's federal rights, actually or constructively, through their official supervisory positions over the agencies that contracted with private, inadequate clemency counsel to represent Mr. Bowles in his state clemency proceedings instead of allowing his qualified § 3599 counsel to do so.

D. Defendants are Appropriately Sued in their Official Capacities

Mr. Bowles has appropriately sued Defendants in this action in their official capacities. "When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself." *Penhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). The Eleventh Amendment bars suits against state officials where the suit is, in essence, a suit against the State and not the officials, and the officials are only sued nominally. *Id.* However, the Supreme Court has recognized time and again that there is "an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." *Id.* at 102. Likewise, a suit that challenges whether a state official's action violates an individual's federal statutory rights is not one against the

State. *See, e.g.*, *Doe v. Round Valley Unified School Dist.*, 873 F. Supp. 2d 1124, 1130-31 (D. Ariz. 2012) ("Section 1983 provides no cause of action unless someone acting 'under color of law' violated a constitutional or federal statutory right.").

This is not a suit that names Defendants nominally while actually seeking to sue the State of Florida. The State of Florida's scheme, either in its clemency proceedings or state statutory provisions regarding clemency, are not at issue here. While Mr. Bowles does not concede that Florida's scheme is constitutional, this action also does not challenge the constitutionality of those legislative or rules-based procedures. Instead, this suit challenges the actions of the named officials in their application of these laws and guides against Mr. Bowles in a manner that violated his federal rights. The statutes and rules themselves did not create the harm that Mr. Bowles asserts herein; however, Defendants' actions were taken with and through the authority given to them through this statutory and rules-based scheme, and those actions violated Mr. Bowles's rights. Thus, Defendants in this case are sued in their official capacities, as officials or agents of FCOR or the Clemency Board, and are appropriately named as defendants in this matter.

E. Mr. Bowles is Entitled to Injunctive Relief

As discussed further below, *infra* section III, injunctive relief is permissible and appropriate in this case. Mr. Bowles seeks prospective injunctive relief and declaratory relief against Defendants, state officials, for their violation of his federal

rights in his clemency proceedings—proceedings which, under Florida law, are a necessary prerequisite before Mr. Bowles's execution. Mr. Bowles asks that Defendants and the Governor of Florida, in particular, not be allowed to execute him based on a state clemency proceeding that violated his federal statutory rights.

III. This Court Should Issue a Stay of Execution

A stay of execution of a death sentence is a form of injunctive relief, with identical elements. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (announcing the elements for injunctive relief). A stay is warranted where four factors are satisfied: "(1) [the applicant] has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013) (quoting *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011)). As detailed below, and in Mr. Bowles's simultaneously filed motion for a stay of execution, Mr. Bowles has proffered facts that satisfy each of these elements. This Court should stay his scheduled August 22, 2019, execution pending the resolution of this action in the ordinary course, without the imminent threat of a death warrant.

A. This Cause of Action has a Substantial Likelihood of Success

The issue in this case is whether Mr. Bowles, a man with intellectual disability, having had counsel appointed to him under § 3599, had a federal right to

that counsel's representation in clemency proceeding, and whether that right was violated by Defendants' actions as they related to Mr. Bowles's clemency. This is a question of first impression in this Court and the Eleventh Circuit, and one that has a substantial likelihood of success. *See e.g.*, *Samayoa*, 2019 WL2864411 at *3-4 (accepting the arguments made herein).

Mr. Bowles not only did not have § 3599 counsel present at his critical clemency interview, but he did not have *any* "adequate representation" in his clemency proceedings due to Defendants' actions. The attorney who represented Mr. Bowles in clemency had never handled a death penalty case, was not death-qualified under Florida law, had no specialized training in death penalty cases, had no training or expertise regarding intellectual disability, and was denied the assistance of § 3599 co-counsel and expert witnesses at Mr. Bowles's clemency interview. As discussed above, these inadequacies were obvious: Mr. Bowles's FCOR-retained counsel was unfamiliar with his case, did no investigation, and prepared only a five-page clemency "petition" on Mr. Bowles's behalf that was riddled with factual inaccuracies and was nearly identical to the petition he submitted for another client years earlier, even misidentifying Mr. Bowles as that same client. *See supra* section (II)(B)(iv). Mr. Bowles's federal statutory rights were thus violated during his clemency proceedings.

Additionally, the need for adequate counsel was particularly pronounced in Mr. Bowles's case. Mr. Bowles has an intellectual disability—a condition which, when properly explained, is likely to be compelling in clemency proceedings, as individuals with intellectual disability are ineligible for execution under Constitutional law and our societal standards of decency due to a longstanding consensus that they have a lessened culpability. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002). But with unqualified, inadequate counsel, Mr. Bowles's intellectual disability was not properly explained, and his decision-makers were left unaware that individuals with intellectual disability "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321.

Mr. Bowles has presented a detailed factual record of communications and other documents delineating the violations that occurred in this case. Appendix to Complaint. Mr. Bowles's arguments above, and his factual support in his Complaint and attachments, constitute a substantial showing of the violation, and show a "substantial likelihood of success" on this issue.

B. Mr. Bowles Will Suffer Irreparable Injury—Death—If No Injunction is Issued

In this case, the injury Mr. Bowles faces is clear: he will be executed unless this Court issues a stay, and he will have been executed without ever having a clemency proceeding in which he had access to his federally protected statutory

rights. This injury is presumptive. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident."); *Ferguson v. Warden, Fla. State Prison*, 493 F. Appx 22, 26 (11th Cir. 2012) (Wilson, J., concurring) ("As a general rule, in the circumstance of an imminent execution, this court presumes the existence of irreparable injury.").

C. A Stay Would Not Harm Defendants

Mr. Bowles has been on Florida's death row since the 1990s. He has been eligible for clemency since exhaustion of his initial appeals, when his conviction and sentence were upheld by the Eleventh Circuit in 2010. Defendants waited more than seven years after such time to initiate clemency proceedings for Mr. Bowles. Because there is no meaningful transparency in the clemency process in Florida, it is impossible to know when (or if) a determination was made as to Mr. Bowles's clemency before the signing of his warrant for execution on June 11, 2019.

Defendants would not suffer any financial or other hardship from the issuance of a stay to allow the Court to evaluate the violation of Mr. Bowles's federal statutory rights. Where an individual's claim underlying his desire for a stay of execution could mean further proceedings—as here, a new clemency proceeding—that weighs heavily against a State's interest in the person's imminent execution. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("Moreover, contrary to the State's

contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment.").

D. A Stay Would Not Be Adverse to Public Interest in This Case

The public has an interest in individuals having access to the "safeguard" of our death penalty system: clemency. Clemency has long been regarded as the "safeguard" for capital cases. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 768 (E.D. Va. 2001) (referring to clemency as a "historic remedy employed to prevent a miscarriage of justice where the judicial process has been exhausted.").

Clemency is frequently the last forum for a death-sentenced individual. *See, e.g.*, *Harbison*, 556 U.S. at 196 ("[T]he sequential enumeration [of clemency at the end of the appeals process] suggests an awareness that clemency proceedings are not as divorced from judicial proceedings as the Government submits."). Executive clemency is frequently the only place in which an individual can make some claims, including, for instance, claims of actual innocence. *See, e.g.*, *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999) ("[W]hen available, state clemency proceedings

provide the proper forum to pursue claims of actual innocence based on new facts . . . . Virginia has such an executive clemency process available to Royal . . . . Thus, we cannot grant Royal the requested habeas relief based simply on his assertion of actual innocence due to newly discovered evidence."); *Wilson v. Lawrence County*, 154 F.3d 757, 761 (8th Cir. 1998) (referring to clemency as a "fail-safe" with a "history . . . replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.").

Additionally, due to procedural bars and the increasing complexity of litigation as time goes on, clemency is sometimes the only way to have other unfairness or injustices in the application of the death penalty addressed. *See, e.g.*, *Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015) ("But clemency is different than litigation, even if similar issues are raised . . . [the Governor] may decide that clemency is warranted even if [the applicant] could not meet a particular legal standard for mitigation in court."); *Sanborn v. Parker*, No. 99-678-C, 2011 WL 6152849, at *1 (W.D. Ky. Dec. 12, 2011) (noting that because "a bid for clemency is not reliant upon or restricted to matters argued before the courts and is not restricted to cases where the guilt of the petitioner is in doubt," evidence of a petitioner's "neuropsychological state, including whether or not he has some sort of brain damage or abnormality, is indeed relevant to his clemency petition, even though [he] was twice judged competent to stand trial."). There are many examples

of clemency being used to correct injustices that do not relate to innocence. *See* Clemency, Death Penalty Information Center.[6]

Moreover, clemency has been granted regularly on the basis of intellectual disability alone, or in cases in which low IQ was a major factor in the consideration of clemency. For example, Missouri Governor Mel Carnahan, cited death row inmate Bobbie Shaw's intellectual disability, and the jury's lack of knowledge about these disabilities at the time of sentencing, when granting Mr. Shaw clemency; Nevada Governor Kenny C. Guinn, who granted clemency to Thomas Nevius on the basis of Nevius's intellectual disability; Louisiana Governor Murphy Foster, who granted clemency to Herbert Welcome on the basis of intellectual disability; Virginia Governor Timothy Kaine, who cited intellectual disability as one of the factors he considered when granting clemency to Percy Walton; Ohio Governor John Kasich,

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A few of the examples of a state using its clemency power to correct procedural or other unfairness include: Governor Richard Celeste of Ohio, who selected eight death row inmates for clemency based on factors such as mental health and intellectual disability; Virginia Governor Terry McAuliffe, who in 2017 granted clemency to death-sentenced inmate William Burns due to his pervasive mental illness and incompetence; Ohio Governor John Kasich, who in 2018 granted clemency to death-sentenced Raymond Tibbetts on the basis of his powerful mitigation and "fundamental flaws in the sentencing phase of his trial" that prevented his jury from "making an informed decision about whether Tibbetts deserved the death penalty."; and Governor Greg Abbott, who commuted Thomas Whitaker's death sentence due in part to proportionality concerns, since the triggerman had not received the death penalty.

who considered John Eley's limited mental capacity as a factor in his decision to grant clemency; President Barack Obama, who granted clemency to Abelardo Arboleda Ortiz, an inmate with claims of intellectual disability. *See* Clemency, Death Penalty Information Center.[7]

The public has an interest in ensuring that the procedural and substantive unfairness of Mr. Bowles's death sentence was adequately addressed in clemency. Mr. Bowles, who has intellectual disability, was sentenced to death prior to the United States Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically banning the execution of individuals with intellectual disability) and *Hall v. Florida*, 572 U.S. 701 (2014) (disavowing a strict IQ score cutoff and mandating that individuals with scores in a qualifying range be given the opportunity to present evidence of their intellectual disability). Mr. Bowles's intellectual disability was only investigated and subsequently litigated by his § 3599 counsel.

Correcting procedural injustices is particularly important in Mr. Bowles's case. Mr. Bowles raised his intellectual disability, a life-long condition, for the first time in 2017. Since that time, clemency proceedings have been initiated against Mr. Bowles, a warrant was signed for his execution, and recently, the Duval County Circuit Court denied Mr. Bowles an evidentiary hearing on his intellectual disability

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claim, siding with the argument of the State. Moreover, the State argued in the case management hearing for this claim that Mr. Bowles is barred from filing anything in federal court on his intellectual disability. *See* App. at 274 ("Bowles has had his first habeas petition. To file a second one, he would have to go to the Eleventh Circuit. The Eleventh Circuit has held that we will not entertain successive habeas petitions based on *Hall vs. Florida*."). Thus, even according to the State, clemency was *the only forum* for Mr. Bowles to receive any kind of merits review or consideration of his intellectual disability claim, and thus to correct the procedural injustice of his alleged failure to timely file his intellectual disability claim, which is a categorical bar to his execution.

Whereas clemency is supposed to be a curative safeguard for uncorrected legal injustices, the violations of Mr. Bowles's right to § 3599 counsel instead compounded the injustice. Mr. Bowles's clemency counsel, having no experience with intellectual disability litigation in a death penalty context, having conducted no investigation with regard to Mr. Bowles's intellectual disability, and having consulted with no experts regarding Mr. Bowles's intellectual disability, was unable to make any meaningful presentation to FCOR or the Clemency Board regarding this ground for mercy—which, if the State is successful in blocking merits review of his claim in state court, would be the only forum Mr. Bowles has for consideration of a categorical bar to execution.

The public and the judiciary have a heightened interest in ensuring the procedural and moral application of punishment in cases such as Mr. Bowles's, because, as the long-held maxim goes, death is different. *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."). The public interest is best served by ensuring that all death-sentenced individuals have meaningful access, in line with their federal rights, to the safeguard of clemency procedures in their state. This public interest is heightened in the case of Mr. Bowles, who had no meaningful opportunity before or during his clemency to present evidence that his intellectual disability rendered him ineligible for the death penalty. It is in the public interest to ensure that the State of Florida maintains clemency's important safeguard function.

IV. The Issue Presented in This Suit Was Not Resolved by Judge Rodgers's Recent Order Denying a Clemency-Related Stay of Execution in *Long*

Judge M. Casey Rodgers of this District recently found, in her consideration of a clemency-related motion for a stay of execution in another case, that § 3599 did not create an enforceable right, *see Long v. Sec'y, Fla. Dep't. of Corrs.*, No. 4:19-cv-213, ECF No. 13 at 13-14 (N.D. Fla. May 16, 2019), and that even if it did, the plaintiff in that case did not have such a right in state clemency proceedings because Florida had otherwise furnished him counsel, *see id*., ECF No. 13 at 16.

Judge Rodgers's order in *Long*, however, is not dispositive in this case. For the reasons discussed in more detail in Mr. Bowles's concurrently filed motion for a

stay of execution, Judge Rodgers's order does not meaningfully discuss the federal right asserted for the purposes of § 1983, and mistakenly refers to the Eleventh Circuit's citation to *Irick*, a Sixth Circuit case, in a non-clemency related case, as persuasive. This was in error, as *Irick* relies on a misreading of *Harbison*, and has already been rejected by more than one federal court. Further, even to the extent that *Irick* and the *Long* order are applicable here, Mr. Bowles's factual claims are distinguishable from Mr. Long's, and present circumstances that are far more grave, both because of Mr. Bowles's vulnerabilities as well as because his counsel was far more inadequate. For reasons more specifically delineated in his motion for a stay of execution, the *Long* order, which did not reach the merits of the claims and ruled only on a motion for a stay of execution, is not dispositive to the issues raised here.

V. Conclusion

For the reasons detailed above, and in his accompanying complaint and motion for a stay of execution, Mr. Bowles respectfully requests that this Court issue a preliminary injunction, prohibiting the State of Florida from executing him until the Court has had the opportunity to fully consider Mr. Bowles's complaint and this supporting legal memorandum. Mr. Bowles ultimately requests that the Court grant declaratory relief and a permanent injunction, barring Defendants from executing him pending a clemency proceeding that complies with state and federal law.

Respectfully submitted,
Gary Ray Bowles
By Counsel

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Katherine_Blair@fd.org
Federal counsel for Mr. Bowles

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA McCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD, Chairman, Commissioner,
Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
Commission Investigator Supervisor,
Florida Commission on Offender Review,
in her official capacity.

CIVIL ACTION NO._____

EMERGENCY
INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

EMERGENCY MOTION FOR A STAY OF EXECUTION

I. Introduction

Simultaneously with this motion for a stay of execution of his Florida death sentence, Plaintiff Gary Ray Bowles filed an action pursuant to 42 U.S.C. § 1983, and a memorandum of law in support of that complaint. In these materials, Mr. Bowles has proffered facts that satisfy each of the elements necessary for a stay of execution. Thus, in this motion, Mr. Bowles respectfully moves for a stay of his scheduled August 22, 2019, execution pending the disposition of his § 1983 claims.

II. Mr. Bowles's Federal Statutory Rights Have Been Violated, and he Meets the Requirements for a Stay of Execution Pending the Resolution of his 42 U.S.C. § 1983 Action.

A stay of execution of a death sentence is a form of injunctive relief, with identical elements. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (announcing the elements for injunctive relief). A stay is warranted where four factors are satisfied: "(1) [the applicant] has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013) (quoting *Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011)).

Mr. Bowles has alleged in his § 1983 complaint, appendix, and supporting memorandum of law, that his § 3599 rights were violated when Defendants barred his § 3599 counsel from representing him in his clemency proceedings, and forced

him to proceed with inadequate counsel. In effect, Mr. Bowles had no counsel within the meaning of § 3599 for this critical proceeding, which the United States Supreme Court has called a "safeguard[]" for capital cases. *Herrera v. Collins*, 506 U.S. 390, 427 (1993). Where a capital litigant is deprived of § 3599 counsel for an authorized proceeding, "[a] stay [of execution] is needed to make [his] right to [§ 3599] counsel meaningful." *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016).

As detailed below, Mr. Bowles has proffered facts that satisfy each of the elements required for a stay. This case presents such a "rare circumstance," *Battaglia*, 824 F.3d at 474, where a death-sentenced individual was denied meaningful representation under § 3599, justifying a stay of execution. As such, Mr. Bowles should be granted a stay pending this Court's resolution of these claims.

A. The Cause of Action has a Substantial Likelihood of Success

The issue in this case is whether Mr. Bowles, a man with intellectual disability, having had counsel appointed to him under § 3599, had a federal right to that counsel's representation in clemency proceeding, and whether that right was violated by Defendants' actions as they related to Mr. Bowles's clemency. This is a question of first impression in this Court and the Eleventh Circuit, and one that has a substantial likelihood of success. *See e.g.*, *Samayoa*, 2019 WL2864411 at *3-4 (accepting the arguments made herein).

Mr. Bowles not only did not have § 3599 counsel present at his critical clemency interview, but he did not have *any* "adequate representation" in his clemency proceedings due to Defendants' actions. The attorney who represented Mr. Bowles in clemency had never handled a death penalty case, was not death-qualified under Florida law, had no specialized training in death penalty cases, had no training or expertise regarding intellectual disability, and was denied the assistance of § 3599 co-counsel and expert witnesses at Mr. Bowles's clemency interview. As discussed above, these inadequacies were obvious: Mr. Bowles's FCOR-retained counsel was unfamiliar with his case, did no investigation, and prepared only a five-page clemency "petition" on Mr. Bowles's behalf that was riddled with factual inaccuracies and was nearly identical to the petition he submitted for another client years earlier, even misidentifying Mr. Bowles as that same client. *See supra* section (II)(B)(iv). Mr. Bowles's federal statutory rights were thus violated during his clemency proceedings.

Additionally, the need for adequate counsel was particularly pronounced in Mr. Bowles's case. Mr. Bowles has an intellectual disability—a condition which, when properly explained, is likely to be compelling in clemency proceedings, as individuals with intellectual disability are ineligible for execution under Constitutional law and our societal standards of decency due to a longstanding consensus that they have a lessened culpability. *See, e.g.*, *Atkins v. Virginia*, 536

U.S. 304, 320-21 (2002). But with unqualified, inadequate counsel, Mr. Bowles's intellectual disability was not properly explained, and his decision-makers were left unaware that individuals with intellectual disability "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321.

Mr. Bowles has presented a detailed factual record of communications and other documents delineating the violations that occurred in this case. Appendix to Complaint. Mr. Bowles's arguments above, and his factual support in his Complaint and attachments, constitute a substantial showing of the violation, and show a "substantial likelihood of success" on this issue.

B. Mr. Bowles Will Suffer Irreparable Injury—Death—If No Injunction is Issued

In this case, the injury Mr. Bowles faces is clear: he will be executed unless this Court issues a stay, and he will have been executed without ever having a clemency proceeding in which he had access to his federally protected statutory rights. This injury is presumptive. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("We consider the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident."); *Ferguson v. Warden, Fla. State Prison*, 493 F. Appx 22, 26 (11th Cir. 2012) (Wilson, J., concurring) ("As a general rule, in the circumstance of an imminent execution, this court presumes the existence of irreparable injury.").

C. A Stay Would Not Harm Defendants

Mr. Bowles has been on Florida's death row since the 1990s. He has been eligible for clemency since exhaustion of his initial appeals, when his conviction and sentence were upheld by the Eleventh Circuit in 2010. Defendants waited more than seven years after such time to initiate clemency proceedings for Mr. Bowles. Because there is no meaningful transparency in the clemency process in Florida, it is impossible to know when (or if) a determination was made as to Mr. Bowles's clemency before the signing of his warrant for execution on June 11, 2019.

Defendants would not suffer any financial or other hardship from the issuance of a stay to allow the Court to evaluate the violation of Mr. Bowles's federal statutory rights. Where an individual's claim underlying his desire for a stay of execution could mean further proceedings—as here, a new clemency proceeding—that weighs heavily against a State's interest in the person's imminent execution. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) ("Moreover, contrary to the State's contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment.").

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III. The Issue Presented in This Suit Was Not Resolved by Judge Rodgers's Recent Order Denying a Clemency-Related Stay of Execution in *Long*

Judge M. Casey Rodgers of this District recently found, in her consideration of a clemency-related motion for a stay of execution in another case, that 18 U.S.C. § 3599 did not create an enforceable right, *see Long v. Sec'y, Fla. Dep't. of Corrs.*, No. 4:19-cv-213, ECF No. 13 at 13-14 (N.D. Fla. May 16, 2019), and that even if it did, the plaintiff in that case did not have such a right in state clemency proceedings because Florida had otherwise furnished him counsel, *see id.*, ECF No. 13 at 16. Judge Rodgers's order in *Long*, however, is not dispositive in this case.

There is no meaningful discussion in the *Long* order as to why § 3599 does not create an enforceable federal right apart from the conclusory finding that "Long has cited no case in which a court has determined that § 3599 creates a federal right

enforceable against state actors under § 1983[.]" *Id*., ECF No. 13 at 14.[3] Instead, the *Long* order relies heavily its interpretation of the "adequacy" provision of § 3599, and the United States Court of Appeals for the Sixth Circuit opinion in *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). *Id*., ECF No. 13 at 16; *see also id*., ECF No. 15 (order denying Long's motion for reconsideration, noting: "[R]elief was denied on grounds that Long had no substantial likelihood of success on the merits because he had 'adequate representation' available, 18 U.S.C. § 3599(a)(2), through McClellan, his state appointed attorney."). As the Ninth Circuit recently explained, however, this reasoning relies on a misreading of *Harbison* and § 3599.

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[3] It should be noted that Florida's highly unusual clemency counsel scheme, which provides for the private contracting of counsel for clemency by an agency integral in the clemency process, has only been in existence since 2014, when the Florida legislature passed Fla. Stat. 940.031. Before that, Florida circuit courts were responsible for appointing clemency counsel for death-sentenced individuals, and thus there was another forum apart from § 1983 for any clemency related concerns. Such a forum no longer exists.

As a historical note, the bill that resulted in this change was a sweeping change to Florida's clemency scheme to remove all judicial involvement in ensuring death-sentenced persons had clemency counsel. *See* H.B. No. 5303, 23rd Leg., 2nd Reg. Sess. (Fla. 2014) ("An act relating to counsel in proceedings for executive clemency; amending ss. 27.51 and 27.511, F.S.; deleting provisions concerning the power of a trial court to appoint the public defender, office of criminal conflict and civil regional counsel, or other attorney in proceedings for relief by executive clemency; correcting cross-references; amending s. 27.5303, F.S.; deleting provisions concerning the appointment of a public defender or attorney by the court to represent an indigent defendant in death penalty executive clemency proceedings; amending s. 27.5304, F.S.; deleting provisions concerning compensation of an appointed attorney representing a defendant in executive clemency proceedings; creating s. 940.031, F.S.; providing for clemency counsel representation of defendants in executive clemency proceedings; providing for compensation . . .").

As the Ninth Circuit found in *Samayoa*, "[t]he availability of state appointment of clemency counsel is irrelevant to federally appointed counsel's ongoing representation of a death-row client in state clemency proceedings." *Samayoa v. Davis*, No. 18-56047, 2019 WL2864411 at *3 (9th Cir. July 3, 2019) (internal quotation omitted). Instead, a plain reading of § 3599 instructs that counsel appointed under that subsection are obligated (noting the mandatory language of "*shall*" in § 3599(e)) to continue representation through all subsequent proceedings, and specifically state clemency proceedings. Thus, the Ninth Circuit concluded, counsel "authorized under § 3599(e) [should] continue to represent Samayoa in his California clemency petition, regardless of any provisions under California law regarding state appointment of clemency counsel." *Id*. at *4.

The Ninth Circuit's opinion in *Samayoa* and the Sixth Circuit's opinion in *Irick* cannot be reconciled, and the Eleventh Circuit has issued no guidance on the issue herein. Even the *Long* order's reference to the Eleventh Circuit's citation to *Irick* was misplaced. *See Long*, ECF No. 13 at 17. The *Long* order noted that in *Lugo v. Sec'y, Fla. Dep't of Corr*., 750 F.3d 1198, 1214 (11th Cir. 2014), the Eleventh Circuit said that *Irick* reading of § 3599 "makes good sense." But the Eleventh Circuit's reference to *Irick* was limited to *Irick*'s reasoning concerning competency proceedings, not state clemency proceedings. *See Lugo*, 750 F.3d at 1214 (citing and quoting *Irick*: "[E]ven if § 3599 would otherwise apply to Irick's *state post-*

conviction proceedings, he would not be eligible for federal funding because state law affords him 'adequate representation.'" (emphasis added)).

Moreover, that the Eleventh Circuit was only making a limited reference is supported by the context of the citation in the *Lugo* opinion. In *Lugo*, the Eleventh Circuit was discussing whether § 3599 counsel could "assist [] in the pursuit and exhaustion of his state postconviction remedies, including the filing of motions for state collateral relief." *Lugo*, 750 F.3d at 1213. Such motions are not ordinarily subsequent for the purposes of § 3599(e), and are not specifically delineated in the statute, unlike clemency proceedings.

The Eleventh Circuit has not spoken on the issue in Mr. Bowles's case, and their cursory reference to *Irick*, in discussing an issue wholly separate from state clemency proceedings, should not persuade this Court one way or the other in determining the issue presented here. Additionally, the *Irick* decision itself is fundamentally flawed, and relies on a misreading of *Harbison*. The *Irick* opinion is based on misapplied dicta from *Harbison* taken from the Court's discussion of the hypothetical scenario where federally appointed counsel might be obligated to represent a defendant at a retrial following the issuance of a writ. *See Harbison*, 556 U.S. at 189. The full quote in *Harbison* reads:

> The Government suggests that reading § 3599(e) to authorize federally funded counsel for state clemency proceedings would require a lawyer who succeeded in setting aside a state death sentence during postconviction proceedings to represent her client during an ensuing

> state retrial. We do not read subsection (e) to apply to state-court proceedings that follow the issuance of a federal writ of habeas corpus. When a retrial occurs after postconviction relief, it is not properly understood as a "subsequent stage" of judicial proceedings but rather as the commencement of new judicial proceedings. Moreover, subsection (a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation. States are constitutionally required to provide trial counsel for indigent defendants. Thus, when a state prisoner is granted a new trial following § 2254 proceedings, his state-furnished representation renders him ineligible for § 3599 counsel until the commencement of new § 2254 proceedings.

Id. Thus, the opinion in *Harbison* does not, as *Irick* suggests, support the proposition that the availability of state-furnished counsel in *a subsequent stage* authorized under § 3599(e), like state clemency proceedings, disqualifies counsel from representing their client. *Harbison* was analyzing the applicability of § 3599 to fund counsel for a retrial—which is indisputably not an ordinary "subsequent stage" as contemplated by § 3599(e). *Harbison*'s notation that § 3599 would not fund a state proceeding not contemplated as subsequent by § 3599(e) is not disputed by Mr. Bowles in the least, and is simply not relevant here.

In relying on a misreading of *Harbison*, the *Irick* decision is thus fundamentally flawed, and its error should not be perpetuated by other courts. *Cf. Samayoa v. Davis*, No. 18-56047, 2019 WL2864411 at *3-4 (9th Cir. July 3, 2019) (explicitly rejecting *Irick* and noting its misreading of *Harbison*); *Mickey v. Davis*, No. 93-00243, 2018 WL 3659298, *4 (N.D. Cal. Aug. 2, 2018) (rejecting the

reasoning of *Irick* after examining the context of the language from *Harbison* and finding it to be inapposite as applied to appointment of clemency counsel).

However, even if Mr. Bowles's § 3599 counsel's ability to represent Mr. Bowles in his state clemency proceedings was affected by the availability of state-furnished counsel, the *Long* order would still not be dispositive in this case because Mr. Bowles's case is factually distinguishable from Mr. Long's case. Judge Rodgers's order in *Long* acknowledged that § 3599(a)(2) requires *adequate* representation be provided by states, *Long*, ECF No. 13 at 16, and she reaffirmed that view in her order denying a motion for reconsideration of the denial of Mr. Long's stay motion, *id.*, ECF No. 15 at 2. Mr. Bowles has alternatively argued in his suit that even if state-furnished counsel could replace § 3599 counsel, that § 3599 still operates to ensure that any substituting representation is "adequate."

Here, Mr. Bowles did not have adequate representation—and certainly had representation that fell short even of Mr. Long's clemency representation. For example, in discussing Mr. Long's counsel and finding him adequate, Judge Rodgers noted: "McClellan was on Florida's list of clemency attorneys, he appeared at the clemency interview and gave a presentation in Long's absence discussing his brain injuries, and in his 28 years of practice, he had tried death penalty cases." *Id.*, ECF No. 15 at 2. In contrast, Mr. Bowles's counsel, Mr. Simmons, had never handled a death penalty case at any stage, had no familiarity with death penalty law, and no

familiarity with intellectual disability litigation in the death penalty context. Mr. Bowles's counsel had also only been in practice for eleven years, less than half the time of Mr. Long's counsel.

That Mr. Bowles had inadequate counsel was also evident in his clemency proceedings, in which Mr. Simmons failed to correct material misstatements by FCOR during his clemency interview, allowed Mr. Bowles to be subjected to questioning about his ongoing intellectual disability litigation, and submitted an Application for Executive Clemency that was nearly word-for-word identical to that of another death-sentenced individual, Stephen Booker, and contained numerous factual inaccuracies, including misidentifying Mr. Bowles as Mr. Booker. Unlike in Mr. Long's case where his brain injuries were discussed by his clemency counsel, in Mr. Bowles's case, Mr. Simmons said absolutely nothing specific about Mr. Bowles's known intellectual disability. If there is any meaning to the "adequate" representation requirement Judge Rodgers discussed in *Long*, Mr. Bowles's clemency counsel does not meet any reasonable adequacy metric. Thus, because Mr. Bowles's counsel was far more inadequate than Mr. Long's, and because the Long order was not a decision on the merits of these issues and relied on a flawed reading of relevant authority, it is not dispositive here.

IV. Conclusion

For the reasons detailed above, and in his accompanying complaint and memorandum of law, Mr. Bowles respectfully requests that a stay of his scheduled August 22, 2019, execution be granted so that his 42 U.S.C. § 1983 action can be considered without the imminent threat of Mr. Bowles's death.

Respectfully submitted,
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By Counsel

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

GARY RAY BOWLES,

Plaintiff,

v.

CASE NO.: 4:19-cv-319-MW-CAS
CAPITAL CASE

RON DESANTIS,
Governor of Florida,
in his official capacity, et al.,

Defendants.

_____/

RESPONSE TO MOTION FOR STAY OF EXECUTION

On July 11, 2019, Bowles, a Florida death row inmate with an active death warrant, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a 42 U.S.C. § 1983 action, raising a claim regarding the CHU-N not being allowed to appear as clemency counsel. Bowles argues that the Florida Commission on Offender Review's refusal to allow his federal habeas counsel, the CHU-N, to participate in the clemency interview as clemency co-counsel violated his Sixth Amendment right to counsel and his federal statutory right to counsel in 18 U.S.C. § 3599. He

insists that Florida has made clemency a "critical stage" to which the constitutional right to counsel attaches. He also claims that § 3599 entitles federal habeas counsel to appear as clemency counsel, regardless of whether the State provides clemency counsel or not. Bowles also filed an emergency motion for a stay of the execution based on his pending § 1983 action. This is the Defendants' response to the motion to stay.[1]

Bowles must establish four factors to be granted a stay of execution including a showing of a substantial likelihood of success on the merits of his § 1983 action. But Bowles fails three of the four factors including the showing of a substantial likelihood of success on the merits because there is no likelihood of success on the merits of his right to clemency counsel claim. There is no Sixth Amendment right to clemency counsel under controlling Eleventh Circuit precedent and there is no statutory right under § 3599 for federal habeas counsel to appear as state clemency counsel when the State provides clemency counsel under controlling United States Supreme Court precedent. Indeed, the § 1983 action is due to be dismissed for failure to state a claim. Therefore, the motion for stay should be denied.

Alternatively, the motion for stay of the execution should be denied because the CHU-N was dilatory in filing the § 1983 action. Under both United States Supreme Court and Eleventh Circuit precedent, there is a "strong equitable

[1] This is the response of all named Defendants.

presumption" against granting a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. The CHU-N waited nearly a year after the clemency interview and then waited a month after the warrant was signed to file this § 1983 action. Therefore, the presumption against a stay arises.

Facts regarding state clemency

On March 22, 2018, the Florida Commission on Offender Review entered into an agreement with Nah-Deh Simmons to represent Bowles as clemency counsel. (Appendix at 7-17). On March 26, 2018, Clemency Investigation Research Specialist S. Michelle Whitworth wrote a letter to Gary Bowles informing him the clemency interview was scheduled for August 2, 2018. (Appendix at 20).

On March 28, 2018, Commission Investigator Russ Gallogly wrote a letter to Billy Nolas, Chief of the Capital Habeas Unit of the Northern District, soliciting any comments in support of commutation of the death sentence. (Appendix at 21). On June 21, 2018, Chief of the CHU-N, Billy Nolas, on official Federal Public Defender letterhead, wrote a letter to the Florida Commission on Offender Review, which also signed by state postconviction co-counsel Francis Shea and clemency counsel Nah-Deh Simmons. (Appendix at 26-34). The letter highlighted the claim that Bowles is intellectually disabled; informed the Commission of the pending intellectual disability litigation in the state trial court; and urged the Commission

to postpone clemency review until that litigation was completed. (Appendix at 26, 29-30). The letter also recounted Bowles' unstable childhood and teenage years as a homeless prostitute. (Appendix at 27-29).

On June 22, 2018, Kelsey Peregoy of the CHU-N wrote an email to Jack Heekin of the Governor's Office requesting the clemency interview be postponed until the state litigation on intellectual disability was completed. (Appendix at 35). The email insisted that the clemency interview would "unnecessarily complicate and interfere" with the court proceedings on intellectual disability. (Appendix at 35). On the same day, June 22, 2018, Heekin emailed back denying the request to postpone the clemency interview. (Appendix at 35). Heekin explained that Bowles had been appointed "separate legal counsel to represent him in the clemency proceedings" to avoid any such complication and interference with the ongoing litigation in state court. (Appendix at 35). Heekin concluded the email by informing federal habeas counsel: "You are welcome to submit any materials in support of inmate Bowles' request for clemency which will be given full consideration." (Appendix at 35).

On July 22, 2018, Kelsey Peregoy of the CHU-N wrote an email to Michelle Whitworth asking the Clemency Board and the Commission to reconsider their decision prohibiting federal habeas counsel, the CHU-N, from representing Bowles as clemency co-counsel. (Appendix at 37). The email acknowledged that the CHU-N had been "working with" clemency counsel Simmons on clemency matters.

(Appendix at 37). The CHU-N stated that because Bowles was intellectually disabled, their assistance was "crucial" to clemency review. (Appendix at 37).

The email referred to an attached letter. (Appendix at 37). The attached letter was dated July 26, 2018, was written on Federal Public Defender letterhead, and was signed by both clemency counsel Simmons and federal habeas counsel Nolas. (Appendix at 38-41). The attached letter referred to a letter, written on July 23, 2018, by clemency counsel Simmons informing the Commission that federal habeas counsel, the CHU-N "would jointly appear and conduct" the clemency interview. (Appendix at 38). Clemency counsel Simmons' letter referred to Dr. Toomer, a psychologist retained by the CHU-N as part of the state court intellectual disability litigation, who diagnosed Bowles with intellectual disability. (Appendix at 38). The attached letter stated that S. Michelle Whitworth of the Commission had informed clemency counsel Simmons that neither the CHU-N nor Dr. Toomer would be allowed to participate in, or be present for, the clemency interview. (Appendix at 38). The attached letter acknowledged that the CHU-N and clemency counsel Simmons "have worked cooperatively" on clemency and that the clemency petition was "jointing created" by the CHU-N and clemency counsel Simmons. (Appendix at 39, 40). The attached letter insisted that the "clemency presentation would suffer without the assistance of the CHU" and that clemency counsel Simmons "cannot provide adequate representation without the CHU." (Appendix at 41). The attached letter stated that clemency counsel Simmons, as

well as Bowles himself, "desires the CHU's presence" at the clemency interview. (Appendix at 41). The attached letter insisted that under 18 U.S.C. § 3599 Bowles had a federal statutory right to the assistance of federal habeas counsel in state clemency proceedings. (Appendix at 39-41). The attached letter also insisted that Bowles had a due process right to "the knowledge and resources of the CHU" in state clemency proceedings. (Appendix at 40). The attached letter concluded with a plea to reconsider the decision not to allow the CHU-N to be clemency co-counsel and not to allow the testimony of Dr. Toomer at the upcoming clemency interview. (Appendix at 41).

On July 30, 2018, S. Michelle Whitworth of the Commission responded to the email again denying the request for the CHU-N to act as clemency co-counsel. (Appendix at 42). The email concluded by again informing the CHU-N that: "Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration." (Appendix at 42).

Clemency counsel Simmons submitted an application for clemency to the Governor. (Appendix at 133-140). The application referred to Bowles' claim of intellectual disability. (Appendix at 139).

On August 2, 2018, the Commission conducted the clemency interview at Union Correctional Institution. (Appendix at 47-105). Bowles was present and answered numerous questions. (Appendix at 53, 58-104). Bowles was represented by clemency counsel Simmons at the interview but his federal habeas counsel, the

CHU-N, were not present. (Appendix at 48, 50). Clemency counsel Simmons discussed intellectual disability with the Commission and stated his intention to submit additional material regarding intellectual disability after the interview. (Appendix at 54-56). During the interview, a member of the panel referred to Department of Corrections' assessment by a psychiatrist including an intellectual disability assessment that concluded that he had no significant impairments. (Appendix at 58).

On September 12, 2018, following the clemency interview, the CHU-N wrote a letter to the Commission requesting a "supplemental" clemency interview at which the CHU-N would be allowed to represent Bowles as clemency counsel. (Appendix at 106-111). The letter acknowledged that any clemency materials should be submitted within 45 days of the clemency interview. (Appendix at 106). Instead of submitting clemency materials, such as Dr. Toomer's intellectual disability report, the CHU-N's letter complained about the timing of the clemency proceedings. (Appendix at 106-107). The CHU-N's letter again insisted that, under 18 U.S.C. § 3599, Bowles had a federal statutory right to the assistance of federal habeas counsel in state clemency proceedings. (Appendix at 107). The letter, quoting *Chavez v. Sec'y, Fla. Dept. of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014), took the position that the CHU-N had an obligation under that statute to represent Bowles during the state clemency. (Appendix at 107). The letter referred to a July 23, 2018, email informing the Commission that two CHU-N attorneys,

Kimberly Sharkey and Kelsey Peregoy, as well as Dr. Toomer, who diagnosed Bowles with intellectual disability, would be present for the clemency interview. (Appendix at 108). Clemency counsel Simmons was informed via a phone call that neither of the two CHU-N attorneys nor Dr. Toomer would be allowed to attend the clemency interview. (Appendix at 108). The letter stated that neither of the CHU-N attorneys nor the expert were allowed to participate in the clemency interview. (Appendix at 108). The letter then complained that information about intellectual disability was not "fully presented" at the clemency interview. (Appendix at 109). The letter also complained that Bowles was questioned during the clemency interview about his intellectual functioning without the presence of counsel who were "the most informed about his intellectual disability." (Appendix at 109-110). The letter asserted that Bowles was denied his right to clemency counsel of his choice by the exclusion of the CHU-N from the clemency interview. (Appendix at 110). The CHU-N's letter urged the Commission and Clemency Board to conduct a supplemental clemency interview at which the CHU-N would be allowed to represent Bowles as clemency counsel and present intellectual disability testimony. (Appendix at 110-111). So, instead of submitting written materials regarding intellectual disability, the CHU-N requested a second clemency interview to present live testimony regarding intellectual disability.

On June 11, 2019, S. Michelle Whitworth wrote a letter to state clemency counsel Simmons informing him that the Governor had denied Bowles' clemency

application. (Appendix at 148).

Sixth Amendment right to counsel and clemency

There are only minimal due process limits on state actors in the clemency context. For example, they may not flip a coin to decide whether to grant clemency and they may not deny a defendant access to the clemency process. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (concluding that "some ***minimal*** procedural safeguards apply to clemency" and observing that judicial intervention "might" be warranted if a state official flipped a coin to determine whether to grant clemency or where the State arbitrarily denied a prisoner "any" access to its clemency process) (emphasis in original); *Gissendaner v. Comm'r, Ga. Dept. of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015) (affirming the dismissal of a § 1983 action alleging a due process violation when the warden prohibited staff from speaking with clemency counsel in support of the clemency application, for failure to state a claim because due process does not prevent state officials from limiting access to prison staff citing *Wellons v. Comm'r, Ga. Dept. of Corr.*, 754 F.3d 1268 (11th Cir. 2014)); *Gissendaner*, 794 F.3d at 1333 (Jordan, J., concurring) (agreeing the allegations do not state a due process claim under *Wellons*); *Hand v. Scott*, 888 F.3d 1206, 1208 (11th Cir. 2018) (noting the "broad discretion of the executive to carry out a standardless clemency regime" citing *Beacham v. Braterman*, 300 F.Supp. 182 (S.D. Fla. 1969), *affirmed*, 396 U.S.

12 (1969)). The Eleventh Circuit has rejected both due process and Eighth Amendment attacks on purely discretionary pardon regimes. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983); *Hand v. Scott*, 888 F.3d 1206, 1208 (11th Cir. 2018) (observing of the holding in *Smith v. Snow*, if a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature). The Eleventh Circuit has also rejected a due process challenge to Florida's clemency process as applied to a capital defendant. *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013) (denying a motion for stay of execution because the capital defendant did not establish a substantial likelihood of success on the merits of his claim that he was denied access to a second clemency proceeding).

But Bowles does not allege that any of the named defendants tossed a coin to make their decision regarding clemency or that he was denied access to the clemency process. Indeed, he admits that he was given access to Florida's clemency process and also admits that he was given a clemency attorney during that clemency process. Bowles' claim is only that he was not allowed to have his federal habeas counsel act as clemency co-counsel during the clemency proceedings.

But there is no Sixth Amendment right to clemency counsel. *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995) (stating: "no constitutional right exists to counsel in clemency hearings" citing *Coleman v. Thompson*, 501 U.S. 722,

756-57 (1991)); *Barbour v. Haley*, 471 F.3d 1222, 1231 (11th Cir. 2006) ("The Sixth Amendment applies only to criminal proceedings" citing *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974)); *Gardner v. Garner*, 383 Fed. Appx. 722, 728 (10th Cir. 2010) (before Tacha, Tymkovich, and Gorsuch) (explaining that there is no right to clemency counsel because the "constitutional right to the effective assistance of counsel does not extend beyond direct appeal" and the availability of federally funded habeas counsel under § 3599 to represent capital defendants in state clemency proceedings did not create a constitutional right to effective clemency counsel).

The CHU argues that because Florida mandates clemency that somehow is the equivalent of making clemency a "critical stage" of the prosecution for purposes of the Sixth Amendment right to counsel. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical stages' of the criminal proceedings" quoting *United States v. Wade*, 388 U.S. 218, 227-28 (1967)). But, contrary to opposing counsel's assertion, clemency is not a critical stage and therefore, there is no Sixth Amendment right to counsel during clemency.

The entire concept of "critical stage" is limited to proceedings before and during the prosecution; it does not extend beyond the trial to postconviction proceedings, much less to clemency proceedings. The United States Supreme Court has defined a critical stage as "any stage of the ***prosecution***, formal or

informal, in court or out, where counsel's absence might derogate from the accused's right to a ***fair trial***." *United States v. Wade*, 388 U.S. 218, 226 (1967) (emphasis added). Neither state postconviction proceedings nor federal habeas proceedings are critical stages of a trial for the simple reason the trial and sentencing are long over before any of these proceedings take place. Indeed, the direct appeal is over before the state postconviction proceedings or federal habeas proceedings begin. *Hernandez v. Sec'y, Fla. Dept. of Corr.*, 408 Fed. Appx. 316, 318 (11th Cir. 2011) (holding the oral argument in the direct appeal was not a critical stage citing *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986)).

Once the trial and direct appeal are completed, the Sixth Amendment right to counsel ends. *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (holding there is no federal constitutional right to postconviction counsel); *Murray v. Giarratano*, 492 U.S. 1 (1989) (applying *Finley* to capital defendants); *Barbour v. Haley*, 471 F.3d 1222, 1230 (11th Cir. 2006) (stating that *Finley*, *Giarratano*, and *Coleman* clearly establish that death-sentenced inmates have no federal constitutional right to postconviction counsel and rejecting a right to a "lesser form of legal assistance"). That logic is even more true of clemency proceedings. Not only are the trial and direct appeal completed prior to clemency but both the state postconviction and federal habeas proceedings are completed as well before the clemency proceedings begins in Florida.

Furthermore, clemency is an executive function, not a judicial function.

Clemency, which is not even a form of judicial review, cannot be a "critical stage" of the prosecution for purposes of the Sixth Amendment right to counsel because it is entirely distinct and separate from the prosecution.

There is no case holding, or even hinting, that a State providing a clemency process automatically makes clemency a critical stage for purposes of the Sixth Amendment right to counsel. Opposing counsel certainly does not cite any case that stands for such a proposition. Bowles has no Sixth Amendment right to clemency counsel.

And even when the Sixth Amendment right to counsel applies, there is no constitutional right to counsel of the defendant's choice of counsel at public expense, much less a right to co-counsel of choice at public expense. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (noting the Sixth Amendment right to counsel of choice does not extend to indigent defendants citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989)). The United States Supreme Court has specifically stated, in a § 3599 case, that Congress did not confer "capital habeas petitioners with the right to counsel of their choice" by enacting this statute. *Christeson v. Roper*, 135 S.Ct. 891, 893-94 (2015). There is no Sixth Amendment right to clemency counsel of choice.

There is no Sixth Amendment right to clemency counsel. The Eleventh Circuit's precedent of *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995), completely forecloses this claim. A plaintiff may not premise a § 1983 action on

a constitutional right that does not exist under the controlling precedent.

Right to counsel under § 3599

Alternatively, Bowles asserts he has a statutory right, under 18 U.S.C. § 3599, for his federal habeas counsel to appear in state clemency proceedings. The problem with this assertion, of course, is that the United States Supreme Court has said otherwise.

In *Harbison v. Bell*, 556 U.S. 180, 183 (2009), the United States Supreme Court held that 18 U.S.C. § 3599 authorizes federal habeas counsel to represent death row inmates in state clemency proceedings. Harbison was a Tennessee death row inmate who requested clemency counsel in the state court but the Tennessee Supreme Court held that state law does not authorize the appointment of clemency counsel. *Id.* at 182. Tennessee took no position on the question of whether § 3599 authorized federal habeas counsel to represent a death row inmate in state clemency proceedings. *Id.* at 184, 192, n.9.

The *Harbison* Court, relying on the language of the "Counsel for financially unable defendants" statute, 18 U.S.C. § 3599, noted that death row inmates are statutorily entitled to counsel in § 2254 federal habeas proceedings and concluded the statutory language indicated that appointed federal habeas counsel's authorized representation included state clemency proceedings. *Harbison*, 556 U.S. at 186. The *Harbison* Court also noted that a district court has the

discretion, under the "other appropriate motions and procedures" provision of § 3599(e), to allow federally paid habeas counsel to exhaust a claim in state court. *Id.* at 190, n.7. The *Harbison* Court, however, emphasized that § 3599 provides for counsel "***only*** when a state petitioner is unable to obtain adequate representation." *Id.* at 189 (emphasis added). The Supreme Court explained that "state-furnished representation renders him ***ineligible*** for § 3599 counsel." *Id.* (emphasis added). So, according to the United States Supreme Court in *Harbison*, if a State provides counsel for a proceeding, § 3599 does not allow federal habeas counsel to appear in that proceeding.

The Eleventh Circuit has repeatedly stated that federal habeas counsel may not appear as counsel in state court proceedings, if the state provides counsel. The Eleventh Circuit explained that a district court may appoint federal habeas counsel to exhaust a claim in state court but "***only*** where the petitioner is unable to obtain adequate legal representation in state court." *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014), *cert. denied, Lugo v. Jones*, 135 S.Ct. 1171 (2015) (emphasis added). The Eleventh Circuit concluded that Congress' purpose in enacting § 3599 was "to aid state capital prisoners in seeking *federal* habeas relief in *federal* court," not "to provide counsel, at federal expense, to state prisoners engaged in state proceedings." *Id.* at 1214 (emphasis in original) (quoting *King v. Moore*, 312 F.3d 1365, 1368 (11th Cir. 2002)). The *Lugo* court noted that federally funded habeas counsel appearing in state postconviction

litigation "not only would increase the cost of implementing § 3599 enormously," but also "would have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases." *Id.*

In *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1277 (11th Cir. 2012), the Eleventh Circuit held a federal habeas petitioner was not entitled to federal funds to pay for experts in state court litigation. The *Gary* Court also found no abuse of discretion in the district court's refusal to authorize federal funds for experts to testify at the state clemency hearing. *Id.* at 1268-69. The *Gary* Court discussed the "sound policy reasons why Congress would not provide for federally-funded counsel in independent state court proceedings." *Id.* at 1278. The *Gary* majority noted the comity concerns and significant practical problems that would arise. Such funding would "raise troubling federalism concerns." *Id.* "Providing court-appointed counsel to prisoners challenging their convictions in state court after they have been denied § 2254 relief would put the district courts in the position of overseeing, and thus indirectly managing, counsel's performance in the state court proceeding." *Id.* The *Gary* Court noted that authorizing federal habeas counsel to litigate in state court would mean that federal interference with state courts would be "inevitable." *Id.* The *Gary* majority concluded that § 3599 does not provide for the appointment of counsel to prosecute the state postconviction motion pending in state court. *Id.* at 1279.

The Sixth Circuit has also held that a capital defendant is not eligible for

federal funding under § 3599 in various state court proceedings because the capital defendant had a right to counsel under state law. *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). Irick filed a motion in federal court requesting authorization under § 3599 for federal habeas counsel to represent him in state court to reopen his state postconviction proceedings; in his competency-to-be-executed state court proceedings; and in his state clemency proceedings. *Id.* at 290. The district court granted the motion as to clemency because Tennessee did not provide clemency counsel but denied the motion as to the other state court proceedings, ruling that § 3599 applies only when adequate representation is unavailable. *Id.* at 291.

The Sixth Circuit agreed. *Irick*, 636 F.3d at 291. The Sixth Circuit noted that the Supreme Court in *Harbison*, arrived at its holding that federal habeas counsel could appear in state clemency proceedings only after noting that state law did not authorize the appointment of clemency counsel. *Id.* The Sixth Circuit noted that the *Harbison* Court emphasized that "§ 3599](a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation." *Id.* The Sixth Circuit noted that Irick had a statutory right under Tennessee law to appointed counsel in these other proceedings. *Id.* at 292 (citing Tennessee statutes). So, the Sixth Circuit reasoned, "even if § 3599 would otherwise apply to Irick's state post-conviction proceedings, he would not be eligible for federal funding because state law affords him adequate representation." *Id.* at 292 (citing *Harbison*, 556 U.S. at 188). The Sixth Circuit also explained a defendant who

cannot qualify for federally appointed counsel under subsection (a) has no claim to counsel under subsection (e). *Id.* at 291, n.2.

The Sixth Circuit held that because "state law provides Irick with adequate counsel, we hold that he is not entitled to representation pursuant to § 3599." *Irick*, 636 F.3d at 290. The Sixth Circuit rejected Irick's argument that § 3599 funding should be available because his federal habeas counsel were "already familiar with his case" reasoning that, as long as Tennessee provides adequate representation, Irick's arguments that his federal habeas counsel are more qualified was "of no import under § 3599." *Id.* at 292. The Eleventh Circuit has cited *Irick* with approval. *Lugo*, 750 F.3d at 1214.

Bowles is simply not eligible for federal habeas counsel to appear as clemency counsel under § 3599 according to the United States Supreme Court's decision in *Harbison* and the Eleventh Circuit's decisions in *Lugo* and *Gary*, as well as under the logic of the Sixth Circuit's decision in *Irick*.

Furthermore, the existence of the funding statute § 3599 does not create any additional rights or any authority for federal courts to interfere in the state clemency process. *Baze v. Parker*, 632 F.3d 338, 345-46 (6th Cir. 2011) (rejecting an argument that § 3599 creates enforcement powers over the state clemency process, explaining that the appointment and funding of federal counsel for a state clemency proceeding under § 3599 is not "bundled with jurisdiction to oversee the state clemency proceeding itself"). Federal courts lack the authority

to tell state executives which attorneys may or may not represent a capital defendant during state clemency proceedings and § 3599 did not create such powers. Indeed, this type of argument raises the very comity concerns highlighted by the *Gary* majority.

Because the State of Florida provided clemency counsel to Bowles, federal habeas counsel is disqualified under § 3599 from appearing as clemency counsel or as clemency co-counsel. In the words of the *Harbison* Court, because Florida provided clemency counsel, Bowles is "ineligible for § 3599 counsel." *Harbison*, 556 U.S. at 189. The CHU may never appear as clemency counsel because Florida provides clemency counsel to capital defendants.[2]

A plaintiff may not premise a § 1983 action on an interpretation of a federal statute that the United States Supreme Court has rejected. The statutory claim in the § 1983 action is contrary to the United States Supreme Court's decision in *Harbison*.

Motions to stay a execution

A court may grant a preliminary injunction, including a stay of execution,

[2] Florida's clemency statute does not create a right to clemency counsel but it allows the Clemency Board to appoint clemency counsel to capital defendants and it is the standard practice to do so. § 940.031(1)-(3), Fla. Stat. (2018); *Babb v. State*, 92 So.3d 281 (Fla. 5th DCA 2012) (holding a different public defender's office can be appointed as state clemency counsel citing § 27.51(5)(a), Fla. Stat. (2011)).

only if: 1) there is a substantial likelihood of success on the merits; (2) he will suffer irreparable injury; 3) the stay will not substantially harm the other litigant; ***and*** 4) the stay would not be adverse to the public interest. *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016). Bowles must establish all four factors, not merely one or two of the factors. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (holding that inmate seeking a stay of execution "must satisfy ***all*** of the requirements for a stay, including a showing of a significant possibility of success on the merits") (emphasis added); *cf. Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011) ("Because Valle has failed to show a substantial likelihood of success on the merits, we need not address the other three requirements for issuance of a stay of execution."). And it is Bowles that has the burden of establishing all of these factors. *Mann v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013) (stating that the defendant "bears the burden of establishing that he is entitled to a stay of execution" and denying a stay).

As to the first factor, Bowles has no chance of success on the merits, much less a substantial one. As explained above, in detail with citations to controlling caselaw, there is no constitutional right to clemency counsel nor any statutory right to clemency counsel under § 3599 when the state provides clemency counsel. The § 1983 action should be dismissed for failure to state a claim because both the constitutional and statutory arguments are directly contrary to controlling precedent. The claim of a constitutional right to counsel is controlled

by *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995), and the claim of a statutory right to counsel under § 3599 is controlled by *Harbison*, *Lugo,* and *Gary*. A § 1983 action that is due to be dismissed cannot be a valid basis for a motion to stay. *Jones v. GDCP Warden*, 815 F.3d 689, 702 (11th Cir. 2016) (denying a stay on the basis that there was not a substantial likelihood of success on the merits and explaining that a motion that should be dismissed necessarily means there is not a substantial likelihood of success on the merits of that motion). Bowles fails the first factor.

As to the third factor, a stay will substantially harm the State by interfering with its sovereign power to enforce its valid criminal judgments. *In re Blodgett*, 502 U.S. 236, 239 (1992) (noting the concern that the State of Washington has "sustained severe prejudice" by the 2½-year stay of execution which "prevented Washington from exercising its sovereign power to enforce the criminal law"). As the Eleventh Circuit has observed, the Supreme Court has unanimously instructed courts, on multiple occasions, in considering whether to grant a stay of execution to be "sensitive to the State's strong interest in enforcing its criminal judgment without undue interference from the federal courts" and that federal courts "can and should protect States from dilatory or speculative suits." *Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016). The Eleventh Circuit in *Brooks* rejected the argument that the equities favor a stay because the defendant will suffer irreparable harm if he is executed, whereas the State will only suffer the

minimal inconvenience of having to postpone his hearing, due to the lengthy period of time since the murder occurred. *Id.* at 825 ("After all, Brooks raped and murdered Jo Deann Campbell on December 31, 1992, and he was convicted of three counts of capital murder by a jury and sentenced to die for his crimes in 1993."). The murder in this case occurred in November of 1994 which is nearly 25 years ago. Bowles fails the third factor.

As to the fourth factor, it is not in the public interest to stay the execution. In the words of the United States Supreme Court, when faced with a capital inmate with a scheduled execution who sought a stay to pursue a § 1983 action, which, like this one, amounted "to little more than an attack on settled precedent," the people of the State and the surviving victims "deserve better." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). It is not in the public interest to delay an execution of a serial killer so that he can pursue a totally frivolous § 1983 action that is "little more than an attack on settled precedent" and a pretty feeble attack at that. Bowles fails the fourth factor.

Bowles fails three of the four factors for granting a stay of execution and therefore, the stay should be denied.

Furthermore, there is a "strong equitable presumption" against granting a stay of an execution where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). As Justice Thomas recently observed, granting a stay

of execution in the face of unexplained delays "only encourages the proliferation of dilatory litigation strategies" that the Supreme Court has "recently and repeatedly sought to discourage." *Price v. Dunn*, 139 S.Ct. 1533, 1538 (2019) (Thomas, J., concurring in the denial of certiorari with Alito, J., and Gorsuch, J., joining). The clemency interview that is the basis for the § 1983 action occurred on August 2, 2018, but the CHU did not file this § 1983 action until over 11 months later on July 11, 2019. And even more telling, the CHU waited a full month after the Governor signed the warrant to file this § 1983 action. The "strong equitable presumption" against a stay applies to this case due to these delays and is a second, independent reason to deny the motion for stay.

Caselaw on motions to stay and clemency counsel claims

In *Banks v. Sec'y, Fla. Dept. of Corr.*, 592 Fed. Appx. 771, 773 (11th Cir. 2014), the Eleventh Circuit affirmed a district court's denial of a motion to stay an execution. Banks filed a § 1983 action, three days before his scheduled execution, raising various claims including a claim that the clemency board violated due process because it is composed of elected politicians; a claim that he was denied his clemency counsel of choice because his postconviction counsel was not statutorily allowed to represent him in the clemency proceedings; a claim that his clemency counsel was ineffective; and a claim that Florida's clemency process was unconstitutional because no death-sentenced inmate had been granted clemency

in Florida in over 31 years. *Id.* at 773. The district court dismissed the § 1983 action and denied a motion for stay of execution. *Id.* at 772.

The Eleventh Circuit observed that for a claim of alleged violations of due process or equal protection in a clemency proceeding to succeed, the violation must be grave, such as flipping a coin to determine whether to grant clemency or the arbitrary denial of a prisoner to any access of the State's clemency process. *Banks*, 592 Fed. Appx. at 773. But, the Eleventh Circuit noted, the allegations regarding clemency counsel being raised were not sufficient to establish that Florida's clemency process was arbitrary as a coin flip or that he was denied access to that process and therefore, the district court did not abuse its discretion in denying the motion for a stay of the execution. *See also id.* at 774 (Martin, J., concurring) (agreeing that the claim attacking Florida's clemency process did not show a violation of due process).

In *Gardner v. Garner*, 383 Fed. Appx. 722 (10th Cir. 2010) (before Tacha, Tymkovich, and Gorsuch), the Tenth Circuit concluded that a Utah death row inmate, with a scheduled execution, "wholly failed to demonstrate a cognizable challenge to the clemency proceedings" and on that basis denied the stay of execution. *Id.* at 726. Gardner filed a § 1983 action raising, among other claims, a claim that the Utah Board of Pardons and Parole denied him meaningful representation by his clemency counsel by refusing to allow clemency counsel to present two witnesses via videotape. While the Board ultimately allowed the

videotaped testimony, Gardner argued that the original denial and late notice of reversal of the decision to allow the videotape testimony the day before the clemency hearing interfered with his clemency counsel's preparation and ineffectiveness. *Id.* at 728. The Tenth Circuit rejected the claim because the "constitutional right to the effective assistance of counsel does not extend beyond direct appeal," even if state law provides for the appointment of counsel in later proceedings. *Id.* The Tenth Circuit relied on cases holding there is no constitutional right to postconviction counsel including *Coleman v. Thompson*, 501 U.S. 722, 752 (1991), to determine there is no right to clemency counsel. *Id.* at 728-29 & n.7. The Tenth Circuit rejected the notion that the availability of federal habeas counsel to act as clemency counsel in state clemency proceedings somehow created a right to clemency counsel or a right to effective clemency counsel. *Id.* at 729. The Tenth Circuit concluded that there was no legal foundation for such a claim. *Id.*

In *Long v. DeSantis*, 4:19-cv-213-MCR-MJ (N.D. Fla. May 16, 2019 - order of M. Casey Rodgers) (Doc. #13), a federal district court denied a motion to stay an execution concluding that the § 1983 action challenging federal habeas counsel's ability to act as co-counsel in state clemency proceedings did not establish a substantial likelihood of success on the merits. Doc. #13 at 2, 11, 23. Long filed a § 1983 action claiming he had both a Sixth Amendment right to have his federal habeas counsel to appear as clemency co-counsel during the state

clemency proceedings and a statutory right under18 U.S.C. § 3599 for his federal habeas counsel to appear as clemency co-counsel. *Id.* at 10.

In *Long*, the Florida Commission on Offender Review appointed clemency counsel to represent Long during the clemency proceedings. *Long*, 4:19-cv-213, Doc. #13 at 4. Federal habeas counsel, Robert Norgard and the Capital Habeas Unit of the Middle District of Florida (CHU-M), sent a letter to the Florida Commission on Offender Review seeking to participate in the state clemency proceedings. *Id.* at 5. Clemency counsel appointed by the Commission joined in the request to allow the CHU-M to be clemency co-counsel. *Id.* at 5-6. The Commission denied the CHU-M's request to formally participate in the clemency proceedings but informed federal habeas counsel that anyone was permitted to submit materials in support of clemency which would be given "full consideration." *Id.* The clemency interview was held six months after the appointment of clemency counsel but Long, on the advice of federal habeas counsel, refused to appear. *Id.* at 6. Clemency counsel, however, made a presentation at the interview highlighting Long's brain injuries, criminal history, and military service. After a warrant was signed, federal habeas counsel filed a § 1983 challenging their exclusion from the clemency interview. *Id.* at 1, 7.

The district court first explained the law regarding clemency. *Long*, 4:19-cv-213, Doc. #13 at 7-8. The district court observed that Due Process rights regarding clemency was limited to notice and an opportunity to participate in an

interview. *Id.* at 8 (citing *Gissendaner v. Comm'r, Ga. Dept. of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015) (stating that only extreme circumstances in clemency violate due process)). The district court also noted that there is no constitutional right to clemency counsel, much less a constitutional right to clemency co-counsel of choice. *Id.* (citing *White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995) (citing *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991)). The district court described Florida's clemency process including the statute that allows for, but does not mandate, the appointment of clemency counsel. *Id.* at 9 (citing § 940.031(1), (3), Fla. Stat.).

The district court noted that a federal statute, 18 U.S.C. § 3599, provides federal habeas counsel for capital defendants including capital habeas defendants convicted in state court. *Long*, 4:19-cv-213, Doc. #13 at 9. The statute allows federal habeas counsel to represent those capital defendants in subsequent state court proceedings including state clemency proceedings. *Id.* (citing *Harbison*). The district court discussed whether the statute, § 3599, created a "unambiguous" federal right for purposes of § 1983. *Id.* at 11-14 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002)). The district court noted that "Long has cited no case in which a court has determined that § 3599 creates a federal right enforceable against state actors under § 1983, requiring the state to permit federally appointed counsel to appear in a state clemency proceeding." *Id.* at 14.

The district court observed that contrary to broadly recognizing a federal

right under § 3599 that federal habeas counsel must be allowed to appear in all clemency proceedings, the Supreme Court in *Harbison v. Bell*, 556 U.S. 180, (2009), recognized § 3599 counsel would not provide representation, such as representation at state clemency proceedings, in every case. *Long*, 4:19-cv-213, Doc. #13 at 14-15 (citing *Harbison*, 556 U.S. at 188 (appointed counsel is not expected to provide each service enumerated in subsection (e) for every client)). "Instead, the Court explained that the federal representation was intended to 'fill a gap' in circumstances, such as clemency proceedings, where states are not constitutionally required to provide counsel." *Id.* at 15 (citing *Harbison*, 556 U.S. at 191). The district court observed that authorizing federal habeas counsel to appear in state clemency proceedings is "a far cry from recognizing an enforceable right to have federal counsel appear." *Id.* The district court noted that the *Harbison* case involved the scope of federal habeas counsel representation under § 3599 "in the context of a state clemency system that did not authorize the appointment of counsel so the state had no position or interest in the issue." *Id.* at 16, n.12. The district court also noted that the *Harbison* Court did not discuss whether the statute creates a private cause of action for a federal right enforceable against a state actor. *Id.* at 16, n.12. The district court concluded that "nothing in *Harbison* or § 3599 unambiguously confers an enforceable federal right in all clemency proceedings to have federally appointed counsel appear in conflict with a state's process, and especially not where the state process provides counsel." *Id.*

at 15. The district court noted that the *Harbison* Court also explained that § 3599(e) would not require federally appointed counsel to represent a defendant awarded a retrial in state court because states are constitutionally required to provide counsel for indigent defendants at trial. *Id.* at 17, n.13 (citing *Harbison*, 556 U.S. at 189). The district court observed that this statement in *Harbison* "lends support for the conclusion that there is no federal right to federally funded counsel under § 3599 where counsel is otherwise provided." *Id.* at 17, n.13.

The district court observed that recognizing a right of federal habeas counsel to appear in state clemency proceedings "would require the state to accept the appearance of federal counsel in clemency proceedings, overriding the state's discretion and conflicting with the state's own procedure, potentially raising serious federalism concerns." *Long*, 4:19-cv-213, Doc. #13 at 15-16. The district court also observed that creating such a right could "potentially give rise to conflicting advice between federal counsel and state counsel and disrupt the state process." *Id.* at 16. The district court concluded that § 3599 did not create a federal right enforceable in a § 1983 action. *Id.*

The district court stated that even assuming a federal right existed, it would not apply to Long. *Long*, 4:19-cv-213, Doc. #13 at 16. Relying on the text of § 3599, the district court observed that a capital petitioner is only eligible for the federally funded representation under the statute if he is not able to obtain representation. "Section 3599(a)(2) provides that an indigent habeas petitioner is

eligible for federally funded representation if unable to obtain adequate representation." *Id.* at 16. The district court reasoned that a capital defendant's ability "to obtain adequate representation" materially changed when the state provided counsel. *Id.* at 18. The district court again noted that "Florida's clemency process authorizes the clemency board to appoint private counsel to represent a person sentenced to death" and that the Commission had, in fact, appointed clemency counsel. *Id.* (citing Fla. Stat. § 940.031). The district court reasoned that this "eliminated any need for the federally appointed counsel to fill the gap recognized in *Harbison*" and ruled the appointment of clemency counsel "rendered Long ineligible for federal representation in clemency under § 3599(a)(2)." *Id.* The district court rejected the argument that the availability of clemency counsel was irrelevant and that § 3599(e) applied because the statute "does not speak to the impact of the availability of a state court attorney in a state proceeding." *Id.* at 17-18 & n.14.

The district court also relied on the Sixth Circuit case of *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011), noting Sixth Circuit affirmed the denial of authorization for federal funding for counsel's representation of a capital habeas petitioner in a state court competency-to-be-executed proceeding because state law provided counsel. *Long*, 4:19-cv-213, Doc. #13 at 16. "As explained by the Sixth Circuit, based on the structure of § 3599, a defendant who cannot qualify for federally appointed counsel under subsection (a) has no claim to counsel under subsection

(e)." *Id.* (quoting *Irick*, 636 F.3d at 291 & n.2). The district court noted that the Sixth Circuit had declined "to obligate the federal government to pay for counsel in state proceedings where the state itself has assumed that obligation." *Id.* at 17 (quoting *Irick*, 636 F.3d at 291). The district court observed that the Eleventh Circuit in *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014), had agreed with the Sixth Circuit's decision in *Irick*. *Id.* at 17. The district court noted that in *Lugo*, the Eleventh Circuit had rejecting a claim that § 3599 entitles a state prisoner to federally paid counsel in subsequent state postconviction proceedings, noting that such an expansive reading of the statute would greatly "increase the cost of implementing § 3599" and "would have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases." *Id.*

The district court reasoned that the argument basically amounted to a claim that Long was entitled to clemency counsel of his choice. *Long*, 4:19-cv-213, Doc. #13 at 19. The district court ruled that Long was not entitled to clemency counsel of his choice. *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). The district court explained that there is no federal "guaranty to the best possible" clemency attorney. *Id.* at 19, n.16.

The district court rejected the argument that state clemency counsel was inadequate. *Long*, 4:19-cv-213, Doc. #13 at 19. The district court reasoned that § 3599 involved "a mere eligibility standard" but did not create a ineffectiveness

standard. The district court also noted that clemency counsel McClellan was qualified to be on Florida's registry list of clemency counsel which amounted to adequate representation. *Id.* The district court additionally noted that "nothing prevents" the federal habeas counsel from "passing relevant information" to state-appointed clemency counsel, as, in fact, occurred in the case. *Id.* at 19, n.16.

The district court also rejected any Sixth Amendment right to counsel based on the argument that clemency is a critical stage. *Long*, 4:19-cv-213, Doc. #13 at 20. The district court observed that Long offered "no support" for his critical stage argument and the district court could find none. *Id.* at 20. The district court reasoned that critical stage jurisprudence related to steps in a criminal prosecution, such as pretrial lineups or preliminary hearings, that are "concerned with adjudicating the guilt or innocence of a defendant." *Id.* at 21 (citing cases). The district court concluded the fact that Florida's clemency proceeding is a necessary step to obtaining a death warrant "does not elevate" clemency to a critical stage. *Id.* at 22 (citing *Gardner v. Garner*, 383 Fed. Appx. 722, 728-29 (10th Cir. 2010)). The district court noted that clemency remains "a discretionary process" that is "ultimately about mercy," not guilt or innocence. *Id.* at 22-23. The district court found Long's critical stage argument was "unavailing." *Id.* at 22.

The district court noted the Supreme Court precedent that there is no constitutional right to counsel in state postconviction proceedings. *Long*, 4:19-cv-213, Doc. #13 at 21 (citing *Finley* and *Giarratano*). The district court reasoned

that because clemency was even more discretionary than postconviction proceedings, that there was no constitutional right to counsel in clemency either. *Id.* at 22 (citing *White v. Singletary*). The district court observed that when there is no right to counsel, there is no right to effective counsel. *Id.* at 21 (citing *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982)). The district court concluded that the Sixth Amendment right to clemency counsel claim was "futile" because it "would not be cognizable." *Id.* at 23.

The district court denied the motion for stay of execution finding no substantial likelihood of success on the merits. *Long*, 4:19-cv-213, Doc. #13 at 23; *id.* at 11 (citing *Hill v. McDonough*, 547 U.S. 573, 584 (2006), and *DeYoung v. Owens*, 646 F.3d 1319 (11th Cir. 2011)); *id.* at 2.

Alternatively, the district court also denied the stay because of the delay in filing the § 1983 action. *Long*, 4:19-cv-213, Doc. #13 at 23-24. The district court relied on the "strong equitable presumption" against granting a stay of an execution where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Id.* at 23 (citing *Hill* and *Nelson*). The district court observed that Long had waited until two weeks before his execution to file the § 1983 action even though the claim, based on the date of the clemency interview, had been available for over seven months. *Id.* at 23-24.

Here, as in *Long*, the motion for stay of execution should be denied for the same reasons. Here, as in *Long*, there is no Sixth Amendment right to clemency

counsel. Here, as in *Long*, the claim basically amounts to a claim that Bowles is entitled to clemency counsel of his choice. But there is no Sixth Amendment right to appointed counsel of choice, much less a Sixth Amendment right to appointed clemency counsel of choice. Regarding the statutory right to counsel under § 3599, here, as in *Long*, no "enforceable federal right" exists under § 3599. But even if there was an enforceable federal right, as in *Long*, the appointment of state clemency counsel rendered Bowles "ineligible for federal representation in clemency under § 3599(a)(2)." As in *Long*, the statute did not created a "guaranty to the best possible" clemency attorney. And, as in *Long*, "nothing prevented" the federal habeas counsel from "passing relevant information" to state-appointed clemency counsel.[3] Here, as in *Long*, federal habeas counsel was allowed to

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[3] The district court noted the apparent benefit of "maintaining the continuity of counsel" by having federal habeas counsel, who had accumulated a great deal of knowledge about the capital defendant and the case, represent the capital defendant in state clemency proccedings. *Id.* at 19, n.16. But this ignores the benefit of a fresh set of legal eyes. New clemency counsel may take a different approach or see the mitigation in a different light. Indeed, Florida usually prohibits state postconviction counsel from acting as state clemency counsel largely for that purpose and to avoid ethical dilemmas. *Muhammad v. State*, 132 So.3d 176, 198, n14 (Fla. 2013) (noting the valid legal grounds to remove postconviction counsel from acting as clemency counsel citing § 27.711(11), Fla. Stat. (2011), and *Darling v. State*, 45 So.3d 444, 455 (Fla. 2010)); *cf. Christeson v. Roper*, 135 S.Ct. 891, 894 (2015) (holding federal habeas counsel should have been substituted with different habeas counsel to argue equitable tolling because original habeas counsel "cannot reasonable be expected to denigrate their own performance"). Ethical dilemmas can arise from the different roles of habeas counsel and clemency counsel. For example, the CHU-N complains about Bowles answering questions at the clemency interview but an inmate is likely to lose any chance of clemency being granted to him by refusing to answer any questions. But appointing a different attorney as clemency counsel can solve much of that

submit material in support of clemency to the Florida Commission on Offender Review. The CHU-N was informed weeks before the clemency interview in two different emails that they could provide information and background materials, including information regarding Bowles' intellectual functioning, such as Dr. Toomer's written report, to the Commission which would be given "full consideration." But the CHU-N refused to do so. Instead, the CHU-N insisted on a second clemency interview at which they would be allowed to represent Bowles as clemency counsel and be allowed to present Dr. Toomer's live testimony.[4] That

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dilemma. And, regardless of which side has the better policy view of federal habeas counsel also acting as clemency counsel, the Supreme Court's decision in *Harbison* simple prohibits federal habeas counsel from being clemency counsel, regardless of their greater knowledge of the case, when the State appoints clemency counsel, as Florida does.

[4] While the CHU does not actually seem to be making a claim that the failure to allow Dr. Toomer to testify live at the clemency interview was a violation of due process in the § 1983 action, there was no due process violation. There is no due process right to present live testimony at a clemency hearing. The right of confrontation and the right to present witnesses are limited to trials and do not apply to other proceedings, such as clemency interviews. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 567-70 (1974); *Baxter v. Palmigiano*, 425 U.S. 308, 315-22 (1976). Furthermore, written submissions satisfy the "opportunity to be heard" aspect of due process. *Brown v. Braxton*, 373 F.3d 501, 502 (4th Cir. 2004) (holding due process was not violated where an inmate was not permitted to present live testimony of another inmate but was allowed to present the other inmate's written statement at a disciplinary hearing). Indeed, most federal appeals are decided by circuit courts of appeals solely on the written submission, *i.e.*, briefs, with no oral argument permitted including many direct appeals of criminal convictions. Fed. R. App. P. 34(2). This standard appellate practice does not violate due process.

Here, the CHU was repeatedly informed that they could submit written material in support of the clemency application, including intellectual disability expert reports, which would be "fully considered." The CHU refused to do so. That was their choice and, no doubt, part of their litigation strategy for this § 1983

the CHU-N chose not to pass the relevant information regarding intellectual disability to clemency counsel Simmons or, more importantly, to the Commission via written submissions belies the validity of the intellectual disability claim as well as the claim regarding the ineffectiveness of clemency counsel Simmons in handling the intellectual disability presentation.

Here, as in *Long*, both the Sixth Amendment right to clemency counsel claim and the statutory § 3599 claim are "futile" and not "cognizable" and therefore, there is no likelihood of success on the merits, much less a substantial likelihood. And, here, as in *Long*, because there is no substantial likelihood of success on the merits, a stay of execution is not warranted.

And, here, as in *Long*, the delay in bringing the § 1983 action, both before and after the warrant was signed, gives rise to a "strong equitable presumption" against granting a stay. Indeed, the delay between the clemency interview and the filing of the § 1983 action in this case was longer than the delay in *Long*. The CHU-N waited nearly a year after the clemency interview and then waited a month after the warrant was signed to file this § 1983 action. The delay is a second independent reason to deny the stay. Here, as in *Long*, the motion for stay of execution should be denied.

Accordingly, the motion for a stay of execution should be denied.

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action, but it was not a violation of due process. The Commission's refusal to allow Dr. Toomer to testify live at the clemency interview is not a violation of due process.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ *Charmaine M. Millsaps*
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COUNSEL FOR ALL DEFENDANTS[5]

[5] Undersigned counsel, after consultation, represents all named defendants.

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I HEREBY CERTIFY that the foregoing RESPONSE TO MOTION FOR STAY OF EXECUTION is 9,237 words which is over the 8,000 word limit in Northern District of Florida local rule 7.1(f) but the response will be accompanied by a motion to accept the enlarged response.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO MOTION FOR STAY OF EXECUTION has been furnished by CM/ECF to **TERRI BACKHUS**, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org; **SEAN T. GUNN**, 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 33301; phone: (850) 942-8818; email: sean_gunn@fd.org this 17th day of July, 2019.

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

CASE NO. 4:19-CV-319-MW-CAS

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA MCCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD, Chairman, Commissioner,
Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
Commission Investigator Supervisor,
Florida Commission on Offender Review,
in her official capacity.

EMERGENCY
INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

REPLY IN SUPPORT OF
MOTION FOR A STAY OF EXECUTION

I. Mr. Bowles Has Met the Requirements for a Stay of Execution

As Mr. Bowles discussed in his Motion for Stay of Execution (ECF No. 5), he meets the four requirements for a stay in this case. In response, Defendants concede that Mr. Bowles will suffer irreparable injury, and argue primarily that his claim for relief fails because it has "no chance of success on the merits," ECF No. 19 at 20.

However, because Defendants fundamentally misunderstand Mr. Bowles's claims for relief, as well as misread *Harbison v. Bell*, 556 U.S. 180 (2009), 18 U.S.C. § 3599, and Eleventh Circuit precedent, this Court should not be persuaded by these arguments on the likelihood of success[1] of Mr. Bowles's claim for relief.

Furthermore, Defendants have waived any arguments to the contrary on the adequacy of Mr. Bowles's state-retained counsel by failing to respond to any of the fact-specific information Mr. Bowles pleaded, which should be taken as true. *See, e.g., Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1334 (11th Cir. 2013). As discussed further herein, because Defendants have made no persuasive

[1] In some instances, a motion for a stay may be granted even when the movant has not met the threshold of "substantial likelihood of success on the merits." *See Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018) (acknowledging in the context of a motion to stay execution that although a "petitioner face[d] an uphill battle on the merits," on balance with the other three factors, a stay was still appropriate); *see also In Re EMI Resorts, Inc.*, 2010 WL 11506117, *1 (S.D. Fla. 2010) (granting motion to stay pending appeal upon lesser showing of substantial case on the merits because "the [question] at bar is a complex and novel question that has not yet been clearly addressed by the Eleventh Circuit.").

arguments on the merits of Mr. Bowles's claim and waived other responses, his motion for a stay of his imminent execution should be granted.

II. Defendants Misconstrue Mr. Bowles's Claim for Relief

Defendants wrongly characterize Mr. Bowles's § 1983 action as arguing that his "Sixth Amendment right to counsel" was violated, and that clemency is a "critical stage" to which the constitutional right to counsel attaches. ECF No. 19 at 1-2. Defendants also wrongly argue that Mr. Bowles's claim should fail because his due process rights were preserved by Florida's clemency procedure, and because he was not entitled to counsel of his choice. *Id*. at 10, 13. These arguments are irrelevant to the § 1983 action before this Court.

Mr. Bowles does not contend that the Sixth Amendment applies to clemency, or that clemency is a critical stage of prosecution for such purposes. Mr. Bowles's claim does not rely on the Due Process Clause, nor does he rely on arguments concerning counsel of choice. As his complaint, memorandum of law, and emergency stay motion make clear, Mr. Bowles's claim is that Defendants violated his federal *statutory* right, codified in § 3599, to representation by his appointed federal counsel, or at least other "adequate" counsel within the meaning of the statute, in his state capital clemency proceedings. *See* ECF Nos. 1, 4, 5. Defendants' arguments concerning matters not at issue in this case should be disregarded.

III. Defendants Misread *Harbison* and Eleventh Circuit Precedent

Defendants maintain that *Harbison* held that "if a State provides counsel for a proceeding, § 3599 does not allow federal habeas counsel to appear in that proceeding," and that "[t]he Eleventh Circuit has repeatedly stated that federal habeas counsel may not appear as counsel in state court proceedings if the state provides counsel," ECF No. 19 at 15-16. Defendants assert that "[Mr.] Bowles is simply not eligible for federal habeas counsel to appear as clemency counsel under § 3599 according to the United States Supreme Court's decision in *Harbison* and the Eleventh Circuit's decisions in *Lugo* [*v. Sec'y, Fla. Dept. of Corr*., 750 F.3d 1198 (11th Cir. 2014)] and *Gary* [*v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261 (11th Cir. 2012)], as well as under the logic of the Sixth Circuit's decision in *Irick* [*v. Bell*, 636 F.3d 289 (6th Cir. 2011)]." ECF No. 19 at 18. Defendants conclude that Mr. Bowles's "claim of a statutory right to counsel under § 3599 is controlled by *Harbison*, *Lugo*, and *Gary*." ECF No. 19 at 21.

Defendants misread *Harbison* and Eleventh Circuit precedent. *Harbison* does not provide, as Defendants contend, that state-retained clemency counsel renders an individual ineligible for clemency representation by their *already appointed* § 3599 counsel. As Mr. Bowles explained in his stay motion, the lone reference in *Harbison* to state-retained counsel replacing § 3599 counsel concerns the hypothetical scenario proposed by the State concerning whether § 3599 counsel would be obligated to

represent their client in a retrial that comes "subsequent" to federal habeas for § 3599(e) purposes. *See* ECF No. 5 at 15-16.

Defendants, just as the Sixth Circuit did in *Irick*, divorce the quote "state-furnished representation renders him ineligible for § 3599 counsel," *Harbison*, 556 U.S. at 189, from its proper context. *Harbison*'s proper reading is that § 3599 counsel is obligated to continue to represent clients for those events delineated in § 3599(e) that occur "subsequent" to federal habeas, but not state postconviction or trial proceedings that are not ordinarily "subsequent" within the meaning of the statute. *See* ECF No. 15-16. Clemency is specifically listed in § 3599(e) as a "subsequent" event. *See Harbison*, 556 U.S. at 189.

As the Ninth Circuit recently recognized, the Sixth Circuit in *Irick* applied the same misreading of *Harbison* as Defendants. *See Samayoa v. Davis*, No. 18-56047, 2019 WL 2864411, *3 (9th Cir. July 3, 2019) (calling the reasoning of *Irick* "unpersuasive" and noting that "[n]owhere in the [*Harbison*] Court's statement on the question on certiorari or in its discussion of the case did it condition the scope of § 3599(e) on the state's failure to provide clemency counsel.").

Defendants' response does not even address Mr. Bowles's arguments concerning the Ninth Circuit's proper interpretation of *Harbison* in *Samayoa*, or the Sixth Circuit's flawed in reasoning in *Irick*, and responses to those arguments should be considered waived at this point. *Cf. Egidi v. Mukamai*, 571 F.3d 1156, 1163 (11th

Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in a reply brief are deemed waived.").

In addition, Defendants' contention that the Eleventh Circuit's decisions in *Lugo* and *Gary* are dispositive (or authoritative) in this action is misplaced. As Mr. Bowles explained in his stay motion, *Lugo* was not a case concerning state clemency proceedings, the opinion's reference to *Irick* was cursory, and the § 3599 discussion was limited to successive state postconviction proceedings, which—unlike clemency—are not "subsequent" for § 3599(e) purposes. *See* ECF No. 5 at 14-15. Defendants did not respond to any of Mr. Bowles's arguments concerning *Lugo*.

Defendants also misread the Eleventh Circuit's decision in *Gary*. In that case, Gary had two attorneys appointed under § 3599, who represented him in federal habeas, and continued to represent him through clemency in Georgia, until his clemency was denied. *Gary*, 686 F.3d at 1263. After clemency was denied, the Georgia Supreme Court stayed Gary's execution pending his successive litigation of a motion for DNA testing and motion for a new trial, in which his § 3599 counsel continued to represent him. *Id*. at 1264. On appeal, the Eleventh Circuit considered the district court's denial of motion for funds to pay experts for his clemency hearing, a partial denial of payment for his § 3599 counsel's services in litigating the motion for a new trial, and the denial of a motion for funds to pay an expert for the DNA motion. *Id*.

While *Gary* did discuss funding for experts in state clemency, Defendants' references to—and quotes from—*Gary* are misleading. In their Response, Defendants characterize *Gary* as only about the denial of funding for experts in clemency, ECF No. 19 at 16, and give the impression that the quotes concerning federal funding and representation in state proceedings are related to the clemency ruling. But that is not what *Gary* says. The quotes Defendants use to support their contention that the *Gary* Court had federalism concerns and concerns over the use of federal funds in state proceedings were not about clemency at all, but rather about Gary's attempts to receive funding for his successive DNA motion and successive motion for a new trial that were litigated in Georgia state courts. *Compare* ECF No. 19 at 16, *with* Gary, 686 F.3d at 1277-78. In fact, the *Gary* Court explicitly *distinguished* clemency from any other state proceedings:

> Clemency proceedings and hearings on DNA motions are fundamentally different types of proceedings and should be treated differently for purposes of § 3599(a)(2). A clemency proceeding, by its nature, will typically occur subsequent to the prisoner's unsuccessful collateral attack on the constitutional validity of his conviction or death sentence. . . . The "fail safe in our criminal justice system," *Herrera v. Collins*, 506 U.S. 390, 415 [] (1993) (internal quotation marks omitted), clemency is a proceeding of last resort for a prisoner before execution. It is, therefore, a unique species of proceeding that is typically subsequent to the conclusion of a § 2254 proceeding.

Gary, 686 F.3d at 1275. The only reason that the *Gary* Court upheld the denial of federal funds for use in clemency, under an abuse of discretion standard, was because "Gary failed to show that the experts' personal appearances before the Board were

'reasonably necessary' to enable his attorneys to adequately to represent him," *id*. at 1269, not due to any concerns about federalism or federal court oversight of state proceedings. Like *Lugo*, the Eleventh Circuit's decision in *Gary* does not concern state clemency or clemency representation, and is not dispositive (or arguably even relevant) to the issues in Mr. Bowles's case.

Given *Irick* and *Samayoa*, it is clear that a circuit split has developed on the interpretation of whether the existence of state-retained counsel can make an individual with other properly appointed § 3599 counsel no longer eligible for § 3599 representation in subsequent proceedings under § 3599(e). *Compare Irick*, 636 F.3d at 291-92, *with Samayoa*, 2019 WL 2864411 at *3. The Eleventh Circuit has no precedent that is dispositive to the issues raised in Mr. Bowles's suit. Because *Irick* was wrongly decided and based on a misreading of *Harbison* and § 3599, *see* ECF No. 4 at 10-14, and there is no otherwise controlling precedent in the Eleventh Circuit, this Court should be instructed by *Samayoa* and a plain reading of *Harbison*.

IV. To the Extent That the Existence of State-Retained Clemency Counsel is Relevant to Mr. Bowles's Claim, Defendants Ignore Mr. Bowles's Arguments Regarding § 3599's Adequacy Provision

As Mr. Bowles has explained, the availability of state-retained clemency counsel is not relevant to his right to § 3599 counsel's representation in clemency proceedings. *See* ECF No. 4 at 11-14; *see also Samayoa*, 2019 WL 2864411 at *3. However, to the extent that the existence of state-retained counsel is relevant to Mr.

Bowles's claim, his memorandum of law explains why § 3599(a)(2) at least requires that any replacement counsel is "adequate" to provide representation in capital clemency proceedings. *See* ECF No. 4 at 15-20. Defendants' answer completely omits, and thereby waives, any response to Mr. Bowles's statutory "adequacy" arguments.

Tellingly, Defendants do not make *any* fact specific arguments that Mr. Bowles's state-retained counsel was "adequate" to provide representation in a capital clemency proceeding for purposes of § 3599.

Instead, Defendants advance the extreme position that § 3599 counsel "may never appear as clemency counsel because Florida provides clemency counsel to capital defendants." ECF No. 19 at 19. But this erroneous view is not supported by a plain reading of § 3599(a)(2) ("any defendant who is or becomes financially unable to obtain *adequate* representation"), or even by the cases Defendants cite, *see*, *e.g.*, *Irick*, 636 F.3d at 292 ("The relevant consideration under § 3599 is whether a state affords *adequate* representation.") (both emphases added).

Even in discussing Judge M. Casey Rodgers's May 16, 2019 order denying a clemency-related motion for a stay of execution in *Long v. Sec'y, Fla. Dep't. of Corrs.*, No. 4:19-cv-213, ECF No. 13 (N.D. Fla. May 16, 2019), Defendants suggest that *any* clemency counsel provided by Florida automatically constitutes "adequate representation" for purposes of federal law. ECF No. 19 at 30. This is not an accurate

characterization of Judge Rodgers's ruling in *Long*,[2] and is wrong on the merits. As Mr. Bowles has explained, adequacy determinations must take into account fact-specific information about the appropriateness of a particular counsel as well as the needs of a particular case or client. *See* ECF No. 4 at 15-20. Florida's provision of any state-funded clemency counsel is not, by itself, sufficient for § 3599 purposes.

In this case, Mr. Bowles's state-retained clemency counsel, Mr. Simmons, could not and did not serve as adequate counsel for the purposes of § 3599. Mr. Simmons was not qualified to represent capital defendants at any stage, *see* Complaint, ECF No. 1 at ¶ 53, had no experience with death penalty law or intellectual disability in the capital context, *id*. at ¶ 78, waived all access to any funding for investigative or expert services before knowing anything about Mr. Bowles's case, *id*. at ¶¶ 54-55, did not know anything about Mr. Bowles's particular vulnerabilities due to his intellectual disability and traumatic background, did not conduct an independent investigation, and was not provided with any guidance or required to complete any training in order to provide capital clemency representation, *id*. at ¶¶ 50-51, 54-55.

[2] In fact, on reconsideration in *Long*, Judge Rodgers specifically clarified her reading of the adequacy requirement, stating that: "Long's claim that the Court read 'adequate' out of § 3599(a)(2) is not accurate. The Court fully recognized that a petition is only eligible under subsection (a)(2) if 'adequate representation' is not otherwise available but found nothing supported his claim that [Long's clemency counsel] was not 'adequate.'" *Long*, ECF No. 15 at 2.

Mr. Simmons's inadequacy is evident from what thin record is available of the clemency proceedings. Mr. Simmons failed to correct material factual inaccuracies during Mr. Bowles's clemency interview, *id*. at ¶ 78, failed to intercede when FCOR asked Mr. Bowles direct questions about his pending intellectual disability litigation or related diagnoses, *id*. at ¶¶ 78-79, and then turned in an "Application for Executive Clemency" that was less than eight double-spaced pages, was largely copied word for word from another death-sentenced individual's application, misidentified Mr. Bowles as that individual, contained obvious factual inaccuracies, and failed to tailor arguments to Mr. Bowles or his intellectual disability, *id*. at ¶ 82.

Defendants' response ignores all of these relevant and fact-specific concerns about the adequacy of state-retained counsel that Mr. Bowles was provided. Defendants should be considered to have waived such responses.

V. This Suit Does Not Intrude on Florida's State Clemency Scheme

Defendants argue that concerns over comity and federalism should prevent this Court from enforcing Mr. Bowles's § 3599 rights. *See* ECF No. 19 at 16, 19, 29. But concerns over comity and federalism do not control all outcomes. Under the circumstances presented here, it is appropriate for this Court to enforce Mr. Bowles's federal rights. Doing so will not intrude on Florida's state clemency scheme.

Section 1983 actions were designed for precisely the relief Mr. Bowles seeks: federal enforcement of a federal right due to the violation of that right by state actors. Such actions necessarily implicate some level of federalism and comity, as they seek to vindicate federal rights within state systems. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (noting in the context of a § 1983 action: "The concept [of Federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments[.]"). However, that federalism or comity concerns exist is not itself sufficient for a federal court in a § 1983 action to decline to enforce a federal right in a state system; federal courts are charged only with being sensitive to state interests, not abandoning the enforcement of a federal right.

In this case, Mr. Bowles has simply asked for this Court to enforce his federal rights as provided in § 3599. Mr. Bowles has not argued that Florida's scheme for providing clemency representation is unconstitutional, nor that it cannot be used in cases in which a death-sentenced person has § 3599 counsel. The issue in this case is much narrower: Mr. Bowles was entitled by federal statute to his already-appointed § 3599 counsel's continued representation in state clemency, regardless of whether the state provided additional counsel. Defendants violated his rights by

interfering with and *preventing* his § 3599 counsel's efforts to serve as either clemency counsel or co-counsel. Mr. Bowles does not ask this Court to indicate what Florida's clemency scheme *should* be or do, but only what its actors, such as Defendants, *may not* do—violate his federal rights. This is particularly important in Mr. Bowles's case, where depriving him the involvement of his § 3599 counsel left him uniquely vulnerable with no attorney present who understood his intellectual disability or his ongoing litigation regarding this disability.[3] Defendants' collective actions prevented the vindication of Mr. Bowles's federal rights, and thus deprived Mr. Bowles of his § 3599 right to adequate counsel in state clemency proceedings.

VI. Mr. Bowles Was Not Dilatory in Filing This Action

Defendants wrongly argue that Mr. Bowles was dilatory in filing this action, which occurred just one month after the Governor simultaneously denied clemency

[3] Defendants suggest that the *Harbison* Court's discussion concerning the value of continuity of § 3599 counsel in state clemency proceedings, *Harbison*, 556 U.S. at 193, creates an "ethical dilemma," and that Mr. Bowles's § 3599 counsel had some sort of ethical conflict because of their representation of Mr. Bowles in his intellectual disability litigation from advocating for him in clemency on this basis. *See* ECF No. 19 at 34-35 n. 3. However, in making this argument, Defendants seemingly concede Mr. Bowles's point: because § 3599 counsel had done the investigation and developed the intellectual disability evidence, *they were the only ones who could advocate on this basis*. Defendants' attempts to portray this as an ethical dilemma miss the point because this is the exact reason Mr. Bowles repeatedly cited that his § 3599 counsel was the only counsel that could *adequately* represent him in clemency due to his unique vulnerabilities and litigation posture.

and signed a warrant for his execution, and six weeks before his scheduled execution date of August 22, 2019. ECF No. 19 at 23.

Defendants misunderstand when this action accrued for the purposes of timeliness. It is well-settled in the Eleventh Circuit that "[a] cause of action under [42 U.S.C. §§ 1983 and 1985] will not accrue, and thereby set the limitations clock running, until the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003); *see also McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008).

Here, Mr. Bowles did not have a complete cause of action—i.e., Defendants violated his rights by interfering with clemency representation by his § 3599 counsel—until his clemency proceedings ended, which was not until June 11, 2019. Defendants' violation continued for the duration of the clemency proceedings. That clemency representation overlapped completely with the duration of the clemency proceedings was by the design of the Defendants due to the Rules of Executive Clemency and the terms of the contract of his privately retained clemency counsel, which contractually bound him to represent Mr. Bowles until clemency was denied. *See* Appendix to Complaint, ECF No. 1-1 at 11, ¶ 8.

This action was filed just weeks later, and well before Mr. Bowles's scheduled execution date of August 22, 2019. Under the circumstances presented, Mr. Bowles

could not be reasonably expected to file this action materially earlier. Mr. Bowles was diligent, not dilatory, in the timely filing this action.[4]

VII. Conclusion

The Court should stay Mr. Bowles's scheduled August 22, 2019, execution and consider his § 1983 claim without the imminent threat of a state death warrant.

[4] It is also worth noting that Defendants misrepresent Judge Rodgers's dilatoriness finding in *Long*. While Defendants contend that Judge Rodgers "[a]lternatively . . . denied the stay because of the delay in filing the § 1983 action," ECF No. 19 at 33, that was not the basis of her denial. As she clarified on reconsideration, the denial was based on his "likelihood of success on the merits," and noted that "even if the Court erred in finding Long could have brought suit earlier challenging the exclusion of his § 3599 counsel, the result would have been the same." *Long*, ECF No. 15 at 1-2. Thus, Judge Rodgers did not alternatively deny Long's action on dilatoriness grounds, as Defendants suggest, and further, Mr. Long filed only two weeks prior to his execution, whereas Mr. Bowles has filed six weeks from his scheduled execution.

Respectfully submitted,
Gary Ray Bowles
By Counsel

/s/ Terri Backhus

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Sean Gunn, Esq.
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Kelsey_Peregoy@fd.org
Katherine_Blair@fd.org
Federal counsel for Mr. Bowles

CERTIFICATE OF SERVICE

I hereby certify that the forgoing reply was electronically served on this date, July 19, 2019, to the defendants in this matter through the ECF system.

/s/ Terri Backhus
Terri Backhus

CERTIFICATE OF COMPLIANCE

This reply does not comply with the 3,200 word limit in Local Rule 7.1(I), excluding those portions exempted by Local Rule 7.1(F), because it is 3,576 words, but it will be accompanied by an unopposed motion to accept the enlarged response.

/s/ Terri Backhus
Terri Backhus

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GARY RAY BOWLES,
Plaintiff,

CIVIL ACTION NO._____

v.

RON DESANTIS, Governor,
in his official capacity;

JIMMY PATRONIS,
Chief Financial Officer,
in his official capacity;

ASHLEY MOODY, Attorney General,
in her official capacity;

NIKKI FRIED, Commissioner of Agriculture,
in her official capacity;

JULIA McCALL, Coordinator,
Office of Executive Clemency,
in her official capacity;

MELINDA COONROD,
Chairman, Commissioner, Florida Commission on Offender Review,
in her official capacity;

SUSAN MICHELLE WHITWORTH,
a/k/a S. Michelle Whitworth a/k/a Michelle Whitworth,
Commission Investigator Supervisor, Florida Commission on Offender Review, in her official capacity.

EMERGENCY INJUNCTIVE RELIEF SOUGHT

EXECUTION OF STATE DEATH SENTENCE SCHEDULED FOR AUGUST 22, 2019, AT 6:00 P.M.

APPENDIX TO 42 U.S.C. § 1983 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818 Fax 942-8809

April 11, 2018

S. Michelle Whitworth
Capital Punishment Research Specialist
The Office of Executive Clemency
4070 Esplanade Way
Tallahassee, FL 32399-2450
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Chapter 119 Request for Public Records

To Whom It May Concern:

This is a formal request for access to public records pursuant to Chapter 119 of the Florida Statutes. I ask that you provide the information listed below:

1. Whether or not your office has made a determination on the issue of clemency, pursuant to the authority proscribed in Article IV, Section 8(a) of the Florida Constitution and Rule 15 of the Rules for Executive Clemency, for each of the individuals on Florida's Death Row. A complete list of the 347 individuals on Florida's Death Row, updated by the Florida Department of Corrections as of the date of this request, is attached.
2. For those individuals to whom clemency was denied, the date of the denial of clemency by the Governor and Clemency Board.
3. Any document, record, list or other memoranda naming the individual attorneys who are presently approved to represent death-sentenced individuals in clemency proceedings. This includes, but is not limited to, the list maintained pursuant to Fla. Stat. § 940.031 (1).
4. Any document, record, list or other memoranda listing the qualifications necessary for an individual attorney to represent death-sentenced individuals in clemency proceedings.
5. Any document, record, report or other memoranda generated by any attorney, who represents any death-sentenced individual on Florida's death row, in clemency that lists the hours billed for services rendered and/or describes services rendered.
6. All contracts for any attorney who represents any death-sentenced individual on Florida's death row in clemency that initiates such representation.

If your office claims any exemptions to this request or withholds any materials, please provide, pursuant to Fla. Stat. § 119.071, an itemized list of materials withheld, a written explanation identifying conclusions you reached when classifying all listed records as exempt, and the statutory authority you relied on in arriving at that decision. I also request a letter certifying that you are providing a complete and accurate copy of all requested materials. If any documents or files have been destroyed, please provide the destruction authorization or order in your response. If any costs are associated with this request, please notify our office immediately and payment will be made.

Thank you for your prompt attention.

Sincerely,

_____

Billy H. Nolas, FL Bar No. 806821
Kimberly Sharkey, FL Bar No. 505978
Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301

FLORIDA COMMISSION ON OFFENDER REVIEW

4070 Esplanade Way, Tallahassee, Florida 32399-2450

MELINDA N. COONROD *Commissioner/Chair*
RICHARD D. DAVISON *Commissioner/Vice-Chair*
DAVID A. WYANT *Commissioner/Secretary*

April 23, 2018

Billy Nolas
Kimberly Sharkey
Capital Habeas Unit
Office of the Federal Public Defender
227 North Bronough Street
Suite 4200
Tallahassee, Florida 32301

APR 25 2018

Re: April 11, 2018, Public Records Request

Dear Mr. Nolas and Ms. Sharkey:

The Commission is in receipt of your April 11, 2018, public records request for various records related to capital punishment executive clemency, a copy of which is enclosed here.

Pursuant to Rule 16, Rules of Executive Clemency, and s. 14.28, Fla. Stat., all records generated or received in the executive clemency process are confidential and exempt from disclosure absent express permission of the Governor. As to records responsive to items 1., 2., 5., and 6., of your request, the Executive Office of the Governor respectfully declines to authorize release of any responsive records. As to records responsive to items 3., and 4., of your request the Executive Office of the Governor has authorized release of the attached records. The information redacted from the Capital Clemency Counsel Listing is confidential and exempt from disclosure pursuant to Rule 16, Rules of Executive Clemency and s. 14.28, Fla. Stat.

The Commission provides these records to you free of charge, as a courtesy. The Commission's election to provide you these records free of charge does not constitute a waiver of the Commission's authority to charge statutorily permissible fees for future or additional public records requests.

The production of these records here satisfies the Commission's obligations pursuant to your April 11, 2018, public records request.

Thank you.

Public Records Unit
Office of the General Counsel
Commission on Offender Review
4070 Esplanade Way
Tallahassee, Florida 32399
P: (850) 488-4460
E: fcorlegal@fcor.state.fl.us

Florida Capital Clemency Counsel Attorney List

Applications Now Being Accepted

Pursuant to Section 940.031,F.S., the Office of Executive Clemency is compiling a list of attorneys in private practice who are available for appointment to represent death row inmates during the clemency review process.

The Executive Clemency Coordinator will appoint eligible attorneys from the List to represent inmates upon the commencement of the clemency process. Appointed attorneys must be readily accessible to the inmate. At a minimum, appointed clemency counsel will be required to: travel to meet with the inmate in person on death row; prepare for and attend a clemency interview before the Florida Commission on Offender Review (*formerly Florida Parole Commission*) at death row; file a clemency petition on behalf of the inmate; and if scheduled, attend a clemency hearing before the Governor and Cabinet. The appointed attorney will be compensated by the Board of Executive Clemency for all fees and costs (not to exceed $10,000). Effective July 1, 2014, fees and costs will be governed by the Office of Executive Clemency.

APPLICATIONS FOR IMMEDIATE CONSIDERATION ARE DUE JULY 31, 2014.

(Applications received after July 31, 2014 will be reviewed and processed on a semi-annual basis.)

Applications and information may be obtained by contacting:

Julia McCall, Coordinator
Office of Executive Clemency
4070 Esplanade Way, Tallahassee, Florida 32399-2450
(850) 488-2952 juliamccall@fcor.state.fl.us

Office of Executive Clemency

Clemency Counsel Appointment

Please provide the following information to be on the list for Capital Clemency Counsel appointment. This application must be completed in its entirety if you wish to be considered for appointment to represent an inmate on death row during the clemency review process.

Applicant Information

(As it appears on your Florida Bar Membership)

Last Name | First Name | Middle Initial | FL Bar #

Street Address | Apartment/Unit #

City | State | Zip Code

Phone number | Cell number | Fax number

E-mail address

Please Check the Following That Apply:

- ☐ I am a member in good standing with the Florida Bar.
- ☐ I have read the qualifications herein and agree to these qualifications.
- ☐ I am familiar with the fees, costs and expense provisions set by law, including the fee limitations prescribed in § 940.031, Fla. Stat.
- ☐ I will not solicit compensation from the inmate I am appointed to represent.
- ☐ I will notify the Clemency Coordinator of any formal complaint filed by the Florida Bar against me, any non-confidential agreements entered into between myself and The Florida Bar, and any claim of ineffective assistance of counsel that has been set for a hearing before a judge or magistrate.
- ☐ I agree to be readily accessible to the inmate and to meet the inmate in person, prepare for and attend the Clemency interview before the Parole Commission at death row, file a clemency petition on behalf of the inmate, and attend a clemency hearing before the Governor and Cabinet, if scheduled.
- ☐ I am familiar with the Rules of Executive Clemency, including Rule 15 as it relates to Commutation of Death Sentences, and I will adhere to the Rules.
- ☐ I will cooperate and abide by the contract entered into between the Florida Parole Commission and me for performance of services under this agreement.
- ☐ I agree to continue representing the inmate until my services are no longer required by the Board of Executive Clemency.

Disclaimer and Signature

I certify that the answers given herein are true and complete. I understand that false or misleading information given in my application or omission of information requested will be grounds for refusal of appointment or dismissal.

Signature

FL Bar #

Date

Your completed application and resume must be received in the Coordinator's office no later than July 31, 2014. Applications received after July 31, 2014 will be reviewed and processed on a semi-annual basis. Please submit this application to the following location:

Julie McCall
Office of Executive Clemency
4070 Esplande Way
Tallahassee, Florida 32399

Agreement #: 25

AGREEMENT BETWEEN

FLORIDA COMMISSION ON OFFENDER REVIEW

AND

NAH-DEH E. W. SIMMONS

This Agreement is entered into between the Florida Commission on Offender Review (FCOR), whose address is 4070 Esplanade Way, Tallahassee, Florida 32399-2450 and Nah-Deh E. W. Simmons, an attorney (Attorney), or a Legal Entity (Legal Entity), whose address is P. O. Box 41083, Jacksonville, FL 32203.

For purposes of this Agreement, the obligations of this Agreement apply equally to an Attorney and to a Legal Entity. The Legal Entity is responsible for ensuring that any attorney in its practice working under this Agreement knows and understands the responsibilities of this Agreement. Any breach of a provision of this Agreement by any attorney under the authority or supervision of Legal Entity shall also constitute a breach of this Agreement by the Legal Entity. If the Legal Entity is appointed, this Agreement is the basis under which the services of the attorney shall be provided.

I. APPLICABLE DEFINITIONS

1. Attorney means any individual attorney who is a member of the Florida Bar in good standing.
2. Legal Entity means any group under the direction of member(s) of the Florida Bar in good standing such as a law firm or partnership registered with the Florida Department of State to provide legal services.
3. Client means a capital punishment inmate (inmate who has previously been sentenced to death and is currently incarcerated on death row).
4. Clemency Board means the Governor and Cabinet sitting as the Board of Executive Clemency.
5. Executive Clemency Coordinator means the person appointed by the Rules of Executive Clemency.

II. TERM

1. The term of this Agreement shall be from the date of execution, which is the date of the last signatory, through June 30, 2018, unless terminated sooner as provided herein. In the event the parties sign this agreement on different dates, the latter date shall be the effective date. If it becomes necessary to replace this Agreement with another Agreement, then the new Agreement shall supersede and terminate this Agreement.

2. FCOR may renew this Agreement upon the same terms and conditions of which may not exceed the relief by term of the original Agreement, or three years, whichever is longer. Exercise of the renewal option is at the sole discretion of FCOR and shall be contingent, at a minimum, upon satisfactory

performance, subject to the availability of funds and other factors deemed relevant by FCOR.

III. AUTHORITY

Section 940.031, Florida Statutes (F.S.) gives FCOR the authority to contract with an Attorney/Legal Entity to represent a person sentenced to death for relief by Executive Clemency.

IV. SERVICES

1. Attorney/Legal Entity shall provide legal services for **Gary Ray Bowles**, **Department of Corrections #086158,** as provided by the Florida Statutes and the General Appropriations Act. The capital punishment inmate is deemed to be the Client of Attorney/Legal Entity appointed by the Clemency Board. Attorney/Legal Entity shall represent the Client, throughout the entire clemency review process. Attorney/Legal Entity shall represent the Client until his/her services are no longer required by the Clemency Board. Attorney/Legal Entity's representation of Client includes any and all sentences of death that have been imposed.

2. Attorney/Legal Entity shall conduct a meeting in person (meeting) with the Client to determine how the Client would like to proceed in his/her clemency review process. The meeting shall take place prior to the clemency interview and within sixty (60) calendar days of the execution of this Agreement. FCOR shall notify Attorney/Legal Entity in writing of the date of the clemency interview. Attorney/Legal Entity may request in writing that the meeting occur past the sixty (60) calendar days of the execution of this Agreement and FCOR may approve in writing an alternate date for the meeting. Attorney/Legal Entity shall submit to FCOR a statement advising of the date and location of the in-person meeting with the Client within fourteen (14) calendar days subsequent to the meeting.

3. Attorney/ Legal Entity shall attend the clemency interview in person, on the date provided in writing to the Attorney/Legal Entity by FCOR, at the correctional institution where the Client is located. Attorney/Legal Entity shall provide legal representation to the Client during the clemency interview. Attorney/Legal Entity shall submit within fourteen (14) calendar days subsequent to the clemency interview to FCOR a statement advising that he/she personally attended the clemency interview and provided legal representation to the Client.

4. Attorney/Legal Entity shall prepare a written statement, brief or memorandum on behalf of the Client. The written statement, brief or memorandum shall be submitted to FCOR within forty five (45) calendar days subsequent to the interview date, unless otherwise requested in writing by the Attorney/Legal Entity and approved in writing by FCOR. The written statement, brief or

memorandum shall include all information relevant to the Client to the issue of clemency for the Clemency Board's consideration. The Attorney/Legal Entity shall submit one (1) original and six (6) copies of the written statement, brief or memorandum to FCOR.

5. If a clemency hearing is scheduled by the Clemency Board, the Executive Clemency Coordinator will notify in writing the Attorney/Legal Entity. Attorney/Legal Entity shall attend the clemency hearing on the date and time scheduled in Tallahassee, Florida, and shall make an oral presentation on behalf of the Client to the Clemency Board.

6. Attorney/Legal Entity shall personally perform the legal services required for the Client. Attorney/Legal Entity shall at all times comply with all requirements of the federal, state, county, and municipal statutes, ordinances, rules, regulations, and the Rules of Professional Conduct in the performance of Attorney's obligations under this Agreement. Attorney/Legal Entity shall, throughout the term of this Agreement, be a member in good standing with The Florida Bar.

7. Attorney/Legal Entity may not reassign or subcontract any case or portion thereof to another Attorney/Legal Entity. This limitation on subcontracting or reassigning shall include associates or partners of Attorney's law firm regardless of whether the associate or partner is on the private counsel list maintained by the Clemency Board. Attorney/Legal Entity affirmatively waives the right to seek compensation for work performed by any other attorney. Attorney/Legal Entity agrees to be responsible for the management and direction of all legal services pursuant to this Agreement.

8. Attorney/Legal Entity shall provide competent representation and be readily accessible to the Client. Attorney/Legal Entity shall provide to the Client all professional legal services reasonably required related to the clemency review process from the date of the executed agreement through conclusion or until Attorney/Legal Entity services are no longer required by the Clemency Board. Attorney/Legal Entity agrees to represent the Client, throughout the clemency review process, even though said representation may occur beyond the term of this Agreement.

9. The parties agree that this Agreement does not create the relationship of Attorney/Legal Entity and Client between FCOR and Attorney/Legal Entity. This Agreement is not intended to, and shall not be construed to, create the relationship of agent, servant, employee, partnership, joint venture, or association between FCOR and Attorney/Legal Entity. Attorney/Legal Entity is, and shall at all times be deemed an independent contractor and shall be wholly responsible for the manner in which Attorney/Legal Entity performs the services required by the terms of this Agreement. Attorney/Legal Entity exclusively assumes responsibility for the acts of Attorney/Legal Entity's employees, agents, and all others acting at the direction of, or on behalf of,

Attorney/Legal Entity as they relate to the services to be provided under this Agreement. Attorney/Legal Entity and its agents and employees shall not be entitled to any rights or privileges of employees of the State of Florida including, but not limited to, compensation insurance, malpractice insurance and unemployment insurance, as a result of this Agreement.

10. Nothing in this Agreement shall preclude Attorney/Legal Entity from representing privately retained or contracted clients provided that no private client shall be accepted that is likely to cause a conflict of interest with the Client under this Agreement.

11. Attorney shall notify Executive Clemency Coordinator of any disciplinary action against Attorney/Legal Entity where probable cause has been found. Attorney/Legal Entity shall notify Executive Clemency Coordinator of the cases in which there is a judicial finding or a sanction imposed by the Florida Bar that Attorney/Legal Entity provided ineffective assistance of counsel.

12. All FCOR correspondences and deliverables are to be sent to the attention of the Capital Punishment Research Specialist located at the Florida Commission on Offender Review, 4070 Esplanade Way, Tallahassee, Florida, 32399-2450.

13. All correspondence for the Executive Clemency Coordinator is to be sent to the Florida Commission on Offender Review, 4070 Esplanade Way, Tallahassee, Florida, 32399-2450.

V. DELIVERABLES

Deliverable	Due Date	Submit To	Payment
A statement advising of the date and location of the in-person meeting with the Client	Within 14 calendar days subsequent from the in-person meeting	FCOR By U.S. Mail or E-mail	$2,000.00
A statement advising that Attorney/Legal Entity personally attended the clemency interview and provided legal representation to the Client	Within 14 calendar days subsequent to the clemency interview	FCOR By U.S. Mail, E-mail or hand delivered	$5,000.00
A written statement, brief or memorandum (1 Original and 6 copies)	Within 45 calendar days subsequent from the interview date	FCOR By U.S. Mail or hand delivered	$3,000.00

VI. COMPENSATION

1. Attorney/Legal Entity shall be paid in accordance with the Florida Statutes and the General Appropriations Act in effect at the time of Attorney/Legal Entity's date of appointment.

2. Attorney/Legal Entity agrees and acknowledges that the compensation to be paid pursuant to this Agreement shall be the sole, exclusive and full compensation to which Attorney/Legal Entity shall be entitled for the Client pursuant to this Agreement.

3. FCOR will pay the Attorney/Legal Entity a total compensation under this Agreement an amount not to exceed $10,000.00 US Dollars.

4. If Attorney/Legal Entity does not fulfill all contractual obligations prior to the full performance of his or her duties through the representation of the Client, FCOR shall presume that the Attorney/Legal Entity is not entitled to full payment and any amount remaining up to the maximum $10,000.00 US Dollars will be deemed forfeited.

5. If Attorney/Legal Entity discovers upon receiving information from the Client during the in-person meeting with the Client that a conflict exists Attorney/Legal Entity shall notify FCOR within 7 calendar days of the in-person meeting.

6. Attorney/Legal Entity is required to submit their Substitute Form W-9 to Department Financial Services (DFS). Information and the form are available through the DFS web site. Within fifteen (15) calendar days of execution of this Agreement, Attorney/Legal Entity shall provide written notification to FCOR that they have submitted their Substitute W-9 form. If FCOR does not receive notification of submission of the W-9 form within fifteen (15) days of execution of this Agreement, the Agreement shall be null and void.

7. Attorney/Legal Entity shall not receive payment for services rendered prior to the execution date or after the termination date of this Agreement. The State of Florida and FCOR's performance and obligation to pay under this Agreement are contingent upon an annual appropriation by the Legislature. FCOR is not liable for payments in excess of the amount appropriated per Client to FCOR by the legislature for this purpose.

8. Attorney/Legal Entity shall designate who shall receive payment from FCOR under this Agreement and shall match the name on the Substitute W-9. Payment by FCOR under this Agreement may only be made to either Attorney or Legal Entity. Attorney/Legal Entity shall hold FCOR harmless from any and all liability which might arise from any dispute or litigation as a result of a payment by FCOR. This sub-paragraph does not authorize Attorney/Legal

Entity to assign duties or responsibilities in representing the Client to any other Attorney/Legal Entity other than who has entered into this Agreement.

9. Attorney/Legal Entity is willing to accept as payment prescribed in s. 940.031, F.S. Attorney/Legal Entity affirmatively waives the right to seek compensation in excess of the payment prescribed in s. 940.031, F.S., and the General Appropriation Act. Attorney/Legal Entity acknowledges that Attorney's ability to participate in the private counsel list, constituting only of attorneys willing to waive compensation in excess of the payment prescribed in s. 940.031, F.S., constitutes adequate and complete consideration for this waiver of the right to seek compensation in excess of the payment prescribed in s. 940.031, F.S.

10. For compensation and tax reporting purposes, payments pursuant to this Agreement shall be made payable only to the holder of the tax identification number. If Legal Entity is appointed to a case and Attorney is assigned to the case, invoices presented by Legal Entity shall be certified by Attorney. Attorney/Legal Entity shall bill under one tax identification number. Attorney/Legal Entity shall execute a new contract if there are changes to the tax identification number. Any sharing of compensation with prior firms or future firms is the responsibility of Attorney/Legal Entity.

11. Attorney/Legal Entity acknowledges and agrees that agreements between Attorney/Legal Entity and service providers are the sole responsibility of Attorney/Legal Entity. FCOR is not privy to any agreement between Attorney/Legal Entity and service providers and in no way accepts responsibility or liability for quality of service, terms and conditions, or any other aspects of any agreement between Attorney/Legal Entity and service providers. Attorney/Legal Entity acknowledges that service providers retained must be properly licensed pursuant to Florida law.

12. Upon request by Attorney/Legal Entity, FCOR will provide one copy of the clemency interview transcript to the Attorney/Legal Entity at no cost to Attorney/Legal Entity.

13. Pursuant to s. 28.345, F.S., Attorney/Legal Entity is exempt from all court-related fees and charges assessed by the clerks of the circuit courts. Pursuant to s. 28.24, F.S., the clerks of court shall provide without charge to Attorney/Legal Entity as private Clemency Board appointed counsel access to and a copy of a public record. As delineated in s. 57.081 F.S., an indigent shall receive the services of the courts, sheriffs, and clerks, with respect to pending proceedings, despite his or her present inability to pay for these services including filing fees; service of process; certified copies of orders or final judgments; a single photocopy of any court pleading, record, or instrument filed with the clerk.

14. Attorney/Legal Entity shall not obtain services for his or her Client from

service providers or other business entities of which Attorney/Legal Entity or Attorney's spouse or child is an officer, partner, director, or proprietor or in which Attorney/Legal Entity or Attorney's spouse or child, or any combination of them, has a material interest in any form whatsoever. Attorney/Legal Entity shall not solicit or accept anything of value to Attorney, including a gift, loan, and reward, promise of future employment, favor, or service, from a service provider or other business entity who provides services to Attorney/Legal Entity's Client.

15. Attorney/Legal Entity within thirty (30) calendar days of written notification from FCOR that a deliverable has been received and accepted shall bill FCOR in accordance with Exhibit 1. The properly prepared invoice will include, but not be limited to, a concise meaningful description of the services rendered, with sufficient detail to enable FCOR to evaluate the services rendered.

16. If an invoice is submitted to FCOR more than ninety (90) calendar days after the Attorney/Legal Entity receives written notification from FCOR that a deliverable has been received and accepted the payment shall be reduced by fifty percent (50%). The reduction is a contractual penalty for failing to submit a bill in a timely fashion. A bill shall not be deemed submitted to FCOR until all of the documents required have been received by FCOR. A Vendor Ombudsman, established within the Department of Financial Services, may be contacted if Attorney/Legal Entity is experiencing problems in obtaining timely payment(s) from a State of Florida agency.

17. It is Attorney/Legal Entity's responsibility to verify that all necessary documentation required for payment of an invoice is submitted to FCOR prior to or with the submission of the invoice. Attorney/Legal Entity is also responsible for verifying that the case has reached a billable stage and submitting the invoice in an amount consistent with contractual requirements. Repeated failures to submit invoices that comport contractual requirements constitute good cause for FCOR to terminate this Agreement.

VII. RECORD RETENTION/ INSPECTION

1. Attorney shall keep contemporaneous detailed records to enable FCOR to verify all costs, expenses, and Attorney/Legal Entity's time expended representing the Client under this Agreement. The records shall include supporting documentation necessary to adequately evaluate and substantiate payments made under this Agreement. The Attorney/Legal Entity shall maintain appropriate documentation, including contemporaneous and detailed hourly accounting of time spent representing the Client.

2. These records and documents are subject to review by FCOR, subject to the Attorney/Legal Entity-Client privilege and work-product privilege. Attorney/Legal Entity may redact information from the records and documents only to the extent necessary to comply with the privilege. Attorney/Legal

Entity shall maintain the records and documents in a manner that enables the Attorney/Legal Entity to redact information subject to a privilege in order to facilitate and not impede FCOR's review of the records and documents.

3. Upon FCOR's issuance of a notice of inspection of records and documents as to the Client, Attorney/Legal Entity shall deliver to FCOR copies of any and all contemporaneous billing records related to that case within a reasonable period of time. This time period shall not exceed thirty (30) calendar days unless an extension is granted by FCOR in writing. Attorney/Legal Entity's failure to provide the contemporaneous billing records within a reasonable period of time shall be deemed a refusal to allow FCOR to inspect the billing records.

4. Attorney/Legal Entity shall maintain all records and documents (including electronic storage media), for a minimum of five (5) years in accordance with Chapters 119 and 257, Florida Statutes, and the Florida Department of State Record Retention Schedule located at: http://dlis.dos.state.fl.us/recordsmgmt. Attorney/Legal Entity agrees to make available for inspection and audit at Attorney/Legal Entity's place of business, upon reasonable notice, all books, statements, ledgers and other financial records relating to services under this Agreement for a period of five (5) years from the date of termination of this agreement. For purposes of this subparagraph, fourteen (14) calendar days notice shall be deemed reasonable notice. The failure to allow FCOR to inspect such records upon reasonable notice shall be deemed a refusal to allow FCOR to inspect those records.

VIII. ELECTRONIC COMMUNICATION AND ELECTRONIC FUNDS TRANSFER

1. Attorney/Legal Entity shall own, possess or have routine access to a computer, a printer, a fax and a scanner. Attorney/Legal Entity shall maintain sufficient internet capability, including an e-mail account, to communicate with FCOR under this Agreement. Attorney/Legal Entity agrees to accept communications including a billing audit deficiency by e-mail.

2. Attorney/Legal Entity shall participate in an Electronic Funds Transfer (EFT) program under which Attorney/Legal Entity authorizes the transfer of funds electronically to an account in the Attorney/Legal Entity's name at a federal-chartered or state-chartered financial institution. Attorney/Legal Entity is required to register for EFT. Information and the forms to register for EFT are available on the DFS web site. Within fifteen (15) calendar days of execution of this agreement, Attorney/Legal Entity shall provide written notification to FCOR that they have registered for EFT. If FCOR does not receive notification of EFT registration, payment for service will not be made to the Attorney/Legal Entity.

IX. TERMINATION

1. FCOR shall have the right to terminate this Agreement immediately if, in its sole opinion, Attorney/Legal Entity, or its agents or employees fail to comply with the terms of this Agreement. Such failure shall constitute a material breach of this Agreement by Attorney/Legal Entity. In the event of breach, Attorney/Legal Entity shall not be entitled to payment for work performed.

2. Except as provided in Paragraph 1, upon thirty (30) calendar days written notice, FCOR or Attorney/Legal Entity may, without cause, terminate this Agreement. Attorney/Legal Entity is not eligible for any new appointments in the event of termination of this Agreement, unless FCOR executes a new agreement with Attorney/Legal Entity.

3. Notice of termination of this Agreement must be in writing and sent to FCOR by certified or registered United States mail with return receipt requested to the last known address. Any notice of termination of this Agreement by either FCOR or Attorney/Legal Entity shall be copied to the Executive Clemency Coordinator.

X. GOVERNING LAW AND VENUE

The validity, construction, and interpretation of this Agreement shall be governed by the laws of the State of Florida and the Florida Constitution. Any action arising over any dispute over performance or other terms of this Agreement may only be maintained in the Florida state courts. Venue for all equitable or legal actions arising from or related to this Agreement wherein FCOR or the State of Florida is a named party shall be in the appropriate state court in Leon County, Florida. The parties waive any right to jury trial.

XI. SEVERABILITY

The terms and conditions of this Agreement shall be deemed to be severable. If any clause, term, or condition herein shall be held to be illegal or void, such determination shall not affect the validity or legality of the remaining terms and conditions. Notwithstanding any such determination, this Agreement shall continue in full force and effect unless a particular clause, term, or condition held to be illegal or void renders the balance of the Agreement impossible to perform.

XII. AMENDMENT OF AGREEMENT

This Agreement expresses the understandings of the parties concerning all matters covered. No changes or additions to this Agreement or the terms of this Agreement, whether by written or verbal understanding of the parties, their officers, agents, or employees, shall be valid unless in the form of a written amendment executed by the both parties.

XIII. MISCELLANEOUS PROVISIONS

1. Attorney/Legal Entity shall affix Attorney's name and bar number on all communications addressed to FCOR and the Clemency Board. Attorney/Legal Entity shall keep FCOR informed at all times of Attorney/Legal Entity's current name, address, telephone and facsimile numbers, email address and tax identification number. Notification of changes shall be provided in writing to FCOR within five (5) business days of a change.

2. In executing this Agreement, the Attorney/Legal Entity certifies that it is not listed on either the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, created pursuant to section 215.473, Florida Statutes. Pursuant to section 287.135(5), Florida Statutes, the Attorney/Legal Entity agrees FCOR may immediately terminate this Agreement for cause if the Attorney/Legal Entity is found to have submitted a false certification or if the Attorney/Legal Entity is placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List during the term of the Agreement.

3. Any dispute concerning compliance and/or performance of this Agreement shall be decided by FCOR's designated Contract Manager, who shall reduce the decision to writing and serve a copy to the Attorney/Legal Entity. Any dispute that cannot be resolved shall be reduced to writing and delivered to the FCOR Chair or designee for resolution.

XIV. ENTIRE AGREEMENT

1. This Agreement supersedes all prior negotiations, correspondence, conversations, agreements, or understandings applicable to the matters contained herein and the parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, it is agreed that no deviation from the terms of this Agreement shall be predicated upon any prior representations or agreements, whether oral or written.

2. Modifications or amendments of provisions of this Agreement shall only be valid when they have been reduced to writing and duly signed by both parties observing all the formalities of the original Agreement. Changes to the Agreement will be provided to the other party in writing and a copy of the written notification shall be maintained in the official Contract file maintained by FCOR

3. This agreement constitutes an agreement promulgated by FCOR pursuant to s. 940.031, F.S. this agreement may not be altered, modified or amended except through a separate agreement executed by Attorney/Legal Entity and

an authorized representative of FCOR. If any term of this agreement is altered, modified, amended or otherwise changed to deviate from the terms of the agreement promulgated by FCOR, then this agreement is void in its entirety notwithstanding any execution by an authorized representative of FCOR. Alterations, modifications, or amendments include any handwritten or typographical change or deviation of any of the terms of the agreement. Performance by FCOR under this agreement shall under no circumstances waive this provision.

XV. INDEMNIFICATION

Attorney/Legal Entity shall hold FCOR harmless from any and all liability which might arise from any malpractice dispute or litigation raised by the Client as a result of the Attorney/Legal Entity's services performed in accordance with this Agreement.

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be executed by their undersigned officials as duly authorized.

ATTORNEY/ LEGAL ENTITY

NAME: NAH-DEH SIMMONS

SIGNED BY: N Simmons

NAME: NAH-DEH SIMMONS

TITLE: ATTORNEY

DATE: 03/19/2018 Received JMC

VENDOR NUMBER: _____

STATE OF FLORIDA

Florida Commission On Offender Review

SIGNED BY: Melinda N. Coonrod

NAME: Melinda N. Coonrod

TITLE: Chair

DATE: 3/22/18

THIS AGREEMENT IS NOT VALID UNTIL SIGNED AND DATED BY BOTH PARTIES.

DUVAL - CRIMINAL
July 1, 2018 to June 30, 2019
REVISED 2-21-19

1. "X" indicates that the attorney has been approved by the judiciary for this area, and has signed a JAC contract.
2. If so noted, "Not App" indicates that the attorney requested, but the Judiciary will not expand the Registry List for that category(ies).
3. Anything outside of (1) and (2), above, indicates the SPECIFIC sub-category(ies) for which the attorney REQUESTED, QUALIFIED, and was APPROVED to serve. For example: an attorney may have requested to serve in Felony; however, he/she was qualified to handle up to 3rd Degree Felonies at the moment, so it would be noted accordingly.

ATTORNEY NAME AND BAR NO.	CAPITAL (1st Degree - 1st or 2nd Chair)	CAPITAL		ALL OTHER FELONIES	MM		JUVENILE DELINQUENCY		POST-CONV (3.800 & 3.850)	CAPITAL APPEAL	FELONY APPEAL	CROSSOVER TRIAL
		Sex Batt.	Homicide Non-Death	1st, 2nd, 3rd Degree; FPBL, Life, RICO, VOP, VOCC, Contempt, Extradition	Trial Ct.	App.	Trial Court	Appeals				
ADAMS-JONES, SISSY #0404152		X	X	X	X		X		Not App			X
ALAVI, TANIA Z. #0937680	1st & 2nd Chair											
ANDERSON, CHRISTOPHER #0976385	Not App	Not App	Not App	Not App	X	X	Not App	Not App	Not App	X	Not App	
ANDUX, GONZALO #525286	1st & 2nd Chair	Not App	X	X								
BAVINGTON, PHILIP #404616		Not App	Not App	Not App	X		Not App		X			
BEDELL, KATE #0632457	1st & 2nd Chair		X	X	X	X	X		Not App	X	X	
BOSSEN, MICHAEL S. #939544	1st & 2nd Chair	Not App	X	X	X		X		Not App			X
BOYD, SUMMER. #330360							X	X				X
BRYANT, GARY T.J. #68342		Not App		X	X		X		Not App			
CARBONE, ROCCO #95544						X			Not App	X	X	
CARLISLE, KEVIN #76859	2nd Chair	Not App	X	X	X		X					
CHAVERS, RALPH #76203					X	X	X	X	Not App			X
COBB, JASON A. #0143049						X			Not App		Not App	
COBBIN, KEVIN #645206			Not App	X	X		X					
CRICK, BRIAN #73767				X	X							
CRONIN, DAVID #0185401				Not App	X							
DAVIS, ROBERT C. #685550	Not App	Not App	Not App	X	X	X	X		Not App		Not App	
DAVIS, RONALD #106569	Not App	Not App	Not App	Not App	X		X					
DORSEY, DOUG #419214				Not App	X							
EAST, ISAAC #103703					X		X					
EILER, REFIK #0642126	Not App	Not App	X	X	X		X		X			
ELLIS, SAMANTHA V. #0052070				X	X		X					
FALLIS, GEORGE T. #0122033				Not App	X		Not App					
FALLIS, THOMAS G. #699233	Not App		Not App	Not App	X							
FINNELL, ANN E. #0270040	1st & 2nd Chair											
FLETCHER, CHARLES #0125792	Not App	Not App	Not App	X			X		Not App		Not App	
GAPSKE, LAURA #0554294			Not App	Not App	X							
GREEN, KARL T. #880892				Not App	X		Not App					
HAMRICK, JOSEPH S. #47047	2nd Chair									X		
HART, ANDREA #25780				Not App	X		X					
HENDERSON, WAYNE #347965	Not App	Not App	Not App	Not App	X	X			Not App	Not App	Not App	
HERNANDEZ, JAMES A. #0871303	1st & 2nd Chair		X									
HILL, JAMES P. #73828		X	X	X	X		X					X

018

Cert. Appx. 431

DUVAL - CRIMINAL
July 1, 2018 to June 30, 2019
REVISED 2-21-19

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2. If so noted, "Not App" indicates that the attorney requested, but the Judiciary will not expand the Registry List for that category(ies).
3. Anything outside of (1) and (2), above, indicates the SPECIFIC sub-category(ies) for which the attorney REQUESTED, QUALIFIED, and was APPROVED to serve. For example: an attorney may have requested to serve in Felony; however, he/she was qualified to handle up to 3rd Degree Felonies at the moment, so it would be noted accordingly.

ATTORNEY NAME AND BAR NO.	CAPITAL (1st Degree - 1st or 2nd Chair)	CAPITAL Sex Batt.	CAPITAL Homicide Non-Death	ALL OTHER FELONIES 1st, 2nd, 3rd Degree; FPBL, Life, RICO, VOP, VOCC, Contempt, Extradition	MM Trial Ct.	MM App.	JUVENILE DELINQUENCY Trial Court	JUVENILE DELINQUENCY Appeals	POST-CONV (3.800 & 3.850)	CAPITAL APPEAL	FELONY APPEAL	CROSSOVER TRIAL
JAMIESON, STEPHANIE NICOLE #20299	2nd Chair	Not App	X	X	X		X		X		Not App	X
JOHNSON, DIANA #35949					X	X	X	X			X	
KORODY, PATRICK #0107361	2nd Chair	Not App	X	X	X							
KURITZ, RICHARD #972540	Not App		Not App	Not App	X	X	Not App		Not App	Not App	Not App	
LENAMON, TERENCE #970476	1st & 2nd Chair											
LOVE, JASON #103082				X	X		X					
LUFRANO, MATTHEW #69675		X	X	X	X							
MAIRS, DONALD B. #0777234	2nd Chair	Not App	X	X	X		X		X			X
MARTIN, LYNN	Not App	Not App	Not App	Not App	X							
MURPHY, THOMAS #020552		Not App	Not App	Not App	X		X					
NEAL, BRYAN #161446				Not App	X							
PLATA, BELKIS CHRISTINA #85198		X		X	X		X					X
POITIER, JONI A. #22861		Not App	Not App	Not App	X	X	X		Not App			
POORE, TIFFANY #31056				X	X							
RAINKA, MICHAEL #92981				X	X				Not App			
RAUDT, KEVIN **#380652**		Not App		Not App								
RIVERS, ROBERT C. #0637210				Not App	X		X					X
ROCKWELL, JOHN #0779911	2nd Chair		X	X	X	X	X	X	X		Not App	
SCHLAX, JULIE A. #093040	1st & 2nd Chair	X	X	X	X							
SCHOTT, SHANNON B. #85380				Not App			X					X
SHEA, FRANCIS JEROME #292524	Not App	Not App	X	X	X	X			Not App	X	Not App	
SHELTON, BEJAE #0100016	Not App		Not App	X	X		X					
SHUMARD, GARY #93032		Not App	X	X	X	X	X	X	X			
SICHTA, RICHARD #0669903									Not App	Not App	Not App	
SIMMONS, NAH-DEH #38188			Not App	Not App	X		Not App					
STANSKI, MICHAEL #109276				Not App	X	X			Not App		Not App	
WILLIAMS, C. MICHAEL #691046	Not App	Not App	Not App	Not App	X	X	Not App	Not App	Not App			Not App
YARBROUGH, JEFFREY A. #14892		Not App	Not App	Not App	X	X	Not App		Not App			

FLORIDA COMMISSION ON OFFENDER REVIEW
4070 Esplanade Way, Tallahassee, Florida 32399-2450

MELINDA N. COONROD
Commissioner/Chair

RICHARD D. DAVISON
Commissioner/Vice-Chair

DAVID A. WYANT
Commissioner/Secretary

March 26, 2018

Gary Bowles DC# 086158
Union C.I.
Death Row
7819 N. W. 228th Street
Raiford, Florida 32026-1000

Mr. Bowles:

The Florida Commission on Offender Review has been requested by the Governor's Office to conduct an investigation into the factors in your case relevant to commutation of sentence.

Please be advised that you are scheduled for a clemency interview at Union C.I. on August 2, 2018.

You and your attorney, Nah-Deh Simmons, who has been appointed as **Clemency Counsel** to represent you, will be given an opportunity to present written and/or oral statements of testimony on your behalf at this time with regard to commutation of your sentence. Mr. Simmons will be in contact with you in the near future.

Sincerely,

S. Michelle Whitworth
Capital Punishment Research Specialist
Clemency Investigations

Cc: Nah-Deh Simmons, Esq.

FLORIDA COMMISSION ON OFFENDER REVIEW

5850 East Milton Road, Milton, Florida 32583

MELINDA N. COONROD *Commissioner/Chair*
RICHARD D. DAVISON *Commissioner/Vice-Chair*
DAVID A. WYANT *Commissioner/Secretary*

March 28, 2018

Mr. Billy Nolas, Esq.
c/o Federal Public Defender Northern District of Florida
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301-1300

RE: BOWLES, Gary DC# 086158

Dear Mr. Nolas:

The Office of the Governor has referred the above named death row inmate for a clemency investigation. The Florida Commission on Offender Review is responsible for conducting this investigation.

The investigation includes solicitation of comments from court officials either supporting or opposing commutation of the death sentence. If you have any comments, as the post-conviction counsel, for the Governor and Cabinet (acting as the Board of Executive Clemency) to consider, please respond via telephone at (850) 983-5913, via email at RussellGallogly@fcor.state.fl.us, via U.S. mail at 5850 East Milton Road, Milton, Florida 32583, or via facsimile at (850) 983-5915.

If you are unfamiliar with the clemency review process for capital punishment cases or have any questions please feel free to contact me.

Respectfully Submitted,

Russ Gallogly,
Commission Investigator Assistant Supervisor
Region I, Milton
Telephone (850) 983-5913

Per the Rules of Executive Clemency and Florida Statute 14.28, all records and documents generated and gathered in the clemency process are confidential and shall not be made available for inspection to any person except members of the Clemency Board.

Enclosure: Rule 15 & 16 of the Rules of Executive Clemency

15. Commutation of Death Sentences
This Rule applies to all cases where the sentence of death has been imposed. The Rules of Executive Clemency, except Rules 1, 2, 3, 4, 15 and 16 are inapplicable to cases where inmates are sentenced to death.

A. Confidentiality
Notwithstanding incorporation of Rule 16 by reference in cases where inmates are sentenced to death, the full text of Rule 16 is repeated below for clarification: Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. Only the Governor and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials shall not constitute a waiver of confidentiality.

B. Commission on Offender Review Investigation
In all cases where the death penalty has been imposed, the Florida Commission on Offender Review may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board. The investigation shall include, but not be limited to, (1) an interview with the inmate, who may have clemency counsel present, by the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; (3) an interview, if possible, with the presiding judge and; (4) an interview, if possible, with the defendant's family. The Florida Commission on Offender Review shall provide notice to the Office of the Attorney General, Bureau of Advocacy and Grants, that an investigation has been initiated. The Office of the Attorney General, Bureau of Advocacy and Grants shall then provide notice to the victims of record that an investigation is pending and at that time shall request written comments from the victims of record. Upon receipt of comments from victims of record or their representatives, the Office of the Attorney General, Bureau of Advocacy and Grants shall forward such comments to the Commission on Offender Review to be included in the final report to the Clemency Board.

C. Monitoring Cases for Investigation
The investigation by the Commission on Offender Review shall begin at such time as designated by the Governor. If the Governor has made no such designation, the investigation shall begin immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor. An investigation shall commence immediately upon any failure to timely file the initial motion for post conviction relief in state court, and any appeal there from, or the initial petition for writ of habeas corpus in federal court, and any appeal there from. The time frames established by this rule are not tolled during the pendency of any petition for rehearing or reconsideration (or any similar such motion for clarification, etc.), request for rehearing en banc in the 11th Circuit Court of Appeals, or petition for writ of certiorari in the U.S. Supreme Court. Failure to conduct or complete

the investigation pursuant to these rules shall not be a ground for relief for the death penalty defendant. The Commission on Offender Review's Capital Punishment Research Specialist shall routinely monitor and track death penalty cases beyond direct appeal for this purpose. Cases investigated under previous administrations may be reinvestigated at the Governor's discretion.

D. Commission on Offender Review Report
After the investigation is concluded, the Commissioners who personally interviewed the inmate shall prepare and issue a final report on their findings and conclusions. The final report shall include (1) any statements made by the defendant, and defendant's counsel, during the course of the investigation; (2) a detailed summary from each Commissioner who interviewed the inmate; and (3) information gathered during the course of the investigation. The final report shall be forwarded to all members of the Clemency Board within 120 days of the commencement of the investigation, unless the time period is extended by the Governor.

E. Request for Hearing by any Clemency Board Member
After the report is received by the Clemency Board, the Coordinator shall place the case on the agenda for the next scheduled meeting or at a specially called meeting of the Clemency Board if, as a result of the investigation, or final report, any member of the Clemency Board requests a hearing within 20 days of transmittal of the final report to the Clemency Board. Once a hearing is set, the Coordinator shall provide notice to the appropriate state attorney, the inmate's clemency counsel, the victim's rights coordinator in the Executive Office of the Governor and the Office of Attorney General, Bureau of Advocacy and Grants. The Office of the Attorney General, Bureau of Advocacy and Grants shall then notify the victims of record of the hearing.

F. Request for Hearing by Governor
Notwithstanding any provision to the contrary in the Rules of Executive Clemency, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board.

G. Transcript of Interview
Upon request, a copy of the actual transcript of any statements or testimony of the inmate relating to a clemency investigation shall be provided to the state attorney, the inmate's clemency counsel, or victim's family. The attorney for the state, the inmate's clemency counsel, the victim's family, the inmate, or any other interested person may file a written statement, brief or memorandum on the case within 90 days of initiation of the investigation under Rule 15, copies of which will be distributed to the members of the Clemency Board. The person filing such written information should provide five (5) copies to the Coordinator of the Office of Executive Clemency.

H. Time Limits
At the clemency hearing for capital punishment cases, the inmate's clemency counsel and the attorneys for the state may make an oral presentation, each not to exceed 15 minutes collectively.

Representatives of the victim's family may make oral statements not to exceed an additional five minutes collectively. The Governor may extend these time frames at his or her discretion.

I. Distribution and Filing of Orders

If a commutation of a death sentence is ordered by the Governor with the approval of at least two members of the Clemency Board, the original order shall be filed with the custodian of state records, and a copy of the order shall be sent to the inmate, the attorneys representing the state, the inmate's clemency counsel, a representative of the victim's family, the Secretary of the Department of Corrections, and the chief judge of the circuit where the inmate was sentenced. The Office of the Attorney General, Bureau of Advocacy and Grants shall inform the victim's family within 24 hours of such action by the Clemency Board.

16. Confidentiality of Records and Documents

Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials, as approved by the Governor, does not constitute a waiver of confidentiality.

RE: Gary Bowles, DC #086158
Gallogly, Russell to: Kelsey Peregoy 03/28/2018 04:48 PM
Cc: Billy Nolas
History: This message has been forwarded.

Thank you, Ms. Peregoy. You have plenty of time to respond, I just wanted to make sure that you received the initial contact. If I can be of further assistance, please let me know.

Russ Gallogly, Commission Investigator Assistant Supervisor
Florida Commission on Offender Review, Region I
5850 East Milton Road
Milton, Florida 32583
Phone (850) 983-5913
Fax (850) 983-5915

FCOR Website www.fcor.state.fl.us/
Find us on Facebook

Luck is where preparation meets opportunity.
-Dwight D. Eisenhower

From: Kelsey Peregoy [mailto:Kelsey_Peregoy@fd.org]
Sent: Wednesday, March 28, 2018 3:46 PM
To: Gallogly, Russell <RussellGallogly@fcor.state.fl.us>
Cc: Billy Nolas <Billy_Nolas@fd.org>
Subject: Gary Bowles, DC #086158

Mr. Gallogly,

I received word of your message from Mr. Nolas concerning a clemency investigation for our client Gary Bowles. Our office is conferring about this matter, and we look forward to being in contact with you about it at the end of next week. Our apologies for the delay, our entire office has just returned from a national conference.

Thank you,

Kelsey Peregoy

Kelsey Peregoy, Esq.
Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818 Fax 942-8809

June 21, 2018

The Office of Governor Rick Scott
c/o The Clemency Board
Florida Commission on Offender Review
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Gary Bowles
DOC No. 086158

Dear Clemency Board,

In 1999, Mr. Gary Bowles received the death sentence for which he remains incarcerated on death row. Throughout his life, Mr. Bowles has been slipping through the cracks of society. After suffering severe parental abuse and neglect during childhood, he fled home as a thirteen-year-old. He was continuously preyed upon. Sadly, the sexual exploitation he suffered was what allowed him to survive living on the streets as a youth.

There is strong evidence that Mr. Bowles is an intellectually disabled individual. Legal issues related to Mr. Bowles's intellectual disability are presently being litigated in the Circuit Court. *See State of Florida v. Gary Ray Bowles*, No. 1994-CF-12188 (Duval County Cir. Ct.). It is the position of clemency counsel Nah-Deh Simmons, state postconviction counsel Francis Jerome Shea, and federal counsel Billy H. Nolas, that given the pending litigation in Mr. Bowles's case, a clemency investigation and determination should proceed after the intellectual disability proceedings. This is a better use of resources and will be more helpful to the Governor, Board, and Commission. If the court ruling is in Mr. Bowles's favor, clemency proceedings will not be necessary. If clemency proceedings proceed, counsel will be able to make a more meaningful presentation after the evidence is developed and hearings are conducted in court. We also note that an evaluation of Gary Bowles by any mental health professional is inappropriate without the presence of counsel, given the potential implications of such an evaluation on his pending litigation.

Nevertheless, Mr. Bowles's clemency, state postconviction, and federal postconviction counsel jointly offer the following information about Mr. Bowles and a recommendation for clemency. The following presentation, while incomplete, demonstrates that clemency is appropriate for Mr. Bowles.

I. Gary Bowles's Traumatic Childhood

Gary Ray Bowles ("Gary") was born on January 25, 1962, in Clifton Forge, Virginia. Gary was the second child of the union of Frances Carol Bowles and Franklin William Bowles. Frances and Franklin were married on July 2, 1959, after lying about Frances's age to avoid the stigma of having their first child out of wedlock. Frances was only fifteen years old, and Franklin was twenty-one years old, when they married. Their first child, William Franklin Bowles ("Frank"), was born exactly seven months after their marriage, in Franklin's parents' home in West Virginia. Frank, now deceased, was Gary's only full-blood sibling.

Gary Bowles in his class photo from the second grade.

When Gary was born, his young parents were impoverished and living in West Virginia. They stayed with other family members, mostly Franklin's parents. Many of Gary's relatives were illiterate and primarily were subsistence farmers or coal miners. Franklin was one of ten siblings, many of who continued to live at their mother's house (Gary's paternal grandmother) well into adulthood. Most of Franklin's siblings were alcoholics, and Franklin himself abused alcohol. Many of Franklin's siblings were not able to care for their own children, and those children also lived in Franklin's mother's home.

When Frances was pregnant with Gary, on July 22, 1961, Franklin died from health complications in his lungs. He was only twenty-two years old. Franklin's death devastated Frances, who, at the age of seventeen, found herself a pregnant widow with an infant to care for. Family described her as being emotionally unwell. After Gary was born, Frances took Frank and Gary with her to live with her sister in Illinois.

Less than ten months after Gary's birth, Frances remarried. Bill Fields was her second husband, and a string of husbands would follow. Mr. Fields and Frances had two children, Pamela and David Fields, in 1963 and 1968, respectively. After Pamela's birth, in approximately 1965 when Gary was about three years old, Frances took Gary and his older brother Frank to their paternal grandmother's house, and she abandoned them there. For several years thereafter, Frances's whereabouts were unknown. Eventually, Gary's grandmother's health declined, and two of his aunts loaded six-year-old Gary and eight-year-old Frank onto a bus and sent them, alone, from West Virginia to Illinois.

Gary enrolled in the first grade in the fall of 1968 in Illinois. Life in Illinois with his first step-father was fraught with abuse and neglect. Frances drank heavily and was frequently gone in the evenings with other men. She regularly disappeared for days at a time. Bill Fields physically abused Frances, and their marriage was in constant tumult. The children—Frank, Gary, Pamela, and David—were caught in the midst of the unstable marriage, and Frank and Gary particularly were neglected by their parents. Mr. Fields was open about his preference for his own biological children, and he physically abused Frank and Gary throughout their childhood. The abuse was most often directed at Gary, even in Frank's opinion.

Frances utterly neglected Frank and Gary, and, from about the age of six years old onward, Gary was left running around in the streets in the evening without supervision. When he wasn't playing outside, Gary was abused by his stepfather. Bill Fields beat elementary-school-aged Gary and his brother Frank with belts, his fists, ice-cream paddles, whatever he could find. He threw Gary against walls. The beatings were daily and long. Once he got started, Bill Fields would beat the boys until he was too tired to continue. Gary suffered black eyes, bruises, and other physical signs of abuse. At one point, due to the abuse, Gary was removed from home and lived with a police officer for a short period of time. But he was then returned to home.

Gary Bowles, missing a tooth.

When Gary was about eight years old, he was sexually abused by an adult male employee of the YMCA. Gary's sexual trauma haunted him throughout his childhood, and he wet the bed at night until he was middle-school aged. Frances and Bill Fields separated in approximately 1972, when Gary was about ten years old. Shortly after their separation, Frances began dating Chet Hodges, who would become Gary's next stepfather. Frances, however, did not reveal to Chet for nearly a year after they met that she had any children. Frances actually began living with Chet before telling him about her children. Gary was twelve years old. Chet was an alcoholic, and was extremely abusive to Frances. Chet jerked Frances by her neck, stomped on her, and broke her arm. Frances was also an alcoholic, and the abuse by Chet caused her to attempt suicide.

Frances continued to neglect her children. At that time, in 1974, Gary usually stayed either with other people, in a nearby abandoned house, or the family's detached garage. During the Illinois winter, Gary continued lived in these structures without heat or running water. Frances did not care for the children, and they were left to fend for themselves for food and their other basic needs. Chet Hodges was even more abusive than Bill Fields, and he beat the children in alcohol-induced rages. Chet frequently beat Gary until his eyes were swollen shut. On one occasion, he threw Gary through a wall. In a particularly bad episode, Chet beat Gary with a hammer and a rock in the family's yard, and his brother Frank and his sister's husband fought Chet off of Gary. After the fight, Gary told his mother Frances she had to choose between him and Chet. She told him she chose Chet.

Gary was thirteen years old, and he left home for good.

II. Gary Bowles's Substance Abuse & Life as a Homeless Child Prostitute

A young Gary Bowles, left, holds a cake with his younger brother David. Gary's right eye is swollen shut with a black eye.

After suffering a severely abusive and neglectful childhood and after the rejection of his mother, Gary Bowles left home for the streets. The last day he attended school of any kind was in the eighth grade. A child who had been previously sexually abused by an older man, Gary spent his initial years on the street being victimized again and again. This began when Gary was thirteen years old. He was hitchhiking, and an approximately forty-to-fifty-year-old male stranger picked him up. The man held Gary at gun point, forced Gary to perform oral sex on him, and then performed oral sex on Gary.

Shortly after leaving home, Gary made his way to Louisiana with a friend whose father worked on an oil rig. The friend's father tried to get Gary a job on the oil rig, but was unable to help him once Gary's young age was discovered. Penniless and living on the streets hundreds of miles from his family, Gary began working as a child prostitute in New Orleans, when an older woman took him in. This older woman taught Gary how to use sex as a means of survival to provide for himself, and, before Gary was old enough to legally drive a car, he was working in a brothel.

In addition, Gary had already been exposed to substance abuse through his older brother. Beginning when Gary was between the ages of eight and ten years old, Frank showed him how to use inhalants, including glue, paint, and gasoline, to get high. Around this same time, Gary also learned to drink alcohol and smoke marijuana. Gary's substance abuse from an early age became so bad that in approximately January of 1975, just before his thirteenth birthday, Gary was hospitalized due to his

substance abuse.

Gary's struggles with substance abuse, since elementary school, were exacerbated by his homelessness and work as a child prostitute. He abused drugs and alcohol to cope with the horrors and struggles of his daily life. Gary was transient for all of his remaining teenaged years, and he bounced around Louisiana, Florida, and Georgia. As a teen in Georgia, Gary Bowles met a man named Ken White. Ken has been the only consistent source of support in Gary's life. Gary stayed with Ken periodically in his teens and twenties, while continuing to be primarily transient. Gary never found stable employment or housing, and he never married.[1]

III. Clemency is Appropriate for Gary Bowles

It was three more years after the time of Gary Bowles's penalty phase and death sentence before the Supreme Court of the United States recognized an Eighth Amendment prohibition on the execution of the intellectually disabled in *Atkins v. Virginia*, 536 U.S. 304 (2002). Further, at the time of Mr. Bowles's initial postconviction litigation, Florida Courts recognized a bright-line IQ score cutoff of 70 for an intellectual disability determination—which was later struck down by the United States Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Until his recent litigation, Mr. Bowles has not had a meaningful opportunity to ever litigate his intellectual disability.

Individuals with intellectual disabilities are between four to ten times more likely to be the victims of crimes compared with individuals without disabilities, and those with intellectual disabilities specifically are more likely to be the victim of violent crime.[2] However, individuals with intellectual disabilities and learning disabilities have long been over-represented in the criminal justice system. Some studies estimate that 55% of people with an intellectual or learning disability have some type of involvement with the criminal justice system within eight years of leaving high school.[3] Approximately 37% of juvenile offenders are estimated to be eligible for services under the Individuals with Disabilities Education Act (IDEA).[4] And compared with 2% to 3% of the general population, it is estimated that between 4% and 10% of incarcerated adults have intellectual disabilities.[5]

The foundation of the United States Supreme Court's decision in *Atkins* is the recognition by our society that intellectually disabled individuals have diminished personal culpability for their crimes and diminished capacity to understand the process they are subject to in the legal system. This is no different in the case of an individual facing the death penalty, and that is what makes their convictions unreliable and constitutionally infirm. Such persons have a limited ability to understand their constitution rights or to participate meaningfully in their own defense, even when their own lives are on the line. Because of their social deficits, their demeanor can convey a false sense of lack of remorse, and they are also more

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1 Gary Bowles's adolescent and adult life and his struggles can only be fully understood in the context of his intellectual disability. Because of the pending litigation in the Circuit Court on his intellectual disability claim, the narrative of Gary's life cannot be further expanded on at this time. This highlights, again, why his clemency investigation should be stayed until the conclusion of his pending litigation.

2 Leigh Ann Davis, *People With Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects* (Aug. 2009), The Arc, *available at* https://www.thearc.org/document.doc?id=3664 (last visited June 6, 2018).

3 *The State of Learning Disabilities* (2014), National Center for Learning Disabilities, *available at* https://www.ncld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf (last visited June 6, 2018).

4 *Id*.

5 Leigh Ann Davis, *People With Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects* (Aug. 2009), The Arc, *available at* https://www.thearc.org/document.doc?id=3664 (last visited June 6, 2018).

likely to please authority and thus confess to crimes they did not commit.[6] Thus, the *Atkins* Court recognized that evolving standards of decency could no longer permit the execution of the intellectually disabled, whose convictions are undermined by these concerns. It is also relevant that mental health professionals and organizations largely no longer support the death penalty for those with mental disabilities and illnesses.[7]

Florida courts have not yet ruled on whether Mr. Bowles's intellectual disability preclude his execution, but, at the very least, the risk his execution presents as violating the fundamental principle of *Atkins* and the Eighth Amendment should deeply concern this Clemency Board.

As this petition makes clear, Mr. Bowles's clemency investigation is necessarily incomplete in light of his pending litigation—litigation which could render a clemency proceeding moot if successful. However, if the clemency investigation proceeds, the risk of Mr. Bowles's unconstitutional execution justifies the Board granting clemency in his case. Indeed, intellectual disabilities have been the basis of grants of clemency in the past for death-sentenced individuals.[8]

Mr. Bowles's sentence should be commuted to a sentence of life imprisonment without parole.

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[6] For example, in Florida, Jerry Townsend, a life-sentenced individual, was convicted of six murders and one rape following his false confession to the crimes. In 2001, Mr. Townsend was exonerated through the use of DNA evidence. *See* The National Registry of Exonerations, *available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3697 (last visited June 6, 2018).

[7] *See* Am. Psychiatric Ass'n, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014), *available at* http://www.psychiatry.org/psychiatrists/search-directories-databases/policy-finder (last visited June 6, 2018) (stating position that "defendants shall not be sentenced to death or executed if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law").

See also Am. Psychological Ass'n, *Report of the Task Force on Mental Disability and the Death Penalty* (2005), *available at* https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf (last visited June 6, 2018) (outlining its recommendation to "prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability"); Mental Health Am., *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011), *available at* http://www.mentalhealthamerica.net/positions/death-penalty (last visited June 6, 2018) (declaring position that "defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law").

[8] For example, Gov. Mel Carnahan of Missouri cited a death row inmate's intellectual disability, and the jury's lack of knowledge about these disabilities at the time of sentencing, when granting him clemency. *See* Clemency, Death Penalty Information Center, *available at* https://deathpenaltyinfo.org/clemency?did=126&scid=13 (last visited June 6, 2018). Likewise, Gov. Kenny C. Guinn of Nevada granted clemency for death-sentenced inmate Thomas Nevius and Gov. Foster of Louisiana granted clemency for death-sentenced inmate Herbert Welcome, both citing similar concerns following the United States Supreme Court's ban on the execution of the intellectually disabled. *Id*. Evidence of intellectual disabilities also factored in favor of clemency grants in the cases of Percy Walton in Virginia and Abelardo Arboleda Ortiz who had been federally sentenced. *Id*.

Respectfully submitted,

/s/ Nah-Deh Simmons
Nah-Deh Simmons, Esq.
The Law Office of Nah-Deh Simmons Esq.
P.O. Box 41083
Jacksonville, FL 32203-1083
Phone: 904-545-9044
Clemency Counsel for Mr. Bowles

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
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227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818
Federal Counsel for Mr. Bowles

/s/ Francis Jerome Shea
Francis Jerome Shea, Esq.
Francis Jerome Shea, P.A.
644 Cesery Boulevard, Suite 250
Jacksonville, FL 32211
Phone: 904-399-1966
State Counsel for Mr. Bowles

From:	Kelsey Peregoy
To:	michellewhitworth@fcor.state.fl.us (michellewhitworth@fcor.state.fl.us); Russell Gallogly (RussellGallogly@fcor.state.fl.us)
Cc:	Billy Nolas (Billy_Nolas@fd.org); NahDeh Simmons (newsi2179@gmail.com); Legal Group_Inbox (legal@attorneyshea.com); Kimberly Sharkey (Kimberly_Sharkey@fd.org)
Subject:	Gary Bowles, DC No. 086158 - Clemency submission and Rescheduling Request
Date:	Thursday, June 21, 2018 5:14:00 PM
Attachments:	2018-06-21 Letter to Clemency Board Requesting Rescheduling_Bowles.pdf 2018-06-21 Clemency Submission for Gary Ray Bowles.pdf

Ms. Whitworth & Mr. Gallogly,

Please find attached to this email the initial submission for clemency and request to reschedule his clemency interview on behalf of Mr. Gary Bowles, joined by his clemency counsel, Nah-Deh Simmons, his state counsel, Jerry Shea, and his federal counsel, Billy Nolas. These materials are also being mailed to your office. If there is an individual in the Governor's office that we can direct our request to reschedule Mr. Bowles's clemency interview, please advise.

Thank you,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org
(850) 942-8818 Ext. 1330

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818 Fax 942-8809

June 21, 2018

The Office of Governor Rick Scott
c/o The Clemency Board
Florida Commission on Offender Review
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Gary Bowles
DOC No. 086158

Dear Clemency Board,

On October 19, 2017, state counsel for Gary Ray Bowles, in consultation with his federal counsel at the Federal Public Defender's Office, Capital Habeas Unit ("CHU"), timely filed a successive Rule 3.851 motion for postconviction relief in light of *Atkins v. Virginia, Moore v. Texas*, and *Hall v. Florida* in the Duval County Circuit Court. *See State of Florida v. Gary Ray Bowles*, No. 1994-CF-12188 (Duval County Cir. Ct.). This litigation is still pending. On March 26, 2018, clemency proceedings for Mr. Bowles began. Presently, his interview is scheduled for August 2, 2018.

After speaking with Ms. Michelle Whitworth, and Mr. Russell Gallogly, we were advised to submit a written request to have his scheduled interview postponed until the resolution of his pending intellectual disability claim. As counsel noted in their initial submission for Mr. Bowles provided with this request, if Mr. Bowles is successful in his pending litigation, clemency proceedings will be unnecessary. Further, due to this litigation, Mr. Bowles cannot make a full clemency presentation, including the evidence of his intellectual disability. Mr. Bowles's clemency interview and proceedings will be more meaningful after he is able to develop evidence of his disability in the Circuit Court.

We respectfully request that his clemency interview and proceedings be rescheduled until after his intellectual disability litigation has been resolved, should it still be necessary.

Respectfully submitted,

/s/ Nah-Deh Simmons
Nah-Deh Simmons, Esq.
The Law Office of Nah-Deh Simmons Esq.
P.O. Box 41083
Jacksonville, FL 32203-1083
Phone: 904-545-9044
Clemency Counsel for Mr. Bowles

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818
Federal Counsel for Mr. Bowles

/s/ Francis Jerome Shea
Francis Jerome Shea, Esq.
Francis Jerome Shea, P.A.
644 Cesery Boulevard, Suite 250
Jacksonville, FL 32211
Phone: 904-399-1966
State Counsel for Mr. Bowles

From: Heekin, Jack
To: Kelsey Peregoy
Cc: Michelle Whitworth - FCOR
Subject: RE: Capital Clemency - Gary Bowles, DC #086158
Date: Friday, June 22, 2018 4:56:38 PM

Ms. Peregoy,
Inmate Bowles' request to continue the clemency interview scheduled for August 2, 2018, has been denied. The clemency process is wholly separate and distinct from the successive legal challenges to his death sentence(s), and inmate Bowles has been appointed separate legal counsel to represent him in the clemency proceedings. You are welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration.

Sincerely,

Jack Heekin

From: Kelsey Peregoy <Kelsey_Peregoy@fd.org>
Sent: Friday, June 22, 2018 2:17 PM
To: Heekin, Jack <Jack.Heekin@eog.myflorida.com>
Cc: Billy Nolas <Billy_Nolas@fd.org>; Kimberly Sharkey <Kimberly_Sharkey@fd.org>; NahDeh Simmons (newsi2179@gmail.com) <newsi2179@gmail.com>; Legal Group_Inbox (legal@attorneyshea.com) <legal@attorneyshea.com>
Subject: Capital Clemency - Gary Bowles, DC #086158

Mr. Heekin,

My office represents Gary Ray Bowles, an individual on Florida's death row. Recently, a clemency investigation was initiated on Mr. Bowles, and we have previously been in contact with Ms. Whitworth at FCOR about this.

I am writing to request that Mr. Bowles's clemency interview be rescheduled. Mr. Bowles has strong evidence that he is intellectually disabled and ongoing litigation is currently pending on this issue in the circuit court, and proceeding with a clemency interview at this point in time would unnecessarily complicate and interfere with Mr. Bowles's court proceedings. Ms. Whitworth indicated that we should contact the Governor's office to reschedule Mr. Bowles's clemency interview, which is presently set for August 2, 2018.

If you are not the appropriate person for this request, I would appreciate if you would advise me as to who in the Governor's office handles these matters.

More information about Mr. Bowles is detailed in the attachments to this email, including the initial submission for clemency and a detailed request to reschedule the clemency interview on behalf of Mr. Bowles. This submission is joined by Mr. Bowles's clemency counsel Nah-Deh Simmons, his state counsel Jerry Shea, and his federal counsel Billy Nolas. These materials are also being mailed to your office.

Best,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org
(850) 942-8818 Ext. 1330

From:	Kelsey Peregoy
To:	michellewhitworth@fcor.state.fl.us (michellewhitworth@fcor.state.fl.us)
Cc:	Kimberly Sharkey (Kimberly_Sharkey@fd.org); NahDeh Simmons (newsi2179@gmail.com); Billy Nolas (Billy_Nolas@fd.org); "RanaWallace@fcor.state.fl.us"
Subject:	Gary Bowles: Clemency Interview (8/2/18)
Date:	Thursday, July 26, 2018 5:19:00 PM
Attachments:	2018-07-26 Letter to FCOR (Bowles, Gary).pdf

Ms. Whitworth,

I've just spoken with Ms. Wallace (cc-ed), who indicated that any communication we have for clemency purposes should go only to you and that you will forward that communication to the Office of the Governor, where the decisions will be made.

As you know, we have been working with Mr. Simmons (cc-ed) for Mr. Bowles's clemency. With Mr. Simmons we submit the attached letter, describing Mr. Bowles's specific litigation circumstances and his rights as they relate to this process. Jointly with Mr. Simmons, we ask you, the Commissioners, and the Board to reconsider the decision that my office (Mr. Bowles's clemency co-counsel & federal counsel) is barred from attending his clemency interview.

Our client is intellectually disabled, and our assistance is crucial to his ability to communicate effectively to the Commissioners and ultimately the Clemency Board.

We are relying on Ms. Wallace's representation that you will forward this email and the attachment to the appropriate people and ask that you do so promptly. This is a time-sensitive matter, as Mr. Bowles's clemency interview is scheduled for August 2nd.

Please communicate to us your decision on this matter, and please let us know if we should be in communication with anyone else about this request.

Thank you,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
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Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818 Fax 942-8809

July 26, 2018

Florida Commission on Offender Review
c/o S. Michelle Whitworth
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Gary Bowles
DOC No. 086158

Dear Commissioners & Clemency Interviewers:

On Monday, July 23, 2018, Nah-Deh Simmons, clemency counsel retained by the Florida Commission on Offender Review ("FCOR"), sent a letter to FCOR as a courtesy, notifying them that Mr. Bowles's clemency co-counsel and federal counsel, the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida ("CHU"), would jointly appear and conduct Mr. Bowles's August 2, 2018, clemency interview with Mr. Simmons. In addition, this letter specified that Dr. Jethro Toomer, an experienced psychologist who diagnosed Mr. Bowles with intellectual disability and has been retained by the CHU, would also be present to offer the Commissioners and other relevant clemency interviewers information concerning Mr. Bowles's diagnosis of intellectual disability. Mr. Bowles's intellectual disability should be a significant consideration in clemency proceedings. His intellectual disability is also a matter currently being litigated in judicial proceedings.

On Tuesday, July 24th, Mr. Simmons was informed through a phone call with Ms. S. Michelle Whitworth, Capital Research Specialist for FCOR, that neither Dr. Toomer nor the CHU—Mr. Bowles's clemency co-counsel and federal counsel—would be allowed to participate in Mr. Bowles's clemency interview. Ms. Whitworth indicated that not only would the CHU not be allowed to participate, but the CHU would also be barred from being present at Mr. Bowles's clemency interview.

This letter is intended to address this communication, and to ask the Commissioners and FCOR to reconsider this course of action.

I. Background

Gary Ray Bowles was convicted and sentenced to death in 1999 following a second sentencing proceeding in the Duval County Circuit Court. *See Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2001). Through counsel, Mr. Bowles pursued state and federal postconviction relief. *See Bowles v. State*, 979 So.

2d 182, 184 (Fla. 2008); *Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA (M.D. Fla. Dec. 23, 2009). On September 2, 2015, the Duval County Circuit Court appointed attorney Francis Jerome Shea as state court counsel. *See State v. Bowles*, 1994-CF-12188 (Duval County, Fla. Sept. 3, 2015).

On September 26, 2017, the CHU filed an unopposed motion to be appointed as Mr. Bowles's federal counsel. *See Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA, ECF No. 32 (M.D. Fla. Sept. 26, 2017). On September 27, 2017, Federal District Court Judge Henry Lee Adams granted the CHU's motion. *See Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA, ECF No. 33 (M.D. Fla. Sept. 27, 2017).

After appointment, the CHU worked in conjunction with state court counsel Mr. Shea, in developing and filing a successive postconviction motion in the Duval County Circuit Court on October 19, 2017. *See State v. Bowles*, 1994-CF-12188 (Duval County, Fla. Oct. 19, 2017). This motion raised and explained that Mr. Bowles is intellectually disabled and is therefore ineligible for execution under the Supreme Court of the United States's rulings in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). Mr. Bowles was initially diagnosed as intellectually disabled by Dr. Jethro Toomer who, at the CHU's request, evaluated Mr. Bowles in 2017. Due to Mr. Bowles's pending postconviction motion and the CHU's integral role in filing the motion, the CHU sought and received permission from the federal district court to appear on Mr. Bowles's behalf with Mr. Shea in state court. *See Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA, ECF No. 36 (M.D. Fla. December 6, 2017). The CHU and Mr. Shea have been actively litigating Mr. Bowles's intellectual disability claim in state circuit court since October of 2017, which is still pending. Mr. Bowles's intellectual disability diagnosis, and the presentation of this diagnosis in his pending postconviction motion, is supported both by his trial counsel, attorney Bill White, and prior postconviction counsel, attorney Frank Tassone.

In March 2018, FCOR, at the direction of the Governor's office, began a clemency investigation on Mr. Bowles. FCOR investigator Russ Gallogly contacted Billy H. Nolas, Chief of the CHU, shortly after this investigation began. Since this notification, the CHU and Mr. Simmons have worked cooperatively on Mr. Bowles's clemency proceedings, including more than a dozen communications and meetings, the joint preparation and submission of Mr. Bowles's clemency petition (sent via email and mail to FCOR and the Office of the Governor on June 21 & 22, 2018), and have jointly conferred with Mr. Bowles concerning his upcoming clemency interview.

II. Mr. Bowles Has a Right to the CHU's Assistance in Clemency Proceedings

The CHU's appointment to Mr. Bowles's litigation is pursuant to 18 U.S.C. § 3599, which prescribes, in relevant part:

> [E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and **proceedings for executive or other clemency as may be available to the defendant**.

18 U.S.C. § 3599 (e) (emphasis added).

The plain text of § 3599 indicates that it is appropriate for federal counsel, such as the CHU, to proceed as clemency counsel. Indeed, federal courts across the country have recognized the appropriateness of § 3599 representation for the purpose of clemency. *See, e.g., Harbison v. Bell*, 556 U.S. 180, 185-86 (2009) ("Because state clemency proceedings are 'available' to state petitioners who obtain representation pursuant to subsection (a)(2) [of § 3599], the statutory language indicates that appointed counsel's authorized representation includes such proceedings."); *Holiday v. Stephens*, 136 S. Ct. 387, 387-88 (2015) (Sotomayor, J., concurring) (explaining that the Supreme Court has indicated "the interests of justice required the appointment of attorneys who would represent [the petitioner] in that [clemency] process"); *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014) ("Once federal habeas counsel has been appointed . . . counsel is required to represent the prisoner 'throughout every subsequent stage of available judicial proceedings,' including 'all available post-conviction process" in state and federal court (such as state clemency proceedings)."); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 474 (3rd Cir. 2015) ("§ 3599(e) [requires] the district court to appoint an attorney, already appointed for purposes of seeking federal habeas relief, to represent the petitioner in those proceedings as well."); *Battaglia v. Stephens*, 824 F.3d 470, 474 (5th Cir. 2016) (indicating that "attorneys appointed under § 3599 are obligated to represent their clients in state clemency proceedings"); *Baze v. Parker*, 632 F.3d 338, 342 (6th Cir. 2011) ("There is no question, then, that . . . the district court is authorized to appoint counsel to assist Baze in preparing his state clemency application."). Mr. Bowles has a federal statutory right to representation by the CHU in his clemency proceedings, and FCOR should not interfere with this right. CHU lawyers throughout the United States routinely appear as counsel or co-counsel in clemency proceedings.

Mr. Bowles also has a due process interest in his clemency proceedings. *See, e.g., Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1330-31 (11th Cir. 2015) (recognizing "a due process interest in the context of state clemency proceedings for death row inmates"); *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014); *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2014). Critical to the realization of his due process interest is Mr. Bowles's access to the knowledge and resources of the CHU.

FCOR and the Clemency Board would benefit from a joint presentation from Mr. Bowles's retained clemency counsel Mr. Simmons and the CHU. The CHU has had extensive contacts with Mr. Bowles, has developed a productive working relationship with him, and has invested hundreds of hours developing never-before-found evidence of Mr. Bowles's intellectual disability and a fuller narrative of his life history. Indeed, Mr. Bowles's clemency petition was created jointly by the CHU and Mr. Simmons on the basis of evidence the CHU uncovered and knowledge that the CHU provided. Just as the *Harbison* Court recognized, a client's postconviction counsel frequently develops the very information that makes for a persuasive clemency presentation:

> Indeed, as the history of this case demonstrates, the work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application. Harbison's federally appointed counsel developed extensive information about his life history and cognitive impairments that was not presented during his trial or appeals. . . . Harbison's case underscores why it is "entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells." In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the "fail-safe" of our justice system.

Harbison, 556 U.S. at 193-94 (internal citations omitted). As a practical matter, regardless of the quality of Mr. Simmons's clemency representation, Mr. Bowles's clemency presentation would suffer without the assistance of the CHU, who is in the same position as counsel in *Harbison*.

In fact, Mr. Bowles has a stronger need for the CHU's presence in his clemency proceedings than the petitioner in *Harbison* because Mr. Bowles has ongoing litigation that could be impacted by his clemency statements and presentation. It is imperative that the CHU be present to help its intellectually disabled client navigate the questioning inherent in the clemency interview process. To deprive Mr. Bowles of his counsel for this litigation endangers him because, under the Rules of Executive Clemency, the state attorney—opposing counsel in his intellectual disability litigation—is entitled to a copy of everything Mr. Bowles says during his clemency interview. *See* Rule 15(G), Rules of Executive Clemency ("Upon request, a copy of the actual transcript of any statements or testimony of the inmate relating to a clemency investigation **shall be provided to the state attorney**, the inmate's clemency counsel, or victim's family.") (emphasis added), available at https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf (last visited July 25, 2018).

Simply put, Mr. Simmons cannot provide adequate representation without the CHU. Further, without participation of the CHU, the Board will be deprived of crucial information, including information from Dr. Toomer and other relevant evidence that the CHU has developed. This will impede a meaningful assessment for purposes of clemency.

III. Conclusion

Mr. Bowles has a statutory right to the CHU's assistance in clemency, as well as a due process and Eighth Amendment interest in clemency, which is only vindicated with the CHU's participation in clemency proceedings. Mr. Bowles's unique circumstance as a result of his ongoing intellectual disability litigation only further complicates his ability to meaningfully participate in the clemency process without the assistance of the CHU. To be clear, ,Mr. Bowles is endangered without the CHU's participation in his clemency interview. Further, the clemency presentation to FCOR and the Clemency Board will only be aided by the CHU's participation.

Mr. Bowles's clemency counsel, Mr. Simmons, has worked cooperatively and in conjunction with the CHU for Mr. Bowles's clemency interview and his clemency petition. Mr. Simmons, like Mr. Bowles, desires the CHU's presence. FCOR should reconsider its decision and permit the CHU to participate fully in Mr. Bowles's clemency interview, and FCOR should additionally allow Dr. Jethro Toomer to speak to the Commissioners about Mr. Bowles's intellectual disability. Refusing to hear from the CHU or the CHU's expert is akin to refusing to consider Mr. Bowles's intellectual disability. FCOR should reconsider its decision to prohibit this meaningful presentation. We urge that you reconsider.

Respectfully submitted,

/s/ Nah-Deh Simmons
Nah-Deh Simmons, Esq.
The Law Office of Nah-Deh Simmons Esq.
P.O. Box 41083
Jacksonville, FL 32203-1083
Phone: 904-545-9044
Clemency Counsel for Mr. Bowles

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818
Federal Counsel for Mr. Bowles

From: Whitworth, Michelle
To: NahDeh Simmons
Cc: Wallace, Rana; Kimberly Sharkey; Billy Nolas
Subject: FW: Gary Bowles: Clemency Interview (8/2/18)
Date: Monday, July 30, 2018 9:19:54 AM

Mr. Simmons,
The joint request to reconsider emailed to me on Thursday, July 26th, has been considered and is denied. Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration.

Sincerely,

S. Michelle Whitworth
Commission Investigator Supervisor
Florida Commission on Offender Review
(850) 921-2570 direct line
(850) 487-1175 main line
(850) 414-6903 fax

FCOR Website www.fcor.state.fl.us/

MISSION STATEMENT- The Commission on Offender Review is committed to ensuring public safety and providing victim assistance through the post prison release process.

From: Kelsey Peregoy [mailto:Kelsey_Peregoy@fd.org]
Sent: Thursday, July 26, 2018 5:19 PM
To: Whitworth, Michelle <MichelleWhitworth@fcor.state.fl.us>
Cc: Kimberly Sharkey <Kimberly_Sharkey@fd.org>; NahDeh Simmons (newsi2179@gmail.com) <newsi2179@gmail.com>; Billy Nolas <Billy_Nolas@fd.org>; Wallace, Rana <RanaWallace@fcor.state.fl.us>
Subject: Gary Bowles: Clemency Interview (8/2/18)

Ms. Whitworth,

I've just spoken with Ms. Wallace (cc-ed), who indicated that any communication we have for clemency purposes should go only to you and that you will forward that communication to the Office of the Governor, where the decisions will be made.

As you know, we have been working with Mr. Simmons (cc-ed) for Mr. Bowles's clemency. With Mr. Simmons we submit the attached letter, describing Mr. Bowles's specific litigation circumstances and his rights as they relate to this process. Jointly with Mr. Simmons, we ask you, the Commissioners, and the Board to reconsider the decision that my office (Mr. Bowles's clemency co-counsel & federal counsel) is barred from attending his clemency interview.

Our client is intellectually disabled, and our assistance is crucial to his ability to communicate effectively to the Commissioners and ultimately the Clemency Board.

We are relying on Ms. Wallace's representation that you will forward this email and the attachment

to the appropriate people and ask that you do so promptly. This is a time-sensitive matter, as Mr. Bowles's clemency interview is scheduled for August 2nd.

Please communicate to us your decision on this matter, and please let us know if we should be in communication with anyone else about this request.

Thank you,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org
(850) 942-8818 Ext. 1330

From:	Kimberly Sharkey
To:	"MichelleWhitworth@fcor.state.fl.us"
Cc:	"RanaWallace@fcor.state.fl.us"; "newsi2179@gmail.com"; Billy Nolas (Billy_Nolas@fd.org); Kelsey Peregoy (Kelsey_Peregoy@fd.org)
Subject:	RE: Gary Bowles: Clemency Interview (8/2/18)
Date:	Monday, July 30, 2018 12:36:00 PM

Ms. Whitworth,

I appreciate you responding to our request for reconsideration. As you know, the CHU and Mr. Simmons are trying to provide information to FCOR and the Governor's Office to assist with the consideration of clemency for Mr. Bowles while the issue of Mr. Bowles's intellectual disability is pending before the circuit court.

Would you please let me know whether the decision to prohibit the CHU and Dr. Toomer from speaking at the clemency interview was a decision that was made by you? If it was made by another person or people, please let me know which individual(s) contributed to the decision.

Thank you.
Kimberly Sharkey

****
Kimberly Sharkey
Litigation Coordinator/Attorney - Capital Habeas Unit
Federal Public Defender's Office
227 N. Bronough Street - Suite 4200
Tallahassee, Florida 32301-1300
Tel: (850) 942-8818, ext. 1328
Fax: (850) 942-8809
kimberly_sharkey@fd.org

From: Whitworth, Michelle <MichelleWhitworth@fcor.state.fl.us>
Sent: Monday, July 30, 2018 9:20 AM
To: NahDeh Simmons <newsi2179@gmail.com>
Cc: Wallace, Rana <RanaWallace@fcor.state.fl.us>; Kimberly Sharkey <Kimberly_Sharkey@fd.org>; Billy Nolas <Billy_Nolas@fd.org>
Subject: FW: Gary Bowles: Clemency Interview (8/2/18)

Mr. Simmons,
The joint request to reconsider emailed to me on Thursday, July 26th, has been considered and is denied. Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration.

Sincerely,

S. Michelle Whitworth
Commission Investigator Supervisor
Florida Commission on Offender Review
(850) 921-2570 direct line
(850) 487-1175 main line

(850) 414-6903 fax

FCOR Website www.fcor.state.fl.us/

MISSION STATEMENT- The Commission on Offender Review is committed to ensuring public safety and providing victim assistance through the post prison release process.

From: Kelsey Peregoy [mailto:Kelsey_Peregoy@fd.org]
Sent: Thursday, July 26, 2018 5:19 PM
To: Whitworth, Michelle <MichelleWhitworth@fcor.state.fl.us>
Cc: Kimberly Sharkey <Kimberly_Sharkey@fd.org>; NahDeh Simmons (newsi2179@gmail.com) <newsi2179@gmail.com>; Billy Nolas <Billy_Nolas@fd.org>; Wallace, Rana <RanaWallace@fcor.state.fl.us>
Subject: Gary Bowles: Clemency Interview (8/2/18)

Ms. Whitworth,

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As you know, we have been working with Mr. Simmons (cc-ed) for Mr. Bowles's clemency. With Mr. Simmons we submit the attached letter, describing Mr. Bowles's specific litigation circumstances and his rights as they relate to this process. Jointly with Mr. Simmons, we ask you, the Commissioners, and the Board to reconsider the decision that my office (Mr. Bowles's clemency co-counsel & federal counsel) is barred from attending his clemency interview.

Our client is intellectually disabled, and our assistance is crucial to his ability to communicate effectively to the Commissioners and ultimately the Clemency Board.

We are relying on Ms. Wallace's representation that you will forward this email and the attachment to the appropriate people and ask that you do so promptly. This is a time-sensitive matter, as Mr. Bowles's clemency interview is scheduled for August 2nd.

Please communicate to us your decision on this matter, and please let us know if we should be in communication with anyone else about this request.

Thank you,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org
(850) 942-8818 Ext. 1330

FLORIDA COMMISSION ON OFFENDER REVIEW

CLEMENCY INTERVIEW

OF

GARY RAY BOWLES

Thursday, August 2, 2018, at 2:03 p.m.
Union Correctional Institution
Raiford, Florida

APPEARANCES:

RICHARD D. DAVISON, Commissioner, Vice-Chair
DAVID A. WYANT, Commissioner, Secretary
S. MICHELLE WHITWORTH, Commission Investigator
J. STEVEN DAWSON, Capital Punishment Research Specialist
ALEC YARGER, Director, Legislative Affairs

NAH-DEH E.W. SIMMONS,ESQUIRE
Post Office Box 41083
Jacksonville, Florida 32203-1083
(904) 545-9044
Newsi2179@gmail.com

Attorney for GARY RAY BOWLES

REPORTER: Ingrid T. Cox, RPR
Notary Public, State of
Florida at Large

MR. DAVISON: For the record we have present here today for the interview being held at the Union Correctional Institution in Raiford, Florida, on August 2nd, 2018. The time is 2:03 in the afternoon. David Wyant, commissioner, Florida Commission on Offender Review; Michelle -- or S. Michelle Whitworth, commission investigator/supervisor for the Florida Commission on Offender Review, Tallahassee, Florida; J. Steve Dawson, capital punishment research specialist, Florida Commission on Offender Review, Tallahassee, Florida; Alec Yarger, legislative director, Florida Commission on Offender Review, Tallahassee Florida; and myself, Richard D. Davison, commissioner, Florida Commission on Offender Review, Tallahassee Florida.

Counselor, would you please state your name and address for the record?

MR. SIMMONS: Nah-Deh Simmons, attorney for Mr. Gary Bowles. 903 West Union Street, Suite 102, Jacksonville, Florida 32202.

MR. DAVISON: Thank you. Mr. Bowles, would you please state your full name, prison number, and date of birth for the record?

INMATE BOWLES: My name is Gary Ray Bowles. 086158 is my DC number. And I was born January 25th,

1962.

MR. DAVISON: What's your DC number?

INMATE BOWLES: 086158.

MR. DAVISON: As previously stated, I am Commissioner Richard D. Davison. To my left is Commissioner David A. Wyant. We are members of the Florida Commission on Offender Review and we are here today at the request of the governor and the cabinet who serve as members of the board of executive clemency. We're here to take testimony as to whether your case should be heard for clemency relief before the governor and the cabinet sitting as the board of executive clemency. This commission will record and transcribe for review by the governor and the cabinet any and all statements made at this interview.

The commission is not here to review what happened at your trial nor to determine your guilt or innocence. The purpose of this interview is to give you the opportunity to make any statements or comments concerning commutation to life of the death sentence that was imposed. The commissioners present here today will prepare a final report to include a brief summary of the issues presented and our findings and conclusions, which will be provided to the governor and the cabinet.

If following this interview you desire to provide additional information in this case to the governor and the cabinet it should be submitted in accordance with the rules of executive clemency to the Capital Punishment Research Specialist, Clemency Investigations, at 4070 Esplanade Way, Tallahassee, Florida 32399-24506.

Counselor, you may proceed at this time.

MR. SIMMONS: Good afternoon.

MR. DAVISON: Good afternoon.

MR. SIMMONS: We are here for Mr. Bowles' clemency interview, and previously I notified the commissioner and clemency board that Mr. Bowles currently still has pending litigation in Duval County on his intellectual disability. The captain in his unit, I've had opportunity to speak with him regarding the pending litigation, and we have submitted some information regarding that pending litigation in writing and they are most familiar with his case as it relates to that issue.

We did ask for him to be present during this hearing. However, that was denied. And I am prepared to go forward in regards to this interview to present information that I have investigated in the time that I had regarding that. And I have a

two-part presentation today.

First I would ask questions of Mr. Bowles and then I'm going to give a brief synopsis of what we're asking here from the board as it relates to clemency, as it relates to his intellectual disability, and where we are in that process. And because of where we are in that process there will be a request to submit further information down the line that's going to come in writing, and also after that litigation is potentially concluded we can actually have a full presentation to the board. I would like to present to the board what the clemency will be requested based upon Mr. Bowles' intellectual disability.

MR. DAVISON: Counselor, I'll just let you know that I and Commissioner Wyant will be hearing separate reports and it's going to be based upon what's in our files and what's gathered here today during the interview. And so anything that may or may come from any pending litigation, unless that litigation is resolved prior to the completion of my recommendation, it will not be included.

MR. SIMMONS: Okay. Mr. Bowles -- and I'm going to first ask some questions of Mr. Bowles.

BY MR. SIMMONS:

Q. Mr. Bowles, when you were arrested for the crimes

you were convicted of was it overwhelming to you?

A. Yes, very overwhelming.

Q. Now, during that timeframe in your life were you -- where did you live?

A. I was homeless. I lived on the streets. Slept in the woods here and there.

Q. Okay. Was it during that time hard to understand the legal process?

A. Yes.

Q. Did you do the best to try to understand what your attorneys were telling you during that timeframe?

A. Well, the lawyers they gave me -- the lawyer they gave me, Bill White, I pretty much followed his directions on what I should do.

Q. And at this point in the process do you understand your appeals?

A. Yes.

Q. Have the attorneys tried to explain that to you?

A. Well, yes. They -- the lawyers I have working on my case now have done a lot of work. But as far as my life history, the lawyers I had at the beginning, they didn't put on much of a defense in my case. There was just my mom and brother, that was pretty much it.

Q. Okay. And even after they have explained this process to you, do you understand it?

A. Well, I understand some of it. I mean, I don't understand all of the legal technicalities of it.

Q. And because this process has been going on for quite some time do you sometimes pretend to understand even though you don't?

A. Sometimes.

Q. Now --

A. As I said, I don't understand some of the laws, the laws their self.

Q. I'm going to ask you specifically about your crimes. Are you sorry for what you did?

A. Oh, yes. I'm very sorry. I didn't -- I never wanted my life to be this way. I never wanted to hurt nobody, let alone kill somebody.

Q. And since you've been here have you spent a lot of time thinking about what you've done?

A. I think about it every day, not only what I did to their family, but to my own family as well. I've been ostracized from my own family. I haven't seen or talked to my half-brother and sister since I was ten years old. I haven't seen my mom since she came to court in '96.

Q. And if you could say anything to the people that you hurt what would you want to say to them?

A. I would tell them that I'm really sorry for all

the pain I've caused them. I hope one day that, you know, they can find it to forgive me. I know it's not easy to, you know, look at what I did, but that's pretty much it.

MR. SIMMONS: Thank you, Mr. Bowles.

Now, during this process I had the opportunity to do some research on intellectual disability and I just want to present a few of the prongs and go over regarding that and how it relates to Mr. Bowles.

The first prong is an IQ test that is done to determine whether or not a person can be mentally disabled. And there is a variance in that IQ test of about ten points. So, for example, if somebody was to score 75 it could range from 70 to an 80. And that qualifying IQ score then gets into the next step to see if there is any deficits of that. And those deficits come in different aspects of their lives. It could be conceptual, it can be social, it can be practical, and once that individual falls into one of those phase in regards to those deficits, they then would test him for evidence of when that onset of that intellectual disability actually occurred.

And the writings that were submitted from the board -- I mean, to the board as it relates to Mr. Bowles and also what I am going to be submitting

afterwards is going to further explain Mr. Bowles' qualification for that intellectual disability and where it put him in his life to get potentially in the position that he was in that actually got him right here.

When it comes to intellectual disability people have several disorders and some of the disorders were exhibited by Mr. Bowles during the timeframe that these incidents that occurred actually happened here in prison. And he is significantly impaired by his intellectual functioning. He also has those deficits and during his life those deficits came out in various different ways. And because they weren't caught or because he wasn't in a position to where he was able to get help, he didn't get that help and ultimately from a young age because of where he was and actually, you know, being homeless he actually ended up in prison on several occasions ultimately leading to us being here to where he has these sentences as we speak.

Before his arrest in the case he had been struggling with many aspects of his life. He wasn't really able to keep a job for an extended period of time. He always was dependent on individuals to actually take care of him. What I plan on doing in

regards to supplement what his intellectual disability is and what we're trying to do with regards to actually help Mr. Bowles, I would actually submit in writing a long history of Mr. Bowles' history and ask him where he is in that process.

What we are asking for from the clemency board is, because there has been litigation and Mr. Bowles is intellectually disabled, we're asking for mercy based upon his intellectual disability. And like I said previously, I don't know the timeframe between the decision of what the board is going to make, but because there is this pending litigation and we would have an opportunity to supplement in writing to the board information regarding that, I will definitely supplement my information to the board regarding that that I'm able to gather in between now and then.

And also during the timeframe if there is any information from that litigation I will definitely supplement it to any hearings.

I thank you for this opportunity and I do turn it back over to the board.

BY MR. DAVISON:

Q. Okay. Mr. Bowles?

A. Yes, sir.

Q. Both Commissioner Wyant and I have some questions

and hopefully you'll be able to answer them. And, as I said in the opening statements that we're not here to retry your case, I don't believe that there are questions of guilt or innocence that we're dealing with, what we're trying to do is to make a determination of whether or not there should be a commutation of the death sentence to a life sentence without parole. And I will prepare a report for the governor and the cabinet that are in the capacity of the clemency board, and that in large part will be based upon everything that I have reviewed and the files that have been provided to me, but it will initially include the things that we talk about here today.

And I know that the issue of intellectual disability has been raised by your counsel, that's currently being litigated, but that is outside of the normal appellate process that has already been concluded in the legal system. So that's something in addition to.

But in the assessment that was done, both psychiatric and psychological, there was a determination that you displayed no significant impairment in your ability to adjust within the institutional environment and that you did not exhibit any symptoms of mental disorder and that specifically included the question of

intellectual disability. And so that report that was prepared by the psychiatrist that did your evaluation I'm going to presume going forward is correct, that there are no significant impairments. And so what I'd like to get a better idea of is the crimes, and specifically the crime that we're dealing with today involving Walter Hinton. Are you familiar with that name, Walter Hinton?

A. Yes, sir.

Q. Who is Walter Hinton?

A. He is the person that I killed to receive this death sentence.

Q. And you were living with or spending significant time at Walter Hinton's mobile home?

A. Well, originally I met him in -- we worked out an agreement for me to stay there if I helped him fix up the trailer. And then I eventually left. I stayed there only a short time.

Q. How long was that?

A. Probably maybe a month or so.

Q. And during the time that you stayed at Mr. Hinton's place, is there anything that occurred that would cause you to kill him?

A. No.

Q. Okay.

A. No. There was no -- the events that led up to me killing him were I was drunk and high. And I really had no reason to do it. I just -- I don't -- I kind of had like a blackout or I didn't really realize what I was doing until it was over with. I went outside and I picked up a brick and brought it back in and hit him with the brick. And I later found out there was already bricks, the same bricks, inside the house.

Q. So you said you went outside?

A. Right.

Q. You got a brick?

A. Right.

Q. Would you describe the brick? Because when I think of a brick I'm thinking about a little rectangular --

A. Well, it was like a stepping stone that you lay out, that you put in your yard and walk on. I think they call them --

Q. Pavers?

A. I don't know what they're called. I just call it a brick.

Q. Okay. And so do you know approximately how much this brick weighed?

A. I think they said it weighed like 40 pounds.

Q. How many pounds?

A. 40, 40 pounds or 50 pounds.
Q. So 40 to 50 pounds?
A. Right.
Q. Which is a fairly significant weight?
A. Right.
Q. And you carried this from outside the house into the house?
A. Right.
Q. And what did you do with it?
A. I dropped it on his head.
Q. Why?
A. Like I said, I didn't have a reason. I was drunk and high and there was no reason to do it. I don't know why I did it. Really there was nothing for me to gain by doing it. I mean, the guy didn't have any money, he was poor. And, like I said, I just kind of blacked out or snapped or whatever it was. That's the term that I would use.
Q. So, Mr. Bowles, you say you didn't have anything to gain, but did you not take money from him after you dropped the brick on him?
A. He didn't have any money.
Q. Did you take jewelry or other property?
A. No. He didn't have any jewelry. He didn't have nothing. He was a crack head. He used drugs a lot. We

used drugs a lot together. He had his own stuff in pawn. He didn't have any money. The trailer was -- it was run down. It wasn't very nice, you know.

Q. So, Mr. Bowles, you said you didn't take any money, you didn't take any jewelry. What did you take?

A. Well, I left in his car just to leave the scene.

Q. So you took his car?

A. Yeah. I drove away in his car and then I later just left that at a grocery store. I didn't keep the car for very long. I never -- I just kind of dumped the car off and I didn't leave the area. I stayed in the same area.

Q. Mr. Bowles, after you took his car and left and before you left it at the grocery store did you do anything else with it?

A. Not that I recall.

Q. Did you ever -- when you left the mobile home did you ever return there?

A. Yeah.

Q. After you killed Mr. Hinton?

A. Yes. I came back a couple days later, I think.

Q. Did you come back with his car?

A. Yeah.

Q. All right. So you actually used the car for transportation before you dumped it at the grocery

store?

A. Oh, yeah. Yeah, a couple of days. Now that I think about it, yeah, I did keep it for a couple of days. It wasn't for very long, though.

Q. And so when you came back to his house or mobile home did you return alone?

A. No. There was a girl from the streets that I met. She was kind of sick and we were drinking and doing drugs together.

Q. What's the significance of saying she was kind of sick?

A. She had -- well, she was -- she was just -- I don't know how to describe it. She was sick. She was, I guess, going through DTs or whatever you call it. She was a drug addict or alcoholic. And so we got some drugs and alcohol. And there was like a nor'easter going on at the time, like a 50-mile-an-hour rainstorm.

Q. Mr. Bowles, where was Mr. Hinton at that point?

A. Well, he was in the other side of the trailer.

Q. Dead of course?

A. Yes.

Q. And so how long were you in the mobile home or with the woman you described as being sick?

A. For about two or three hours.

Q. Two or three hours?

A. Yeah. It wasn't very long.
Q. Did you have a discussion with her about the odor that was in the mobile home?
A. I don't remember. I think I just told her not to go to that side of the trailer.
Q. And when you left with her was it that same night?
A. Yes.
Q. Did you return to the trailer?
A. No.
Q. And why did you bring her there?
A. Well, like I said, to get out of -- there was a real bad storm going on.
Q. So the storm was gone in two hours?
A. It was a couple of hours. It was before daylight.
Q. So you said you had no reason to kill Mr. Hinton?
A. No.
Q. And you're saying you don't know why you killed Mr. Hinton?
A. No.
Q. And is there anything that you did subsequent to killing Mr. Hinton that would show that you had any sort of remorse for killing him? Is there anything that you did that would demonstrate that?

A. I don't understand the question.
Q. The question is you killed Mr. Hinton for no reason?
A. Right.
Q. Did you do anything after killing him that would show any sort of remorse or compassion or human response to the fact that you just killed this person?
A. No, no. I guess I left. I didn't -- I mean, when I got arrested I pled guilty and confessed to the crime and I assisted the police as best I could.
Q. How many days after the murder were you arrested?
A. It was probably maybe about a week. I don't really know the timeframe. Maybe a week to ten days. It wasn't very long.
Q. And in that week to ten days did you make any attempt to reach out to law enforcement?
A. No.
Q. Or a friend?
A. No.
Q. Or anybody --
A. No.
Q. -- to show that you had any kind of compassion for the fact that you just murdered this person seven to ten days earlier?
A. No. I didn't really know his family or -- like I

said, I was high on drugs and alcohol and that was basically my daily existence. I was drunk and high constantly.

Q. So being drunk and high would prevent you from showing any sort of compassion or remorse or demonstrating anything that would might show that you -- the fact that you committed this murder and there's something about it that you as a human being are saying I've got to acknowledge this murder in some way?

A. No. I don't -- like I said, I don't understand the question because, I mean, I killed the guy. Of course I didn't want to kill the guy and I didn't plan to kill the guy, and then I just left. I didn't...

Q. But, Mr. Bowles, if you drop a 40 to 50-pound weight on somebody's head, is that not a demonstration that you wanted to kill them?

A. Right. But, like I explained, I don't really know why I did that. I didn't have a reason to do that. It was like an out of -- like it was outside of me. I didn't realize that that's what -- that that's what I was doing. I didn't -- I wasn't subconsciously saying, well, I'm going to go out here and get this rock and I'm going to drop it on this head.

Q. So when you dropped this 40 to 50-pound rock on his head, did you at that point come back to your senses

or whatever and say I need to do something to help this person?

A. No.

Q. So after dropping the rock on his head what did you do?

A. I left.

Q. Before you left?

A. That's all I did. I left the scene.

Q. Did you asphyxiate him in any way?

A. Well, I don't -- no. I don't recall doing the things that they said I did.

Q. So you don't remember sticking things down his throat?

A. No.

Q. You don't remember putting a towel in his mouth?

A. No.

Q. You don't remember basically strangling him?

A. No.

Q. So the only thing you remember is dropping this 40 to 50-pound rock on him and then leaving and then subsequently coming back?

A. Right. I don't even -- the going outside and getting the brick, that is the facts of the case. I don't remember even doing that. That's what I'm saying. It was like I blacked out and I don't remember doing any

of the things that they said I did. I don't have a -- there was no rhyme or reason for me to do that. I drank four quarts of malt liquor. We were smoking crack and smoking pot and I don't remember any of those things. Those were just the -- going outside and getting the brick, that was just the fact of this of what I did. That's where the rock came from.

Q. Mr. Bowles, do you know what an MO is?

A. Yes.

Q. It's better referred to as modus operandi?

A. Yes, sir.

Q. What is the MO?

A. It's kind of like a signature.

Q. Basically it's the way you go about doing things.

A. Yes, sir.

Q. And so do you remember killing Albert Morris?

A. Yes.

Q. Do you remember what you did to Albert Morris in terms of his throat?

A. No. I shot him.

Q. Did you not shove anything down his throat?

A. I don't recall shoving anything down his throat. I recall shooting him.

Q. Do you remember John Roberts?

A. Yes.

Q. Do you remember killing him?
A. Yes.
Q. How did you kill him?
A. I hit him with a lamp.
Q. And then after you hit him with the lamp do you remember shoving anything down his throat?
A. No.
Q. You did not shove anything down his throat?
A. I may -- I put a rag in his mouth.
Q. Okay. In his mouth?
A. Right.
Q. Did you put a rag in Morris' mouth?
A. I don't remember.
Q. Did you put a rag in Mr. Hinton's mouth?
A. Like I said, I don't remember.
Q. David Jarman, do you remember that name?
A. Yes.
Q. Who is David Jarman?
A. He is a guy that I met in Maryland.
Q. And what happened with this guy that you met in Maryland?
A. What do you mean?
Q. Did you kill David Jarman?
A. Yes, sir.
Q. All right. How did you kill David Jarman?

A. I strangled him.
Q. And after you strangled him did you put anything down his throat?
A. No. I don't remember.
Q. Do you know Milton Bradley?
A. Yes.
Q. Who is that?
A. That was a guy I met in Georgia.
Q. Okay. And did anything happen with this guy you met in Georgia?
A. Well, yeah. I killed the guy, I mean --
Q. That's an important part of it.
A. Yes.
Q. So you killed Milton Bradley in Georgia?
A. Yes.
Q. And did you shove anything down his throat?
A. I think I put some leaves and dirt in his mouth.
Q. Some dirt and leaves?
A. Yeah. We were fighting behind the shed.
Q. And you put dirt and leaves in his mouth and down his throat?
A. Well, I don't know if it went down his throat or not.
Q. So I asked you earlier about an MO, modus operandi, and although you have no specific

recollection, but actually the reports show each one of them the MO is murder either by trauma, blunt force, by strangulation or by shooting. And so those are all the different types of ways to commit a murder, but the signature, as you say, the modus operandi, is in every one of them you need to shove things in their mouth or down their throat. Are you saying that you did not do that with Walter Hinton, Albert Morris, John Roberts, David Jarman and Milton Bradley?

A. Well, not subconsciously. I don't -- like I said, those are the facts of the case. That's the facts of the case, but that's not something that I planned. I didn't -- I mean, it's like a crime of opportunity, you know. It was like, you know, if I was strangling the guy, you know, I grabbed it to, you know, make sure that he was dead. It's not like what you're saying, the MO. That's not -- I wasn't trying to leave some kind of message or something like that.

Q. When you killed Albert Morris in Nassau County, Florida, do you have anything that you did that would demonstrate any sort of remorse or demonstrate regret? To say I am remorseful or I regret is one thing, but did you take any actions that show or demonstrate that you were remorseful or regretful for killing Albert Morris?

A. No.

Q. What about with John Roberts, did you take any action --
A. No.
Q. -- to show regret or remorse?
A. I ran from the law. I didn't -- I was running from the law.
Q. What about David Jarman, did you take any action to show regret or remorse?
A. No.
Q. What about Milton Bradley?
A. No.
Q. And so out of the five murders that I've listed, you at no point demonstrated any sort of regret or remorse that would demonstrate that you had some sort of human feelings for these people that you murdered?
A. No.
Q. There is a sixth person that you've admitted to murdering that's not on this list who is also from Georgia. Who is that person?
A. I don't know his name right off the bat.
Q. And how did you kill him?
A. I stabbed him.
Q. Why did you stab him?
A. Because he was attacking me.
Q. Why was he attacking you?

A. Because he wanted to have sex with me and he was trying to force me to do something that I didn't want to do.

Q. Had you had sex with him before?

A. No.

Q. How did you get in a situation where there's a question of you having sex with him?

A. Well, we were at his apartment, we were smoking dope. And he got real aggressive towards me and it was like a line of self-defense.

Q. So this is just some -- he just unknowingly arbitrarily decided that he wanted to have sex with you?

A. Yes.

Q. And there was nothing that happened before then that would move this interaction in that direction?

A. No.

Q. And did you try to leave that situation?

A. No. I grabbed a knife and I stabbed him. I mean, that was my way to get away.

Q. And so was he trying to kill you?

A. Well, he was trying to rape me. So I don't know what his intention would have been after that.

MR. DAVISON: I've got a series of other questions, but before I go to them I'm going to go to Mr. Wyant.

MR. WYANT: Thank you.

BY MR. WYANT:

Q. Thank you, Mr. Bowles, for speaking with us today. Just a couple of follow-up questions kind of to what you and Mr. Davison have talked about already.

After you dropped the brick on Mr. Hinton's head did you check for any signs of life or injury?

A. No. I wasn't in my right state of mind. Like I said, I was very high and drunk and the things that they said transpired, I don't recall those things happening. The records show what I did and that's all I can say is that that's what I did. I don't remember doing those things, but that's what they said happened.

Q. Okay. And what name did Mr. Hinton know you by?

A. Tim.

Q. Tim. Now, how did he come to know you by that identity rather than Gary Ray Bowles?

A. That was a fake name I was using.

Q. Okay. And you actually had a Florida driver's license or a Florida ID card with that name on it?

A. Yeah. I had a picture ID.

Q. Okay.

A. I found a birth certificate and a Social Security card with that name and I took it town to the DMV and had an ID made.

Q. Okay. And I know your counsel is arguing intellectual disability and stuff like that and I understand that, but how did you know if you got these two forms of ID you could go down to the DMV and get you a fake ID made?

A. Well, I knew I could get it from -- I know that's where you go to get IDs.

Q. Where did you find the information you needed to get the fake ID?

A. Well, I found it in a wallet.

Q. Whose wallet?

A. His wallet.

Q. Where at, though? Where did you find Tim's wallet at?

A. Well, I found it at the guy's house in Hilliard, Florida.

Q. What's his name?

A. I don't remember.

Q. One of your victim's houses?

A. Yes.

Q. Okay.

A. Morris.

Q. Okay. So you leave there, you find Tim's information or wallet, and you go to the DMV and you get a fake ID made, I mean, a state issued ID with your

picture and his information; is that right?
A. Yes.
Q. Okay. So when you meet Mr. Hinton he knows you as Tim, not Gary?
A. Yes.
Q. Okay. What was your drug of choice at that time? Did you have a favorite?
A. Crack.
Q. Crack?
A. Crack.
Q. Okay.
A. Crack and pot.
Q. Okay. Do you remember doing an A&E special in 2014 on TV?
A. I did an interview with --
Q. On TV?
A. Yes.
Q. Okay. Do you remember or did you tell him during that special that all your victims got what they deserved?
A. Well, that's what I felt at the time.
Q. You felt that way in 2014 or you felt that way when the crimes occurred?
A. When the crimes -- well, see, the lifestyle that I was living then, I was a street hustler, a male

prostitute, and these men were all interested in sex with -- having sex with young kids. And that's -- and I told them that -- at that time I felt that what I was doing was okay, or after I did it that's what I felt then. That's not how I feel now, of course, but that's how I felt then.

Q. So you felt then they wanted to have sex with children so you were doing the right thing then?

A. Right.

Q. That's what your mindset was then?

A. Right.

Q. Okay. Because there was never any evidence to show any of your victims were involved in pedophilia or anything like that; is that right?

A. Well, no, because I didn't tell them until after I was arrested. They had no reason to think that.

Q. Okay. So if you could say anything to your victims today what would it be?

A. Well, I would say to them that I'm very sorry for, you know, all the pain I caused you, I didn't mean to kill your loved one, I never wanted this to -- I never wanted my life to turn out this way. I never wanted to become a -- or ever kill anybody or, you know, do the things that I've done. The things just got so out of control, the drugs and alcohol, that -- I mean, I

was trying to do the right thing and I was trying to live my life the best I could and it just got so out of control so fast. It all happened within such a short period.

Q. I know other people that have struggled with drugs and alcohol their whole life and it never reaches or escalates to killing people. What do you think separates you from them?

A. I can't answer that. I can't speak for other people. I just -- like I said, the things just got so out of control so fast. I don't see how it happened, but I know it happened. I know, you know, I'm here and that's what happened.

Q. In the case of Mr. Hinton it was recommended by the jury 12 to zero for your sentence.

A. The second time.

Q. Right, the second time.

MR. WYANT: I'll come back. Mr. Davison?

BY MR. DAVISON:

Q. Mr. Bowles, the -- why did you kill these men?

A. I don't really know why I did it. Like I said, I didn't have a reason to.

Q. The reason I ask that again is because I'm having a little bit of difficulty reconciling what you just said a few moments before that because you said that you

believe that all the victims were interested in having sex with young kids and that they all got what they deserved. That's the statement that you made here to Mr. Wyant that that's what you believed and that's the statement that you made on tape during the A&E special that was broadcast. And so I'm having difficulty reconciling that general statement, that they all got what they deserved or they deserved because they wanted to have sex with young kids, with what you're saying several times here today that as it relates to Walter Hinton you don't know why you killed him, you just did it for no reason.

A. Yeah. But I didn't -- his case wasn't included in those others. When I gave my confession to, you know, meeting him and being around him it didn't have nothing to do with like any of the other people.

Q. So this is the first time I'm hearing that explanation, Mr. Bowles, because, you know, that's why I went back to ask the question again. And of course now it's, I guess, a modifier, a different response, from what you said a few times here today. And so that's the challenge that I'm having trying to reconcile the different responses.

Let's go back a little bit to your childhood. And there was a lot of discussion in the documents that

I have about abuse. Talk to us about your childhood.

A. Well, I was raised by an alcoholic stepdad. My real father was a coal miner, he passed away before I was born. And my mom remarried. My mom was 18 when she had me and I already had a two-year-old brother. She remarried and she stayed remarried to the guy. They had two kids together. And he was an alcoholic, drunk, he beat me and my brother a lot. And she divorced him at age ten.

And then my sister and my brother -- we had a third dad, and me and my brother went with my mom and we kind of moved around a lot. Between age of ten, 11, 12 she moved around three or four or five different places and she was with a lot of different guys. And she got remarried again to another guy and he was even more abusive than my first stepdad. And I ended up getting in a big fight with him and that was what led me to leave home.

The guy's name, Chad, he put my mom in the hospital a couple times, beat me a lot. I think they showed some pictures where my whole face was like swollen shut. The guy, he wasn't very nice. He kicked me out of the house. I had to live in the garage. I wasn't even allowed inside.

Finally at the age of 13 I'd had enough and I

told my mom it was him or me and she chose him. And I left home at the age of 13.

Q. Who is William Bowles?

A. Pardon me?

Q. Who is Williams Bowles?

A. William Franklin Bowles was my dad. And William Franklin Bowles, Jr., was my brother.

Q. So William Franklin Bowles, Jr., who is two years older than you?

A. Yes.

Q. And he was -- grew up in the same household as you?

A. Yes.

Q. And --

A. Suffered the same beatings I did.

Q. Took the same beatings?

A. Uh-huh.

Q. By your first and second stepfather?

A. Well, not so much the second stepdad because he had left and joined the Army Corps, like a Job Corps. He wasn't around the second stepdad.

Q. But the same beatings?

A. Yes.

Q. Same abuse as you?

A. Yes.

Q. And he went off and joined the Job Corps?
A. He went in the Job Corps, yes. And then he joined the Army.
Q. And then joined the Army. And where is he today?
A. He's deceased.
Q. And how long has he been deceased?
A. 2005.
Q. And prior to him dying in 2005 what was his lifestyle?
A. He was married and got divorced. And he was a pot head. He got kicked out of the Army for the drugs. And he kind of moved around. He lived on an Indian reservation, lived with different women.
Q. How did you and he get along?
A. Well, there wasn't much contact. Like I said, I left home when I was 13 and I didn't have any contact with my --
Q. In the years that you guys were children up until the time that you left and the time that he left, when you guys lived together in the same household as two brothers and then three brothers and a sister, tell me about your relationship with your brother William Franklin Bowles during that time.
A. Well, we were brothers. I mean, I followed him around. He was a couple of years older than me, but our

life was -- it was like in two parts. My dad worked during the day, my mom worked at night, so we were pretty much all -- all the kids except for the two little ones were -- me and my brother were pretty much on our own. We didn't -- he had his friends and I had my friends so we didn't -- we wasn't super close.

Q. But before the murders, the six murders that you confessed to, there were other crimes, robbery and sexual battery.

A. Well, the sexual battery charge was the first time I ever got in trouble. That was -- I was a male prostitute and she was a prostitute. I was living with two prostitutes. I didn't do the crime that I went to prison for, but the lawyer got me to plead no contest to the charge. I didn't --

Q. So you went to prison two times before you went to prison for the murders?

A. Three times.

Q. Three times?

A. Yeah. They gave me probation. They gave me -- I pleaded no contest to aggravated battery and attempted sexual battery. They gave me three years in prison for the aggravated battery. I did like 18 months for that. And then when I got out I got probation.

I transferred my probation to Virginia. And I

did two years of probation and the people told me that they were terminating my probation, but it never got terminated.

Q. With those three prison sentences and probation and all, and before that when you were a child, did you sniff glue and did other things related to --

A. Yeah. I started sniffing glue, huffing paint, smoking pot, shooting up drugs when I was young, Quaaludes, acid. I did it all and tried it all.

Q. And William, what was he doing at that time?

A. Like I said, he -- well, when we were little kids he was doing the same thing I was doing, but we pretty much separated when I was like 12 and he left. I might have seen him one, two more times after that.

Q. Prior to William's death how many times did he go to prison?

A. I can't -- I don't remember.

Q. Do you even know if he went to prison or not?

A. I think he did.

Q. You think he did. What did he go to prison for?

A. I don't know. Like I said, I didn't have a lot of contact with him. But I think he got in some trouble.

Q. Do you know if he raped anyone?

A. I don't know.

Q. Do you know if he robbed anyone?
A. I don't know.
Q. Do you know if he murdered anyone?
A. No.
Q. So the reason -- what I'm trying to do is do this comparison. The person that you say was William Franklin Bowles, Jr., your brother, the two of you grew up in the same abusive household and you went down this track of rape, robbery and murder. And you say --
A. Well, there was a lot of -- my life was a lot different than his. He didn't have to sell his ass and dick on the street from the age of 13. He didn't have to do those things. That's the things I did.
Q. Did you have to --
A. Yeah. I had to survive.
Q. So -- but your brother had to survive, too?
A. But he was in a different situation. He was in a -- he had people helping him. I didn't have nobody helping me.
Q. Did he -- was he older or younger?
A. He was older. He was in the Army, in the Job Corps. His life started in a different direction.
Q. So did you have the opportunity to go into the Job Corps?
A. No.

Q. You did not have the opportunity?
A. No.
Q. Why not?
A. Well, I wasn't old enough, for one.
Q. But your brother was two years older when you said he left.
A. Yes.
Q. All right. And so -- and he left before you. So did you leave at the same time your brother did or right after your brother did?
A. No. He was already gone. He was gone for -- when he left I was like 12 and he was like 14 or 15.
Q. And so you left when you were 13?
A. I left home.
Q. Right. So you're saying although he was 14 when he left and you were 13 when you left that he had because of his age much more opportunity than you did?
A. Well, when I was 13 he was 15.
Q. But you said he left when he was 14?
A. Right.
Q. And you left when you were 13?
A. Right.
Q. And so -- but you're saying the big difference between you and him was that he was older and he had more opportunities, although when you guys left he was

only one year older than you?

A. Right. But he had an opportunity to do that, to go, to join that corporation and I didn't have that opportunity. That's what I'm saying.

Q. So I guess, Mr. Bowles, the question that I'm trying to get to is that you and your brother were very similarly situated in terms of the things that occurred in your household that caused your brother at 14 to leave and you at 13 to leave. And so you're saying that your brother didn't have to -- and I'm not going to use the same words, but basically sell yourself on the street, your brother didn't have to do that. So why did you have to do that and your brother did not?

A. That was my way to survive. I didn't -- I couldn't do -- I couldn't go and do the things that he did. That's what I'm saying. When I left I did what I had to do to survive.

Q. So then --

A. The day that I left home my stepdad was either going to kill me or I was going to kill him. He attacked me, we were fighting. The fighting went out into the driveway. And my mom came running outside, pulled me off of him. And the cops came, he went to the hospital, and I told my mom that's it, him or me. And she said don't make me choose. I put my stuff in a

garbage bag and I left. I didn't have no other choice.

Q. Let me go back to you and William Franklin. And when you guys were children was William sniffing glue?

A. Yes, sir.

Q. Was he sniffing paint?

A. Uh-huh.

Q. Was he doing acid?

A. Yes.

Q. Was he shooting up?

A. Yes.

Q. The same things that you were -- the both of you were doing?

A. Uh-huh.

Q. And -- but at some point there had to be a choice made of leaving and what you do after you left. And so your choice was to basically become a child prostitute?

A. Right.

Q. And his choice was to join the Job Corps and then the military?

A. Well, if you want to word it like that, I mean, you can say that, yeah. That was the choices.

Q. And so then --

A. But I don't feel that what I -- that I had a choice. I did what I did to survive. I don't feel like I chose that. The way you're wording it is that I chose

to live this life, I chose to do these things. I didn't choose that.

Q. But let's go to the things that were a choice. Did you choose to commit sexual battery on the person that you went to prison for committing sexual battery?

A. No. I didn't do it.

Q. You did not?

A. No.

Q. Did you choose to rob?

A. Well, yes, sir. At the time, yes. Yes, I would say I chose it.

Q. And did you choose to kill Milton Bradley, David Jarman, John Roberts, Alan Morris and Walter Hinton?

A. Well, again, I mean, the way you're wording it is you're making it seem like -- that I wanted to do it. I didn't want to do it. I did it, but I didn't choose to do it.

Q. You were forced to do it?

A. No, I wasn't forced to do it. Like I said, I didn't choose to -- there's no other way to say it. I mean, you're making it seem like that's what I wanted. That's not what I wanted.

MR. DAVISON: Okay. Part of -- well, Mr. Wyant?

BY MR. WYANT:

Q. On that same note when we discussed earlier your

interview on A&E, if you remember, we talked about that. On that same -- during that same interview you made the statement that, and I'm trying to quote this as close as possible, you may remember it, I wanted to kill as many people as I could before I got caught. Do you remember making that statement?

A. Yeah. That's the way I felt then.

Q. What made you want to kill as many people as you could before you caught got?

A. Because the mindset I had was that these people were pedophiles. That's what I had in my mind.

Q. Do you feel today they weren't pedophiles?

A. Yes.

Q. So they were not?

A. Yes.

Q. Okay. That's where I'm kind of running into some confusion as to how you felt then versus how you feel now.

A. Right.

Q. Okay. So thank you for clarifying that.

A. Yeah. Like I said, I was out of my mind. I was smoking a thousand dollars a day in crack and I had it in my mind that these were bad people.

Q. Right. How were you financing your drug habit?

A. By prostituting. And I would do day labor, you

know, odd jobs. I would steal, rob.

Q. Earlier when you said the girl that came over was -- that you came to Mr. Hinton's residence with you was sick. Did you mean she was dope sick or was she with the flu?

A. Well, she had got bit by a spider and the spider was poisonous and it ate a big hole in her leg. And that was what was wrong with her.

Q. Okay. And you said earlier your brother passed away in what year?

A. I think it was 2005.

Q. Do you know why he passed away?

A. He got hit by a drunk driver and the medication that he was taking caused one of his heart valves to clog up and he vomited in his sleep and choked to death.

Q. Had he straightened his life up before he passed away?

A. No. He was staying with my mom. He was still a drug addict. He never -- once he got kicked out of the Army his life never really amounted to much. I mean, he didn't end up like me, but he didn't really have a good life.

Q. And I know you've been asked this a few times today and probably many times over the years. You don't recall forcing the items into your victims' mouths or

throats, that was something that just happened; is that right? Is that how you worded that?

A. Well, the way I worded it was that it was like, I think, psychologically I did that to make sure they were dead.

Q. Okay.

A. It wasn't a plan or something that I wanted -- you know, that I was trying to do.

Q. When it comes to Mr. Hinton, the way he had a rag of some sort in his throat or it was recovered from his mouth or throat, do you know if you did that before you dropped the brick or after you dropped the brick?

A. They said I did it after when he was laying on the floor.

Q. Did you cover him with a sheet before you left?

A. I don't remember. I think a blanket.

Q. Was he already covered when you dropped the brick or could you see him?

A. It was dark. I really couldn't see him.

Q. You just knew where his head was as far as the positioning goes?

A. Right, right.

Q. Okay. And you said you had been staying there about a month; is that right?

A. Well, I stayed there for a short time and then I

left. And then I came back to get my stuff and that was when me and another guy were -- we went out partying with him and drinking and smoking. And then we dropped the friend off and then that was when we went back to the trailer and that was when I did it.

Q. Did you consider Mr. Hinton a friend?

A. Yes.

Q. Do you regret killing him?

A. Very much so.

Q. And I'm not asking that because you're sitting here in your current situation today, but are you sorry you killed him?

A. I'm very sorry because, like I said, he wasn't like the other people. There was no kind of sexual relationship or none of that. That's why I don't have an explanation of why I killed him, because I didn't think he was a pedophile or none of that kind of stuff and he helped me out. And, yeah, I thought of him as a friend.

MR. WYANT: Okay. Thank you.

BY MR. DAVISON:

Q. Just to wrap it up with my last round of questions. Mr. Bowles, at the time that you murdered Walter Hinton were you able to distinguish right from wrong?

A. No. Like I said, I mean, after, yeah. But I don't -- I don't recall the situation so I can't say if I was right or wrong or not.

Q. So I want to be very clear that at the time that you dropped the 40 to 50-pound brick on Walter Hinton's head, you're telling me at that time you were not able to distinguish right from wrong?

A. No.

Q. You could not?

A. No.

Q. So --

A. Because I wasn't in my right mind.

Q. You had been drinking?

A. I drank.

Q. You were high on drugs?

A. Yes.

Q. But did you know what you were doing?

A. No.

Q. You didn't know that you were going outside and getting a brick?

A. No.

Q. You didn't know that you were bringing it back?

A. No.

Q. You didn't know that you were going specifically into Walter Hinton's bedroom and dropping it on his

head?

A. No.

Q. You didn't know that you were strangling him afterwards?

A. No.

Q. You didn't know that you were putting things down his throat afterwards?

A. No.

Q. You didn't know that you were covering him up with a sheet?

A. No.

Q. You didn't know that you left and came back a few days later and specifically told the young lady that you were with don't go into that room?

A. Well, yeah, I remember that.

Q. Okay. So, I mean, you can't like not know this part, but know this part. I know that I've got this dead body in this room of this person I've killed. I don't want her to go in there, but I don't remember what I did to put that dead body in that room.

A. Well, I think you can. Like I said, I was in like a stage of blackout. I don't -- there was no planning. I don't remember doing it. I'm going by the facts of what they said. I don't have a memory in my head of doing those things. I have a memory in my head

of going back to the place, yes, after.

Q. This is difficult for me because today you're saying I was in a state of blackout.

A. Uh-huh.

Q. In 1994 when you were asked about this you said I just snapped.

A. Right. That's what I'm saying, I don't recall doing it. That's the term I used. I snapped, blacked out, it's the same thing.

Q. You're not differentiating between the two? Because blacking out means it's a dark space, I don't remember what happened.

A. Right.

Q. I just snapped is more consistent with what you were describing to me that I did it, I don't know why I did it, but I just did it, as opposed to I don't remember doing it because it's a black hole.

A. Right.

Q. There's a difference between -- there's a difference.

A. I understand, right. Yes, sir, there is.

Q. Okay. And do you remember seeing a psychiatrist during this process who assessed and evaluated you and said it is therefore my opinion that Mr. Bowles was able to distinguish right from wrong at the time of the

alleged charges?

A. Well, I don't remember seeing any psychiatrist. The only person that I remember talking to, Bill White, my attorney, had me talk to a woman, a Dr. McMahon, I think, was her name. That's the only person that I recall talking to.

Q. Do you remember talking to Dr. Daniel Spree?

A. No.

Q. Do you remember talking to Dr. A.G. Gonzalez?

A. No.

Q. Do you remember talking to Dr. Elizabeth McMahon?

A. Yeah. That's the woman that I'm talking about.

Q. And so you remember her assessing you and making a determination as to your mental status?

A. Well, I don't know what her determination was because she -- her testimony was never presented in court. I can't say what her evaluation was.

Q. Did you see Dr. McMahon prior to going into the -- you pled guilty, but going into the sentencing trial?

A. Yes.

Q. You saw her before that sentencing trial?

A. Yeah. Bill White, my attorney -- my attorney that I had, my original attorney, I basically followed his instructions. And they took me over to her office and I had a short conversation with her, maybe for an

hour or two, I don't know how long it was, and that was before the penalty phase.

Q. So Dr. McMahon was basically hired on by your attorney, Bill White --

A. Uh-huh.

Q. -- to examine you?

A. Yes.

Q. And make a determination about your competency?

A. I guess. I don't --

Q. Did the sentencing -- did the sentencing phase and sentencing trial go forward?

A. I had a penalty phase, yeah. Bill White got me -- told me to plead guilty. And then they picked the jury and I had a penalty phase. But, like I said, her testimony -- as far as I know, her testimony wasn't used.

Q. The report of Dr. Elizabeth McMahon is that Dr. McMahon determined that the inmate was competent to proceed to trial and found that the inmate was not insane at the time of the offense. Are you aware of that?

A. Well, no. Like I said, I don't know what was on the record.

Q. But the sentencing portion went forward?

A. Yes.

Q. And that was after your examination by Dr. McMahon?

A. Well, yes, I guess.

Q. And if Dr. McMahon had determined that you were insane or not competent do you think that sentencing phase would have gone forward?

A. No.

Q. It would not have gone forward?

A. I don't think so, no.

Q. And she determined that you were sane and that you were competent to go forward with the sentencing aspects of this whole process.

So in terms of your childhood, how would you character your childhood?

A. Messed up. I mean, I didn't have any real role models. I didn't go to school. I never got out of -- the highest grade I completed was fifth grade, you know. I left home when I was 13. I lived on the streets basically my whole life, sold my body for money. I never had...

Q. You told Dr. McMahon about your childhood?

A. I told her the same thing I'm telling you.

Q. This is what you told Dr. McMahon about your childhood. You said not very good. Lonely. Couldn't have any friends over. Not much fun. Not happy.

Scary. Not peaceful. Chaotic. Not loving. However, you were pretty secure financially, but it was very unpredictable and not emotionally secure.

A. That's pretty much it.

Q. Those are all the things that you told Mr. McMahon about your childhood.

A. That's pretty much how it was.

Q. And is this the same childhood that William Franklin Bowles, Jr., had? Would you describe the same thing for his childhood?

A. Yes.

Q. Your brother?

A. Yes.

Q. All right. And so, however, very different routes beyond the childhood?

A. Well, every person is wired different, you know. Like I said, he was presented an opportunity that he got and I didn't get that opportunity. He suffered a lot, too. I mean, he didn't have a great life. Sure, he didn't have it like me, but no two brothers usually do end up exactly alike.

BY MR. WYANT:

Q. Mr. Bowles, for my own thinking to clarify, you don't -- you do or do not remember killing Walter Hinton?

A. No.
Q. Do you remember killing any of your victims?
A. Yes.
Q. How many of the victims do you remember killing?
A. All the other victims.
MR. WYANT: Okay. Thank you. Mr. Bowles, I appreciate you answering my questions. I don't have any further questions for you. Mr. Davison might.
MR. DAVISON: I am looking over -- I may be done as well. I do have one more.
BY MR. DAVISON:
Q. Mr. Bowles, are there any victims out there that we don't know about that you didn't tell the police about?
A. No. I assisted the police and FBI as best I could.
Q. Mr. Bowles, the last question I have is we talked about MOs. We talked about the differences in the six murders. We talked about the similarities in the six murders and the similarities which I have referred to as your modus operandi. What you are saying here today is you don't remember doing the things that are consistent throughout the six murders, you don't remember that part. And so -- but I think what is also clear here is that the murders were each committed in a cold,

calculated and apparently premeditated manner.

And so my question, the last thing before we give you the opportunity and your attorney to make closing statements, is do you, Gary Ray Bowles, have any regard for human life?

A. Yes, I have regard for human life. The murders were bad, yes, I grant that, but they wasn't premeditated or calculated. I didn't plan -- I never planned to kill each person. It was more of an opportunity and the weapons of choice were weapons of opportunity.

Q. And so in your response to that question that you, Gary Ray Bowles, have regard for human life, that's your response, yes?

A. Uh-huh.

Q. How is that regard for human life demonstrated in the murders?

A. Well, they're not. Like I said, I was completely out --

Q. Milton Bradley, David Jarman, John Roberts, Albert Morris or Walter Hinton, how is your regard for human life demonstrated in any of those murders?

A. Well, they're not, but --

Q. Isn't it a clear disregard for human life?

A. Well, sure, it is at the time, yeah.

Q. So what's changed since then? Because if it was a disregard for human life in 1994 when you were committing the murders how has that changed?

A. Well, it's changed a lot. I mean, I'm drug and alcohol free for over 20 years. I've got more of a clear mind. I don't -- I'm not living in the same environment. I don't have to sell my ass for money. I don't have to, you know, jump from place to place. I have a more clear understanding about things.

Q. So your regard for human life has evolved into -- your disregard for human life has evolved into now a regard for human life?

A. Well, I don't think I had a disregard for life at all. I mean, you can word it like that if you want, but I don't feel like I had a disregard for life at all. I mean...

MR. DAVISON: Thank you. I don't have any additional questions. We'll give you the opportunity to make any closing statement you'd like to make as well as you, Mr. Simmons.

BY MR. SIMMONS:

Q. Now, Mr. Bowles, you had an opportunity to actually speak about those crimes. How do you feel about what you've done and how do you feel right now about what happened?

A. I feel terrible about what I did. Like I said, I never wanted to kill anybody. I never wanted to end up in prison the rest of my life or be executed or whatever. I'm very sorry. I know I caused a lot of pain to a lot of people, including my own family. I ostracized myself. Like I said, I haven't seen my mom in over 20 years. I'll probably never see her again. My sister and brother don't have no contact with me. And I'm pretty much alone in my cell.

Q. And since 13 years old when you left your home did you ever live independently on your own in a meaningful way?

A. No, no. I have -- I started prostituting and I did that back in the late '70s and early '80s. My life was totally different than it is now. Underage prostitutes were everywhere. The police didn't care. There was groups of people banded together and there might be eight, ten people in a motel room a night.

Q. And that was your existence at the time?

A. Yeah. That was my existence from 13 until when I got in the situation I got in in Tampa where I went to prison.

MR. SIMMONS: And in regards to closing for the board, I do understand that this process is going to come to a conclusion at some point. There is

evidence, again, that Mr. Bowles' case is still open, which I presented to the board for consideration before making their conclusion. I will try to gather all that information and try to get it to the board subsequently in writing. And because there is still a pending claim, once that information is available from that claim I will take every opportunity to get that to the board as quickly as I can.

MR. DAVISON: Thank you. Anything else?

MR. SIMMONS: No.

MR. DAVISON: Mr. Bowles?

INMATE BOWLES: Uh-uh, no. I would just like to say thank you for this opportunity to speak with me. And I would like you-all to know that I truly am very sorry for what I did. I never wanted this to happen. I was in a different mindset then and the things that I thought and the way that I lived my life was totally fucked up. I mean, no person should have to leave home at 13. That's it.

MR. DAVISON: Thank you. We're concluding the clemency interview for Gary Ray Bowles. It is 3:27 in the afternoon on the day of August 2nd, 2018.

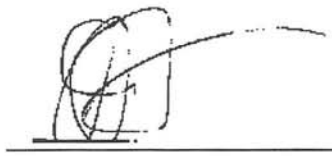
(The proceedings were adjourned at 3:27 p.m.)

STATE OF FLORIDA

COUNTY OF ALACHUA

I, Ingrid T. Cox, Court Reporter and Notary Public, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings on Thursday, August 2, 2018, pages 1 through 58, and that the transcript is a true record.

Dated this 15th day of August, 2018.



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September 12, 2018

Florida Commission on Offender Review
c/o S. Michelle Whitworth
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
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Re: Gary Bowles
DOC No. 086158

Dear Clemency Board:

On Thursday, August 2, 2018, Gary Bowles had a clemency interview before members of the Florida Commission on Offender Review ("FCOR"). Mr. Bowles was informed that his counsel was to submit clemency materials within forty-five days following his clemency interview. Please accept the following letter by Billy Nolas of the Capital Habeas Unit ("CHU") of the Federal Public Defender's Office, in conjunction with the clemency application submitted by Mr. Bowles's clemency counsel, Nah-Deh Simmons. We write separately to illuminate for the Board the concerns of the CHU and request that the Board grant Mr. Bowles a supplemental clemency interview, should one be necessary after the conclusion of his intellectual disability litigation, and allow the CHU to represent Mr. Bowles at such interview.

I. The CHU Was Barred From Meaningfully Representing Its Client Mr. Bowles

A. The CHU Could Not Have Anticipated the Initiation of Clemency Proceedings

On March 26, 2018, Mr. Bowles was first informed that the Governor's office had initiated a clemency investigation for him. *See* Appendix ("App.") (attached) at 1 (Letter from S. Michelle Whitworth to Gary Ray Bowles (March 26, 2018)). It is puzzling as to why Mr. Bowles was selected for clemency proceedings at this time. Rule 15 (C) of the Rules of Executive Clemency provides that,

> The investigation by the Parole Commission shall begin at such time as designated by the Governor. If the Governor has made no designation, the investigation shall begin immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely

manner as determined by the Governor.[1]

Mr. Bowles's initial appeal in the 11th Circuit Court of Appeals concluded on June 18, 2010, and in October of 2017, Mr. Bowles timely filed a successive motion for postconviction relief in light of his intellectual disability in the Duval County Circuit Court. Because Mr. Bowles's initial litigation concluded in 2010, and he had pending successive postconviction litigation, it is unclear why – or when – he was chosen to begin clemency proceeding; neither Mr. Bowles nor his counsel could have anticipated the beginning of such proceedings in any way.

B. Mr. Bowles Had a Statutory Right to the CHU's Representation in Clemency

Mr. Bowles's present counsel, Billy Nolas of the CHU and Francis Jerome Shea of the state registry counsel, were first informed of the initiation of a clemency investigation at the end of March 2018. Although Mr. Shea is prevented in participating in the clemency process due to his appointment as registry counsel for Mr. Bowles, *see* Fla. Statute 27.710, the CHU is authorized to appear in clemency proceedings under 18 U.S.C. § 3599. In fact, not only is the CHU authorized to participate in clemency, but it is obligated to do so. *See, e.g.*, *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014) ("Once federal habeas counsel has been appointed . . . counsel is **required** to represent the prisoner 'throughout every subsequent stage of available judicial proceedings,' including 'all available post-conviction process" in state and federal court (such as state clemency proceedings).") (emphasis added). Despite this statutory proscription, the CHU was never asked to serve as Mr. Bowles's clemency counsel, at no cost to the State of Florida, nor was the CHU ever informed that a private attorney, Nah-Deh Simmons, was being contracted with for clemency purposes until after such agreement was already made.[2]

C. The CHU Attempted to Work as Co-Counsel for Clemency Purposes

After notification of Mr. Bowles's pending clemency investigation, the CHU reached out directly to Mr. Simmons and began developing a joint clemency strategy. At the time of their first contact, Mr. Simmons was unaware of Mr. Bowles's pending intellectual disability litigation or Mr. Bowles's intellectual disability.

On May 3, 2018, the CHU contacted Michelle Whitworth of FCOR about Mr. Bowles's pending intellectual disability litigation and to request a delay in his clemency proceedings to accommodate the resolution of this litigation. Like Mr. Simmons, FCOR was also unaware of his pending litigation. FCOR informed the CHU that any delay or stay of the clemency proceedings could only come from the Governor's office and told the CHU to make such a request there. Mr. Simmons and the CHU worked jointly to prepare both a clemency presentation for Mr. Bowles's clemency interview and to prepare the request to the Governor's office to stay the proceedings.

On June 21 and 22, 2018, the CHU emailed Ms. Whitworth at FCOR and Jack Heekin at the Office of the Governor with the initial submission for clemency and formal request to stay Mr. Bowles's clemency

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[1] *See* Rules of Executive Clemency, available at https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf (last visited August 25, 2018).

[2] The first letter FCOR sent to Mr. Bowles indicated that Mr. Simmons had already been retained by the FCOR to serve as his clemency counsel, suggesting that the arrangement predated such notice. *See* App. at 1.

proceedings until after the conclusion of his postconviction litigation. *See* App. at 2-7 (Initial Clemency Submission); *id*. at 8-9 (Request to Reschedule Clemency Proceedings). This email, submission, and request were joined by Mr. Simmons. Neither Mr. Simmons nor the CHU ever received a response from FCOR, but on June 22, 2018, the same day the request was sent, Mr. Heekin responded by email, denying the joint request. *See* App. at 10-11 (June 22, 2018 Email from Jack Heekin to CHU attorney Kelsey Peregoy).

D. The CHU was Barred from Serving as Mr. Bowles's Clemency Co-Counsel During His Clemency Interview

After the request to stay the proceedings was denied, Mr. Simmons and the CHU developed a joint clemency interview strategy and agreed that the presence of the CHU was necessary to the presentation of any information about Mr. Bowles or his intellectual disability. On July 23, 2018, Mr. Simmons emailed FCOR as a courtesy to inform the interview participants that two attorneys from the CHU, Kimberly Sharkey and Kelsey Peregoy, as well as a psychologist, Dr. Jethro Toomer, who had diagnosed Mr. Bowles with intellectual disability, would be present at Mr. Bowles's August 2, 2018, interview. FCOR never responded to the CHU, but did speak with Mr. Simmons on the phone and indicated that the presentation Mr. Simmons and the CHU had planned would not be possible, because the CHU and its expert would be barred from attending Mr. Bowles's clemency interview.

Upon learning this information, Mr. Simmons and the CHU then drafted a letter requesting that FCOR and the Governor's office reconsider its decision to bar the CHU or other witnesses from attending Mr. Bowles's clemency interview. *See* App. at 12-15. This letter included specific information about Mr. Bowles's federal statutory right to have the CHU present, the CHU's involvement in Mr. Bowles's intellectual disability litigation, and the danger to Mr. Bowles's pending litigation that exists by depriving him of his counsel for the purpose of an interview that, under the Rules of Executive Clemency, would be transcribed and given to the State Attorney, the adversary in Mr. Bowles's pending litigation, upon request. *See* App. at 12-15.

Initially, Mr. Bowles's attorneys were unsure who the decision maker was, as Ms. Whitworth of FCOR had only identified the Governor's Office as a whole in her conversation with Mr. Simmons. On July 26, 2018, the CHU called Ms. Whitworth to ask who at the Governor's Office made such decisions, so counsel could appropriately direct a letter requesting reconsider of the decision to bar anyone but Mr. Simmons from attending the clemency interview with Mr. Bowles. Ms. Whitworth was not available at the time of the CHU's call, but, within minutes of leaving her a message, Rana Wallace, general counsel for FCOR, returned the call of the CHU. After multiple requests, Ms. Wallace refused to identify who at the Governor's Office was responsible for barring the CHU from Mr. Bowles's clemency interview and directed the CHU to correspond only with Ms. Whitworth. The CHU and Mr. Simmons jointly submitted a letter on July 26, 2018, requesting reconsideration of the decision to bar the CHU and Dr. Toomer from the interview. *See* App. at 12-15. On July 30, 2018, Ms. Whitworth emailed Mr. Simmons and the CHU and informed them that the joint request to reconsider the decision to bar the CHU had been denied. *See* App. at 16-17. The CHU again requested who made the decision to bar the CHU from its client's clemency interview. *See* App. at 18-20. Ms. Whitworth never responded to this request.

On August 2, 2018, Mr. Bowles's clemency interview was held. Mr. Simmons was present with Mr. Bowles. Neither his CHU counsel nor the psychologist who diagnosed Mr. Bowles with intellectual disability was allowed to participate in the interview.

This submission follows.

II. Mr. Bowles Should be Given a Supplemental Interview Because His August 2, 2018, Clemency Interview and Presentation Was Deficient Without the Participation of the CHU

A. Information About Mr. Bowles's Intellectual Disability Was Not Fully Presented

First, we understand that FCOR interviewers asked questions related to Mr. Bowles's intellectual disability, which is the issue the CHU is presently litigating in Duval County Circuit Court. This is precisely the reason the CHU's participation was critical to a meaningful presentation on Mr. Bowles's intellectual disability. Mr. Bowles's FCOR-retained clemency attorney could not – and should not have been expected to – answer questions about Mr. Bowles's intellectual disability, a diagnosis he was not aware of until the CHU contacted him. Further, Mr. Bowles himself should not have been placed in a position in which he was expected to cure his clemency counsel's deficiency.

The clemency presentation of Mr. Bowles's intellectual disability deficient because no one involved in his diagnosis or litigation was allowed to participate in the interview, and the Board and interviewers were not properly educated on the nuances of an intellectual disability diagnosis for someone like Mr. Bowles. When it comes to intellectual disability, as with any disorder, some cases are more profound than others. The severity of intellectual disability differs widely, and public perception of what it means to be intellectually disabled does not properly describe the spectrum of individuals with such a diagnosis. Severely intellectually disabled people may function at the level of infants and be unable to feed themselves or to sit unaided. At the other end of the spectrum, people with mild intellectual disabilities appear as though they can somewhat merge into the normal population, but they struggle. Those who fall in the mild intellectually disabled range have no physical characteristics that differentiate them from anyone else. People who are mildly intellectually disabled may be described by others as "slow," gullible, or naïve. They may be unable to show appropriate emotion and seem to lack motivation or the ability to follow rules and structures. People who are mildly intellectually disabled frequently try to mask or hide their limitations – by pretending they understand when they do not and by relying heavily on friends or family to make up for their limitations. Without an informed foundation, lay people can attribute some of an intellectually disabled person's adaptive deficits as having a cause other than intellectual disability and frequently misattribute an intellectually disabled person's behavior as willful disregard, laziness, or antisocial. And unfortunately, these mildly disabled individuals are often the ones who are caught up in the criminal justice system.

Mr. Bowles is exactly the kind of individual who, to a limited degree and by relying heavily on the assistance of others, was able to blend into the general population despite his significantly impaired intellectual functioning. Mr. Bowles has since been diagnosed with intellectual disability. Before his arrest in this case, Mr. Bowles struggled mightily in many aspects of his life, and the narrative of his life cannot be understood except through the prism of his disability. By barring the CHU from Mr. Bowles's clemency interview, the presentation of both Mr. Bowles's diagnosis and his life history were sorely deficient.

B. Mr. Bowles Was Deprived of His Counsel for an Interview That Will Be Given to His Litigation Adversary

During his clemency interview, Mr. Bowles was asked numerous questions about his intellectual disability and prior mental health evaluations. These questions could not be answered accurately, as his counsel who is litigating his intellectual disability was barred from the interview; the questions also put Mr. Bowles in a precarious position. As Mr. Bowles's counsel warned, *see* App. at 15., under the Rules of Executive Clemency, the state attorney – opposing counsel in Mr. Bowles's intellectual disability litigation

– is entitled to a copy of everything Mr. Bowles said during his clemency interview. *See* Rule 15(G), Rules of Executive Clemency ("Upon request, a copy of the actual transcript of any statements or testimony of the inmate relating to a clemency investigation **shall be provided to the state attorney**, the inmate's clemency counsel, or victim's family.") (emphasis added), available at https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf (last visited August 25, 2018).

The position in which FCOR and the Board placed Mr. Bowles during the interview – deprived of of counsel who are the most informed about his intellectual disability and life history, who represent him in pending circuit court litigation, and who have a preexisting professional relationship with him – could potentially have negative effects on his pending litigation. In no other circumstance within the justice system is an individual, let alone an intellectually disabled individual, subjected to questions about pending litigation without the presence and assistance of the attorney who represents him in that matter. While clemency is not a judicial proceeding, the choice to deprive Mr. Bowles of his relevant counsel undermines notions of fairness in this process. *See e.g., Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 289 (1998) (Connor, J., concurring in part and concurring in the judgment) ("[S]some minimal procedural safeguards apply to clemency proceedings."); *Id.* at 292 (Stevens, J., concurring in part and dissenting in part) ("Our cases also support the conclusion that, if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.").

C. Mr. Bowles Was Deprived of His Counsel of Choice for Clemency

Mr. Bowles was deprived of his counsel of choice, the CHU, for the purposes of clemency. As the Supreme Court and the Eleventh Circuit have stated, the constitutional requirement of due process "has always included the right to the aid of counsel when desired and provided by the party asserting the right," *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *see also Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) (drawing an analogy between a civil litigant's due process right and criminal defendant's Sixth Amendment right to counsel of choice). It has been long recognized that the denial of one's counsel of choice is akin to the denial of due process. For example, as the Supreme Court said,

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that **such a refusal would be a denial of a hearing**, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added); *see also Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) ("[T]he right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement"). In this case, Mr. Bowles was not only denied his counsel of choice at the most critical stage of the clemency process – the clemency interview – but his counsel, the CHU, was also blocked at every stage from meaningfully participating in the process, despite extensive efforts to work within the Rules of Executive Clemency, which do not provide for the blanket denials FCOR and the Clemency Board asserted against the CHU.

D. FCOR and the Board Should Provide Mr. Bowles a Supplemental Clemency Interview After the Conclusion of His Pending Litigation, at Which He May Be Represented by the CHU

As FCOR and the Clemency Board are aware, clemency may appropriately be granted to individuals on the basis of their intellectual disability.[3] The Clemency Board and FCOR are unable to consider the information that the CHU has uncovered about Mr. Bowles's intellectual disability until after the conclusion of his intellectual disability litigation and only with the participation of the CHU.

The CHU requests an opportunity to present more information to FCOR and the Clemency Board about Gary Bowles, an intellectually disabled person. Allowing the CHU to advocate for its client, Mr. Bowles, would enable the Board and FCOR to hear directly from the CHU's witnesses or experts on the subject. This is the only way FCOR and the Board can fully consider Mr. Bowles's intellectual disability. The CHU would supplement the August 2, 2018, clemency interview of Gary Bowles with a detailed presentation at an additional interview or hearing if FCOR and the Clemency Board would permit such. We urge you all to consider a supplemental clemency interview at the conclusion of Mr. Bowles's intellectual disability litigation in the courts.

Respectfully submitted,

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818

[3] For example, Gov. Mel Carnahan of Missouri cited a death row inmate's intellectual disability, and the jury's lack of knowledge about these disabilities at the time of sentencing, when granting him clemency. *See* Clemency, Death Penalty Information Center, *available at* https://deathpenaltyinfo.org/clemency?did=126&scid=13 (last visited June 6, 2018). Likewise, Gov. Kenny C. Guinn of Nevada granted clemency for death-sentenced inmate Thomas Nevius and Gov. Foster of Louisiana granted clemency for death-sentenced inmate Herbert Welcome, both citing similar concerns following the United States Supreme Court's ban on the execution of the intellectually disabled. *Id*. Evidence of intellectual disabilities also factored in favor of clemency grants in the cases of Percy Walton in Virginia and Abelardo Arboleda Ortiz who had been federally sentenced. *Id.*

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Tallahassee Division
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APPENDIX[1]

[1] This Appendix is an attachment to the September 12, 2018, letter sent to the Florida Commission on Offender Review, care of S. Michelle Whitworth, from Mr. Bowles's federal counsel, Billy Nolas of the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida.

FLORIDA COMMISSION ON OFFENDER REVIEW
4070 Esplanade Way, Tallahassee, Florida 32399-2450

MELINDA N. COONROD
Commissioner/Chair

RICHARD D. DAVISON
Commissioner/Vice-Chair

DAVID A. WYANT
Commissioner/Secretary

March 26, 2018

Gary Bowles DC# 086158
Union C.I.
Death Row
7819 N. W. 228th Street
Raiford, Florida 32026-1000

Mr. Bowles:

The Florida Commission on Offender Review has been requested by the Governor's Office to conduct an investigation into the factors in your case relevant to commutation of sentence.

Please be advised that you are scheduled for a clemency interview at Union C.I. on August 2, 2018.

You and your attorney, Nah-Deh Simmons, who has been appointed as **Clemency Counsel** to represent you, will be given an opportunity to present written and/or oral statements of testimony on your behalf at this time with regard to commutation of your sentence. Mr. Simmons will be in contact with you in the near future.

Sincerely,

S. Michelle Whitworth
Capital Punishment Research Specialist
Clemency Investigations

Cc: Nah-Deh Simmons, Esq.

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street, Suite 4200
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June 21, 2018

The Office of Governor Rick Scott
c/o The Clemency Board
Florida Commission on Offender Review
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Gary Bowles
DOC No. 086158

Dear Clemency Board,

In 1999, Mr. Gary Bowles received the death sentence for which he remains incarcerated on death row. Throughout his life, Mr. Bowles has been slipping through the cracks of society. After suffering severe parental abuse and neglect during childhood, he fled home as a thirteen-year-old. He was continuously preyed upon. Sadly, the sexual exploitation he suffered was what allowed him to survive living on the streets as a youth.

There is strong evidence that Mr. Bowles is an intellectually disabled individual. Legal issues related to Mr. Bowles's intellectual disability are presently being litigated in the Circuit Court. *See State of Florida v. Gary Ray Bowles*, No. 1994-CF-12188 (Duval County Cir. Ct.). It is the position of clemency counsel Nah-Deh Simmons, state postconviction counsel Francis Jerome Shea, and federal counsel Billy H. Nolas, that given the pending litigation in Mr. Bowles's case, a clemency investigation and determination should proceed after the intellectual disability proceedings. This is a better use of resources and will be more helpful to the Governor, Board, and Commission. If the court ruling is in Mr. Bowles's favor, clemency proceedings will not be necessary. If clemency proceedings proceed, counsel will be able to make a more meaningful presentation after the evidence is developed and hearings are conducted in court. We also note that an evaluation of Gary Bowles by any mental health professional is inappropriate without the presence of counsel, given the potential implications of such an evaluation on his pending litigation.

Nevertheless, Mr. Bowles's clemency, state postconviction, and federal postconviction counsel jointly offer the following information about Mr. Bowles and a recommendation for clemency. The following presentation, while incomplete, demonstrates that clemency is appropriate for Mr. Bowles.

I. Gary Bowles's Traumatic Childhood

Gary Ray Bowles ("Gary") was born on January 25, 1962, in Clifton Forge, Virginia. Gary was the second child of the union of Frances Carol Bowles and Franklin William Bowles. Frances and Franklin were married on July 2, 1959, after lying about Frances's age to avoid the stigma of having their first child out of wedlock. Frances was only fifteen years old, and Franklin was twenty-one years old, when they married. Their first child, William Franklin Bowles ("Frank"), was born exactly seven months after their marriage, in Franklin's parents' home in West Virginia. Frank, now deceased, was Gary's only full-blood sibling.

Gary Bowles in his class photo from the second grade.

When Gary was born, his young parents were impoverished and living in West Virginia. They stayed with other family members, mostly Franklin's parents. Many of Gary's relatives were illiterate and primarily were subsistence farmers or coal miners. Franklin was one of ten siblings, many of who continued to live at their mother's house (Gary's paternal grandmother) well into adulthood. Most of Franklin's siblings were alcoholics, and Franklin himself abused alcohol. Many of Franklin's siblings were not able to care for their own children, and those children also lived in Franklin's mother's home.

When Frances was pregnant with Gary, on July 22, 1961, Franklin died from health complications in his lungs. He was only twenty-two years old. Franklin's death devastated Frances, who, at the age of seventeen, found herself a pregnant widow with an infant to care for. Family described her as being emotionally unwell. After Gary was born, Frances took Frank and Gary with her to live with her sister in Illinois.

Less than ten months after Gary's birth, Frances remarried. Bill Fields was her second husband, and a string of husbands would follow. Mr. Fields and Frances had two children, Pamela and David Fields, in 1963 and 1968, respectively. After Pamela's birth, in approximately 1965 when Gary was about three years old, Frances took Gary and his older brother Frank to their paternal grandmother's house, and she abandoned them there. For several years thereafter, Frances's whereabouts were unknown. Eventually, Gary's grandmother's health declined, and two of his aunts loaded six-year-old Gary and eight-year-old Frank onto a bus and sent them, alone, from West Virginia to Illinois.

Gary enrolled in the first grade in the fall of 1968 in Illinois. Life in Illinois with his first step-father was fraught with abuse and neglect. Frances drank heavily and was frequently gone in the evenings with other men. She regularly disappeared for days at a time. Bill Fields physically abused Frances, and their marriage was in constant tumult. The children—Frank, Gary, Pamela, and David—were caught in the midst of the unstable marriage, and Frank and Gary particularly were neglected by their parents. Mr. Fields was open about his preference for his own biological children, and he physically abused Frank and Gary throughout their childhood. The abuse was most often directed at Gary, even in Frank's opinion.

Frances utterly neglected Frank and Gary, and, from about the age of six years old onward, Gary was left running around in the streets in the evening without supervision. When he wasn't playing outside, Gary was abused by his stepfather. Bill Fields beat elementary-school-aged Gary and his brother Frank with belts, his fists, ice-cream paddles, whatever he could find. He threw Gary against walls. The beatings were daily and long. Once he got started, Bill Fields would beat the boys until he was too tired to continue. Gary suffered black eyes, bruises, and other physical signs of abuse. At one point, due to the abuse, Gary was removed from home and lived with a police officer for a short period of time. But he was then returned to home.

Gary Bowles, missing a tooth.

When Gary was about eight years old, he was sexually abused by an adult male employee of the YMCA. Gary's sexual trauma haunted him throughout his childhood, and he wet the bed at night until he was middle-school aged. Frances and Bill Fields separated in approximately 1972, when Gary was about ten years old. Shortly after their separation, Frances began dating Chet Hodges, who would become Gary's next stepfather. Frances, however, did not reveal to Chet for nearly a year after they met that she had any children. Frances actually began living with Chet before telling him about her children. Gary was twelve years old. Chet was an alcoholic, and was extremely abusive to Frances. Chet jerked Frances by her neck, stomped on her, and broke her arm. Frances was also an alcoholic, and the abuse by Chet caused her to attempt suicide.

Frances continued to neglect her children. At that time, in 1974, Gary usually stayed either with other people, in a nearby abandoned house, or the family's detached garage. During the Illinois winter, Gary continued lived in these structures without heat or running water. Frances did not care for the children, and they were left to fend for themselves for food and their other basic needs. Chet Hodges was even more abusive than Bill Fields, and he beat the children in alcohol-induced rages. Chet frequently beat Gary until his eyes were swollen shut. On one occasion, he threw Gary through a wall. In a particularly bad episode, Chet beat Gary with a hammer and a rock in the family's yard, and his brother Frank and his sister's husband fought Chet off of Gary. After the fight, Gary told his mother Frances she had to choose between him and Chet. She told him she chose Chet.

Gary was thirteen years old, and he left home for good.

II. Gary Bowles's Substance Abuse & Life as a Homeless Child Prostitute

A young Gary Bowles, left, holds a cake with his younger brother David. Gary's right eye is swollen shut with a black eye.

After suffering a severely abusive and neglectful childhood and after the rejection of his mother, Gary Bowles left home for the streets. The last day he attended school of any kind was in the eighth grade. A child who had been previously sexually abused by an older man, Gary spent his initial years on the street being victimized again and again. This began when Gary was thirteen years old. He was hitchhiking, and an approximately forty-to-fifty-year-old male stranger picked him up. The man held Gary at gun point, forced Gary to perform oral sex on him, and then performed oral sex on Gary.

Shortly after leaving home, Gary made his way to Louisiana with a friend whose father worked on an oil rig. The friend's father tried to get Gary a job on the oil rig, but was unable to help him once Gary's young age was discovered. Penniless and living on the streets hundreds of miles from his family, Gary began working as a child prostitute in New Orleans, when an older woman took him in. This older woman taught Gary how to use sex as a means of survival to provide for himself, and, before Gary was old enough to legally drive a car, he was working in a brothel.

In addition, Gary had already been exposed to substance abuse through his older brother. Beginning when Gary was between the ages of eight and ten years old, Frank showed him how to use inhalants, including glue, paint, and gasoline, to get high. Around this same time, Gary also learned to drink alcohol and smoke marijuana. Gary's substance abuse from an early age became so bad that in approximately January of 1975, just before his thirteenth birthday, Gary was hospitalized due to his

substance abuse.

Gary's struggles with substance abuse, since elementary school, were exacerbated by his homelessness and work as a child prostitute. He abused drugs and alcohol to cope with the horrors and struggles of his daily life. Gary was transient for all of his remaining teenaged years, and he bounced around Louisiana, Florida, and Georgia. As a teen in Georgia, Gary Bowles met a man named Ken White. Ken has been the only consistent source of support in Gary's life. Gary stayed with Ken periodically in his teens and twenties, while continuing to be primarily transient. Gary never found stable employment or housing, and he never married.[1]

III. Clemency is Appropriate for Gary Bowles

It was three more years after the time of Gary Bowles's penalty phase and death sentence before the Supreme Court of the United States recognized an Eighth Amendment prohibition on the execution of the intellectually disabled in *Atkins v. Virginia*, 536 U.S. 304 (2002). Further, at the time of Mr. Bowles's initial postconviction litigation, Florida Courts recognized a bright-line IQ score cutoff of 70 for an intellectual disability determination—which was later struck down by the United States Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Until his recent litigation, Mr. Bowles has not had a meaningful opportunity to ever litigate his intellectual disability.

Individuals with intellectual disabilities are between four to ten times more likely to be the victims of crimes compared with individuals without disabilities, and those with intellectual disabilities specifically are more likely to be the victim of violent crime.[2] However, individuals with intellectual disabilities and learning disabilities have long been over-represented in the criminal justice system. Some studies estimate that 55% of people with an intellectual or learning disability have some type of involvement with the criminal justice system within eight years of leaving high school.[3] Approximately 37% of juvenile offenders are estimated to be eligible for services under the Individuals with Disabilities Education Act (IDEA).[4] And compared with 2% to 3% of the general population, it is estimated that between 4% and 10% of incarcerated adults have intellectual disabilities.[5]

The foundation of the United States Supreme Court's decision in *Atkins* is the recognition by our society that intellectually disabled individuals have diminished personal culpability for their crimes and diminished capacity to understand the process they are subject to in the legal system. This is no different in the case of an individual facing the death penalty, and that is what makes their convictions unreliable and constitutionally infirm. Such persons have a limited ability to understand their constitution rights or to participate meaningfully in their own defense, even when their own lives are on the line. Because of their social deficits, their demeanor can convey a false sense of lack of remorse, and they are also more

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1 Gary Bowles's adolescent and adult life and his struggles can only be fully understood in the context of his intellectual disability. Because of the pending litigation in the Circuit Court on his intellectual disability claim, the narrative of Gary's life cannot be further expanded on at this time. This highlights, again, why his clemency investigation should be stayed until the conclusion of his pending litigation.

2 Leigh Ann Davis, *People With Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects* (Aug. 2009), The Arc, *available at* https://www.thearc.org/document.doc?id=3664 (last visited June 6, 2018).

3 *The State of Learning Disabilities* (2014), National Center for Learning Disabilities, *available at* https://www.ncld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf (last visited June 6, 2018).

4 *Id*.

5 Leigh Ann Davis, *People With Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects* (Aug. 2009), The Arc, *available at* https://www.thearc.org/document.doc?id=3664 (last visited June 6, 2018).

likely to please authority and thus confess to crimes they did not commit.[6] Thus, the *Atkins* Court recognized that evolving standards of decency could no longer permit the execution of the intellectually disabled, whose convictions are undermined by these concerns. It is also relevant that mental health professionals and organizations largely no longer support the death penalty for those with mental disabilities and illnesses.[7]

Florida courts have not yet ruled on whether Mr. Bowles's intellectual disability preclude his execution, but, at the very least, the risk his execution presents as violating the fundamental principle of *Atkins* and the Eighth Amendment should deeply concern this Clemency Board.

As this petition makes clear, Mr. Bowles's clemency investigation is necessarily incomplete in light of his pending litigation—litigation which could render a clemency proceeding moot if successful. However, if the clemency investigation proceeds, the risk of Mr. Bowles's unconstitutional execution justifies the Board granting clemency in his case. Indeed, intellectual disabilities have been the basis of grants of clemency in the past for death-sentenced individuals.[8]

Mr. Bowles's sentence should be commuted to a sentence of life imprisonment without parole.

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[6] For example, in Florida, Jerry Townsend, a life-sentenced individual, was convicted of six murders and one rape following his false confession to the crimes. In 2001, Mr. Townsend was exonerated through the use of DNA evidence. *See* The National Registry of Exonerations, *available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3697 (last visited June 6, 2018).

[7] *See* Am. Psychiatric Ass'n, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014), *available at* http://www.psychiatry.org/psychiatrists/search-directories-databases/policy-finder (last visited June 6, 2018) (stating position that "defendants shall not be sentenced to death or executed if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law").

See also Am. Psychological Ass'n, *Report of the Task Force on Mental Disability and the Death Penalty* (2005), *available at* https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf (last visited June 6, 2018) (outlining its recommendation to "prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability"); Mental Health Am., *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011), *available at* http://www.mentalhealthamerica.net/positions/death-penalty (last visited June 6, 2018) (declaring position that "defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law").

[8] For example, Gov. Mel Carnahan of Missouri cited a death row inmate's intellectual disability, and the jury's lack of knowledge about these disabilities at the time of sentencing, when granting him clemency. *See* Clemency, Death Penalty Information Center, *available at* https://deathpenaltyinfo.org/clemency?did=126&scid=13 (last visited June 6, 2018). Likewise, Gov. Kenny C. Guinn of Nevada granted clemency for death-sentenced inmate Thomas Nevius and Gov. Foster of Louisiana granted clemency for death-sentenced inmate Herbert Welcome, both citing similar concerns following the United States Supreme Court's ban on the execution of the intellectually disabled. *Id*. Evidence of intellectual disabilities also factored in favor of clemency grants in the cases of Percy Walton in Virginia and Abelardo Arboleda Ortiz who had been federally sentenced. *Id*.

Respectfully submitted,

/s/ Nah-Deh Simmons
Nah-Deh Simmons, Esq.
The Law Office of Nah-Deh Simmons Esq.
P.O. Box 41083
Jacksonville, FL 32203-1083
Phone: 904-545-9044
Clemency Counsel for Mr. Bowles

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818
Federal Counsel for Mr. Bowles

/s/ Francis Jerome Shea
Francis Jerome Shea, Esq.
Francis Jerome Shea, P.A.
644 Cesery Boulevard, Suite 250
Jacksonville, FL 32211
Phone: 904-399-1966
State Counsel for Mr. Bowles

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818 Fax 942-8809

June 21, 2018

The Office of Governor Rick Scott
c/o The Clemency Board
Florida Commission on Offender Review
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Gary Bowles
DOC No. 086158

Dear Clemency Board,

On October 19, 2017, state counsel for Gary Ray Bowles, in consultation with his federal counsel at the Federal Public Defender's Office, Capital Habeas Unit ("CHU"), timely filed a successive Rule 3.851 motion for postconviction relief in light of *Atkins v. Virginia, Moore v. Texas*, and *Hall v. Florida* in the Duval County Circuit Court. *See State of Florida v. Gary Ray Bowles*, No. 1994-CF-12188 (Duval County Cir. Ct.). This litigation is still pending. On March 26, 2018, clemency proceedings for Mr. Bowles began. Presently, his interview is scheduled for August 2, 2018.

After speaking with Ms. Michelle Whitworth, and Mr. Russell Gallogly, we were advised to submit a written request to have his scheduled interview postponed until the resolution of his pending intellectual disability claim. As counsel noted in their initial submission for Mr. Bowles provided with this request, if Mr. Bowles is successful in his pending litigation, clemency proceedings will be unnecessary. Further, due to this litigation, Mr. Bowles cannot make a full clemency presentation, including the evidence of his intellectual disability. Mr. Bowles's clemency interview and proceedings will be more meaningful after he is able to develop evidence of his disability in the Circuit Court.

We respectfully request that his clemency interview and proceedings be rescheduled until after his intellectual disability litigation has been resolved, should it still be necessary.

Respectfully submitted,

/s/ Nah-Deh Simmons
Nah-Deh Simmons, Esq.
The Law Office of Nah-Deh Simmons Esq.
P.O. Box 41083
Jacksonville, FL 32203-1083
Phone: 904-545-9044
Clemency Counsel for Mr. Bowles

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818
Federal Counsel for Mr. Bowles

/s/ Francis Jerome Shea
Francis Jerome Shea, Esq.
Francis Jerome Shea, P.A.
644 Cesery Boulevard, Suite 250
Jacksonville, FL 32211
Phone: 904-399-1966
State Counsel for Mr. Bowles

From: Heekin, Jack
To: Kelsey Peregoy
Cc: Michelle Whitworth - FCOR
Subject: RE: Capital Clemency - Gary Bowles, DC #086158
Date: Friday, June 22, 2018 4:56:38 PM

Ms. Peregoy,
Inmate Bowles' request to continue the clemency interview scheduled for August 2, 2018, has been denied. The clemency process is wholly separate and distinct from the successive legal challenges to his death sentence(s), and inmate Bowles has been appointed separate legal counsel to represent him in the clemency proceedings. You are welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration.

Sincerely,

Jack Heekin

From: Kelsey Peregoy <Kelsey_Peregoy@fd.org>
Sent: Friday, June 22, 2018 2:17 PM
To: Heekin, Jack <Jack.Heekin@eog.myflorida.com>
Cc: Billy Nolas <Billy_Nolas@fd.org>; Kimberly Sharkey <Kimberly_Sharkey@fd.org>; NahDeh Simmons (newsi2179@gmail.com) <newsi2179@gmail.com>; Legal Group_Inbox (legal@attorneyshea.com) <legal@attorneyshea.com>
Subject: Capital Clemency - Gary Bowles, DC #086158

Mr. Heekin,

My office represents Gary Ray Bowles, an individual on Florida's death row. Recently, a clemency investigation was initiated on Mr. Bowles, and we have previously been in contact with Ms. Whitworth at FCOR about this.

I am writing to request that Mr. Bowles's clemency interview be rescheduled. Mr. Bowles has strong evidence that he is intellectually disabled and ongoing litigation is currently pending on this issue in the circuit court, and proceeding with a clemency interview at this point in time would unnecessarily complicate and interfere with Mr. Bowles's court proceedings. Ms. Whitworth indicated that we should contact the Governor's office to reschedule Mr. Bowles's clemency interview, which is presently set for August 2, 2018.

If you are not the appropriate person for this request, I would appreciate if you would advise me as to who in the Governor's office handles these matters.

More information about Mr. Bowles is detailed in the attachments to this email, including the initial submission for clemency and a detailed request to reschedule the clemency interview on behalf of Mr. Bowles. This submission is joined by Mr. Bowles's clemency counsel Nah-Deh Simmons, his state counsel Jerry Shea, and his federal counsel Billy Nolas. These materials are also being mailed to your office.

Best,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
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(850) 942-8818 Ext. 1330

Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

RANDOLPH P. MURRELL
Federal Public Defender

Reply to Tallahassee Division
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818 Fax 942-8809

July 26, 2018

Florida Commission on Offender Review
c/o S. Michelle Whitworth
4070 Esplanade Way
Tallahassee, FL 32399
Phone: (850) 488-2952
Fax: (850) 488-0695

Re: Gary Bowles
DOC No. 086158

Dear Commissioners & Clemency Interviewers:

On Monday, July 23, 2018, Nah-Deh Simmons, clemency counsel retained by the Florida Commission on Offender Review ("FCOR"), sent a letter to FCOR as a courtesy, notifying them that Mr. Bowles's clemency co-counsel and federal counsel, the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida ("CHU"), would jointly appear and conduct Mr. Bowles's August 2, 2018, clemency interview with Mr. Simmons. In addition, this letter specified that Dr. Jethro Toomer, an experienced psychologist who diagnosed Mr. Bowles with intellectual disability and has been retained by the CHU, would also be present to offer the Commissioners and other relevant clemency interviewers information concerning Mr. Bowles's diagnosis of intellectual disability. Mr. Bowles's intellectual disability should be a significant consideration in clemency proceedings. His intellectual disability is also a matter currently being litigated in judicial proceedings.

On Tuesday, July 24th, Mr. Simmons was informed through a phone call with Ms. S. Michelle Whitworth, Capital Research Specialist for FCOR, that neither Dr. Toomer nor the CHU—Mr. Bowles's clemency co-counsel and federal counsel—would be allowed to participate in Mr. Bowles's clemency interview. Ms. Whitworth indicated that not only would the CHU not be allowed to participate, but the CHU would also be barred from being present at Mr. Bowles's clemency interview.

This letter is intended to address this communication, and to ask the Commissioners and FCOR to reconsider this course of action.

I. Background

Gary Ray Bowles was convicted and sentenced to death in 1999 following a second sentencing proceeding in the Duval County Circuit Court. *See Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2001). Through counsel, Mr. Bowles pursued state and federal postconviction relief. *See Bowles v. State*, 979 So.

2d 182, 184 (Fla. 2008); *Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA (M.D. Fla. Dec. 23, 2009). On September 2, 2015, the Duval County Circuit Court appointed attorney Francis Jerome Shea as state court counsel. *See State v. Bowles*, 1994-CF-12188 (Duval County, Fla. Sept. 3, 2015).

On September 26, 2017, the CHU filed an unopposed motion to be appointed as Mr. Bowles's federal counsel. *See Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA, ECF No. 32 (M.D. Fla. Sept. 26, 2017). On September 27, 2017, Federal District Court Judge Henry Lee Adams granted the CHU's motion. *See Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA, ECF No. 33 (M.D. Fla. Sept. 27, 2017).

After appointment, the CHU worked in conjunction with state court counsel Mr. Shea, in developing and filing a successive postconviction motion in the Duval County Circuit Court on October 19, 2017. *See State v. Bowles*, 1994-CF-12188 (Duval County, Fla. Oct. 19, 2017). This motion raised and explained that Mr. Bowles is intellectually disabled and is therefore ineligible for execution under the Supreme Court of the United States's rulings in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). Mr. Bowles was initially diagnosed as intellectually disabled by Dr. Jethro Toomer who, at the CHU's request, evaluated Mr. Bowles in 2017. Due to Mr. Bowles's pending postconviction motion and the CHU's integral role in filing the motion, the CHU sought and received permission from the federal district court to appear on Mr. Bowles's behalf with Mr. Shea in state court. *See Bowles v. Sec'y, Florida Dep't of Corr.*, No. 3:08-cv-791-HLA, ECF No. 36 (M.D. Fla. December 6, 2017). The CHU and Mr. Shea have been actively litigating Mr. Bowles's intellectual disability claim in state circuit court since October of 2017, which is still pending. Mr. Bowles's intellectual disability diagnosis, and the presentation of this diagnosis in his pending postconviction motion, is supported both by his trial counsel, attorney Bill White, and prior postconviction counsel, attorney Frank Tassone.

In March 2018, FCOR, at the direction of the Governor's office, began a clemency investigation on Mr. Bowles. FCOR investigator Russ Gallogly contacted Billy H. Nolas, Chief of the CHU, shortly after this investigation began. Since this notification, the CHU and Mr. Simmons have worked cooperatively on Mr. Bowles's clemency proceedings, including more than a dozen communications and meetings, the joint preparation and submission of Mr. Bowles's clemency petition (sent via email and mail to FCOR and the Office of the Governor on June 21 & 22, 2018), and have jointly conferred with Mr. Bowles concerning his upcoming clemency interview.

II. Mr. Bowles Has a Right to the CHU's Assistance in Clemency Proceedings

The CHU's appointment to Mr. Bowles's litigation is pursuant to 18 U.S.C. § 3599, which prescribes, in relevant part:

> [E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and **proceedings for executive or other clemency as may be available to the defendant**.

18 U.S.C. § 3599 (e) (emphasis added).

The plain text of § 3599 indicates that it is appropriate for federal counsel, such as the CHU, to proceed as clemency counsel. Indeed, federal courts across the country have recognized the appropriateness of § 3599 representation for the purpose of clemency. *See, e.g., Harbison v. Bell*, 556 U.S. 180, 185-86 (2009) ("Because state clemency proceedings are 'available' to state petitioners who obtain representation pursuant to subsection (a)(2) [of § 3599], the statutory language indicates that appointed counsel's authorized representation includes such proceedings."); *Holiday v. Stephens*, 136 S. Ct. 387, 387-88 (2015) (Sotomayor, J., concurring) (explaining that the Supreme Court has indicated "the interests of justice required the appointment of attorneys who would represent [the petitioner] in that [clemency] process"); *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014) ("Once federal habeas counsel has been appointed . . . counsel is required to represent the prisoner 'throughout every subsequent stage of available judicial proceedings,' including 'all available post-conviction process" in state and federal court (such as state clemency proceedings)."); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 474 (3rd Cir. 2015) ("§ 3599(e) [requires] the district court to appoint an attorney, already appointed for purposes of seeking federal habeas relief, to represent the petitioner in those proceedings as well."); *Battaglia v. Stephens*, 824 F.3d 470, 474 (5th Cir. 2016) (indicating that "attorneys appointed under § 3599 are obligated to represent their clients in state clemency proceedings"); *Baze v. Parker*, 632 F.3d 338, 342 (6th Cir. 2011) ("There is no question, then, that . . . the district court is authorized to appoint counsel to assist Baze in preparing his state clemency application."). Mr. Bowles has a federal statutory right to representation by the CHU in his clemency proceedings, and FCOR should not interfere with this right. CHU lawyers throughout the United States routinely appear as counsel or co-counsel in clemency proceedings.

Mr. Bowles also has a due process interest in his clemency proceedings. *See, e.g., Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1330-31 (11th Cir. 2015) (recognizing "a due process interest in the context of state clemency proceedings for death row inmates"); *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014); *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2014). Critical to the realization of his due process interest is Mr. Bowles's access to the knowledge and resources of the CHU.

FCOR and the Clemency Board would benefit from a joint presentation from Mr. Bowles's retained clemency counsel Mr. Simmons and the CHU. The CHU has had extensive contacts with Mr. Bowles, has developed a productive working relationship with him, and has invested hundreds of hours developing never-before-found evidence of Mr. Bowles's intellectual disability and a fuller narrative of his life history. Indeed, Mr. Bowles's clemency petition was created jointly by the CHU and Mr. Simmons on the basis of evidence the CHU uncovered and knowledge that the CHU provided. Just as the *Harbison* Court recognized, a client's postconviction counsel frequently develops the very information that makes for a persuasive clemency presentation:

> Indeed, as the history of this case demonstrates, the work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application. Harbison's federally appointed counsel developed extensive information about his life history and cognitive impairments that was not presented during his trial or appeals. . . . Harbison's case underscores why it is "entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells." In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the "fail-safe" of our justice system.

Harbison, 556 U.S. at 193-94 (internal citations omitted). As a practical matter, regardless of the quality of Mr. Simmons's clemency representation, Mr. Bowles's clemency presentation would suffer without the assistance of the CHU, who is in the same position as counsel in *Harbison*.

In fact, Mr. Bowles has a stronger need for the CHU's presence in his clemency proceedings than the petitioner in *Harbison* because Mr. Bowles has ongoing litigation that could be impacted by his clemency statements and presentation. It is imperative that the CHU be present to help its intellectually disabled client navigate the questioning inherent in the clemency interview process. To deprive Mr. Bowles of his counsel for this litigation endangers him because, under the Rules of Executive Clemency, the state attorney—opposing counsel in his intellectual disability litigation—is entitled to a copy of everything Mr. Bowles says during his clemency interview. *See* Rule 15(G), Rules of Executive Clemency ("Upon request, a copy of the actual transcript of any statements or testimony of the inmate relating to a clemency investigation **shall be provided to the state attorney**, the inmate's clemency counsel, or victim's family.") (emphasis added), available at https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf (last visited July 25, 2018).

Simply put, Mr. Simmons cannot provide adequate representation without the CHU. Further, without participation of the CHU, the Board will be deprived of crucial information, including information from Dr. Toomer and other relevant evidence that the CHU has developed. This will impede a meaningful assessment for purposes of clemency.

III. Conclusion

Mr. Bowles has a statutory right to the CHU's assistance in clemency, as well as a due process and Eighth Amendment interest in clemency, which is only vindicated with the CHU's participation in clemency proceedings. Mr. Bowles's unique circumstance as a result of his ongoing intellectual disability litigation only further complicates his ability to meaningfully participate in the clemency process without the assistance of the CHU. To be clear, ,Mr. Bowles is endangered without the CHU's participation in his clemency interview. Further, the clemency presentation to FCOR and the Clemency Board will only be aided by the CHU's participation.

Mr. Bowles's clemency counsel, Mr. Simmons, has worked cooperatively and in conjunction with the CHU for Mr. Bowles's clemency interview and his clemency petition. Mr. Simmons, like Mr. Bowles, desires the CHU's presence. FCOR should reconsider its decision and permit the CHU to participate fully in Mr. Bowles's clemency interview, and FCOR should additionally allow Dr. Jethro Toomer to speak to the Commissioners about Mr. Bowles's intellectual disability. Refusing to hear from the CHU or the CHU's expert is akin to refusing to consider Mr. Bowles's intellectual disability. FCOR should reconsider its decision to prohibit this meaningful presentation. We urge that you reconsider.

Respectfully submitted,

/s/ Nah-Deh Simmons
Nah-Deh Simmons, Esq.
The Law Office of Nah-Deh Simmons Esq.
P.O. Box 41083
Jacksonville, FL 32203-1083
Phone: 904-545-9044
Clemency Counsel for Mr. Bowles

/s/ Billy H. Nolas
Billy H. Nolas, Esq.
Chief, Capital Habeas Unit
Office of the Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
Phone: 850-942-8818
Federal Counsel for Mr. Bowles

From: Whitworth, Michelle
To: NahDeh Simmons
Cc: Wallace, Rana; Kimberly Sharkey; Billy Nolas
Subject: FW: Gary Bowles: Clemency Interview (8/2/18)
Date: Monday, July 30, 2018 9:19:54 AM

Mr. Simmons,
The joint request to reconsider emailed to me on Thursday, July 26th, has been considered and is denied. Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration.

Sincerely,

S. Michelle Whitworth
Commission Investigator Supervisor
Florida Commission on Offender Review
(850) 921-2570 direct line
(850) 487-1175 main line
(850) 414-6903 fax

FCOR Website www.fcor.state.fl.us/

MISSION STATEMENT- The Commission on Offender Review is committed to ensuring public safety and providing victim assistance through the post prison release process.

From: Kelsey Peregoy [mailto:Kelsey_Peregoy@fd.org]
Sent: Thursday, July 26, 2018 5:19 PM
To: Whitworth, Michelle <MichelleWhitworth@fcor.state.fl.us>
Cc: Kimberly Sharkey <Kimberly_Sharkey@fd.org>; NahDeh Simmons (newsi2179@gmail.com) <newsi2179@gmail.com>; Billy Nolas <Billy_Nolas@fd.org>; Wallace, Rana <RanaWallace@fcor.state.fl.us>
Subject: Gary Bowles: Clemency Interview (8/2/18)

Ms. Whitworth,

I've just spoken with Ms. Wallace (cc-ed), who indicated that any communication we have for clemency purposes should go only to you and that you will forward that communication to the Office of the Governor, where the decisions will be made.

As you know, we have been working with Mr. Simmons (cc-ed) for Mr. Bowles's clemency. With Mr. Simmons we submit the attached letter, describing Mr. Bowles's specific litigation circumstances and his rights as they relate to this process. Jointly with Mr. Simmons, we ask you, the Commissioners, and the Board to reconsider the decision that my office (Mr. Bowles's clemency co-counsel & federal counsel) is barred from attending his clemency interview.

Our client is intellectually disabled, and our assistance is crucial to his ability to communicate effectively to the Commissioners and ultimately the Clemency Board.

We are relying on Ms. Wallace's representation that you will forward this email and the attachment

to the appropriate people and ask that you do so promptly. This is a time-sensitive matter, as Mr. Bowles's clemency interview is scheduled for August 2nd.

Please communicate to us your decision on this matter, and please let us know if we should be in communication with anyone else about this request.

Thank you,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org
(850) 942-8818 Ext. 1330

From: Kimberly Sharkey
To: "MichelleWhitworth@fcor.state.fl.us"
Cc: "RanaWallace@fcor.state.fl.us"; "newsi2179@gmail.com"; Billy Nolas (Billy_Nolas@fd.org); Kelsey Peregoy (Kelsey_Peregoy@fd.org)
Subject: RE: Gary Bowles: Clemency Interview (8/2/18)
Date: Monday, July 30, 2018 12:36:00 PM

Ms. Whitworth,

I appreciate you responding to our request for reconsideration. As you know, the CHU and Mr. Simmons are trying to provide information to FCOR and the Governor's Office to assist with the consideration of clemency for Mr. Bowles while the issue of Mr. Bowles's intellectual disability is pending before the circuit court.

Would you please let me know whether the decision to prohibit the CHU and Dr. Toomer from speaking at the clemency interview was a decision that was made by you? If it was made by another person or people, please let me know which individual(s) contributed to the decision.

Thank you.
Kimberly Sharkey

****
Kimberly Sharkey
Litigation Coordinator/Attorney - Capital Habeas Unit
Federal Public Defender's Office
227 N. Bronough Street - Suite 4200
Tallahassee, Florida 32301-1300
Tel: (850) 942-8818, ext. 1328
Fax: (850) 942-8809
kimberly_sharkey@fd.org

From: Whitworth, Michelle <MichelleWhitworth@fcor.state.fl.us>
Sent: Monday, July 30, 2018 9:20 AM
To: NahDeh Simmons <newsi2179@gmail.com>
Cc: Wallace, Rana <RanaWallace@fcor.state.fl.us>; Kimberly Sharkey <Kimberly_Sharkey@fd.org>; Billy Nolas <Billy_Nolas@fd.org>
Subject: FW: Gary Bowles: Clemency Interview (8/2/18)

Mr. Simmons,
The joint request to reconsider emailed to me on Thursday, July 26th, has been considered and is denied. Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration.

Sincerely,

S. Michelle Whitworth
Commission Investigator Supervisor
Florida Commission on Offender Review
(850) 921-2570 direct line
(850) 487-1175 main line

(850) 414-6903 fax

FCOR Website www.fcor.state.fl.us/

MISSION STATEMENT- The Commission on Offender Review is committed to ensuring public safety and providing victim assistance through the post prison release process.

From: Kelsey Peregoy [mailto:Kelsey_Peregoy@fd.org]
Sent: Thursday, July 26, 2018 5:19 PM
To: Whitworth, Michelle <MichelleWhitworth@fcor.state.fl.us>
Cc: Kimberly Sharkey <Kimberly_Sharkey@fd.org>; NahDeh Simmons (newsi2179@gmail.com) <newsi2179@gmail.com>; Billy Nolas <Billy_Nolas@fd.org>; Wallace, Rana <RanaWallace@fcor.state.fl.us>
Subject: Gary Bowles: Clemency Interview (8/2/18)

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As you know, we have been working with Mr. Simmons (cc-ed) for Mr. Bowles's clemency. With Mr. Simmons we submit the attached letter, describing Mr. Bowles's specific litigation circumstances and his rights as they relate to this process. Jointly with Mr. Simmons, we ask you, the Commissioners, and the Board to reconsider the decision that my office (Mr. Bowles's clemency co-counsel & federal counsel) is barred from attending his clemency interview.

Our client is intellectually disabled, and our assistance is crucial to his ability to communicate effectively to the Commissioners and ultimately the Clemency Board.

We are relying on Ms. Wallace's representation that you will forward this email and the attachment to the appropriate people and ask that you do so promptly. This is a time-sensitive matter, as Mr. Bowles's clemency interview is scheduled for August 2nd.

Please communicate to us your decision on this matter, and please let us know if we should be in communication with anyone else about this request.

Thank you,

Kelsey Peregoy

Kelsey Peregoy
Attorney - Capital Habeas Unit
North District of Florida
Federal Public Defender's Office
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
kelsey_peregoy@fd.org
(850) 942-8818 Ext. 1330

Application for Executive Clemency

To the Honorable Rick Scott, Governor of Florida:

COMES NOW, the applicant, Gary R. Bowles, by and through the undersigned attorney and petitions the Governor for his order under Florida Statute § 940.03, commuting the applicant's sentence of death to imprisonment for a term of years to life imprisonment.

Gary R. Bowles is a Fifty-Six year old man who has spent the last twenty-four years of his life in prison. In 1994 he was sentenced to death for the murder of Walter Hinton in State v. Booker 16-1994-CF-1218. Before his arrest in this case Mr. Bowles had several previous convictions of various felonies all of which are related to his continuous battle of substance abuse relating to drugs and alcohol. His mental health history and history of substance abuse was not well documented and articulated in the mitigation phase of these proceedings and has not been reiterated throughout this process. Executing Mr. Bowles after twenty-four years imprisonment would be a disproportionate double punishment for the same alleged offense. When a person's execution comes so long after the offense of which they are convicted, there is not enough deterrent effect to

provide an adequate basis for the punishment. When the condemned citizen is both executed and held in prison with this act looming over him for more than a generation, the punishment is far in excess of the suffering resulting from the act of which they were convicted, with the effect that there is no adequate retributive basis for the punishment.

It would be different if Mr. Bowles had filed frivolous pleadings to delay his supposed fate. However, at no point during these proceedings were there ever any accusations made of Mr. Bowles prolonging the proceedings. He subsequently cannot be blamed for participating in the process our society has defined to assure that the death penalty is practiced consistently with our established fundamental values.

Gary R. Bowles has lived more than half of his adult life in prison in a maximum Security prison contemplating his own execution. His recourse in the judicial system has not been exhausted. There is a pending claim in the Circuit Court of Duval County relating to Mr. Bowles and a future court date will be upcoming to address that pending claim.

Mr. Bowles' punishment has included solitary confinement under the threat of death for more than thirty years. Mr. Booker has not abused the judicial process but has properly sought to vindicate his meritorious claims that his conviction and sentence conflict with the law of the land.

This punishment would not have been unusual in England or America in 1776 or

1791. Whatever legal consequences one may attribute to the Constitution's recognition of the existence of the death penalty, in the abstract does not apply to the novel punishment the State of Florida seeks to inflict on this petitioner. A state government would have to work hard to find a more cruel punishment than to allow a prisoner to suffer the anguish of awaiting a sentence of death that could be carried out relatively swiftly, but to make him live with that debilitation uncertainty for more than twenty plus years while his uncertain fate is pondered by the system.

It will not do to say that the review process in capital cases is for Mr. Bowles' benefit: he did not choose to be sentenced to death; he did not choose to retain the death penalty; yet hedged it about with substantive and procedural guaranties that can result in delays of the proportions they have reached in his case. We in the courts, the legal profession, and the public at large have made these contradictory demands on the individual judicial officers whose dockets include capital cases.

We are estopped to deny the novel cruelty of executing Gary R. Bowles after twenty-four years or more for pursuing the very avenues we told him were the proper means of vindicating his constitutional rights.

Quoting the Judicial Committee of the Privy Council in *Pratt v. Attorney-General*, 2 A.C. 1, 4 All ER 769 (1993),"when a sovereign chooses to retain the death penalty and also adopts certain procedures for assuring itself that it is not carried out in error, the

condemned person should not be faulted for employing the means the sovereign has told him to use if he wants to save his life; if the sovereign cannot process his case within a reasonable time, it is the sovereign who bears the blame and may therefore be denied the dubious prize of its citizen's head.

Pratt's refusal to blame the citizen who lawfully asserts his rights under the system that seeks to execute him is especially applicable in Gary R. Bowles' case:

From the record, Counsel is not aware of any dilatory acts on behalf of Mr. Bowles or any of his appointed and or retained counsel.

The facts remained that Mr. Bowles pursued appeals during the period he has been on death row which our society considers a necessary guaranty of reliability in imposing the death penalty in the first place.

Many of the doctrines, decisions, and statutory limitations on the courts' power to grant relief form convictions and sentences are intended not to determine ultimate outcomes, but to preserve the state's role in the federal system, not to make the enforcement of the law harsher against the individual, but to keep the federal government for overwhelming the several states. Nothing in these doctrines, decisions, and statutory limitations and no decision denying relief on the basis of them has any negative implication concerning the authority of the Governor to grant clemency or concerning the appropriateness of doing so in any particular case. To the contrary, in *Harreara v. Collins*, 506 U.S. 390 (1993), the Supreme Court of the United States relied on the power of the chief executives to

exercise clemency as a reason why the federal courts should deny relief in certain situations.

If this power is not used, the rights of our citizens are in jeopardy, because the federal courts are relying on chief executives to remedy wrongs and to mitigate harsh results from which judges do not feel they have the authority to provide relief. This is one such case. Executing Mr. Bowles after imprisoning him for more than twent-four plus years while he has pending litigation in the court would not be a penalty known to the common law or to the framers. By separating the punishment from the crime for more than a generation, it simply fails to come within the deterrent rationale.

With all of that being articulated, it is understood from the outset that executive clemency is a matter of grace rather than a right. It is our opinion that there are compelling reasons for this grace to be extended to the case of .Gary R. Bowles The facts of this case have clearly demonstrated, in addition to the mental health mental health history of Gary R. Bowles that these actions resulting in the death of Walter Hinton and others were those of an individual clearly under the influence of drugs and alcohol. Though Mr. Bowles' background indicates a person who was deprived in many areas, the pending litigation will allow the courts to be aware of the extent, degree and reach of that deprivation and the areas of his life affected by it.

Mr. Bowles came from an impoverished disadvantaged background in which he ultimately dropped out of school. His formal education came through the streets. During

his journey he became addicted to alcohol and drugs. His battle with substance abuse and other illnesses was not stressed during the pendency of the previous proceedings.

Since his sentencing, Mr. Bowles has made several changes in his life. First, he has been in an environment free from the use and abuse of drugs and alcohol. More importantly however, instead of simply doing nothing, he has continued to address his mental health and the concerns and issues that put him in his current position.

Mr. Bowles is very remorseful about what occurred and wants to give back to society for what he did.

Before the Executive Clemency Board is now a man who is remorseful. This is also a man who has been ravaged by mental illnesses.

Before the board is an example of where humanity in our society can err and cause a great tragedy. However, also before this board is an example of the type of person who can be scrutinized, examined and can even be helpful, once we have the opportunity to litigate the pending claim, that can assist us in solving some of the riddles as to why we human beings have among us those capable of the acts in this case.

We have in short, an opportunity to ensure that the risk of discovering what would be the best rehabilitation, to find the best means of future correction to prevent this tragedy from happening in anyone's lifetime. Even though a commutation to the sentence of life carries with it the risk of failure that all of our tools will not work, that we will not be able to create new tools for rehabilitative services, even though it may be a slim chance,

it would still be an achievement worth attempting and seeking.

Mr. Bowles still currently has pending litigation in the Circuit Court of Duval County. Attached to this is a brief synopsis of the pending claim that has to be adjudicated by the Court. I submit that Mr. Bowles is an individual willing to show us the investment will be well worth it. Thus we respectfully request that Mr. Bowles case be extended until the hearing in the Circuit Court of Duval County and revisited to allow the updated information to be presented to the board for consideration.

As the Board was formally notified in the initial clemency submission on June 22, 2018, Mr. Bowles is intellectually disabled. His intellectual disability is the subject of pending circuit court litigation. I do not represent Mr. Bowles in his intellectual disability litigation, and I am not familiar with the issues involved in such litigation. I have needed the assistance of the Capital Habeas Unit (CHU) of the Federal Public Defender's office, Mr. Bowles's counsel in the intellectual disability litigation, to present critical information to the Board. However, the CHU was not allowed to participate in Mr. Bowles's clemency interview, which hindered the presentation of information regarding Mr. Bowles's intellectual disability and life history. I ask that Mr. Bowles be given the opportunity to appear before the Board again after the conclusion of his present litigation and that the Board reconsider its decision to prevent the CHU from meaningfully participating in the clemency process on behalf of Mr. Bowles. I am attaching a letter (with appendix) from the CHU dated September 12, 2018. I understand that the Board

will only consider communications from me, and therefore attach this letter for the Board's consideration. I agree with the position of the CHU and urge the Board to consider the letter which is attached to this submission.

Respectfully Submitted,

/S/Nah-Deh Simmons
NAH-DEH SIMMONS, ESQUIRE
FBN: 38188
P.O. Box 41083
Jacksonville, FL 32203
Ph: (904) 545-9044
Primary email: newsi2179@gmail.com
ATTORNEY FOR DEFENDANT

Application for Executive Clemency

To the Honorable Rick Scott, Governor of Florida:

1. COMES NOW, the applicant, Steven T. Booker, by and through the undersigned attorney and petitions the Governor for his order under Florida Statute § 940.03, commuting the applicant's sentence of death to imprisonment for a term of years to life imprisonment.
2. Steven T. Booker is a Sixty-two year old man who has spent the last thirty-six years of his life in prison. In 1978 he was sentenced to death for the murder of Lorine Harman in State v. Booker 01-1977-CF232-A. Before his arrest in this case Mr. Booker had several previous convictions of various felonies all of which are related to his continuous battle of substance abuse relating to drugs and alcohol. His mental health history and history of substance abuse was well documented and articulated in the mitigation phase of these proceedings and has been reiterated throughout this process.
3. Executing Mr. Booker after thirty-six years imprisonment would be a disproportionate double punishment for the same alleged offense. When a person's execution comes so long after the offense of which they are convicted, there is not enough deterrent effect to provide an adequate basis for the

punishment. When the condemned citizen is both executed and held in prison with this act looming over him for more than a generation, the punishment is far in excess of the suffering resulting from the act of which they were convicted, with the effect that there is no adequate retributive basis for the punishment. It would be different if Mr. Booker had filed frivolous pleadings to delay his supposed fate. However, at no point during these proceedings were there ever any accusations made of Mr. Booker prolonging the proceedings. He subsequently cannot be blamed for participating in the process our society has defined to assure that the death penalty is practiced consistently with our established fundamental values.

Steven T. Booker has lived more than half of his adult life in prison in a maximum Security prison contemplating his own execution. His recourse in the judicial system has for the most part has been exhausted. There have been several moves to set an execution date, however there were subsequently continued and Mr. Booker has remained on death row.

Mr. Booker's punishment has included solitary confinement under the threat of death for more than thirty years. Mr. Booker has not abused the judicial process but has properly sought to vindicate his meritorious claims that his conviction and sentence conflict with the law of the land.

This punishment would not have been unusual in England or America in 1776 or 1791. Whatever legal consequences one may attribute to the Constitution's recognition of the existence of the death penalty, in the abstract does not apply to the novel punishment the State of Florida seeks to inflict on this petitioner. A state

government would have to work hard to find a more cruel punishment than to allow a prisoner to suffer the anguish of awaiting a sentence of death that could be carried out relatively swiftly, but to make him live with that debilitation uncertainty for more than thirty years while his uncertain fate is pondered by the system.

4. It will not do to say that the review process in capital cases is for Mr. Booker's benefit: he did not choose to be sentenced to death; he did not choose to retain the death penalty; yet hedged it about with substantive and procedural guaranties that can result in delays of the proportions they have reached in his case. We in the courts, the legal profession, and the public at large have made these contradictory demands on the individual judicial officers whose dockets include capital cases.

5. We are estopped to deny the novel cruelty of executing Steven T. Booker after thirty-six years or more for pursuing the very avenues we told him were the proper means of vindicating his constitutional rights.

6. Quoting the Judicial Committee of the Privy Council in *Pratt v. Attorney-General*, 2 A.C. 1, 4 All ER 769 (1993),"when a sovereign chooses to retain the death penalty and also adopts certain procedures for assuring itself that it is not carried out in error, the condemned person should not be faulted for employing the means the sovereign has told him to use if he wants to save his life; if the sovereign cannot process his case within a reasonable time, it is the sovereign who bears the blame and may therefore be denied the dubious prize of its citizen's head.

7. Pratt's refusal to blame the citizen who lawfully asserts his rights under the system that seeks to execute him is especially applicable in Steven T. Booker's case:

8. From the record, Counsel is not aware of any dilatory acts on behalf of Mr. Booker or any of his appointed and or retained counsel.

9. The facts remained that Mr. Booker pursued appeals during the period he has been on death row which our society considers a necessary guaranty of reliability in imposing the death penalty in the first place.

10. Many of the doctrines, decisions, and statutory limitations on the courts' power to grant relief form convictions and sentences are intended not to determine ultimate outcomes, but to preserve the state's role in the federal system, not to make the enforcement of the law harsher against the individual, but to keep the federal government for overwhelming the several states.

11. Nothing in these doctrines, decisions, and statutory limitations and no decision denying relief on the basis of them has any negative implication concerning the authority of the Governor to grant clemency or concerning the appropriateness of doing so in any particular case.

12. To the contrary, in *Harreara v. Collins*, 506 U.S. 390 (1993), the Supreme Court of the United States relied on the power of the chief executives to exercise clemency as a reason why the federal courts should deny relief in certain situations.

13. If this power is not used, the rights of our citizens are in jeopardy, because the federal courts are relying on chief executives to remedy wrongs and to mitigate

harsh results from which judges do not feel they have the authority to provide relief. This is one such case.

14. Executing Mr. Booker after imprisoning him for more than thirty-six years would not be a penalty known to the common law or to the framers. By separating the punishment from the crime for more than a generation, it simply fails to come within the deterrent rationale.

15. With all of that being articulated, it is understood from the outset that executive clemency is a matter of grace rather than a right. It is our opinion that there are compelling reasons for this grace to be extended to the case of Steven T. Booker.

16. The facts of this case have clearly demonstrated, in addition to the mental health mental health history of Steven T. Booker that these actions resulting in the death of Lorine Harman were those of an individual clearly under the influence of drugs and alcohol. Though Mr. Booker's background indicates a person who was deprived in many areas, he ultimately brought forth and showed he's an individual with intelligence and an ability to articulate his thoughts.

17. Mr. Booker came from an impoverished disadvantaged background in which he ultimately dropped out of school. His formal education came through the streets and subsequently teaching himself through reading books. During his journey he became addicted to alcohol and drugs. His battle with substance abuse is articulated in the records through his various stays in mental hospitals. Mr. Booker also served in the U.S. Army and records indicate that he was hospitalized and subsequently discharged because of mental disorders. There are no records of prior acts of violence while Mr. Booker was enlisted in the Army.

18. Since his sentencing, Mr. Booker has made several changes in his life. First, he has been in an environment free from the use and abuse of drugs and alcohol. More importantly however, instead of simply doing nothing, he started expressing himself through his found gift of writing. Mr. Booker's writing has been so inspirational, they were published in several publications. Mr. Booker put together a series of poetry that won awards and subsequently published books about his writings. "The Reharkening" and "TUG" which were released in 2014. In addition to his literary activities, Mr. Booker teaches other inmates how to read.

19. Mr. Booker is very remorseful about what occurred and wants to give back to society for what he did. He requested to volunteer his services as an instructor to the other inmates and continues to assist others in any way he can in addition to his writings. Due to his age, Mr. Booker is in prison and most of his family has predeceased him.

20. During his time, he has received various visits including a visit from the victim's relative Ms. Page Zyromski. Furthermore, Ms. Zyromski does not believe that it would be appropriate for Mr. Booker to be put to death. Her strong Christian beliefs have enabled her and the rest of the victim's family to forgive Mr. Booker and embrace the value in Mr. Booker as he attempts to work within the confines of a man sentenced to die.

21. Before the Executive Clemency Board is now a man who is unusually intelligent and articulate. This is also a man who has been ravaged by mental illness although psychiatrists have differed as to the degree.

22. Before the board is an example of where humanity in our society can err and cause a great tragedy.

23. However, also before this board is an example of the type of person who can be scrutinized, examined and can even be helpful through his articulate abilities in solving some of the riddles as to why we human beings have among us those capable of the acts in this case.

24. We have in short, an opportunity to under the risk of discovering what would be the best rehabilitation, to find the best means of future correction to prevent this tragedy from happening in anyone's lifetime. Even though a commutation to the sentence of life carries with it the risk of failure that all of our tools will not work, that we will not be able to create new tools for rehabilitative services, even though it may be a slim chance, it would still be an achievement worth attempting and seeking. I submit that Mr. Booker is an individual willing to show us the investment will be well worth it. Thus we respectfully request that Mr. Booker sentence is commuted to life imprisonment.

Respectfully Submitted,

/S/Nah-Deh Simmons
NAH-DEH SIMMONS, ESQUIRE
FBN: 38188
P.O. Box 41083
Jacksonville, FL 32203
Ph: (904) 545-9044
Primary email: newsi2179@gmail.com

ATTORNEY FOR DEFENDANT

STATE OF FLORIDA
OFFICE OF EXECUTIVE CLEMENCY

RON D. DeSANTIS, GOVERNOR, CHAIRMAN
ASHLEY B. MOODY, ATTORNEY GENERAL
JIMMY T. PATRONIS JR, CHIEF FINANCIAL OFFICER
NICOLE FRIED, COMMISSIONER OF AGRICULTURE
and CONSUMER SERVICES

S. MICHELLE WHITWORTH, COORDINATOR

4070 Esplanade Way, Tallahassee, Florida 32399-2450
Phone: (850) 488-2952 Fax: (850) 488-0695
Toll Free: 1-800-435-8286

June 11, 2019

Mr. Nah-Deh Simmons, Esquire
Post Office Box 41083
Jacksonville, Florida 32203

RE: Gary Ray Bowles DC#086158
Executive Clemency #D200335

Dear Mr. Simmons,

After review of the clemency investigation material provided by the Florida Commission on Offender Review in accordance with the Rules of Executive Clemency, the Governor has denied clemency for your client, Gary Ray Bowles.

A death warrant signed on June 11, 2019, concludes the clemency process.

Sincerely,

S. Michelle Whitworth
Coordinator

cc: Governor Ron DeSantis
Ms. Carolyn Snurkowski, Assistant Deputy Attorney General
Mr. Steve Dawson, Florida Commission on Offender Review
Mr. Robert Friedman, Esquire
Inmate Gary Ray Bowles, DC#086158

RON DESANTIS
GOVERNOR

June 11, 2019

Warden Barry Reddish
Florida State Prison
PO Box 800
Raiford, Florida 32083

Re: Execution Date for Gary Ray Bowles, DC#086158

Dear Warden Reddish:

Enclosed is the death warrant to carry out the sentence of Gary Ray Bowles, as well as a certified copy of his judgment and sentence. I have designated the week beginning at 12:00 noon on Monday, August 19, 2019, through 12:00 noon on Monday, August 26, 2019, for the execution. I have been advised that you have set the date and time of execution for Thursday, August 22, 2019, at 6:00 p.m.

This letter is incorporated into and made a part of the death warrant identified above.

Sincerely,

Ron DeSantis
Governor

Enclosures

FILED
2019 JUN 11 PM 4:31
TALLAHASSEE, FLORIDA

THE CAPITOL
TALLAHASSEE, FLORIDA 32399 • (850) 717-9249

cc:

Honorable Charles Canady
Chief Justice
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399

Honorable Mark H. Mahon
Chief Judge, Fourth Judicial Circuit
501 West Adams St.
Jacksonville, Florida 32202

Secretary Mark Inch
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

Carolyn Snurkowski
Assistant Deputy Attorney General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-0001

Robert S. Friedman
Karin L. Moore
Capital Collateral Regional Counsel - North
1004 Desoto Park Drive
Tallahassee, FL 32301

Michelle Whitworth, Coordinator
Office of Executive Clemency
4070 Esplanade Way
Tallahassee, Florida 32399-2450

Gary Ray Bowles, DC#086158
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026-4400

DEATH WARRANT
STATE OF FLORIDA

WHEREAS, GARY RAY BOWLES, on or about the 16th day of November, 1994, murdered Walter J. Hinton; and

WHEREAS, GARY RAY BOWLES, on the 17th day of May, 1996, pleaded guilty to the crime of first degree murder, and on the 7th day of September, 1999, was sentenced to death for the murder of Walter J. Hinton; and

WHEREAS, on the 11th day of October, 2001, the Supreme Court of Florida affirmed the death sentence of GARY RAY BOWLES; and

WHEREAS, on the 14th day of February, 2008, the Supreme Court of Florida affirmed the trial court order denying GARY RAY BOWLES's Petition for Writ of Habeas Corpus, and on the 29th day of January, 2018 affirmed the trial court order denying his Motion for Collateral Relief; and

WHEREAS, on the 23rd day of December, 2009, the United States District Court for the Middle District of Florida denied GARY RAY BOWLES's federal Petition for Writ of Habeas Corpus, and the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court on the 18th day of June, 2010; and

WHEREAS, it is anticipated that by the date set by this warrant, all further postconviction motions and petitions filed by GARY RAY BOWLES will have been denied, and affirmed on appeal; and

WHEREAS, executive clemency for GARY RAY BOWLES as authorized by Article IV, Section 8(a), of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency is not appropriate; and

WHEREAS, attached hereto is a certified copy of the record of the conviction and sentence pursuant to section 922.052, Florida Statutes.

NOW, THEREFORE, I, RON DESANTIS, as Governor of the State of Florida and pursuant to the authority and responsibility vested in me by the Constitution and Laws of

Florida, do hereby issue this warrant, directing the Warden of the Florida State Prison to cause the sentence of death to be executed upon GARY RAY BOWLES in accord with the provisions of the Laws of the State of Florida.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capital, this 11th day of June, 2019.

GOVERNOR

ATTEST:

SECRETARY OF STATE

FILED
2019 JUN 11 PM 4:31

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, the attorney of record, and the state represented by B de la Rionda, 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 9168 (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

Form CCFB0A

Defendant GARY RAY BOWLE[illegible] 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.

RE-RECORD Book 9408 Pg 782 1

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

Book 9408 Pg 783 (1)

RE-RECORD

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. **The Crime for Which the Defendant is to be Sentenced was Committed for Financial Gain.**

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. **The Crime for which the Defendant is to be Sentenced was Especially Heinous, Atrocious or Cruel.**

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

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. <u>The Defendant suffered from extreme emotional disturbance at the time of the murder</u>.

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. **Background and/or Personal History of the Defendant.**

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

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
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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DUVAL COUNTY, FL
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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

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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.

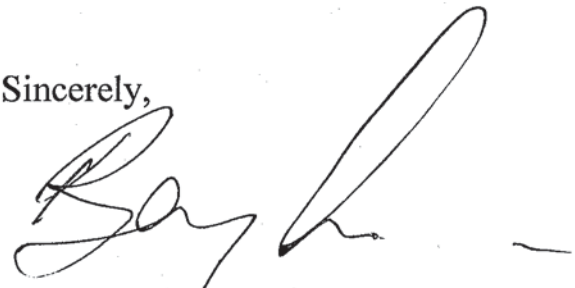
On the Shipley Abstractions, he received an abstraction age of 11 years, 0 months. Mr. Bowles also performed below average in categorical fluency, in the 12th percentile for his age range, and letter naming, in the 6th percentile, on the Test of Verbal Conceptualization and Fluency. This indicates mild 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

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 Ruper 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 Donis took the boys to Rainelle W.VA, put them on a bus to

Kankakee, ILL. 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 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 K 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 C546072830180.

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

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

CASE NO.: 1994-CF-12188
DIVISION: CR-A

STATE OF FLORIDA,

vs.

GARY RAY BOWLES,

Defendant.

CASE MANAGEMENT HEARING

taken on

Monday, July 8, 2019,

before the Honorable Bruce Anderson, Judge of the Circuit Court, in Courtroom No. 508, at the Duval County Courthouse, Jacksonville, Florida, as reported by Cindy M. Griffis, Registered Professional Reporter and Florida Professional Reporter.

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APPEARANCES:

BERNIE DE LA RIONDA, ESQUIRE,
Assistant State Attorney, Fourth Judicial Circuit, and
CHARMAINE MILLSAPS, ESQUIRE,
Office of the Attorney General,
appearing on behalf of the State.

KARIN MOORE, ESQUIRE, Lead Attorney,
Assistant Capital Collateral Regional Counsel - North, and
TERRI BACKHUS, ESQUIRE, Co-Counsel,
Office of Federal Public Defender,
appearing on behalf of the defendant.

ALSO PRESENT:
ELIZABETH SPIAGGI, ESQUIRE,
Assistant Capital Collateral Regional Counsel North,
09:02AM
appearing on behalf of the defendant.

- - -

I-N-D-E-X

- - -

P-R-O-C-E-E-D-I-N-G-S

July 8, 2019 9:00 a.m.

- - -

THE COURT: We're going to go on the record now in the case of State of Florida vs. Gary Ray Bowles, this Case No. 1994-CF-12188, and this case is here this morning pursuant to a death warrant signed by Governor DeSantis. The defendant's execution date is scheduled for August 22nd, 2019. The Florida Supreme Court has ordered this court to complete all post-conviction proceedings by July 17th, 2019.

The State of Florida is represented here today by Bernie de la Rionda, who is the Assistant State Attorney here from the Fourth Judicial Circuit.

And then, counsel, are you Ms. Millsaps or Ms. Donahue?

MS. MILLSAPS: I'm Ms. Millsaps.

THE COURT: All right. Ms. Millsaps, Charmaine Millsaps from the Office of the Attorney General is present here today as well for the State of Florida.

Counsel, are there any other lawyers for the State that would be present here today either in person or by phone?

MR. DE LA RIONDA: No, Your Honor, not at this time. Ms. Loizos was going to try to be here, but she's not here right now.

THE COURT: And then the defendant here today 09:01AM is being represented by Karin Moore, who is the Assistant Capital Collateral Regional Counsel North; is that correct?

MS. MOORE: Yes, sir.

THE COURT: And then, Ms. Moore, your 09:01AM cocounsel is Terri Backhus, who is an Assistant Federal Public Defender; is that correct?

MS. BACKHUS: That's correct, Your Honor.

THE COURT: All right. Welcome. Glad to see you-all again.

09:02AM Then I also received a notice of appearance on Wednesday on behalf of the defendant from Elizabeth -- I don't know if I'm pronouncing the name correctly, is it Spiaggi?

MS. SPIAGGI: Yes, Your Honor.

09:02AM THE COURT: Did I say it correctly?

MS. SPIAGGI: Yes, you did.

THE COURT: Okay. It's Spiaggi. And you're also an Assistant Capital Collateral Regional Counsel North attorney; is that correct?

09:02AM MS. BIAGI: That is correct, Judge.

THE COURT: All right. Is there any other attorneys present at your table that would be speaking on the record that needs to be placed on the record?

09:02AM MS. MOORE: No, Your Honor.

THE COURT: Okay. Are there -- is either side aware of anyone that wants to be present by phone here today, attorneys, counsel, cocounsel, anyone of that nature?

09:02AM MS. MOORE: No one for the defense, Your Honor.

MR. DE LA RIONDA: No one for the State, Your Honor.

THE COURT: Okay. And, Ms. Moore, I'll let

09:02AM you address this, unless Ms. Backhus would like to address it, but all three of you all are present here today on behalf of the defendant, and the defendant is not present here today. Do you agree that his presence is not required because this is a

09:02AM case management conference and not an evidentiary hearing?

MS. MOORE: That's correct, Your Honor.

THE COURT: Okay. And also, I'd like to advise counsel that our court reporter may not know

09:03AM who all of you-all are, she may be learned more --

she may be able to recognize you easier throughout the course of the hearing today, but I think it's best to keep a good record, so if any of you-all that are speaking on behalf of either of the respective sides, please identify yourself for the record as you make whatever arguments or statements you want to make on the record, so I appreciate you-all doing that.

09:03AM

09:03AM

09:03AM

09:03AM

09:04AM

We're here this morning pursuant to this court's scheduling order that was entered on June 17th, 2019, and the amended scheduling order that I entered June 26th, 2019, setting forth today's case management conference on the Defendant's Amended Rule 3.851 Motion for Post-Conviction Relief in light of Moore v. Texas, Hall v. Florida, and Atkins v. Virginia.

Today's case management conference is being held pursuant to the Florida Supreme Court case of Huff v. State, and that case is found at 622 So.2d 982, it's a Florida Supreme Court case from 1993, and the Court will be hearing argument today from both the State and the defense for the purpose of determining whether an evidentiary hearing is required, and also to hear legal argument relating to the Defendant's Amended Rule 3.851 motion.

The Court has read and reviewed both the Defendant's Amended Rule 3.851 motion, as well as the State's answer to the successive 3.851 motion, and so I am prepared in that regard, and I've also reviewed over the past several wakes the case law being cited by both sides in their respective pleadings.

09:04AM

And so, at this time, do you-all have any agreement procedurally as to how this hearing should go today in terms of who is going to argue first and who is going to be sandwiched, and then the rebuttal at the end?

09:04AM

MS. MOORE: Well, Your Honor, I would presume that I would argue first, it's our motion.

09:04AM

THE COURT: That was my presumption as well.

State, do you-all agree the defense would go first in this hearing?

MR. DE LA RIONDA: Yes, Your Honor.

THE COURT: So, I haven't set any time limit for the hearing today. I've set aside the entire day. This is the only case on my calendar today, Judge Weatherby is covering the remainder of my CR-A calendar, and so I'm not putting any time limit on your arguments here today. I know both --

09:05AM

09:05AM

al of you-all are very experienced and

knowledgeable and practice at the highest levels of professionalism and civility, so I'm going to allow you to have as much time as you need to make your record and make your arguments for both sides, but
09:05AM I do want to keep the this organized, and I don't want to have a ping pong match going back and forth, so I'm going to let the defense make their argument, and then I'm going to give the State an opportunity to make their argument as long as you
09:05AM need to make it, and then I'm going to give the defense the last word through rebuttal argument, and then the argument is going to be completed.

Is that acceptable to both sides?

MR. DE LA RIONDA: Yes, Your Honor.

09:05AM MS. MOORE: Yes, sir.

THE COURT: Okay.

MS. MOORE: Your Honor, I would ask leave for Ms. Backhus to address particular issues too.

THE COURT: Okay. So there is some issues
09:06AM that you all are splitting up or is she going address of them?

MS. MOORE: No, no, Your Honor, just to add anything that she believes I've left out.

THE COURT: Okay. All right. All right.
09:06AM Defense is going to proceed first?

MS. MOORE: Yes. May I use the podium?

THE COURT: You may use the podium. I think our court reporter -- Ms. Moore, I think our court reporter would appreciate it if you use that podium, just because it's closer to her, and you can slide that podium a little closer to the jury box, that gives the State an opportunity to see you.

09:06AM

And this is for the benefit of both sides. After reading both the Amended Rule 3.851 motion and the State's answer, there appears to be a disagreement, at least on paper, I'm sure it's going to play out during the arguments, whether the defendant's post-conviction motion was timely filed, and it appears based upon the State's answer they're maintaining it was not timely filed, and so in your respective arguments today, I would ask that you would first address the timeliness issue first, and then whatever other issues you want to address after that is fine, but I really would like to hear timeliness issue addressed first by both sides.

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MS. MOORE: Certainly, Your Honor.

THE COURT: All right. You may proceed whenever you're ready.

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MS. MOORE: Karin Moore for Gary Bowles.

Your Honor, intellectual disability is an absolute bar to execution. I would argue that Blanco, Rodriguez and Harvey violate the Eighth 09:07AM Amendment and Fourteenth Amendment due process clause, and that we plead it sufficiently. The facts are not conclusively rebutted by the record, and so we're entitled to a hearing.

To address the timeliness issue, Your Honor --

09:07AM THE COURT: Ms. Moore, let at the ask you a couple of questions. I promise I'll let you address all -- everything you want to address, but there is a couple of questions I really need you to answer at the beginning. I'm going to ask these of 09:08AM you, and then I'm going to give you time to answer, and whatever other arguments you want to make, but do you agree, Ms. Moore, that the Florida Rule of Criminal Procedure 3.203(d)(4) enacted in 2004 applies to Mr. Bowles' case?

09:08AM MS. MOORE: I do, Your Honor.

THE COURT: Okay. And do you also agree that under that rule Mr. Bowles was permitted to amend his filed post-conviction motion not ruled on before October 1st, 2004 to include intellectual 09:08AM disability claim within 60 days of October 4, 2004?

MS. MOORE: I agree, Your Honor, but I would also ask the Court to consider the exception provided in 3.203, I believe it's subsection (f) that allows a late filing for good cause, and those 09:08AM are some of the issues that I will address in my argument, Your Honor.

THE COURT: So I would assume that, based upon your response, that you do not agree that Mr. Bowles 3.203 claim based upon intellectual 09:09AM disability is waived if wasn't filed by that deadline? You don't agree with; correct?

MS. MOORE: I do not.

THE COURT: And I do have a few other questions. Ms. Moore, do you agree that the 09:09AM defendant filed his initial Motion for Post-Conviction Relief on December 9th, 2002, and the court did not rule on that motion until August 12th, 2005?

MS. MOORE: The record supports that, Your 09:09AM Honor, I agree.

THE COURT: And do you also agree that the time limit in Rule 3.203(d)(4) -- (d)(4)(c) is applicable to defendant, and beginning October 1st, 2004, he had 60 days to amend his pending Rule 09:09AM 3.851 motion to include a claim of intellectual

disability?

MS. MOORE: I agree that's what the rule says.

THE COURT: Okay. I know you're going to make argument that there is good cause to provide exception --

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MS. MOORE: Yes, sir.

THE COURT: -- but do you agree that's what the rule is?

And then, Ms. Moore, do you also agree that the defendant failed to amend to raise his claim of intellectual disability for the first time until October 19th, 2017?

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MS. MOORE: That is correct, Your Honor.

THE COURT: Ms. Moore, do you agree that the previous Florida Supreme Court decision confirming summary denial of a defendant's post Hall and post Atkins claims as untimely under 3.203 would be controlling in this court? I'm referring specifically to Blanco v. State, at 249 So.3d 536, a Supreme Court decision from 2018, Rodriguez vs. State, 250 So.3d 616, Florida Supreme Court decision from 2016, and Harvey, that's H-a-r-v-e-y, Harvey v. State, at 260 So.3d 906, another Florida Supreme Court decision from 2018, that that's cases specifically are controlling on this court in the

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Bowles' case?

MS. MOORE: I would argue that those cases exist, and they stand for what you recited, but I would also argue that they violate the Federal Constitution.

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THE COURT: Are you -- is it your argument that they're not controlling on this trial court, that I can just ignore them and set them aside?

MS. MOORE: Your Honor, I would say seize the day, um, that there are higher constitutional issues here, so I would urge you to find that they are unconstitutional under the Eighth and Fourteenth due process clause. And I know I'm asking a lot --

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THE COURT: Ms. Moore, let me ask -- I have another question to ask. I'm going to let you address all that, but do you -- can you make any argument to this court that the facts of Mr. Bowles' case are in any way distinguishable from the facts in the Florida Supreme Court decision in Blanco, Rodriguez, and Harvey?

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MS. MOORE: Your Honor, I will address that in detail, but I would argue that Walls was decided on October 20th of 2016, which made Hall retroactive to Florida, found it to be of constitutional

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significance, um, and that Mr. Bowles had one year from October 20th, '16 to file his ID claim, and he did, he filed it on October 19th of 2017. So I would say that Walls is the trigger, not Atkins, um, for reasons I'll discuss in a moment.

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THE COURT: Why is there good cause that exists in this case that would explain away or excuse Mr. Bowles' failure to file a post-conviction motion based upon intellectual disability before the Walls case came out?

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MS. MOORE: Well, if we go back to Atkins, Atkins left to the individual states the right to shape the laws, um, as far as the standards to be used, um, but to be informed by the scientific community, the appropriate scientific community. Our court in Cherry decided that 70 was an absolute the cutoff.

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So, after Atkins and under Cherry, if Mr. Bowles had filed a claim, um, it would have -- he would have had to have alleged, I have been found to have a IQ of 80 by Dr. McMahon in '95, um, so he would have alleged a disqualifying fact under the three prongs for intellectual disability, under Cherry, and under Florida law, and under the Florida Statute, so he could not do that, it would

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have been struck, so he's damned if he does and he's damned if he doesn't. Um, so Cherry would have prevailed, he would have been denied any relief based on his 80 IQ by Dr. McMahon, and he would not have been able to raise the Hall issues until Hall was decided, and Walls determined that-- our Florida Supreme Court determined that Hall was retroactive. So, he would have lost in this court in 2005 if he filed an intellectual disability claim that alleged that Dr. McMahon had found his IQ to be 80, because the hard cutoff was 70.

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THE COURT: Ms. Moore, you used the phrase seize the day earlier --

MS. MOORE: I did.

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THE COURT: -- and I guess to somehow justify my ignoring or setting aside the Blanco, that's B-l-a-n-c-o, Rodriguez and Harvey decisions from the Florida Supreme Court as it concerns constitutional issues. But, Ms. Moore, do you agree that when an issue has been decided or resolved by the Florida Supreme Court that this trial court is bound to adhere to that Florida Supreme Court ruling when considering similar issues?

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MS. MOORE: I understand that, Your Honor, and

I understand stare decisis, I understand that, but we have a duty for Mr. Bowles to make a record in this court and for future courts, um, and specifically I'm talking about Federal Court, um, and this issue has not been decided by the federal courts, and so I have pled that, um, and lots of unjust and unconstitutional laws have been overturned over the years, over the centuries by dissenting opinions that come into favor, um, and by trial judges that say, Under these facts, I don't believe this is correct.

So, I'm not asking you to ignore the law, Your Honor, I'm saying that I believe the law is wrong, um, and this is a mechanism that we have in state court, we must exhaust in state court, um, and I would like to make my record for this court, the Florida Supreme Court --

THE COURT: I'm not going to foreclose you from making the record, you have as much time as you need, I just wanted to get those questions out there and get addressed by you as we get -- enter into the argument. So I'm going to ask you, then, ask you this final question, and I'm going to let you make your record. Can you explain to my why there is good cause to make a time exception to the

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deadlines already imposed by Rule 3.203 under the Florida Rules of Criminal Procedure?

MS. MOORE: Your Honor, I would argue to you that we first became involved in this case three months ago, my office CCRC-North. Mr. Bowles has had a series of post-conviction lawyers. Um, Mr. Tassone, back after Atkins was decided, um, and after Moore v. Texas and Hall were decided could have filed the motion for relief, but he didn't. Um, the State has argued that under 3.851, ineffective assistance of counsel that post-conviction counsel doesn't lie, can't be heard, but under 3.203, I think it can be heard, um because Mr. Tassone's failure to raise the claim has prejudiced Mr. Bowles, um, and this intellectual disability that we believe exists would be an absolute bar to his execution.

So, we believe that there is good cause here, and that there should never be a waiver of this type of constitutional right to stop disqualification. Under Roper, if someone didn't file for exception to the death penalty because their client was under 18 at the time of the offense, um, the Eighth Amendment and due process would not allow that defendant to be executed, and

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it's the same thing here, um, so there is good cause.

THE COURT: Okay. Anything further?

MS. MOORE: Yes, sir.

09:18AM THE COURT: All right. You may proceed.

MS. MOORE: But I won't take all day, I promise.

THE COURT: No, I'm going give you as much time as you need.

09:18AM MS. MOORE: Your Honor, as I've said, intellectual disability, a finding by this court or any court, would be an absolute bar to Mr. Bowles' execution. And notwithstanding Blanco, Rodriguez, and Harvey, we would argue that the execution of

09:19AM Mr. Bowles would violate the Eighth Amendment and the Fourteenth Amendment due process clause. We have pleaded sufficient facts that are not conclusively rebutted by the record, and would ask this Court for a hearing.

09:19AM First, as to why we are not time barred. Again, it's an absolute bar, intellectual disability. In 2002 the United States Supreme Court first held that execution of the intellectually disabled violates the Eighth

09:19AM Amendment in Atkins v. Virginia, 536 U.S. 304. 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
09:19AM 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
09:20AM the reliability and fairness of capital proceedings against intellectually disabled defendants. And that's Atkins at 306, 307.

Mr. Bowles' motion is timely for four reasons. His intellectual disability is a categorical bar to
09:20AM execution to the extent of the Florida Supreme Court's holdings in Rodriguez, Blanco, um, and Harvey foreclosed relief to individuals like Mr. Bowles, they violate the United States Constitution.

09:20AM Um, his motion is timely under 3.851(d)(2)(b), because he could have only filed after the Florida Supreme Court's decision in Walls v. State making Hall v. Florida retroactive to him.

And that his claim is timely because he can
09:21AM establish good cause, as we have discussed under

Rule 3.203(f).

As to the first argument -- the first of four arguments, 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 fault, just as it would be illegal to execute a person who was convicted of committing a murder as a 15 year old and who failed to raise an Eighth Amendment challenge at the appropriate time -- we're referring to Roper v. Simmons, 543 U.S., at 568 and 569 -- or to execute a person who was convicted of rape, but not murder, and failed to raise the appropriate challenge under Kennedy v. Louisiana, so, too, it would be illegal to execute an intellectually disabled who failed to raise his claim at the appropriate time.

In State ex rel. Clayton v. Griffith, 457 S.W.3d 735 and 757, the Missouri Supreme Court held, If petitioner is intellectually disabled, then Eighth Amendment makes him ineligible for execution. If a 14-year-old had failed to raise his age at trial or in post-trial proceedings then it would 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.

The State argues in its response that in actual innocence cases the Supreme Court has held that an unjustifiable delay in bringing an actual innocence claim, while not an absolute bar to relief, is a fact to be considered in evaluating the claim. I would argue that actually that some people should not be executed, and I fear that the State is advocating that actually and some people be executed.

Notwithstanding any waiver or provision of Florida law, the Eighth Amendment requires the persons facing the most severe sanction have a fair opportunity to show that the Constitution prohibits their execution. And that's Hall, Your Honor, and also Walls v. State, at 213 So.2d 348, and Justice Perry in his concurring opinion. She states, More than fundamental fairness and clear manifest injustice the risk of executing a person who is not constitutionally able to be executed trumps any other consideration that this court looks to when determining if a subsequent decision of the United States Supreme Court should be applied. The Eighth

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Amendment's categorical bar in executing intellectually disabled individuals does not give way to state procedural rule, rather the procedure must give way to the constitutional prohibition.

09:23AM Because Mr. Bowles, who is categorically ineligible for execution under our claim, his claim cannot be defaulted or waived and this Court should find this motion timely and hold a hearing.

As to Rodriguez, Blanco and Harvey, we would 09:24AM ask you to depart respectfully, um, from those precedents, because they contravene the United States Constitution, the right to notice, the right to present a full and fair defense, in this case an absolute barred execution.

09:24AM Um, Mr. Bowles' conviction and death sentence became final when the U. S. Supreme Court denied his cert petition on June 17th, 2002. Florida Statute 921.137 was enacted in 2001, which barred the execution of the intellectually disabled. And 09:25AM then in 2002, the Atkins' decision came down from United States Supreme Court. Atkins left to the states how to implement the constitutional restriction, and, thus, how to define, how to raise a meritorious Atkins' based claim.

09:25AM Litigants were constrained by the statutory

definition in Florida of what intellectual disability was. At that time Florida had a hard cutoff of 70, two standard deviations from the mean score on the intelligence test. And I'm citing Cherry v. State, 959 So.2d 702 and 712, which was a 2007 decision. Um, so that was a hard cutoff of 70.

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The Florida Supreme Court's decision in Blanco found that an individual like Mr. Bowles who failed to raise his intellectual disability claim prior to the specific ruling by the Florida Supreme Court of 70 in Cherry v. State is time barred. Individuals like Mr. Bowles were entitled to rely on the plain meaning interpretation of the statute establishing the 70 IQ, and then the Florida Supreme Court's edict that 70 was a hard cutoff.

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Mr. Bowles was not on notice prior to Hall and Walls, um, that he should have filed a claim based on Atkins, or anytime thereafter, because his score was an 80 as determined by Dr. McMahon in 1995. Notice and a reasonable opportunity to be heard are critical due process, Your Honor, it's fundamental fairness. Justice Powell in Ford v. Wainwright, 477 U.S. 399, 424, a 1986 case and its concurring opinion, that Mr. Bowles could potentially suffer

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the ultimate loss of his life because he failed to meet a procedural requirement when he could not have been on notice that he was eligible for release because of his IQ score in excess of what
09:27AM the statute in Cherry limited violates his due process rights.

And in Mathews v. Eldridge, at 424 U.S. 319, 348 through 349, a 1976 case, the court held, The essence of due process is the requirement that a
09:27AM person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it.

So, our position is, is that before Walls found Hall retroactive any ID claim with an 80 IQ
09:28AM would have been found, um -- or would have been summarily denied.

THE COURT: Ms. Moore, weren't these arguments made in Blanco, Rodriguez and Harvey?

MS. MOORE: They are, Your Honor, and I am --
09:28AM I'm saying that the Fourteenth Amendment and the Eighth Amendment should trump the Florida Supreme Court's rulings. And to the extent of Blanco and Rodriguez foreclose individuals like Mr. Bowles from obtaining even a review of their ID claims in
09:28AM Florida, this violates the prescription by the

U. S. Supreme Court in Atkins that requires such individuals at least to have an opportunity to present evidence of their intellectual disability. Citing to Hall here, Your Honor, at 576 U.S. 724, quoting, "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."

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Individuals who are categorically ineligible for execution, like Mr. Bowles as we've claimed, cannot be left by states without a forum to at least have that claim heard. And that -- we would argue that that contravenes the spirit and the holdings in Atkins and Hall, and the Florida Supreme Court's holding that Hall is to be given retroactive effect.

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And as the Supreme Court in Hall recognized, states are left with the task of implementing the constitutional restriction in Atkins, but they must do so in compliance with the Eighth Amendment. 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 in Atkins v. Virginia, We hold that the Constitution, what

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restricts the State's power to take the life of any intellectually disabled individual can mean an arbitrary later created procedural requirement, and citing to Moore vs. Texas, 137 S.Ct. at 1048.

09:30AM Rodriguez, Blanco and Harvey create a procedural impediment requiring that an Atkins' claim had been made with an IQ score that would have been fatal to the claim back in 2005 when Mr. Tassone had this case in post-conviction. And 09:30AM that's based on the 80 IQ score determined by Dr. McMahon in 1995. Before they can have their intellectually disability claim reviewed on the merits or seek the benefit of Hall, ah, available to Florida litigants after Walls, it creates an 09:30AM arbitrary and unacceptable risk that an intellectually disabled person will be executed.

Your Honor, Mr. Bowles' motion is timely under 3.851(d)(2)(b), because he could not have filed for before the decision in Hall v. Florida and Walls v. 09:31AM State, which expanded the category of offenders who are ineligible for execution, as I've stated. Um, 3.851(d)(2)(b) provides for the timeliness of a successive Rule 3.851 motion, where the fundamental constitutional right asserted was not stabled 09:31AM within the period provided for in subdivision

(d)(1), and has been held to apply retroactively.

In Mr. Bowles' motion, in part, based on his IQ score of 74 on the WAIS-IV, which is the more current, and our experts would say the more reliable IQ test. That's in our motion, Your Honor, as part of the appendix at page 26.

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Um, only under Hall would this IQ score legally qualify to establish his intellectual disability. Before Hall, and before Walls holding Hall retroactive, the 74 would not have qualified under the first prong of the intellectual disability test.

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When the Florida Supreme Court decided Atkins, it announced a new substantive rule of constitutional law that was necessarily retroactive. However, because the law in Florida indicated that only IQ scores of 70 or below were qualifying under Cherry was not until the U. S. Supreme Court decided Hall v. Florida that individuals like Mr. Bowles' IQ scores between 70 and 75 had a viable legal claim for intellectual disability. Although Hall expanded the range of IQ scores that could establish that an individual is ineligible for execution, it wasn't until Walls that the Florida Supreme Court determined that

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Mr. Bowles could file his Rule 3.851 motion. And the Florida Supreme Court issued its opinion in Walls on October 20, 2016, and Mr. Bowles filed his 3.851 successor with the claim of intellectual
09:33AM disability on October 19th, 2017, within the one year period after Halls -- after Walls was decided.

THE COURT: Ms. Moore, that's a similar fact pattern that we have in Blanco, Rodriguez and Harvey; correct?

09:33AM MS. MOORE: Yes, sir. And we would argue that Mr. Bowles couldn't have filed under the existing law in Florida before Walls ruled Hall retroactive.

Under Rule 3.203, which we've all agreed applies here, this Court ordered -- in fact, on
09:34AM March 5th Judge Schemer ordered that 3.203 does apply here. We're not arguing it doesn't, um, but it's time limits. Under (f), though, a claim authorized under this rule is waived if not filed in the court in the time requirements for filing
09:34AM set out in this rule unless good cause is shown for the failure. So we would argue good cause exists under 3.203.

And determining good cause for Rule 3.203, it's not defined in the rule. We have to look to
09:34AM the statutory construction, um, and cases

interpreting statutes. In Roe v. State, at 394 So.2d 1059, the Florida, I'm not sure which DCA it was, stated, When construing the court rules, the principles of statutory construction apply. Thus, while good cause is not defined by 3.203, the interpretation of good cause in other parts of the rules which affect motions such as this are instructive.

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In State v. Boyd, 846 So.2d, 458 and 459 Florida Supreme Court 2003 case, good cause was discussed, ah, in this way: We define good cause in re Estate of Goldman, finding that it is a substantial reason, one that affords a legal excuse, or cause moving the court to its conclusion, not arbitrary or contrary to all the evidence, and not mere ignorance of the law, hardship on petitioner, and reliance on another's advice.

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In Boyd the court considered the argument that good cause was for an untimely filing because Boyd was transferred to another prison and his legal had not arrived, was granted relief.

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Mr. Bowles could not have raised a successful intellectual disability under Walls until Walls gave him that avenue to satisfy the first prong

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under intellectual disability, that his IQ --

THE COURT: And for the record, the first prong you're referring to is the IQ score.

MS. MOORE: Well, it's evidence of intellectual deficits, yes, Your Honor, typically measured by IQ, but needs to be read and pairing material with other, the adaptive deficits and age at the onset, so, um --

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THE COURT: But the score aspect of it, the 70, 75, plus or minus five, that didn't -- that didn't come into being until Walls retroactively applying Hall; correct?

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MS. MOORE: For Florida.

THE COURT: Right, for Florida.

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MS. MOORE: Yes, sir. And our position is that Mr. Bowles could not have raised a successful intellectual disability claim until Walls was decided, and the failure to act was the result of excusable neglect. In this case Mr. Bowles has at least met that standard, because Mr. Bowles cannot have been expected to anticipate Hall, um, and to anticipate that the Florida Supreme Court would rule that Hall was retroactive, um, and at a minimum, his interpretation of Florida law to foreclose relief to him was excusable. We don't

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have a crystal balls, we don't know how the courts are going to rule. To be told that because Mr. Bowles initial state post-conviction proceeding should have included an intellectual disability claim under Atkins when such was foreclosed by his IQ score of 80 at that time would be akin to holding that Mr. Bowles should have interpret -- interpret that statute contrary to the Florida Supreme Court's ruling, um, in Cherry. He cannot be expected to know more than the Florida Supreme Court did, and the Florida Supreme Court set that hard cutoff of 70.

Thus, because Mr. Bowles could not have raised his intellectual disability before the decisions in Hall and Walls, this is good cause under 3.203(f). And even if the court decisions in Rodriguez, Blanco and Harvey are accepted, alternatively, Mr. Tassone could have filed at some point, um, in time after Atkins. If Rodriguez and Blanco are accepted as standing for the proposition that individuals with IQ scores between 70 and 75 should have known to file after Atkins, then Mr. Bowles' initial post-conviction lawyer, Mr. Tassone, was grossly negligent in failing to investigate, discover, and file a claim under Atkins.

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The State has argued that IAC in post-conviction will not lie, and that's correct, but we would argue under 3.203 it does constitute good cause, particularly when Mr. Bowles had never been
09:39AM assessed for ID consistent with medical standards. When Mr. Bowles was first arrested and indicted and tried on these cases, ah, there was no exemption from execution for mental retardation as it was called back then, intellectual disability as it is
09:39AM now called. Mr. Bowles was not assessed for that by Dr. McMahon during the pretrial periods, or by Dr. Krop in 1995 -- I'm sorry, in 2004, 2005. And Dr. Krop didn't even administer a full scale IQ test.

09:40AM When Mr. Bowles' post-conviction attorney, Mr. Tassone, undertook representation of Mr. Bowles in February of 2002, it was already the law in Florida that the intellectually disabled could not be executed based on legislature in Kilgore v.
09:40AM State, and then when Atkins was decided in June of 2002, creating that categorical bar to execution for the intellectually disabled.

Um, in June of 2002, Mr. Tassone had not yet filed his initial post-conviction relief, as the
09:40AM Court has pointed out, and he amended again in

2003. He had a Huff hearing in 2004. Um, prior to the Huff hearing, um, prior to the 60 days before the evidentiary hearing, he could have moved to amend, but he did not. Um, so we would argue that Mr. Bowles shouldn't be executed because Mr. Tassone didn't anticipate or file under Atkins and didn't anticipate that Walls and Hall would be decided years later.

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The rigid nature of Rodriguez, Harvey and Blanco suggest that it was clear to attorneys practicing in Florida that intellectual disability claims should be investigated for death sentence clients. Mr. Tassone failed to do that, despite multiple pieces of record evidence indicating that he had limited intellectual functioning, ah, Mr. Tassone did not investigate the potential reliability of the claim, and that's supported by Dr. Harry Krop.

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We've submitted a declaration from him, ah, who has stated, "I did not administer a full scale IQ test -- " he did a survey -- "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

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the administration of the full IQ testing used at that time, as well as a comprehensive assessment of adaptive functioning, also required to prevail on a claim of intellectual disability.

09:42AM Moreover, it wasn't until that intellectual disability assessment, as Dr. Krop describes, would not have been warranted. When presented with much of the same information that's in the motion, Dr. Krop agreed, "Based on materials I've reviewed, 09:42AM it's likely that Mr. Bowles is an intellectually disabled person. These materials are consistent with my prior opinion that Bowles has neuropsychological and cognitive impairments which has pervaded his life. Additionally, the materials 09:43AM I've reviewed are consistent with my prior opinion that Mr. Bowles' impairments would have had an origin as early as birth." Which would satisfy the third requirement, the third criteria for --

THE COURT: That it manifested before 18?

09:43AM MS. MOORE: Yes, sir. Um, and we've attached other anecdotal evidence of that as Dr. Crown and Dr. Toomer would also testify at a hearing that they believe onset was before perinatal or early adolescence.

09:43AM THE COURT: You're referring to the

attachments to the amended motion?

MS. MOORE: I am, Your Honor.

THE COURT: Okay. I did review all of those.

MS. MOORE: And those were required to be filed certainly under 3.851 and under 3.203.

09:43AM

Um, while there is no right to effective assistance of counsel, as the State has argued, attorney misconduct or neglect could form a basis for good cause under Rule 3.203. Not an IAC claim under 3.851, but under the good cause under 3.203 for intellectual disability.

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THE COURT: Are you aware of any case law that would support that reading of 3.203 that attorney misconduct or neglect, as you've described it, would qualify as good cause?

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MS. MOORE: No, sir, not in this realm.

THE COURT: Okay.

MS. MOORE: If a death sentence individual should have known to file an intellectual disability claim immediately after Atkins was decided, as this Court has held in Rodriguez, Harvey and Blanco, the Florida Supreme Court has held, Mr. Tassone's failure to even investigate that when his client specifically had documented limited intellectual functioning and

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neuropsychological problems consistent with brain damage, and that's with Dr. Crown's findings that are attached to our motion, it would be excusable neglect sufficient for a good cause, and that has been found under different circumstances where the -- under Parker, which I cited earlier, where the records didn't follow the client to his new prison, but not in an ID situation.

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And finally, Your Honor, we would argue that Mr. Bowles is entitled to an evidentiary hearing, um, based on the facts that we've pled, they're not conclusively rebutted by the record. We have raised issues as to whether Mr. Bowles has a qualifying IQ. We have an IQ determination by Dr. Toomer that it's a 74, which is within the SEM, the error measurement, and under Frankie v. State, an evidentiary hearing must be held if our allegations, our claims aren't conclusively rebutted by the record, and we would argue they are not, and so we would ask the Court to grant us a hearing in this case.

THE COURT: All right.

MS. MOORE: May I have a moment?

THE COURT: You may.

(Short pause).

MS. MOORE: That's all I have for now, Your Honor.

THE COURT: Did anyone else wish to speak on behalf of the defendant from the team? Ms. Backhus?

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MS. BACKHUS: No, Your Honor.

THE COURT: Okay. Thank you, Ms. Moore.

MS. MOORE: Thank you, Your Honor.

THE COURT: All right, I'll turn my attention to the State of Florida. Who would like to speak on behalf of the State? Would that be you, Ms. Millsaps.

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MS. MILLSAPS: Yes, Your Honor.

THE COURT: Ms. Millsaps, I'll begin with the timeliness issue with you as well. Can you tell me why -- let me ask you this before I get into my questions: As to the pleadings, the State's pleadings in this case, it's apparent on the face of the pleadings that the State's position is that the defendant's amended motion is untimely; is that correct?

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MS. MILLSAPS: That is correct, Your Honor.

THE COURT: Is that still the State's position today, that it's not timely?

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MS. MILLSAPS: Yes, Your Honor.

THE COURT: And so can you explain to me why there is no good cause to make a time exception under Rule 3.203 in Mr. Bowles' case? Why should I -- why should I find there is no good cause?

09:47AM MS. MILLSAPS: Because I think to do that what you would be in effect doing is end grounding the holding in Blanco and Harvey. For example, one of the two basis for good cause that they rely on under Subsection (f) of the rule governing

09:47AM intellectual disability claims is Walls itself. But, Your Honor, that exact argument was rejected in Harvey. It doesn't very -- it doesn't make much sense to say that a case wouldn't provide an exception for Rule 3.851 and timing, ah, but would

09:48AM under 38 -- under 3.203(f).

Um, so I really think Harvey forecloses you doing it on the basis of Walls, because Harvey specifically -- why I'm relying, Your Honor, on both Blanco and Harvey for the general proposition

09:48AM that this is untimely. I'm relying specifically on Harvey, because Harvey specifically rejects Walls as a basis to, I'm going to refer to it as restart the clock.

Now, on the second argument they advance to

09:49AM establish good cause under Subsection (f) is

ineffective assistance of post-conviction counsel. Once again, I think that's end grounding the Florida Supreme Courts, and basically the United States Supreme Court as well, as well as our statutes, that provide registry counsel will -- they will -- they do not recognize ineffective assistance of post-conviction counsel.

09:49AM

So, once again, if a stat -- if the statute doesn't recognize it and case law doesn't, this is literally a noncognizable claim, a claim of ineffective assistance of post-conviction counsel. I do not think a claim that is not even cognizable under the law, and that's the way the courts talk about this, I don't think it's cognizable for one purpose and not for another. So, Florida simply doesn't recognize ineffective assistance of post-conviction counsel, and I don't think it recognizes it for Subsection (f) either, Your Honor, I don't think it could provide good cause. Then, Your Honor, I think we have --

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THE COURT: Ms. Millsaps, would it be your argument that if I were to do what the defense is asking me to do, that would require my to legislate from the bench?

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MS. MILLSAPS: It would require that you

ignore controlling Florida -- the Supreme Court precedent.

THE COURT: And, in effect, write rules from the bench?

09:50AM MS. MILLSAPS: Yes, you -- well, you would be -- you would overruling the Florida Supreme Court, Your Honor. That's what you would be doing. And no trial courts under Florida law, for obvious reasons, they are not supposed to overrule

09:50AM precedent, so I consider it more you would be overruling Florida Supreme Court.

THE COURT: Can you think of any case law that would support me using the defense's, quote, "seizing the day," in case law that would allow me

09:51AM to, quote, "seize the day," and ignore existing or Supreme Court precedents and go off in the direction the defense is asking me to go into?

MS. MILLSAPS: Your Honor, there is a number of cases, Pardo, and things like that, where they

09:51AM explain the way our system works. Your Honor, I want to apologize for explaining this to you, but I'd like it on the record what the State's position is.

THE COURT: No, I don't think it is.

09:51AM MS. MILLSAPS: It's the Florida Supreme Court,

it's the DCA's, and it's the trial courts, and under Pardo everybody is supposed to follow -- trial courts are supposed to follow any DCA, unless the DCA in which you reside have ruled to the
09:51AM contrary. So, um, you are to follow DCA precedent if it exists, and you're certainly supposed to follow Florida Supreme Court precedent. And they have said that repeatedly, Your Honor, Fields, Pardo. There are a number of cases saying trial
09:52AM courts may not overrule us. So, no, I do not think you are free to just ignore Harvey or Blanco.

THE COURT: Are there any circumstances that allow me to look ahead into a crystal ball, somehow project how the federal courts might look at the
09:52AM issue in this case as to timeliness, and on that basis, under some belief that the federal courts might reverse the Florida Supreme Court, just look ahead and say, I'm going to ignore the Florida Supreme Court precedent time three -- times three
09:52AM in Blanco, Rodriguez and Harvey, and just seize the day and go in the direction I perceive the Federal Court might go into?

MS. MILLSAPS: You would be in violation of Eleventh Circuit precedent is you did that. Your
09:52AM Honor, it's not accurate to say that the Eleventh

Circuit hasn't reached Hall vs. Florida. I'm going to explain a little federal habeas to you. Federal habeas, one of the Chief Justices, and one of the justices of the Supreme Court, I think it was Thomas, referred to it as Byzantine. So I'm going to assume, if you don't know Byzantine law, there is no reason for you to.

09:52AM

But, once you've had an initial petition, Your Honor, an initial federal habeas petition, you can file a second or a successive, but you must have permission from the Eleventh Circuit to file that. It's a pre-permission, that you cannot just file one in a second petition. Bowles has had his first habeas petition. To file a second one, he would have to go to the Eleventh Circuit. The Eleventh Circuit has held that we will not entertain successive habeas petitions based on Hall vs. Florida. So it's not -- your crys -- it's not a matter of using a crystal ball, Your Honor, it would be a matter of ignoring Eleventh Circuit precedent. So, no, Your Honor.

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Now, is it -- is it, if the law is unclear, does a trial court often have to use the equivalent of a crystal ball to answer a question when the law is unclear? The problem here is the law the

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brutally clear both from the Florida Supreme Court, and, quite frankly, from the Eleventh Circuit, so there is no crystal ball involved. And they're certainly entitled to, you know, make that argument to the Federal District Court, but I don't think a -- that's a pretty big crystal ball, Your Honor, to look into it.

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Let's say for a minute that the Eleventh Circuit hadn't reached that issue. It has, but if it had not, that's a pretty big crystal ball for a state trial court judge to look into what, not just the federal courts, but what the Eleventh Circuit would say regarding -- regarding a timeliness issue.

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So, no, Your Honor, I do not think that (f) provides, Subsection (f) provides a way to just ignore precedent, and that's really what -- what this would require you to do. Relying on Walls would require you to ignore Harvey, and relying on ineffective assistance of post-conviction counsel would require you to ignore a number of Florida Supreme Court cases saying that's not even cognizable.

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Now, Your Honor, I'd also like to get sort of to the merits of that. I don't think it's

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accurate -- we seem to be proceeding on the assumption that Mr. Tassone was ineffective. I'm going to pretend for a minute -- I'm going to do Strickland vs. Washington analysis on that. I don't think he would meet that even -- I don't think they have established ineffective assistance of counsel on Mr. Tassone's part. I think what Mr. Tassone did was realize that his score, ah, was -- the two scores that he had, ah, he had from Dr. McMahon around trial, he had an 80, and then he hired his own expert, Dr. Krop, who, Your Honor, if you put Dr. Krop in the Florida Supreme Court database in Westlaw in capital cases, you'll see -- I think I tried it one time years ago, and they referred to him 53 times. That's how much of an expert -- when a lawyer hires an expert, and the expert says, My number is a little bit higher, but pretty much matches the trial -- Mr. White tried this case, I'm going to call, ah -- ah, Mr. White's expert as well.

Lawyers are allowed to rely on experts, especially when they are two different defense experts, nonetheless coming to approximately 80 and 83, coming to approximately the same conclusion regarding the first prong of intellectual

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disability, which is significant subaverage general intellectual functioning. You just haven't got the tools. It doesn't even matter about Cherry. Cherry hadn't even been decided, just for Your
09:57AM Honor's knowledge at this time. But you haven't got the tools to make that argument. Cherry had the tools, because his number was very close, and was a 72. These are significantly higher, and so a lawyer would often do exactly what Mr. Tassone did,
09:58AM which is raise sort of a twist, they focused more on brain damage at the post-conviction. So I don't even think that even that -- ineffectiveness of post-conviction counsel is not a good cause under (f), but even if it were, I don't think they've
09:58AM established ineffective assistance of counsel.

And Dr. Krop, at the evidentiary hearing, literally said -- they are really saying that Dr. Krop -- neither McMahon or Krop did a full intellectual disability assessment. That's because
09:58AM in those days, Your Honor, when you got numbers close to 80, 80 or above certainly, they simply stopped, because you necessarily did not meet that first prong. And, Your Honor, I'm going to argue to you that's true today. It doesn't mat -- with
09:58AM numbers that high, counsel today is not within the

Hall 75, so a lawyer today faced with those two figures of 80 or 83, which is what Mr. Tassone was faced with, does not have a valid Hall claim.

THE COURT: What about the argument that his most recent score is 74?

09:59AM

MS. MILLSAPS: All right, Your Honor, but -- and now, we can't really use that for Mr. Tassone, because he did not have it. He had two experts --

THE COURT: Well, I think the argument, if I understood it correctly, was that the test that resulted in a 74 score was more reliable than the type of standardized test he would have had back when he scored higher. That was the argument that was made.

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MS. MILLSAPS: Yes, but, Your Honor, they're arguing it's more reliable. That test wasn't available. If we're going to do ineffective assistance of counsel, we have to do it from the time and with the information, assuming that it's good information, and I'm saying Dr. Krop is a recognized State's expert.

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THE COURT: You've already anticipated my follow-up question, which was, is that in any way relevant to an argument of ineffective assistance of counsel? With the current score of 74, does it

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justify an ineffective assistance counsel based upon another score of 80, or around that 80 mark?

MS. MILLSAPS: No, Your Honor, they were using the -- the IQ scores. WAIS had very many -- WAIS-III, WAIS-III-RR's --

THE COURT: When you say WAIS, for the record, are you talking about W-A-I-S?

MS. MILLSAPS: Yes, the Wechsler Intellect.

So, Your Honor, the current one was -- that 74 was literally not available to post-conviction counsel Tassone.

THE COURT: And how is that -- maybe I'm going a little about too far ahead, but the current score of 74, how does that play into a good cause argument based upon Walls and Hall, with Walls being -- making Hall retroactive, and the Cherry hardline of 70 no longer being the law? How does the current score of 74 play into a good cause argument, setting aside the ineffective assistance of counsel claims?

MS. MILLSAPS: And would the argument be something along the lines of just --

THE COURT: Well, I'm not making -- I'm not arguing that, I'm saying the defense arg --

MS. MILLSAPS: No, I'm trying to --

THE COURT: -- the defense argument was that --

MS. MILLSAPS: And I'm trying to just interpret the question, Your Honor.

10:01AM THE COURT: The question is: What, if any weight, should the Court consider the 74, the current score of 74 in a good cause argument that, in effect, this defendant didn't know he had a 74 IQ score until he took the more improved, or I

10:01AM guess a newer test, I guess used in the defendant's argument -- the defense argument, in that even if he -- that he didn't have the ability to make that claim until Walls made Hall retroactive that changed the law in Cherry? So, how does that play

10:01AM into a good cause argument, if at all? What, if in any weight, should I give the argument that's now 74, what weight, if any, should I give to that in a good cause argument made by the defense?

MS. MILLSAPS: I don't think merely taking a

10:02AM newer, I'm going to use the word improved, but just a newer IQ does not automatically establish -- a more recent IQ score does not automatically establish good causes. That would -- remember, Your Honor, how what Subsection (f) was really

10:02AM designed. You -- it looked -- it looked at the 60

days, so it was really designed to -- to factually based, I would argue, something like, I was transferred to another prison, not the law changed, but it was supposed to be good cause for -- for not
10:02AM filing it within months of that -- of that date. So, Your Honor, they would have to establish good cause for basically, what would that be, something like over a decade.

So, I don't -- the State's position is merely
10:03AM taking a newer IQ score does not provide good cause for the over decade long delay in not filing this. This Subsection (f) is a waiver provisions. I mean, if you do not file it, we deem this waived. And, so, just a newer score does not provide good
10:03AM cause. The mere -- the mere fact all alone that you took a new IQ test that resulted in a within one point, that -- obviously, Your Honor, it is within the Hall 75, but it's one point below.

And as I'm sure you've read, um, intellectual
10:04AM disability has three prongs, and the State's -- the State's argument on the first prong of significantly subaverage general intellectual functioning is you have to consider IQ's collectively. And if you consider these
10:04AM collectively, and I don't really care -- I did it a

number of different ways. Um, no matter how you do it, it's still over 75. Your Honor, the State's position is this is not -- this is not a viable claim to this day, after Hall and Walls, so that's my position on that.

10:04AM

Now, Your Honor, I don't want to -- I don't want to rehash everything just Reader's Digest condensed version of what I've already argued to you. Obviously my position is, um, successive motions that are untimely should be denied on the basis of their being untimely. I've cited some general cases, but obviously the two cases I'm really relying on are Blanco and Harvey, and the only reason I don't talk about Rodriguez is because it was an unpublished opinion. It was, however, cited by Blanco and Harvey. It was cited by one of those cases, so they turned it into precedent.

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THE COURT: I believe Blanco cited Rodriguez.

MS. MILLSAPS: Yes, one if them did.

THE COURT: I think if my memory is correct, the reason for the motion for rehearing in Blanco was because of Rodriguez. It was the -- the court originally in Blanco, I believe if my memory is correct, the court originally granted an evidentiary hearing after the Huff hearing, and the

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State then filed a motion for rehearing based upon Rodriguez, which then led to the trial court decision in Blanco finding it untimely.

MS. MILLSAPS: Okay. I've got it here, it's Harvey that cites Rodriguez, Your Honor.

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THE COURT: Okay.

MS. MILLSAPS: Okay. So, but I would like to, um, clarify something that I don't -- I just can't let slide. I cited McQuiggin vs. Perkins. Your Honor, I cited what the United States Supreme Court said. The State's position is that actually innocent people should not be set free. The State's position is no less than the United States Supreme Court, I'm quoting directly from them, says that unexplained delay may be considered when Your Honor is addressing the merits. What they specifically said was that unexplained delay -- the defendant in Perkins had waited ten -- had waited five years to bring his claim of his actual innocence, and they said, "An unexplained delay," and I'm quoting here, seriously under -- "would seriously undermine the credibility of the actual innocence claim.

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I think that came from the Sixth Circuit, that's how it got up there, and they had said you

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didn't have to be diligent. And the United States Supreme Court, they didn't impose an absolute diligence or time bar, but they did say delay of this may be taken into considerations.

10:07AM And that's very much analogous in the sense that it was a claim of actual innocence, and they were -- the actual holding in Perkins was that actual innocence is an exception to the time bar, but that courts may consider unexplained delays to

10:07AM reject a federal habeas claim.

Okay. Now, um, I am going to talk -- Your Honor, I would like to talk a little bit about the merits, because the State disagrees -- first of all, when something is untimely, it should be

10:08AM summarily denied, and that's the Florida Supreme Court precedent in Harvey and Blanco. But just in the alternative, Your Honor, I do think that this conclusively rebutted as the record -- on the record as it stands.

10:08AM First of all, Your Honor, I do think it's perfectly proper. There is a higher standard of proof under our statute, and the Florida Supreme Court recognized that in Wright. Under our statute, um, a defendant must prove he is

10:08AM intellectually disabled by clear and convincing.

So, Your Honor, they -- it is perfectly proper for you -- when you are considering the -- whether it's conclusive or rebutted to take into account the high standard of proof they're going to have at any evidentiary hearing.

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Now, regarding the three prongs -- and I'm just going to for the record say what they are. The first one is significantly subaverage general intellectual functioning.

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The second one is concurrent deficits in adaptive behavior.

The third one is manifestation of the condition before HAT.

Um, we shortened those into subaverage intellectual functioning, adaptive deficits, and onset. And I'm going to talk about all three prongs, but, Your Honor, the Florida Supreme Court has now made it clear that a failure on any one of those prongs is a failure of proof on -- on the claim of intellectual disability. So they must prove all three prongs, but if we can refute one prong, that means he is not intellectually disabled.

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Going through the significantly subaverage, and I'm going to stay with the record, Your Honor,

because that's the State's argument, conclusively rebutted by the record as it currently exists.

Significantly subaverage general intellectual functioning. Your Honor, if you consider his IQ scores of the 80, 83, and the 74, there is -- the average, the median, any way I could do it, um, were over 75, so he is not entitled, and Hall vs. Florida does not apply to him, but our record conclusively rebuts that he's within the standard error of measurement by considering the three IQ scores together.

Regarding adaptive deficits. Your Honor, he obtained a GED. Dr. McMahon's deposition --

THE COURT: That was while he was in the State prison; correct?

MS. MILLSAPS: Yes, Your Honor, he was Desoto Correctional Institution at the time. The Florida Supreme Court in a case called Dufour, which is cited in the more recent case of Williams, and I'm quoting here, "Obtaining a GED is clear evidence," quote, unquote, "and direct proof," quote, unquote, "that the defendant does not suffer from adaptive deficits." So we believe the obtaining of the GED establishes he fails the second prong.

Regarding the third prong, Your Honor, there

are school records in -- that were introduced as part of the post-conviction hearing. Um, the -- his grades, Your Honor, as he got further in school, he became much more of a problem. The PSI, his mother says by the fifth grade he had started setting fires. So I'm going to focus on him as a young child, in other words first, second, third grade.

And in the first grade his grades listed were an A, a B, a B and an A, and I'm reading you every score -- every grade listed. So he got A's and B's in the first grade. He also in the first and second got A's and B pluses and A's in math. His -- the -- one of the notations on his school records next on to his achieve -- one of his achievements is high normal. Um, the -- the school records also provide, you'll see at one of them there is a comment with two exclamation parts, "never present." So what happened was not -- was intellectual disability, what happened was his attendance went down and his behavior became problematic. But as a young child, he was making A's, and Dr. Krop -- these were -- these were not Special Ed classes.

Now, somebody who has had -- is, ah -- has

intellectual disability does not make A's and B's in regular school classes.

So we believe that all three prongs, but we only -- Your Honor you only need to agree with me as to one prong to say the record conclusively rebuts this. So we believe all three prongs are conclusively rebutted by the current record, and therefore you, even minus -- even in the alternative to the time bar, that this claim should be summarily denied because it is conclusively rebutted by the post-conviction record basically, Your Honor.

That's all I have, Your Honor.

THE COURT: All right. Anything further?

MS. MILLSAPS: No.

THE COURT: Mr. de la Rionda, did you want to address anything on behalf of the State?

MR. DE LA RIONDA: No, Your Honor.

THE COURT: We've been going about an hour and 15 minutes. I know we have rebuttal argument from the defense.

And, Ms. Moore, how long do you anticipate -- I'm not going to put a time limit on you, your best estimate, because I'll take -- I can take a comfort break here if you want a little bit of time to

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gather some more thoughts, everyone can go to the restroom, we'll come back?

MS. MOORE: That would be appreciated, Your Honor. I don't anticipate being more than about ten minutes, 15 at the most.

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THE COURT: Why don't we do this, then. Why don't we take a ten minute --

Madam court reporter, is ten minutes acceptable?

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THE COURT REPORTER: (Nods head).

THE COURT: We'll do a ten minute comfort break here. That'll bring us back out here at 10:25. We won't do anything on the record, but everyone be back in the courtroom -- you can go out

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in the hallway, go to the restroom, get a drink, if you want use your phone. We'll be back on the record at 10:25.

MS. MOORE: Thank you, Your Honor.

THE COURT: Thank you.

10:14AM

(Short recess).

THE COURT: Is everyone prepared to go back on the record?

MR. DE LA RIONDA: Your Honor, very briefly? I'm not going to take longer than two or three minutes.

THE COURT: You may. Whatever time, I'm letting both sides have as much time as they need.

MR. DE LA RIONDA: And thank you, Ms. Moore, for allowing me to step in.

10:24AM Very briefly, Judge, our position is still the same, that we believe it's procedurally barred, but I just want the record to be clear, that if the Court were to rule that an evidentiary hearing is necessary, we are prepared to tomorrow, Wednesday,

10:25AM Thursday, prepared for it. We have prepared. I have filed already, or tendered to defense counsel and the Court, I filed officially on the record today Dr. Tannahill Glen's report regarding the defendant -- her opinion that the defendant is not

10:25AM intellectually disabled, he doesn't not meet the criteria.

We would also be prepared to introduce a lot of other evidence, including letters the defendant sent, etcetera.

10:25AM So our position is that it's procedurally barred, time barred, but at the same time, if the Court were to rule and grant this, to be extra cautious, even though there is a Supreme Court precedent, we are prepared to rebut that and to

10:25AM prove -- disprove their argument that he is

intellectually disabled.

THE COURT: All right. Thank you, Mr. de la Rionda.

All right. I guess we'll proceed now with the 10:25AM defendant's rebuttal argument.

Ms. Moore, are you going to give the entire rebuttal argument for the defense?

MS. MOORE: Yes, sir.

THE COURT: All right. And I'll give you time 10:26AM when you're finished if you want to confer with your cocounsel if any of your cocounsel would like to also speak, I'll give them an opportunity as well, because I want to make sure you-all get out whatever you need to put on the record.

10:26AM MS. MOORE: Thank you, Your Honor. Your Honor, if I could address, um, the merits argument that the State made. We now have a qualifying score of Mr. Bowles of 74. That was an IQ test conducted by Dr. Toomer, whose reports are attached 10:26AM to the Amended Motion, and the State has had access to the initial one since 2017.

The State says that the school records refute problems with the adaptive deficits and with IQ. Dr. Toomer addresses that in his report. He talks 10:26AM about how young children in the early grades, um,

when they're dealing with concrete subjects may grade very well, but it's not unusual, in fact it's very common for individuals with intellectual disability to struggle when they hit the fourth and sixth grades, where they are now required to engage in abstract thinking, and that's where Mr. Bowles failed there. He failed miserably.

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The school records also reflect that Mr. Bowles was referred to Special Ed, so that certainly counters the State's argument there. And it could be that in the first or second grade any child could be brilliant, but in the third or fourth grade has a bike accident, has a brain injury, um, and now is ID, and because the onset is before 18, that would still qualify as an ID.

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THE COURT: And for the record, Ms. Moore, I hate to interrupt, but I want to make sure we have a good record, when you say, I-A-P, you're talking about Individual Education Plan?

MS. MOORE: No, I'm sorry, I said I-D, I think.

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THE COURT: I thought you said IEP earlier. You said some something about an accident and then Special Education. So you're talking about intellectual disability?

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MS. MOORE: Yes, sir.

THE COURT: That's supported by your argument that he was in Special Education in public schools?

MS. MOORE: Yes, sir, there is a reference to his referral to Special Ed in the school records.

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THE COURT: And for the record, I know you've been using the term ID throughout the argument. I didn't interrupt you earlier, but ID is referring to intellectual disability; correct?

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MS. MOORE: Yes, sir.

THE COURT: Okay.

MS. MOORE: Yes, sir. Um, so Dr. Toomer is allowed to present evidence on this claim, would say that that's entirely doing well in the first and second grades, and then doing poorly in later

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elementary school is entirely consistent with a person with intellectual disability.

Um, so as far as the merits go, we also have plentiful evidence of adaptive deficits concurrent

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with the intellectual -- or with the deficient intellectual functioning, reported by people who knew Mr. Bowles as a young child. His cousin would testify to that, and Dr. Toomer, um has had the benefit of reading the affidavits that are attached

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to the motion, so we can prove that there was onset

before 18, and we can prove the adaptive deficits. What we have is a conflict in the evidence, which is best determined by the Court at a full hearing. There is no conclusive rebuttal of our claim in the record.

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As far as the proceedings themselves and whether we're barred, um, Mr. Tassone was either incompetent under Rule 3.203, not -- not 3.851. I recognize that it's not -- IAC is not cognizable under 3.851, um, you know, or he was barred from raising that. Um, so we've never had a forum to raise this.

10:29AM

The State argues that we would be ignoring Eleventh Circuit precedent to file this intellectual disability claim in Federal Court, but the fact of the matter is, is that the CHU approached of the Federal District Court in 2017 and asked for appointment for the specific purpose of exhausting the State Court claim on intellectual disability, because it had never been raised, and the Federal District Court allowed that to happen.

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THE COURT: When you say the CHU, for the record, you are referring to Capital Habeas Unit, C-H-U?

MS. MOORE: I'm sorry. The Capital Habeas

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Unit of the Federal Public Defendant's Office for the Northern District of Florida. I'm sorry, Your Honor.

Um, so, to argue that when they've be specifically directed to exhaust the claim in State Court, if this Court denies us a hearing on that, then there is absolutely no forum available to us, um, or to Mr. Bowles to have ID claim heard. Ms. Millsaps would say, Well, you're not entitled to it in Federal Court, and under the argument here, Ms. Millsaps is saying we're not entitled to it here either. Um, so that's particularly troubling when a finding of intellectual disability would disqualify Mr. Bowles from being executed.

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May I have one moment, Your Honor?

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THE COURT: You may. Take whatever time you need.

(Short pause).

MS. MOORE: I have nothing further.

THE COURT: Okay. Ms. Moore, did anyone else from your team representing the defendant wish to speak on any of the issues before we close?

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MS. MOORE: Ms. Backhus, do you have anything to say?

THE COURT: Ms. Backhus?

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MS. BACKHUS: I know you really want to hear from me, Your Honor, so the only thing I would add is just from the Federal Court perspective, there is a mechanism for good cause to be shown to raise an issue in Federal Court, and that mechanism is Martinez v. Ryan, and under that mechanism post-conviction counsel can be established as having been ineffective, and that can be considered good cause for a claim to be heard in Federal Court. So, there is a mechanism in Federal Court for that under Martinez, and I think that's analogous to what the Florida Supreme Court was trying to come up with in 3.203. But, ah, that's all I could add to that, but --

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THE COURT: And for the record, you are Terri Backhus; correct?

MS. BACKHUS: Terri Backhus.

THE COURT: Okay.

MS. BACKHUS: Thank you.

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MS. MOORE: Thank you, Your Honor.

THE COURT: Thank you.

Anyone else from the defense team?

MS. MOORE: No, sir.

THE COURT: All right. I do appreciate the arguments of both the State and the defense in this

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case this morning and the professionalism and civility that both sides have demonstrated today.

The Court finds that the timeliness of the Defendant's Amended Successive Rule 3.851 Motion for Post-Conviction Relief is dispositive in this case, and based on the record, the argument of counsel, and the case law presented to the Court and considered by the Court, the Court does find the defendant's motion claiming intellectual disability to be untimely. That is the Court's finding.

Existing Florida Supreme Court precedents are binding on this Court, and those precedents -- those decisions clearly state that untimely claims are to be summarily denied, and therefore no evidentiary hearing is necessary in this case.

The Court will write and enter a written order. It will be filed by the deadline set forth in my scheduling order that was entered on June 17th, 2017, as amended on June 26th, 2019. That deadline is July 17th, 2019 by 3 p.m. My order will be entered by that time.

And so, are there any others matters to take up in the case management conference today, State or defense?

MR. DE LA RIONDA: Not on behalf of the State, Your Honor.

MS. MOORE: No, Your Honor, not for the defense.

10:34AM THE COURT: Very good. Then today's case management conference is concluded, and everyone have a good day. Thank you.

MS. MOORE: Thank you, Your Honor.

(The proceedings were concluded).

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C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Cynthia M. Griffis, Registered Professional Reporter and Florida Professional Reporter, certify that I was authorized to and did stenographically report the foregoing pages, and that the transcript is a true and complete record of my stenographic notes.

DATED this 9th day of July, 2019.

/s/ Cynthia M. Griffis
Registered Professional Reporter
Florida Professional Reporter

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