No. _____

IN THE

Supreme Court of the United States

GARY RAY BOWLES,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

Gary Ray Bowles is an intellectually disabled man on Florida's death row. Despite this Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that the execution of intellectually disabled individuals violates the Eighth Amendment, Mr. Bowles has been precluded from litigating the merits of his claim.

The questions presented are:

1. Whether a capital defendant's claim that the Eighth Amendment forbids his execution as he is intellectually disabled becomes viable upon the issuance of a death warrant, therefore exempting the claim from the gatekeeping provisions of 28 U.S.C. § 2244(b)(2)?

2. Whether procedural obstacles to the consideration of a claim of intellectual disability must cede to the categorical protections of the Eighth Amendment?

3. Whether the Eleventh Circuit has a duty to interpret 28 U.S.C. § 2241 in a way that does not condone unconstitutional executions?

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Petitioner Gary Ray Bowles, a death-sentenced Florida prisoner scheduled for execution on August 22, 2019, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondent, Mark S. Inch, the Secretary of the Florida Department of Corrections, was the appellee in that court.

DECISION BELOW

The Eleventh Circuit's decision is not yet reported but is available at __ F.3d __, 2019 WL 3890201, and is reprinted in the Appendix (App.) at App. 1.

JURISDICTION

The judgment of the Eleventh Circuit was entered on August 21, 2019. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2241 provides, in relevant part:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions.

28 U.S.C. § 2254 provides, in relevant part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

I. Introduction

At the time that *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided, this Court "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall v. Florida*, 572 U.S. 701, 719 (2014) (quoting *Atkins*, 536 U.S. at 317)). As such, Florida litigants were constrained by Florida's statutory definition of intellectual disability in pursuing their claims. After *Atkins*, Florida's statutory definition of intellectual disability required an IQ score of "two or more standard deviations from the mean score on a standardized intelligence test," for a litigant to qualify as intellectually disabled. *See, e.g.*, *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007) (quoting Fla. Stat. § 921.137(1) (2002)); *see also Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) ("Under Florida law, one of the criteria to determine if a person is [intellectually disabled] is that he or she has an IQ of 70 or below."); *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting testimony that only an IQ of 70 or below qualified to establish intellectual disability). Florida courts applied this statutory definition as a hard IQ score cutoff of 70, failing to account for the Standard Error of Measurement (SEM) and interpreting IQ scores between 70 and 75 as a "failure to produce such evidence [that] was fatal to the entire claim," *Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018).

In *Hall v. Florida*, this Court invalidated Florida's IQ-score cutoff because it unacceptably risked execution of individuals within the Eighth Amendment's categorical exemption, given the SEM. *See* 572 U.S. at 724. The Florida Supreme

Court subsequently held, in *Walls v. State,* 213 So. 340 (Fla. 2016), that *Hall* was retroactive in Florida. It was at this time that Mr. Bowles was able to present a viable claim of intellectual disability.

II. Procedural History

A. Mr. Bowles's Death Sentence and Prior Litigation

In 1996, Mr. Bowles pleaded guilty to first-degree murder in the circuit court of the Fourth Judicial Circuit. Subsequent to a penalty phase, the jury recommended death by a vote of 10 to 2, and the trial court followed the jury's recommendation. *See Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998). On appeal, the Florida Supreme Court found that Mr. Bowles's death sentence was unreliable because the trial court erred in allowing the State to introduce prejudicial evidence, and thus vacated Mr. Bowles's death sentence and remanded for a new sentencing proceeding. *Id.* at 773.

A new penalty phase was held in May 1999, after which the jury unanimously recommended a death sentence, and the trial court again followed the jury's recommendation. *See Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2001). On direct appeal, the Florida Supreme Court affirmed, *id.* at 1184, and this Court denied certiorari on June 17, 2002. *Bowles v. Florida*, 536 U.S. 930 (2002).

On December 9, 2002, Mr. Bowles filed an initial motion for postconviction relief in the state circuit court. An evidentiary hearing was held, and on August 12, 2005, the trial court denied relief. On February 14, 2008, the Florida Supreme Court affirmed. *Bowles v. State*, 979 So. 2d 182, 193 (Fla. 2008).

On August 8, 2008, Mr. Bowles filed a petition for federal habeas corpus under 28 U.S.C. § 2254 in the Middle District of Florida. *Bowles v. Sec'y, Fla. Dep't of Corrs.*, No. 3:08-cv-791-HLA (M.D. Fla. Aug. 8, 2008). Mr. Bowles's petition was denied on December 23, 2009. The Eleventh Circuit affirmed. *Bowles v. Sec'y for Dep't of Corrs.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert. denied*, 562 U.S. 1068 (2010).

B. Mr. Bowles's Intellectual Disability Litigation

On October 19, 2017, Mr. Bowles filed a successive motion for state postconviction relief, arguing that he is intellectually disabled and his execution would violate the Eighth Amendment in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 572 U.S. 701 (2014), and *Atkins*, 536 U.S. 304.

On March 12, 2019, while the motion was pending, Mr. Bowles's state postconviction counsel, Francis Jerome ("Jerry") Shea, unexpectedly moved to withdraw from the case. PCR-ID at 62. On March 25, 2019, the state court granted Mr. Shea's motion and appointed a lawyer from the Office of the Capital Collateral Regional Counsel—North (CCRC-N) as new state-appointed counsel. PCR-ID at 108-09. On March 26, 2019, CCRC-N attorney Karin Moore entered an appearance. PCR-ID at 110. On April 11, 2019, Ms. Moore filed a motion for additional time to either reply to the State's recently filed answer memorandum or to amend the postconviction motion that had been filed by Mr. Shea. *See* PCR-ID at 131-35.

On April 15, 2019, the circuit court granted Ms. Moore an additional 90 days to either file a reply to the State's answer or move to amend Mr. Bowles's intellectual disability claim, should she determine that an amendment was necessary. PCR-ID at

136. Under the state court's order, Ms. Moore's reply or motion to amend was due July 14, 2019. But on June 11, 2019—less than 80 days after Ms. Moore first entered an appearance in the case, and more than a month before the state court's deadline for her to review the case and decide whether to file a reply or motion to amend—the Governor signed Mr. Bowles's death warrant, scheduling the execution for August 22, 2019. The Florida Supreme Court thereafter ordered Mr. Bowles's intellectual disability proceedings expedited, and required the circuit court to decide Mr. Bowles's intellectual disability claim *in total* by July 17, 2019. Death Warrant Scheduling Order, *Bowles v. State*, Nos. SC89-261, SC96-732 (Fla. June 12, 2019).

Beginning in 2017, and up until his final amended postconviction motion was filed on July 1, 2019, Mr. Bowles developed and proffered extensive evidence of his intellectual disability.[1] Regarding significantly subaverage intellectual functioning, Mr. Bowles provided evidence that every mental health professional who is known to have evaluated Mr. Bowles's intellectual functioning—including Dr. McMahon (1995, pretrial); Dr. Krop (2003, initial state postconviction); Dr. Toomer (2017); Dr. Crown (2018); and Dr. Kessel (2018-19)—admits either that they did not assess Mr. Bowles for intellectual disability (Dr. McMahon, *see* App. at 284, PCR-ID at 835, and Dr. Krop, App. at 236-37, PCR-ID at 789-790), or that Mr. Bowles is intellectually

[1] Since *Hall*, 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) 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)).

disabled or has intellectual functioning consistent with an intellectually disabled person (Dr. Toomer, App. at 230; 235, PCR-ID at 778-83; 786-88, Dr. Crown, App. at 232; PCR-ID at 784-85, Dr. Kessel, App. at 248; PCR-ID at 791-801).

Mr. Bowles has only two full scale IQ scores: a score of 80 on the Wechsler Adult Intelligence Scale, Revised (WAIS-R) as given by Dr. McMahon in 1995, and a score of 74 on the Wechsler Adult Intelligence Scale, 4th Edition (WAIS-IV) as given by Dr. Toomer in 2017. When the WAIS-R score of 80 is corrected for norm obsolescence,[2] it falls within the SEM for an intellectual disability diagnosis (between 70-75). Mr. Bowles's most recent score of 74 on the WAIS-IV is within the SEM, and is a qualifying score for such a diagnosis. *See, e.g.*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (finding that an IQ score of 75 is "squarely in the range of potential intellectual disability."). Mr. Bowles also has neuropsychological testing results that indicate he has brain damage consistent with an intellectual disability. *See* App. at 232, PCR-ID at 784-85 (Dr. Crown's report).

Regarding adaptive deficits, Mr. Bowles proffered sworn statements from a dozen individuals establishing that he had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. *See* App. at

[2] Norm obsolescence is the psychometric observation that IQ scores of the population increases over time, which is also known as the Flynn Effect. *See, e.g.,* James W. Ellis, Carolina Everington & Anna M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 HOFSTRA L. REV. 1305, 1363-66 (2018) (discussing the Norm Obsolesce ("Flynn") Effect); American Psychiatric Association (APA) Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5), p. 37 (discussing the Flynn Effect); American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual (11th ed. 2010) (AAIDD-11), p. 37 (same).

249-83, PCR-ID at 802-34 (sworn statements of lay witnesses); App. at 225-48, PCR-ID at 741-45 (discussing how sworn lay witness observations establish significant adaptive deficits in each domain).

Mr. Bowles also proffered evidence that his intellectual disability manifested before the age of 18—nearly half of the lay witnesses knew Mr. Bowles in his childhood or teenaged years, and neuropsychological testing revealed that Mr. Bowles's brain damage was consistent with an "earlier origin, including a possibly perinatal origin." App. at 232, PCR-ID at 785 (Dr. Crown's report). No mental health professional who has conducted an evaluation on Mr. Bowles currently disputes Mr. Bowles's intellectual disability diagnosis.

On July 11, 2019, the state circuit court summarily denied Mr. Bowles's claim as time-barred as a result of the Florida Supreme Court's rulings in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018). In those rulings, the Florida Supreme Court held that individuals who did not previously raise an intellectual disability claim pursuant to Fla. R. Crim. P. 3.203 (2004) were time-barred from doing so, regardless of this Court's ruling in *Hall*, which was held retroactive in Florida by the Florida Supreme Court in *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

On August 14, 2019, the Florida Supreme Court affirmed the circuit court's order, agreeing that Mr. Bowles's intellectual disability claim was untimely in accordance with the aforementioned decisions. *Bowles v. State*, No. SC19-1184 (Fla. August 13, 2019).

On August 15, 2019, Mr. Bowles filed a federal habeas petition in the district court. On August 18, 2019, the district court issued an order finding that Mr. Bowles's petition was second or successive, and that it therefore lacked the jurisdiction to hear it without prior authorization from the Eleventh Circuit. M.D. Fla. Doc. 11 at 1-2. The district court advised Mr. Bowles to seek the necessary authorization from the Eleventh Court. *See id.* at 15.

On August 19, 2019, Mr. Bowles filed a notice of appeal, an emergency motion for stay of execution, and an application in the Eleventh Circuit for leave to file a successive habeas petition.

C. The Eleventh Circuit's Decision Below

On August 21, 2019, the Eleventh Circuit issued an opinion denying Mr. Bowles's stay motion. App. 14. According to the Eleventh Circuit, 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. App. 8.

The Eleventh Circuit rejected Mr. Bowles's argument that § 2244(b)(3)(A) did not apply to him under *Panetti v. Quarterman*, 551 U.S. 930 (2007). App. 10-11. The court reasoned 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. *Id.* According to the court:

> If Bowles has an intellectual disability now, then he has had an intellectual when he filed his first federal habeas petition in 2008. That was six years after the Supreme Court decided Atkins. But Bowles did not include an Atkins claim in that petition. That makes his current petition second or successive under § 2244(b)(3)(A), and given the lack

> of authorization from this Court the district court was right to dismiss it for lack of jurisdiction. See Burton, 549 U.S. at 157.

App. 12.

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.'" App. 12-13.

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. App. 13-14.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide Whether Mr. Bowles's Claim of Intellectual Disability was Ripe for Review Upon the Issuance of a Death Warrant

The AEDPA curtailed a state prisoner's ability to file a second petition for a writ of habeas corpus in federal court. "In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007).

However, this Court has explained that "[t]he phrase 'second or successive' is not self-defining." *Id.* at 943. Rather, it takes its full meaning from the Court's case law, including decisions which predate the enactment of AEDPA. *Id.* at 943-44. This Court "has declined to interpret 'second or successive' as referring to all § 2254

applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Id*. at 947.

In *Panetti v. Quarterman*, the specific constitutional claim that the habeas petitioner raised was one premised upon *Ford v. Wainwright*, 477 U.S. 399 (1986), *i.e.* that the petitioner was not competent to be executed as required by the Eighth Amendment. *Panetti*, 551 U.S. at 934-35. This Court ruled that such a claim could not ripen until the capital defendant had a scheduled execution. *Id*. at 946-47. The petitioner in *Panetti* could not raise the *Ford* claim in his first federal habeas petition because there was no scheduled execution at the time. *Id*. This Court specifically held that the subsequent habeas petition raising a *Ford* claim was not a "second or successive" habeas petition within the meaning of 28 U.S.C. § 2244(b)(2). *Id*. at 947.

Subsequently, in *Magwood v. Patterson*, 561 U.S. 320 (2010), this Court reiterated that the phrase "second or successive" is a "term of art" and that "it is well settled that the phrase does not simply 'refe[r] to all § 2254 applications filed second or successively in time.'" 561 U.S. at 332 (citing to *Panetti*, 551 U.S at 944). This Court further stated that "[i]f an application is 'second or successive,' the petitioner must obtain leave from the Court of Appeals before filing it with the district court . . . . If, however, [the] application [is] not second or successive, it [is] not subject to § 2244(b) at all, and [the] claim [is] reviewable." *Magwood*, 561 U.S. at 330-31.

This Court should grant certiorari to consider whether Mr. Bowles's habeas petition, although second-in-time, is not a second or successive petition because his present claim was not ripe when he filed his initial habeas petition. *See e.g., Panetti*,

551 U.S. at 945; *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998); *Stewart v. United States*, 646 F.3d 856, 860 (11th Cir. 2011) ("Particularly when a petitioner raises a claim that could not have been raised in a prior habeas petition, courts have forgone a literal reading of 'second or successive.'"); *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) ("Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded . . . . [S]uch claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding." (citing cases)); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) (petition raising ex post facto claim based on amendments to state law that occurred after first petition was not second or successive) .

Mr. Bowles's claim that the Eighth Amendment forbids the execution of an intellectually disabled person became viable when his death warrant was issued. Just as separate claims based on *Ford* may be raised at the time of sentencing and execution, separate claims based on *Atkins* should also be able to be raised prior to the imposition of the death sentence and prior to the actual execution of the sentence. Indeed, in *Atkins*, this Court quoted *Ford* to hold that "the Constitution 'places a substantive restriction on the State's power to take the life' of [an intellectually disabled] offender." *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405).

The Eleventh Circuit attempted to distinguish an *Atkins* claim from a *Ford* claim on the basis that "[i]f Bowles has an intellectual disability now, then he had an intellectual disability when he filed his first federal habeas petition in 2008." App. 12. Misunderstood by the court is the fact that it is the intellectual disability standard

that is fluid, not Mr. Bowles's intellectual functioning. Mr. Bowles is in the present legal quagmire because in 2008, he could not have been found intellectually disabled under Florida law that existed at the time. But, today, Mr. Bowles can be found intellectually disabled because Florida's IQ-score cutoff was invalidated in *Hall v. Florida* and made retroactive in *Walls v. State,* 213 So. 340 (Fla. 2016).

In order to effectively ensure that intellectually disabled individuals are not executed in violation of the Eight Amendment, they must necessarily be treated similarly to *Ford* claims. Here, because the basis for Mr. Bowles's claim did not exist prior to his warrant being signed, his numerically second motion should not be deemed "second or successive," and AEDPA's gatekeeping provision does not apply. *See*, *e.g.*, *Stewart*, 646 F.3d at 865.

II. The Eighth Amendment Categorically Excludes the Execution of Intellectually Disabled Persons

This Court should grant certiorari to consider whether the Eleventh Circuit erred in its determination that a procedural rule can override the Eighth Amendment prohibition against executing the intellectually disabled.

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court delineated its Eighth Amendment jurisprudence, which includes categorical exclusions from the death penalty, noting:

> The Court's cases addressing the [Eighth Amendment] proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

> In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.
>
> * * *
>
> The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551 [] (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 [] (2002).

Graham, 560 U.S. at 59-61. This categorical prohibition, of which there are few, emanates from the Eighth Amendment because to execute the intellectually disabled "violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708.

This Court's post-*Atkins* jurisprudence affirms this categorical ban time and time again, analogizing the execution of the intellectually disabled to the execution of juveniles (and citing to *Roper v. Simmons* in doing so). For example, in 2014 in *Hall v. Florida*, the Court stated:

> The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized. *Ibid.* No person may be sentenced to death for a crime committed as a juvenile. *Roper*, *supra*, at 572, [.] And, as relevant for this case, persons with intellectual disability may not be executed. *Atkins*, 536 U.S., at 321[].

Hall, 572 U.S. at 708. In 2017, in *Moore v. Texas,* this Court again clearly stated: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 553-564 (2005)) (emphasis in original).

This Court has never held that the Eighth Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver, procedural

bar or default. This Court's continual comparison of the prohibition of the intellectually disabled to that of the execution of juveniles is not accidental. Just as it would be illegal to execute a person who was convicted of committing a murder as a fifteen-year-old and who failed to raise an Eighth Amendment challenge at the appropriate time, *see Roper*, 543 U.S. at 568-69, so too it would be illegal to execute an intellectually disabled person who failed to raise his claim at the appropriate procedural time. *See, e.g.*, *State ex re. Clayton v. Griffith*, 457 S.W. 3d 735, 757 (Mo. 2015) (Stith, J., dissenting) ("[I]f [petitioner] is intellectually disabled, then the Eighth Amendment makes him ineligible for execution . . . [I]f a 14–year–old had failed to raise his age at trial or in post-trial proceedings then [] would [it] 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 Eighth Amendment's categorical bar on executing intellectually disabled individuals does not give way to a procedural rule—rather, the procedure must give way to the constitutional prohibition. Because Mr. Bowles is categorically ineligible for execution, his claim cannot be defaulted or waived.

III. The Eleventh Circuit Had a Duty to Interpret AEDPA so as Not to Condone Unconstitutional Executions

Mr. Bowles's second-in-time petition included the assertion that it was not subject to 28 U.S.C. § 2244(b)'s procedural restrictions because he was seeking relief under § 2241, not § 2254. The Eleventh Circuit found this avenue "closed" to Mr. Bowles so as not to allow him to "evade" AEDPA's restrictions. App. 14. In doing so,

the Eleventh Circuit interpreted § 2241 in a way that permits the execution of an intellectually disabled man.

This Court should consider whether the Eleventh Circuit's statutory interpretation withstands this Court's mandate that "[t]he cardinal principle of statutory construction is to save and not to destroy." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Per that mandate, this Court has "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see also Nat. Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 519, 562 (2012) (Roberts, C.J., concurring) ("[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so").

Despite this canon, the Eleventh Circuit has interpreted AEDPA in a way that condones unconstitutional executions. This Court should consider whether such an interpretation constitutes dereliction of the judiciary's duty to "save the act."

A. The Eleventh Circuit interprets 28 U.S.C. § 2241 to condone unconstitutional executions

When Congress passed AEDPA in 1996, it left intact 28 U.S.C. § 2241. Section 2241 provides:

> Writs of habeas corpus may be granted . . . by . . . the district courts . . . within their respective jurisdictions. . . . The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States.

The relationship between § 2241 and § 2254 is subject to much debate. The Eleventh Circuit views the two provisions as "identical statutory references to 'the writ of habeas corpus' [that] must be read as referring to the same remedy." *Medberry v. Crosby*, 351 F.3d 1049, 1059 (11th Cir. 2003). As a result, the Eleventh Circuit subjects state prisoners filing under § 2241 to the same procedural restrictions imposed on § 2254 petitioners when AEDPA does not expressly do so itself. This reflects the court's concern that by permitting state prisoners to file under § 2241 separately from the parameters in § 2254, habeas petitioners originating in state court would be able to "evade any and all" of AEDPA's restrictions. *See Johnson v. Warden, Georgia Diagnostic and Classification Prison*, 805 F.3d 1317, 1323 (11th Cir. 2015). This in turn would mean that "§ 2254 would serve no function at all" and would be "a complete dead letter." *See Medberry*, 351 F.3d at 1060; *see also Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351-52 (11th Cir. 2008) ("a prisoner may not avoid gatekeeping under § 2244(b) . . . by a mere change of caption when, in substance, their lawsuit collaterally attacks a sentence."). To avoid this, the Eleventh Circuit often views § 2241 as a separate avenue relief as "closed" to § 2254 petitioners, as it did here. *See* App. 14.

The Eleventh Circuit's approach leads to constitutionally impermissible results**.** "[A] core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence." *Webster v. Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015). *Atkins* precludes executing the intellectually disabled. *Atkins*, 536 U.S. at 321. The Eleventh Circuit should not be allowed to read AEDPA in a way that "leaves [the

court] powerless to prevent a custodian from inflicting an unconstitutional sentence." *Williams v. Kelley*, 858 F.3d 464, 479 (8th Cir. 2017) (Kelly, J., concurring) (internal citation omitted). Yet, the Eleventh Circuit did so here.

B. Alternative readings of AEDPA exist so as not to allow an unconstitutional execution

In response to one of Mr. Bowles's other claims, the Eleventh Circuit "decline[] Bowles's invitation to effectively declare part of the AEDPA unconstitutional." App. 13. Regarding interpretation of § 2241, Mr. Bowles does not disagree. Indeed, he asserted that where possible, the Eleventh Circuit had a "plain duty" to interpret AEDPA in a way that will "save the act." *N.L.R.B.*, 301 U.S. at 30. Such a reading is possible here.

While it is possible to interpret AEDPA's text to create two separate avenues of relief in § 2241 and § 2254—*see generally Thomas v. Crosby*, 371 F.3d 782, 802-14 (11th Cir. 2004) (Tjoflat, J., concurring) (describing how AEDPA's text and the canons of statutory interpretation require each provision to stand as two separate habeas avenues)—and this Court's precedent allows for separate habeas statutes—*see Ex Parte Yerger*, 75 U.S. 85, 105 (1868) (explaining the Judiciary Act of 1867 and the Judiciary Act of 1789 provided this Court jurisdiction over habeas petitions in two separate statutes and changes to one did not affect the other)—a much narrower reading is also available to "save the act." "[T]here is no categorical bar against resort to section 2241 in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty." *Webster v. Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015).

In *Webster v. Daniels*, 784 F.3d 1123, 1132 (7th Cir. 2015), new counsel for the petitioner discovered previously undisclosed records showing the petitioner had had been diagnosed with intellectual disability a year before his capital crime. Mr. Webster filed an *Atkins* claim in an application for a successive § 2255, which was denied. *In re Webster*, 605 F.3d 256, 259 (5th Cir. 2010). Mr. Webster then sought a writ of habeas corpus from the district court under § 2241, which was also denied. *Webster*, 784 F.3d at 1135. The Seventh Circuit, in finding that the district court erred in finding § 2241 inapplicable, explained that the savings clause afforded Mr. Webster an opportunity to pursue his *Atkins* claim under § 2241 because that section "applies when 'the remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention.'" *Id.* (citing § 2255(e)). *Id.* Because Mr. Webster's new evidence in support of his *Atkins* claim did not fall under § 2255's provisions allowing successive habeas petitions, the Seventh Circuit found § 2255 "inadequate or ineffective," thus opening the door to a petition under § 2241. *Id.* The Seventh Circuit explained: "To hold otherwise would lead in some cases—perhaps Webster's—to the intolerable result of condoning an execution that violates an Eighth Amendment. We decline to endorse such a reading of the statute." *Id.* at 1139.

Webster's exception is not overly broad so as to open the floodgates to every state prisoner seeking federal review under § 2241 to "evade" AEDPA's procedural restrictions. Most of the Eleventh Circuit cases interpreting § 2241 involved cases raising general claims of constitutional error commonly seen in federal habeas petitions, *see, e.g.*, *Johnson v. Warden, Ga., Diagnostic & Classification Prison*, 805

F.3d 1317 (11th Cir. 2015) (raising claims about insufficiency of the evidence, ineffective assistance of counsel, and the unreliability of eyewitnesses); or raising claims regarding prisoners' credit for time served, parole eligibility, or other prison-related matters, *see, e.g.*, *McCarthen v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1079 (11th Cir. 2017) (raising claim about change in law regarding term of years sentence enhancement); *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348 (11th Cir. 2008) (raising claim about time credit); *Medberry*, 351 F.3d at 1062 (raising claim about result in prison's administrative disciplinary proceedings); *In re Wright*, 826 F.3d 774 (4th Cir. 2016) (raising claims about parole eligibility, classification, and time credit under the Fair Sentencing Act).

While some of these claims are rooted in the constitution, none of them impose immutable constitutional prohibitions on the states. For example, ineffective assistance of counsel, based on the Sixth Amendment right to the effective assistance of counsel, is subject to a test for prejudice, even when timely filed. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In contrast, there is no comparable prejudice or harmless error component to an *Atkins* claim. *Atkins* created an absolute bar to the imposition of the death penalty on the intellectually disabled. *Atkins*, 536 U.S. at 321. The Supreme Court left the states to establish a procedure for determining intellectual disability, but this "did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. 701, 719 (2014).

This distinction was critical to the Seventh Circuit's holding in *Webster* that § 2241 was available to a federal prisoner asserting intellectual disability where the

standard for a successive petition under § 2255 rendered that avenue of relief unavailable to him. *See Webster*, 784 F.3d at 1123. The *Webster* court intended this exception to apply where it would lead to "the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.* In another case, *Poe v. LaRiva*, 834 F.3d 770, 774 (7th Cir. 2016), the Seventh Circuit made this distinction in finding Poe's claim of erroneous jury instructions did not fall within *Webster*'s exception. *Id.* at 772. There, the Seventh Circuit explained that § 2241 is available in that circuit only where there is some structural problem that prevents a prisoner from seeking relief to which he is entitled. *Id.* But such a structural problem exists here, where Florida law prevented Mr. Bowles from consideration for an intellectual disability before *Hall* and both state and federal law bar this determination now.

Thus, the Eleventh Circuit did not have to condone an unconstitutional result when it is "fairly possible" to read a constitutional interpretation allowing state prisoners to seek relief under § 2241. *See Webster*, 784 F.3d at 1139. This Court should grant certiorari review to decide if the Eleventh Circuit is obligated to do so.

CONCLUSION

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

Respectfully submitted,

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