No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

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

APPLICATION FOR STAY OF EXECUTION

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

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

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

[1] Mr. Bowles requests expedited consideration of the petition. *See* Petition at 1 n.2.

Mr. Bowles is an intellectually disabled man who is scheduled to be executed without any court having considered the strong evidence that he is intellectually disabled, despite Mr. Bowles's continuous efforts to present that evidence for nearly two years. Although Mr. Bowles's intellectual disability claim itself is not the basis for this stay application and accompanying certiorari petition—the Florida Supreme Court's refusal to review the merits of Mr. Bowles's intellectual disability claim is the subject of another stay application and certiorari petition pending in this Court, *see Bowles v. Florida*, No. 19-5617—Mr. Bowles's intellectual disability is closely related to the issues presented by the present petition, which involves the violation of Mr. Bowles's 18 U.S.C. § 3599 rights during state clemency proceedings.

This Court emphasized in *Herrera v. Collins*, that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." 506 U.S. 390, 411-12 (1993). For death-sentenced individuals like Mr. Bowles, this Court has impressed that clemency is integral to the "functioning of our legal system," and "part and parcel of the multiple assurances that are applied before a death sentence is carried out." *Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring). That is why the Court has called clemency "the fail safe in our criminal justice system." *Herrera*, 506 U.S. at 415 (internal quote omitted).

This Court made clear in *Harbison v. Bell* that a federal court's appointment of counsel to represent a death-sentenced prisoner under § 3599 includes representation in state clemency proceedings. 556 U.S. 180, 194 (2009). In enacting § 3599, Congress sought to ensure that "no prisoner would be put to death without

meaningful access to the fail-safe of our justice system," and 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." *Id*. (internal quotes omitted).

At the time of Mr. Bowles's state clemency proceedings, his § 3599 counsel were representing him in pending state litigation concerning whether he is intellectually disabled and therefore ineligible for execution under the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002). Given the sensitivities of Mr. Bowles's intellectual disability litigation, and the prospect that his claim might never receive judicial review because of a procedural rule recently created by the Florida Supreme Court, his § 3599 counsel sought to represent him in state clemency proceedings to ensure that the fail-safe of his process was preserved, and that Mr. Bowles, an intellectually disabled man, was not left to navigate the process alone.

But Florida state clemency officials barred § 3599 counsel from representing Mr. Bowles in state clemency proceedings, instead paying a private lawyer who had no experience with capital cases or clemency cases a flat fee of $10,000 to represent Mr. Bowles. Unsurprisingly, Mr. Bowles's state-retained clemency counsel failed to act as meaningful counsel. State-retained counsel failed to speak with any lay or expert witnesses, failed to seek Mr. Bowles's full case file, allowed critical factual inaccuracies to go uncorrected during Mr. Bowles's only opportunity for a clemency presentation, and submitted a clemency petition that was less than eight double-spaced pages in length from title to signature. State-retained counsel failed to meaningfully investigate or present Mr. Bowles's intellectual disability as a basis for

clemency. And because state officials barred the only counsel that knew Mr. Bowles and understood his intellectual disability litigation—his § 3599 counsel—it was akin to Mr. Bowles having no counsel in the proceedings at all.

After clemency was denied and a death warrant was signed, Mr. Bowles sought injunctive relief under 42 U.S.C. § 1983 based on the state officials' denial of his rights under § 3599. Both the district court and the court of appeals recognized that § 3599 counsel's representation extended to state clemency proceedings as far as the federal courts were concerned, but held that state officials' deprivation of Mr. Bowles's § 3599 rights was in no way enforceable through § 1983.

But even the decisions below commented on the troubling nature of Florida's decision to refusal to allow Mr. Bowles's § 3599 counsel to represent him during his clemency proceedings. *Bowles v. DeSantis*, No. 19-12929, 2019 WL 3886503, at *15 (11th Cir. Aug. 19, 2019) (Martin, J., concurring) ("It is puzzling that the Commission barred the knowledgeable and willing CHU lawyers from representing Mr. Bowles . . . [it] is not only mysterious but possibly tragic that counsel was turned away."); *Bowles v. DeSantis*, No. 4:19-cv-319, Order at 9 (N.D. Fla. July 19, 2019) (Walker, J.) (describing Florida's "decision to exclude CHU from the clemency proceeding" as "troubling" and questioning how that decision "contributes to the integrity or reliability of the clemency determination").

Mr. Bowles now faces imminent execution, having never had a clemency proceeding where he was represented by competent counsel that could fairly present his compelling grounds for clemency—the strong evidence of his intellectual

disability. This is particularly impactful because Mr. Bowles has separately been barred by state and federal procedural rules from presenting the merits of his intellectual disability claim in any court. The violations of Mr. Bowles's § 3599 rights as they relate to clemency therefore represent a breakdown in "the fail-safe of our justice system," leaving Mr. Bowles effectively alone "at the last moment and left to navigate" the clemency process without his trusted attorneys. *See Harbison*, 556 U.S. at 194. Yet the district court and court of appeals approved of this outcome below, because in their view state officials' violations of § 3599 rights are not enforceable.

Though this Court stated clearly that "§ 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings," *Harbison*, 556 U.S. at 194, two federal appeals courts—the Sixth and Ninth Circuits—are presently split on what exactly it means to "authorize" counsel. *Compare Samayoa v. Davis*, 928 F.3d 1127 (9th Cir. 2019) *with Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). This Court now has the opportunity to resolve this circuit split over the fundamental meaning of § 3599 for state clemency proceedings, and intervention is urgently needed if § 3599(e)'s mandate that counsel "*shall* represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . proceedings for executive or other clemency," is to have any meaning at all. 18 U.S.C. § 3599(e) (emphasis added).

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

Respectfully submitted,

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