**No._____**

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 2018**

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GARY RAY BOWLES,

Petitioner,

v.

MARK S. INCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

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**APPLICATION FOR STAY OF EXECUTION**

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

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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 today, **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]

As described in the petition, Mr. Bowles is an intellectually disabled man who is scheduled to be executed without any court having considered the strong evidence that he is intellectual disabled, despite Mr. Bowles's continuous efforts to present that evidence to the state courts for almost two years. This stay application and accompanying certiorari petition concerns Mr. Bowles's subsequent efforts to present the merits of his claim to the federal courts, and the Eleventh Circuit's misinterpretation of the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Some Members of this Court have recently expressed reservations with "last-minute" litigation by death row prisoners under warrant. *See, e.g.*, *Price v. Dunn*, 139 S. Ct. 1533 (Thomas, Alito, and Gorsuch, JJ., concurring in the denial of certiorari). Mr. Bowles does not fall into that category. As the petition describes, Mr. Bowles's intellectual disability claim had been pending for nearly two years when the Governor signed his death warrant. The expedited nature of this litigation was not the result of Mr. Bowles filing a claim in response to a death warrant, but the Governor signing a death warrant in the middle of Mr. Bowles's intellectual disability litigation.

Since 2017, Mr. Bowles developed and proffered evidence of his intellectual disability.[2] Regarding significantly subaverage intellectual functioning, Mr. Bowles

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[1] Petitioner requests expedited consideration of the petition. *See* Petition at 1 n.1.

[2] Following *Hall v. Florida*, 572 U.S. 701 (2014), Florida courts have held a definition of intellectual disability that includes: "'(1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3)

provided evidence that every mental health professional who is known to have evaluated Mr. Bowles's intellectual functioning admits either that they did not assess Mr. Bowles for intellectual disability, or that Mr. Bowles is intellectually disabled or has intellectual functioning consistent with an intellectually disabled person. Mr. Bowles also has neuropsychological testing results indicating brain damage consistent with an intellectual disability stemming from early childhood. Regarding adaptive deficits, Mr. Bowles proffered sworn statements from a dozen individuals establishing that Mr. Bowles had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. No mental health professional who has conducted an evaluation on Mr. Bowles currently disputes Mr. Bowles's intellectual disability diagnosis.

Nevertheless, as a result of the rule first announced by the Florida Supreme Court in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), which provides that certain intellectual disability claims filed after *Hall v. Florida*, 572 U.S. 701 (2014), are time-barred and no evidence supporting those claims can even be considered, Mr. Bowles was denied the opportunity to litigate his intellectual disability claim on the merits in state court. Mr. Bowles has filed a separate stay application and certiorari petition in this Court addressing the Florida Supreme Court's ruling. *See Bowles v. Florida*, No. 19-5617. The petition being filed with the present stay application concerns Mr. Bowles's efforts, after being rebuffed by the Florida Supreme Court, to present the

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manifestation of the condition before age eighteen.'" *Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) (quoting *Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016)).

merits of his claim to the federal courts, and the Eleventh Circuit's refusal to allow his claim to proceed under the AEDPA.

One day after the Florida Supreme Court's decision refusing to review his claim, Mr. Bowles filed a second-in-time petition in the United States District Court for the Middle District of Florida, asserting: (1) Mr. Bowles is intellectually disabled; (2) his petition was not successive under *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007), because, like incompetence, Mr. Bowles's intellectual disability claim did not ripen until his warrant was signed; (3) categorical bars to execution cannot be procedurally barred; (4) relief was necessary in his case to prevent a miscarriage of justice because Mr. Bowles is actually innocent of the death penalty; (5) Mr. Bowles was alternatively seeking relief under § 2241, to which 2244(b)'s procedural restrictions do not apply. The district court dismissed Mr. Bowles's petition for lack of subject matter jurisdiction, finding the petition to be successive.

On appeal from the district court's ruling,[3] the Eleventh Circuit also denied a stay of execution, holding that the district court was correct in dismissing Mr. Bowles's second § 2254 petition for lack of jurisdiction as he filed it without first seeking authorization, rejecting Mr. Bowles's argument that § 2244(b)(3)(A) did not apply to him under *Panetti v. Quarterman*, 551 U.S. 930 (2007). The court reasoned

[3] In addition to appealing the dismissal of his petition, Mr. Bowles also filed an application for authorization to file a successive petition pursuant to 28 U.S.C. § 2244(b). As of this filing, the day of Mr. Bowles's scheduled execution, the Eleventh Circuit has not rendered a decision on Mr. Bowles's § 2244 application. When the Eleventh Circuit rules, Mr. Bowles expects further filings in this Court which will address his § 2244(b) arguments.

that *Panetti* is limited to incompetency claims, and an *Atkins* claim of intellectual disability is not like a *Ford* [*v. Wainwright*, 477 U.S. 399 (1986)] claim of mental incompetence. With regard to Mr. Bowles's assertion that there is a categorical bar to the execution of the intellectually disabled, the Eleventh Circuit stated that "[t]he restrictions of the AEDPA apply to constitutional claims, and '[n]othing in the Constitution requires otherwise.'" Finally, in addressing Mr. Bowles's claim that he should be allowed to bring his petition for writ of habeas corpus under 28 U.S.C. § 2241, the Eleventh Circuit held that this was "closed to Bowles as well" because a prisoner collaterally attacking his conviction or sentence cannot avoid the procedural restriction imposed on § 2254 petitions by nominally bringing suit under § 2241.

The provision of AEDPA should not serve to deprive Mr. Bowles of the Eighth Amendment's protection against the execution of the intellectually disabled, particularly given the state courts' refusal to consider his claim on the merits. This Court's intervention is urgently needed to prevent the imminent execution of Mr. Bowles, whom the evidence strongly suggests is intellectually disabled and thus categorically exempt from the death penalty.

The Court should stay Mr. Bowles's execution and grant his petition to address the important constitutional and AEDPA questions in this case.

Respectfully submitted,

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