**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*

## 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

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No. 19-13150-P

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D.C. Docket No. 3:19-cv-936-J-32JBT

GARY RAY BOWLES,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

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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. On August 14, 2019 he filed a habeas petition under

28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. He claimed that the Eighth Amendment prohibits the State from executing him because he is intellectually disabled. The district court dismissed the petition for lack of jurisdiction because it is Bowles' second § 2254 petition and he did not obtain this Court's authorization before filing it. On August 19, 2019, four days before his scheduled execution, Bowles appealed the district court's order and filed an emergency motion for a stay of execution in this Court. We deny the motion for a stay of execution pending appeal.

## I. PROCEDURAL HISTORY

We have set out the facts of Bowles' crimes in our order denying his motion for a stay of execution based on his §1983 case. See Bowles v. DeSantis, No. 19-12929-P, slip op. at 3–7 (11th Cir. Aug. 19, 2019).

### A. Sentencing, Re-Sentencing, And Bowles' Direct Appeals

In November of 1994 Bowles murdered Walter Hinton by dropping a 40-pound concrete block on his head while Hinton was sleeping. Bowles v. State, 716 So. 2d 769, 770 (Fla. 1998) (per curiam). Bowles pleaded guilty to the crime and was sentenced to death. Id. The Florida Supreme Court affirmed the conviction but vacated the death sentence because of an evidentiary error at the original sentence proceeding. Id. at 773. On remand, a jury unanimously recommended death and the trial court again imposed that sentence. Bowles v. State, 804 So. 2d

1173, 1175 (Fla. 2001) (per curiam). This time the Florida Supreme Court affirmed the sentence. Id. at 1184. The United States Supreme Court denied certiorari on June 17, 2002, and Bowles' conviction and death sentence became final. See Bowles v. Florida, 536 U.S. 930 (2002) (mem).

B. First State Postconviction Motion

After the conclusion of his direct appeals, Bowles sought relief in state postconviction proceedings under Rule 3.851 of the Florida Rules of Criminal Procedure. See Bowles v. State, 979 So. 2d 182, 184 (Fla. 2008) (per curiam). He filed his first collateral motion on August 29, 2003, asserting claims of ineffective assistance of counsel, improper jury instructions, and the unconstitutionality of Florida's death penalty scheme. Id. at 186 & n.2. In one of the claims he said that his trial counsel were ineffective because they failed to present an expert witness at his sentence hearing to discuss various mitigating factors related to his mental health. See id. at 186–87. He admitted that his counsel had retained a psychologist, Dr. Elizabeth McMahon, to evaluate him, but argued that the lawyers were ineffective because they did not have her testify. Id. at 187.

The postconviction trial court held an evidentiary hearing and admitted the deposition testimony of Dr. McMahon. Id. She stated that Bowles was "probably not working with what we would say is an intact brain" and that he had "some very mild dysfunction." Id. But she also said that Bowles had told her of three

additional murders he had committed. Id. She explained that Bowles' trial counsel made the strategic decision not to have her testify so that she would not be asked about those additional murders on cross-examination. Id. The postconviction court denied Bowles' motion, and the Florida Supreme Court affirmed. Id. at 187–89, 94.

C. First Federal Habeas Petition

Bowles filed his first petition for habeas corpus relief under 28 U.S.C. § 2254 in federal district court on August 8, 2008. See Petition, Bowles v. Sec'y, Dep't of Corr, 3:08-cv-791 (M.D. Fla. Aug. 8, 2008), ECF No. 1. He raised ten grounds for relief. Id. None of them involved an intellectual disability claim based on the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002). The district court denied the petition but granted Bowles a certificate of appealability on one issue based on the State's use of peremptory challenges at the resentencing trial. See Order, Bowles v. Sec'y, Dep't of Corr, 3:08-cv-791 (M.D. Fla. Dec. 23, 2009), ECF No. 18. This Court affirmed the district court's denial of relief, see Bowles v. Sec'y, Dep't of Corr, 608 F.3d 1313, 1317 (11th Cir. 2010), and the United States Supreme Court denied Bowles' petition for a writ of certiorari, see Bowles v. McNeil, 562 U.S. 1068 (2010) (mem).

D. Second and Third State Postconviction Motions

In March 2013 Bowles brought a successive Rule 3.851 postconviction motion in Florida state court, raising two claims of ineffective assistance of appellate counsel based on the Supreme Court's decision in Martinez v. Ryan, 566 U.S. 1 (2012). The postconviction trial court denied that motion in July 2013 and Bowles did not appeal. See Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence, State v. Bowles, No. 16-1994-CF-012188-AXXX-MA, (Fla. 4th Cir. Ct. Jul. 17, 2013), Doc. D1573.

About four years later, on June 14, 2017, Bowles filed another successive motion for postconviction relief in Florida state court. This one was based on the Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016). The state trial court denied that motion and the Florida Supreme Court affirmed. See Bowles v. State, 235 So. 3d 292, 292–93 (Fla. 2018) (per curiam), cert. denied, Bowles v. Florida, 139 S. Ct. 157 (2018) (mem).

E. Fourth State Postconviction Motion

Bowles filed his fourth motion for postconviction relief in Florida state court on October 19, 2017. That motion raised a single claim of intellectual disability based on the Supreme Court's decisions in Moore v. Texas, 137 S. Ct. 1039 (2017), Hall v. Florida, 572 U.S. 701 (2014), and Atkins v. Virginia, 536 U.S. 304 (2002). Bowles amended his intellectual disability claim on July 1, 2019, after the

Governor denied his clemency application and set an execution date for August 22, a little more than seven weeks later. In his amended motion Bowles asserted that he "is now, and has always been, an intellectually disabled person." As a result, he claimed, his death sentence must be vacated because the Supreme Court in Atkins had created a "categorical rule" making intellectually disabled offenders "ineligible for the death penalty."

The Florida postconviction trial court summarily denied the motion as untimely and the Florida Supreme Court affirmed. See Bowles v. State, Nos. SC19-1184 & SC19-1264, 2019 WL 3789971, at *1–3 (Fla. Aug. 13, 2019). The Florida Supreme Court also denied Bowles' habeas claim that the death penalty is cruel and unusual punishment and is barred by the Eighth Amendment of the United States Constitution. Id. at *3–4. Bowles then filed a petition for a writ of certiorari in the United States Supreme Court and asked that Court for a stay of execution. See Bowles v. State, Nos. 19-5617 & 19A183 (U.S. Aug. 16, 2019).

F. Second Federal § 2254 Petition And Motion To Stay

On August 14, 2019, Bowles filed his second 28 U.S.C. § 2254 petition in federal district court, this time raising his claim of intellectual disability. He also filed a motion for a stay of execution. The district court dismissed the petition for lack of subject matter jurisdiction. It concluded that because Bowles had already filed a § 2254 petition in 2008, he could not file another one without first obtaining

this Court's authorization, which he had not done. The court also denied Bowles' motion for a stay of execution. Bowles appealed the district court's dismissal of his habeas petition and has moved this Court for an emergency stay of execution "to allow for full and fair consideration" of his appeal.

## II. DISCUSSION

We may grant a stay of execution only if Bowles can establish that: "(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." Powell v. Thomas, 641 F.3d 1255, 1257 (11th Cir. 2011). The "most important question concerning a stay" is whether Bowles can show a substantial likelihood of success on the merits. Jones v. Comm'r, Ga. Dep't of Corr., 811 F.3d 1288, 1292 (11th Cir. 2016). For the reasons articulated in the district court's well-reasoned order, he cannot.

### A. The District Court's Dismissal Of Bowles' § 2254 Petition

The district court concluded that Bowles' present § 2254 petition is "second or successive" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and dismissed it for lack of jurisdiction because he did not obtain this Court's authorization before filing it. A jurisdictional ruling on a petition for habeas corpus is reviewed de novo on the merits. See Patterson v. Sec'y, Fla.

Dep't of Corr., 849 F.3d 1321, 1324 (11th Cir. 2014) (en banc) ("We review de novo whether a petition for a writ of habeas corpus is second or successive.").[1]

The district court was right to dismiss Bowles' § 2254 petition for lack of jurisdiction. Bowles filed his first § 2254 petition in the district court in 2008. It denied the petition on the merits and this Court affirmed. Bowles, 608 F.3d at 1315 (11th Cir. 2010). That made any later § 2254 petitions Bowles filed subject to AEDPA's restrictions on second or successive petitions. One of those restrictions is that "[b]efore a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). But Bowles did not come to this Court for authorization to file his petition. Instead, he filed his second habeas petition directly in the district court. As a result, the district court was required to dismiss the petition for lack of jurisdiction, and that's what it did. See Burton v. Stewart, 549 U.S. 147, 157 (2007) (holding that a district court must dismiss a petition "for lack of jurisdiction" if the prisoner does not receive authorization from the court of appeals before filing a second or successive petition in the district court); Lambrix

[1] Bowles does not need a certificate of appealability to appeal from the district court's order because that order is not "a final order in a habeas corpus proceeding" within the meaning of 28 U.S.C. § 2253(c). Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004). Instead, the decision is a final order dismissing the petition for lack of subject matter jurisdiction, so we can review that order under 28 U.S.C. § 1291. Id.

v. Sec'y, Dep't of Corr., 872 F.3d 1170, 1180 (11th Cir. 2017) (stating that when a petitioner fails to obtain authorization from the court of appeals to file a second or successive habeas petition, "the district courts lack jurisdiction to consider the merits of the petition"); Farris v. United States, 333 F.3d 1211, 1216 (11th Cir. 2003) ("Without authorization, the district court lacks jurisdiction to consider a second or successive petition.").

In his motion to stay Bowles argues that he "can make a strong showing that he is likely to succeed in his argument that his Atkins claim is not successive," but he does not elaborate on what that showing would be. In his reply brief he clarified that he is relying on the arguments he made before the district court for that showing, and what Bowles argued there is that the clear statutory command of § 2244(b)(3)(A) does not apply to him because his petition is not really a second or successive one under Panetti v. Quarterman, 551 U.S. 930 (2007). But that decision does not apply to Bowles' petition.

In Panetti a petitioner brought a claim under Ford v. Wainwright, 477 U.S. 399 (1986), contending that his mental illness at the time of his scheduled execution meant that the State could not execute him. 551 U.S. at 941–42. The Supreme Court held that the petition, though the inmate's second one, did not trigger AEDPA's "second or successive" restrictions because a Ford claim does not become ripe until a date is set for the prisoner's execution, which may occur

after he has filed his first federal habeas petition. Id. at 947. The Court held that "[t]he statutory bar on 'second or successive' applications does not apply to a Ford claim brought in an application filed when the claim is first ripe." Id.

We have explained that: "The Panetti case involved only a Ford claim, and the Court was careful to limit its holding to Ford claims. The reason the Court was careful to limit its holding is that a Ford claim is different from most other types of habeas claims." Tompkins v. Sec'y, Dep't of Corr., 557 F.3d 1257, 1259 (11th Cir. 2009) (citation omitted). Unlike most other types of claims, a Ford claim of mental incompetence can arise at any point in a prisoner's life and is usually "not ripe until after the time has run to file a first federal habeas petition." Panetti, 551 U.S. at 943. The Supreme Court's narrow reasoning created a narrow holding that is "notably limited . . . to incompetency claims." In re Davis, 565 F.3d 810, 820 n.6 (11th Cir. 2009) (per curiam).

Bowles is not seeking to raise a Ford claim of mental incompetence to be executed. Instead, he wants to raise an Atkins claim that he cannot be executed because he is intellectually disabled. But Panetti "d[id] not involve Atkins or [intellectual disability]."[2] Hill v. Humphrey, 662 F.3d 1335, 1359 (11th Cir. 2011) (en banc). And an Atkins claim of intellectual disability is not like a Ford claim of

[2] Like the Supreme Court, "[p]revious opinions of this Court have employed the term 'mental retardation.'" Hall v. Florida, 572 U.S. 701, 704 (2014). "This opinion uses the term 'intellectual disability' to describe the identical phenomenon." Id.

mental incompetence. The district court explained the difference: "Intellectual disability at the time the crime is committed (Atkins) is different from incompetency at the time of execution (Ford). The first renders an inmate ineligible for a death sentence; the second renders a death-sentenced inmate ineligible for execution."

Under Supreme Court precedent, not to mention by medical definition, the onset of intellectual disability in an Atkins claim "must occur before age 18 years." Atkins, 536 U.S. at 308 n.3 (2002); see Hall v. Florida, 572 U.S. 701, 710 (2014) ("[T]he medical community defines intellectual disability according to three criteria . . . [including] onset of [intellectual and adaptive] deficits during the developmental period."); see also Carroll v. Sec'y, DOC, 574 F.3d 1354, 1369 (11th Cir. 2009) (stating that a prisoner bringing an intellectual disability claim must "demonstrate significantly subaverage general intellectual functioning along with deficits in adaptive behavior and an onset before age 18.") (emphasis omitted) (quotation marks omitted). As a result, "[t]he Supreme Court's holdings regarding Ford incompetence-to-be-executed claims cannot be imported, wholesale, into the law governing Atkins claims." Busby v. Davis, 925 F.3d 699, 713 (5th Cir. 2019); see Davis v. Kelly, 854 F.3d 967, 971–72 (8th Cir. 2017) (holding that "Panetti . . . has no force or applicability to [the prisoner's Atkins] claim" because

Atkins focuses on the prisoner's culpability at the time of the crime, whereas Ford concerns the prisoner's competency at the time of his execution).

That also means that, unlike a Ford claim, an Atkins claim "can be and routinely [is] raised in initial habeas petitions." Tompkins, 557 F.3d at 1260; see, e.g., Hill, 662 F.3d at 1361 (denying petitioner's Atkins intellectual disability claim raised in first federal habeas petition); Powell v. Allen, 602 F.3d 1263, 1268, 1272 (11th Cir. 2010) (same); Carroll, 574 F.3d at 1366–67 (same). If Bowles has an intellectual disability now, then he had an intellectual disability 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.

B. Bowles' § 2241 Petition And Miscarriage Of Justice Arguments

Bowles raised three other arguments before the district court for why his petition should not be dismissed. First, he argued that the court should grant him relief because "any procedural obstacle to the consideration of a claim of intellectual disability must cede to the categorical protections of the Eighth Amendment." "Any procedural obstacle" here being the AEDPA's restrictions on second or successive applications. The restrictions of the AEDPA apply to

constitutional claims, and "[n]othing in the Constitution requires otherwise." Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands, 461 U.S. 273, 292 (1983); see also Gonzalez v. Thaler, 565 U.S. 134, 138, 154 (2012); Pace v. DiGuglielmo, 544 U.S. 408, 419 (2005). We decline Bowles' invitation to effectively declare part of the AEDPA unconstitutional.

Second, Bowles argued in the district court that he could overcome any AEDPA restrictions on second or successive petitions because a fundamental miscarriage of justice would occur if he were executed because he is "actually innocent" of the death penalty. He relied on the Supreme Court's decision in Sawyer v. Whitley, 505 U.S. 333 (1992), which involved the procedural default doctrine. But we have rejected that argument and "made clear that AEDPA forecloses the Sawyer exception in all circumstances, including § 2254 challenges to state death sentences." In re Hill, 715 F.3d 284, 301 (11th Cir. 2013); see In re Hill, 777 F.3d 1214, 1225 (11th Cir. 2015) (per curiam) (stating that "Hill's argument that Sawyer provides an equitable exception to the restriction on successive § 2254 petitions is similarly foreclosed" because "the Sawyer actual-innocence-of-the-death-penalty exception did not survive the AEDPA").

Third, Bowles also argued in the district court that he should be allowed to bring his petition for a writ of habeas corpus under 28 U.S.C. § 2241. But we have held many times that "a prisoner collaterally attacking his conviction or sentence

may not avoid the various procedural restrictions imposed on § 2254 petitions . . . by nominally bringing suit under § 2241." Antonelli v. Warden, U.S.P. Atlanta, 542 F.3d 1348, 1351 (11th Cir. 2008); see also Johnson v. Warden, Ga. Diagnostic & Classification Prison, 805 F.3d 1317, 1323 (11th Cir. 2015) (per curiam) ("[Petitioner's] position — that a habeas petitioner can evade any and all of the [AEDPA] restrictions set out in §§ 2244 and 2254 by the simple expedient of labeling the petition as one filed under § 2241 — has no merit whatsoever."). So that avenue is closed to Bowles as well. Bowles has not shown a substantial likelihood of success on the merits of his appeal.[3]

## III. CONCLUSION

We **DENY** Bowles' emergency motion for a stay of execution.

[3] In view of our holding, we have no occasion to address the Respondents' argument that equitable considerations relating to the timing of Bowles' filing of his latest petition also counsel in favor of denying his motion for a stay of execution.

MARTIN, Circuit Judge, concurring in the judgment:

The Majority correctly describes this Circuit's precedent, which renders Mr. Bowles's 28 U.S.C. § 2254 petition "second or successive" under the Antiterrorism and Effective Death Penalty Act of 1996. Mr. Bowles did not first seek permission from this Court before filing his petition with the District Court, so the District Court did not have jurisdiction over it. See Burton v. Stewart, 549 U.S. 147, 157, 127 S. Ct. 793, 799 (2007) (holding a district court is without jurisdiction to entertain a second or successive petition filed without authorization from the Court of Appeals). I therefore join the ruling of the Majority Opinion that the District Court did not err in dismissing Mr. Bowles's petition. See id.

**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

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August 21, 2019

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Appeal Number: 19-13150-P
Case Style: Gary Ray Bowles v. Secretary, Florida DOC, et al
District Court Docket No: 3:19-cv-00936-J-32JBT

**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**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

GARY R. BOWLES,

Petitioner,

v. Case No. 3:19-cv-936-J-32JBT

MARK S. INCH, Secretary, Florida Department of Corrections, et al.,

Respondents.

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**ORDER**
**(Execution Scheduled for August 22, 2019)**

Petitioner, a death row inmate who is scheduled for execution on August 22, 2019, filed an Emergency Petition Under 28 U.S.C. §§ 2254 and 2241 for a Writ of Habeas Corpus (Doc. 1) on August 14, 2019.[1] He also filed an Emergency Motion for a Stay of Execution (Doc. 2). Relying mainly on Atkins v. Virginia, 536 U.S. 304 (2002), Petitioner claims that his death sentence violates the Eighth Amendment because he is intellectually disabled. Respondents filed a Motion to Dismiss the Successive Habeas Petition for Lack of Jurisdiction (Doc. 8) and a Response to the Motion to Stay the Execution (Doc. 9). Petitioner filed a Consolidated Reply (Doc. 10). Upon review of the parties' filings and applicable law, the Court finds that the Petition is second or

[1] Citations to all documents filed in this case are to the docket and page numbers as assigned by the Court's electronic case filing system.

successive, and therefore, the Court lacks jurisdiction to hear it without prior authorization from the Eleventh Circuit.

***Procedural History***

The facts and procedural history leading to Petitioner's death sentence are set forth in the Florida Supreme Court's decision affirming that sentence. See Bowles v. State, 804 So. 2d 1173, 1174-75 (Fla. 2001). This Court summarizes only those facts and procedural history necessary to resolve whether the Petition is second or successive.

On May 17, 1996, Petitioner entered a plea of guilty to the 1994 first degree murder of Walter Hinton. Bowles v. State, 716 So. 2d 769 (Fla. 1998); see State v. Bowles, No. 16-1994-CF-12188 (Fla. 4th Cir. Ct.). Following the penalty phase proceedings, a jury recommended that Petitioner be sentenced to death by a vote of ten-to-two, and the judge followed that recommendation, sentencing him to death on September 6, 1996. See Bowles, No. 16-1994-CF-12188. The Florida Supreme Court affirmed Petitioner's first degree murder conviction, but reversed his death sentence and remanded for a new penalty phase. Bowles, 716 So. 2d at 773. The state court conducted a second penalty phase proceeding, and on May 27, 1999, a jury unanimously recommended that Petitioner be sentenced to death. See Bowles, No. 16-1994-CF-12188. The judge followed that recommendation and imposed the death penalty on September 7, 1999. Id. Petitioner filed a second direct appeal, and the Florida Supreme Court affirmed his death sentence through a written opinion issued

on October 11, 2001. Bowles, 804 So. 2d at 1174-75. The United States Supreme Court denied certiorari review on June 17, 2002. Bowles v. Florida, 536 U.S. 930 (2002).

On December 9, 2002, Petitioner filed his initial state motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. See Bowles, No. 16-1994-CF-12188. On June 25, 2003, Petitioner filed an amended Rule 3.851 motion, and he filed a second amended Rule 3.851 motion on August 29, 2003. Id. Thereafter, following an evidentiary hearing, the trial court denied his second amended Rule 3.851 motion on August 12, 2005. See id. The Florida Supreme Court affirmed the denial through a written opinion issued on February 14, 2008. Bowles v. State, 979 So. 2d 182 (Fla. 2008). Petitioner filed his first federal habeas corpus petition under 28 U.S.C. § 2254 on August 8, 2008. See Bowles v. Sec'y Fla. Dep't of Corr., No. 3:08-cv-791-J-25 (M.D. Fla.) (Doc. 1).[2] It contained no Atkins claim. This Court denied habeas relief on all of

[2] Petitioner raised the following ten grounds in his federal habeas petition: (1) Petitioner's rights under the Sixth and Fourteenth Amendments were denied, *i.e.*, his right to an impartial jury and his due process right to a jury from which no jurors have been systematically removed by the state, when the state used peremptory challenges to remove prospective jurors who, while in favor of the death penalty, expressed reservations about recommending capital punishment; (2) the trial court erred in permitting the state to introduce, at the resentencing hearing, evidence of two homicides, which were inadmissible at the original sentencing hearing, in violation the Eighth and Fourteenth Amendments; (3) the trial court erred in finding the murder to have been committed in an especially heinous, atrocious, or cruel manner, in violation of the Eighth and Fourteenth Amendments; (4) the trial court erred in giving the standard jury instruction to define the heinous, atrocious, or cruel aggravating circumstance, in violation of the Eighth and Fourteenth Amendments; (5) Florida's death penalty scheme, as applied, violated Petitioner's constitutionally guaranteed right to a fair and impartial trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the statute under which he was sentenced, Fla. Stat. § 921.141, did not meet the heightened reliability requirements of a capital sentencing scheme and failed to adequately safeguard his right to a fair trial by permitting unreliable and prejudicial evidence to be used against

his claims, but issued a certificate of appealability on ground one regarding Petitioner's Sixth and Fourteenth Amendment right to an impartial jury. Id. at Doc. 18. The Eleventh Circuit Court of Appeals denied Petitioner's request for an expanded COA and affirmed this Court's denial of federal habeas relief through a written opinion issued on June 18, 2010. Bowles v. Sec'y for Dep't of Corr., 608 F.3d 1313 (11th Cir. 2010).

On March 19, 2013, Petitioner filed a successive Rule 3.851 motion, which the trial court denied on July 17, 2013. Bowles, No. 16-1994-CF-12188. Petitioner did not appeal the denial. He filed a second successive Rule 3.851 motion pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), on June 14, 2017. See Bowles, No. 16-1994-CF-12188. The trial court denied Petitioner's second successive Rule 3.851 motion, and the Florida Supreme Court affirmed the denial on January 29, 2018. Bowles v. State, 235 So. 3d 292 (Fla. 2018).

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him; (6) ineffective assistance of appellate counsel for failure to allege the issue of whether the state's introduction of gruesome photographs to the jury had any relevance to the state's case, and whether Petitioner was prejudiced thereby; (7) the trial court erred in finding Petitioner committed the murder during the course of an attempted robbery and for pecuniary gain, in violation of the Eighth and Fourteenth Amendments; (8) the Supreme Court of Florida's finding that Petitioner did not prove the two proposed statutory mitigating circumstances of "extreme emotional disturbance" and "diminished capacity" was a ruling contrary to clearly established federal law as well as an unreasonable decision in light of the evidence presented in the state courts; (9) the death penalty imposed on Petitioner is a disproportionate sentence and it constitutes a cruel or unusual punishment contrary to Art. 1, § 17 of the Florida Constitution, as well as a cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments to the United States Constitution; and (10) ineffective assistance of trial counsel for failure to introduce Dr. McMahon's testimony concerning mental mitigation at the Spencer v. State, 615 So. 2d 688 (Fla. 1993), hearing, which would have supported the proposed two statutory mitigating circumstances.

On October 19, 2017, Petitioner filed a third successive Rule 3.851 motion asserting, for the first time, a claim of intellectual disability under Moore v. Texas, 137 S. Ct. 1039 (2017); Hall v. Florida, 572 U.S. 701 (2014); and Atkins, 536 U.S. at 304. See Bowles, No. 16-1994-CF-12188.[3] While his third successive Rule 3.851 motion was pending, Governor DeSantis signed a death warrant on June 11, 2019, and the execution was set for August 22, 2019. The trial court permitted Petitioner to amend his pending third successive Rule 3.851 motion, and following a case management conference pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), the trial court summarily denied his third successive Rule 3.851 motion as untimely. Bowles, No. 16-1994-CF-12188. The Florida Supreme Court affirmed the trial court's denial through a written opinion issued on August 13, 2019. Bowles v. State, --- So. 3d ---, 2019 WL 3789971 (Fla. 2019). Petitioner's second federal habeas petition followed the next day.

***Second or Successive Petitions Under AEDPA***

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs a state prisoner's federal habeas corpus petition. See Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 642 (11th Cir. 2016). AEDPA bars the filing of a second or successive habeas petition, absent approval from the appropriate court of appeals. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application

[3] At the penalty phase, Petitioner presented evidence to support the statutory mental mitigator of "substantially diminished capacity to appreciate the criminality of the acts at the time of the murder." Bowles, 804 So. 2d at 1176. However, in support of this statutory mitigator, Petitioner argued his "level of intoxication at the time of the murder substantially reduced his ability to appreciate the criminality of his conduct," not that he was intellectually disabled. Id. at 1181.

permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); see also Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273, 1278 (11th Cir. 2014) (recognizing that "[s]ubject to [certain] exceptions[,] . . . a district judge lacks jurisdiction to decide a second or successive petition filed without [the Eleventh Circuit's] authorization").

> The phrase "second or successive" is not self-defining. It takes its full meaning from [Supreme Court] case law, including decisions predating the enactment of the [AEDPA]. The 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.

Panetti v. Quarterman, 551 U.S. 930, 943-44 (2007) (citations omitted).

***Parties' Positions***

Petitioner acknowledges that he did not raise his Atkins claim in his first federal habeas petition filed in 2008. He also does not suggest that the Eleventh Circuit has authorized him to file a second or successive petition. Instead, Petitioner claims that the instant Petition is not "second or successive," and thus he does not need the Circuit's approval.

Petitioner likens his Atkins claim to a Ford[4] claim in an attempt to meet the exception recognized by the United States Supreme Court in Panetti, 551 U.S. at 945. In Panetti, the Court concluded that AEDPA's bar on second or successive habeas

[4] Ford v. Wainwright, 477 U.S. 399 (1986).

petitions did not apply "in the unusual posture presented [t]here: a § 2254 application raising a Ford-based incompetency claim filed as soon as that claim is ripe." Id. Because a Ford claim is not ripe until an execution is imminent, a petitioner is likely unable to bring such a claim in his first federal habeas proceeding. See id. at 946-47. Thus, a second-in-time petition raising a Ford claim that is filed when the claim is first ripe (when execution is imminent) is not barred as "second or successive." Id. at 947.

Petitioner argues that his intellectual disability "claim was not ripe when he filed his initial [federal] habeas petition." Doc. 1 at 44. He asserts that his "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 may also be raised prior to the imposition of the sentence of death and prior to the actual execution of that sentence." Id. He further contends that he "is exempt from execution due to the fact of his intellectual disability," and "[b]ecause the basis for his claim did not exist prior to his warrant being signed, [Petitioner]'s numerically second motion is not 'second or successive,' and AEDPA's gatekeeping provision does not apply." Id. at 45 (emphasis added). Petitioner also asserts that because he is intellectually disabled, he is "actually innocent of the death penalty"; therefore, the bar against second or successive petitions should not be applied because it would be a miscarriage of justice. See id. at 46-48. Alternatively, Petitioner seeks to proceed under

28 U.S.C. § 2241, seeking to avoid the "second or successive" bar under § 2244. See id. at 48-59.

Respondents counter that the Petition is second or successive, and this Court is without jurisdiction to consider it. See Doc. 8. Respondents assert that Panetti does not extend to Petitioner's Atkins claim, because his Atkins claim was ripe and could have been raised in his first federal habeas petition filed in 2008. See id. at 4-5. Moreover, Respondents contend that there is no miscarriage of justice exception applicable to the second or successive bar. Id. at 6-7. Finally, Respondents assert that Petitioner's attempt to invoke § 2241 to evade the statutory limitations relating to the filing of second or successive petitions is foreclosed by precedent. Id. at 13-20.

***Discussion***

Intellectual disability at the time the crime is committed (Atkins) is different from incompetency at the time of execution (Ford). The first renders an inmate ineligible for a death sentence; the second renders a death-sentenced inmate ineligible for execution. Thus, the Atkins claim ripens early on while the Ford claim only becomes ripe when execution is imminent. This distinction drives the analysis of whether Petitioner's Atkins claim is second or successive.

The United States Supreme Court "decided in Ford . . . that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has 'lost his sanity' after sentencing." Madison v. Alabama, 139 S. Ct. 718, 722 (2019). Under Ford, "[t]he critical question is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding' of 'the State's

rationale for [his] execution.' Or similarly put, the issue is whether a 'prisoner's concept of reality' is 'so impair[ed]' that he cannot grasp the execution's 'meaning and purpose' or the 'link between [his] crime and its punishment.'" Id. at 723 (quoting Panetti, 551 U.S. at 958-60). Because competency can be lost and regained over time, it follows that a Ford claim is not ripe until execution is imminent:

> Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh. It is not ripe years before the time of execution because mental conditions of prisoners vary over time. The reason the Ford claim was not ripe at the time of the first petition in Panetti is not that evidence of an existing or past fact had not been uncovered at that time. Instead, the reason it was unripe was that no Ford claim is ever ripe at the time of the first petition because the facts to be measured or proven—the mental state of the petitioner at the time of execution—do not and cannot exist when the execution is years away.

Tompkins v. Sec'y, Dep't of Corr., 557 F.3d 1257, 1260 (11th Cir. 2009) (per curiam) (citations omitted). Thus, under Panetti, a Ford claim—"competency to be executed"—is not ripe until execution is imminent, usually after the death warrant is signed.

By contrast, an Atkins claim ripens much earlier and is not dependent on when the death warrant is signed. The Supreme Court in Atkins "recognized that the execution of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment." Brumfield v. Cain, 135 S. Ct. 2269, 2273 (2015); see Atkins, 536 U.S. at 321 (concluding that "the Constitution places a substantive restriction on the State's power to take the life of a[n intellectually disabled] offender"). While an individual's competency can fluctuate over one's lifetime, intellectual disability is permanent and, by definition, has an onset before

the age of 18.[5] See Atkins, 536 U.S. at 318 ("[C]linical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."); see also Busby v. Davis, 925 F.3d 699, 713 (5th Cir. 2019) ("Incompetence may occur at various points after conviction, and it may recede and later reoccur. A finding that an inmate is incompetent to be executed does not foreclose the possibility that she may become competent in the future and would no longer be constitutionally ineligible for the death penalty. By contrast, intellectual disability is by definition a permanent condition that must have manifested before the age of 18. A person who is found to be intellectually disabled is permanently ineligible to be executed, and the sentence of death is vacated." (emphasis added)). Thus, the facts to be measured and proven with respect to intellectual disability at the time of the crime exist long before execution is imminent.

In seeking the benefit of the Panetti exception to the second or successive rule, Petitioner improperly conflates intellectual disability at the time of the crime (Atkins) with competency to be executed (Ford). The Eighth Circuit case of Davis v. Kelley, 854 F.3d 967 (8th Cir. 2017), illustrates the fallacy of this argument. In Davis, the petitioner's first federal habeas petition was pending when Atkins was decided. Id. at 968. Nevertheless, the petitioner failed to raise an Atkins claim in the district court. Id. On appeal, he requested that the Eighth Circuit remand to the district court for

[5] Petitioner was 32 years old when he murdered Hinton. See Bowles, No. 16-1994-CF-12188.

further proceedings, "arguing that there was significant evidence of his intellectual disability to render his death sentence unconstitutional in light of Atkins." Id. The Eighth Circuit construed the request to remand as a second or successive petition, and while it recognized that the claim relied on a new rule of constitutional law (Atkins), found that the petitioner could have and should have raised the claim in his first habeas petition. Id.

Years later, the petitioner's death warrant was signed, and he filed, in the Eighth Circuit, a motion to recall the mandate or alternatively for leave to file a successive habeas petition. Id. He acknowledged that he had previously raised a claim challenging his death sentence under Atkins, but he argued that he was raising, for the first time, a claim that Atkins prohibits his execution and that such a claim was not ripe until his death warrant was issued. Id. at 971. The Eighth Circuit denied relief and drew a distinction between the issue of competency and intellectual disability, recognizing that "competency can be lost or regained over time," while intellectual disability requires "the onset of . . . deficits while still a minor." Id. (quotations and citation omitted). The court stated that Ford "focus[ed] on the inmate's competency at the time of execution," while "Atkins focused exclusively on the prisoner's culpability . . . at the time that the crime was committed." Id. The court concluded that "[t]he issue of intellectual disability, therefore, does not suddenly become ripe when the execution date is imminent," and "decline[d] to treat Davis's Atkins claim as though it were a Ford claim." Id. at 972, 973. The Davis decision is consistent with Eleventh Circuit precedent which has confined the Panetti exception

to its facts. See Tompkins, 557 F.3d at 1260; Scott v. United States, 890 F.3d 1239 (11th Cir. 2018) (following Tompkins); Jimenez v. Sec'y, Fla. Dep't of Corr., 758 F. App'x 682 (11th Cir. 2018) (same).

Thus, the Panetti exception to the second or successive rule does not extend to Petitioner's Atkins claim. Atkins was decided 6 years before Petitioner filed his first federal habeas petition. Sufficient factual predicate for the claim also predated his first federal habeas petition.[6] Petitioner could have, but failed to, raise it in his first federal petition. Contrary to Petitioner's argument, Doc. 1 at 44, the recent issuance of Petitioner's death warrant has no bearing on the ripeness of his claim of intellectual disability.[7]

Insofar as Petitioner cites to Hall, 572 U.S. at 701,[8] decided in 2014, to overcome the successive nature of his Petition, this is likely a contention that should be addressed by the Eleventh Circuit in the first instance. In any event, the United States

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[6] To the extent Petitioner relies on some new evidence of IQ testing and other recently created evidence, the underlying factual predicate of the claim existed prior to him filing his first federal habeas petition.

[7] While true that Petitioner filed a motion raising the Atkins issue in state court in 2017, he only litigated the issue in the Florida courts after the death warrant was signed. In any event, Petitioner relies on the Panetti exception to argue that this federal habeas petition, his second, is not barred by the "second or successive" rule of § 2244.

[8] In Hall, the Supreme Court found that Florida's bright-line cutoff of an IQ score of 70 or below to establish "subaverage intellectual functioning" violated the Eighth Amendment. Hall, 572 U.S. at 723. Instead, the Court held that the determination of intellectual disability must be a "conjunctive and interrelated assessment" and where an individual's IQ score falls within the margin of error for intellectual disability, he must be given the opportunity to present evidence of intellectual disability, "including deficits in adaptive functioning over his lifetime." Id.

Supreme Court did not make the rule announced in Hall retroactive to cases on collateral review. See In re Henry, 757 F.3d 1151, 1159 (11th Cir. 2014) (holding the exception in § 2244(b)(2)(A) does not apply to claims of intellectual disability based on Hall because the Supreme Court has not made Hall retroactive); see also In re Hill, 777 F.3d 1214, 1223 (11th Cir. 2015) (recognizing In re Henry as binding precedent and finding that Hall is not retroactive, and therefore, Hill was not entitled to file a successive habeas petition). While Petitioner argues that the Court should follow the Florida Supreme Court's retroactive application of Hall, see Walls v. State, 213 So. 3d 340 (Fla. 2016), this Court is bound by the Eleventh Circuit's application of federal law, not the Florida Supreme Court's. See, e.g., James v. Jones, No. 18-22416-Civ-Scola, 2019 WL 112214, at *2 (S.D. Fla. Jan. 4, 2019) (holding that district court is bound by Eleventh Circuit's holding in In re Henry, not the Florida Supreme Court's decision in Walls). Further, when given the opportunity to consider Hall's application to Petitioner's case, the Florida Supreme Court found that Petitioner should have raised any constitutional claim regarding Florida's standards for determining intellectual disability within sixty days of October 1, 2004, when Florida adopted Florida Rule of Criminal Procedure 3.203. Bowles, --- So. 3d --- , 2019 WL 3789971, at *2 (holding "Bowles' inaction should not be ignored on the basis of the perceived futility of his claim").[9]

[9] In his Reply, Petitioner also cites to the Fifth Circuit's very recent decision in In re Johnson, --- F.3d --- , 2019 WL 3814384 (5th Cir. 2019), for the proposition that his intellectual disability claim did not become "available" until the publication of the DSM-5. Doc. 10 at 17-19. The Fifth Circuit decided the case in the context of an application filed with the circuit court of appeals requesting permission to file a

***Miscarriage of Justice***

According to Petitioner, "[t]he Supreme Court has made clear that a fundamental miscarriage of justice occurs when the petitioner is actually innocent of the crime, see Schlup v. Delo, 513 U.S. 298, 324-27 (1995), or is ineligible for the death penalty, Sawyer v. Whitley, 505 U.S. 333 (1992)." Doc. 1 at 46-47. While he makes no claim of actual innocence of the crime, he asserts that a habeas claim that is otherwise barred by AEDPA may be heard if the petitioner is able to show actual innocence of the death penalty. Id. at 47. Petitioner contends this Court should hear his claim because he argues that he is categorically exempt from execution based on his intellectual disability. See id. at 47-48.

Sawyer, however, was pre-AEDPA, and since then, the Eleventh Circuit has "made clear that AEDPA forecloses the Sawyer exception in all circumstances, including § 2254 challenges to state death sentences." In re Hill, 715 F.3d at 301; see In re Hill, 777 F.3d at 1225 ("Hill's argument that Sawyer provides an equitable exception to the restriction on successive § 2254 petitions is similarly foreclosed" because "the Sawyer actual-innocence-of-the-death-penalty exception did not survive

successive habeas petition based on intellectual disability. Thus, while In re Johnson provides no basis for this Court to act, it can certainly be cited to the Eleventh Circuit if Petitioner applies for permission to file a successive habeas petition.

the AEDPA.").[10] Thus, Petitioner cannot overcome the second or successive bar by arguing he is actually innocent of the death penalty.[11]

***Conclusion on Second or Successive Issue***

Petitioner's claim of intellectual disability has never been tested on the merits; the undersigned expresses no view on whether Petitioner would be able to prove such a claim other than to say that, based on the parties' submissions, whether Petitioner is intellectually disabled would be a contested issue. However, this Court is without authority to consider this claim without approval from the Eleventh Circuit because the Petition is second or successive. Petitioner's path is to seek permission from the Eleventh Circuit to file a successive petition.

***Whether Petitioner Can Proceed Under 28 U.S.C. § 2241***

Petitioner argues in the alternative that he can bring his petition for a writ of habeas corpus under 28 U.S.C. § 2241.[12] Doc. 1 at 48-59. In doing so, Petitioner seeks

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[10] Petitioner recognizes the Eleventh Circuit precedent in his Reply, but "submits that it is at odds with other circuits as well as the Supreme Court itself." Doc. 10 at 5. This Court is required to follow the Eleventh Circuit.

[11] Petitioner also argues that "any procedural obstacle to the consideration of a claim of intellectual disability must cede to the categorical protections of the Eighth Amendment." Doc. 1 at 45. He asserts that "Atkins protects intellectually disabled individuals from execution regardless of when the claim is brought." Id. at 46. Petitioner does not cite to any authority to support the proposition that "any procedural obstacle" otherwise required by law must be ignored when an Atkins claim is raised.

[12] Section 2241 provides that "[w]rits 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. § 2241(a). "The writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States." § 2241(c)(3).

to attack the constitutionality of his state court judgment, freed from the constraints of AEDPA associated with § 2254. Petitioner relies heavily on the concurring opinion in Thomas v. Crosby, 371 F.3d 782, 788-814 (11th Cir. 2004) (Tjoflat, J., concurring), and the Seventh Circuit's decision in Webster v. Daniels, 784 F.3d 1123 (7th Cir. 2015). However, Petitioner's argument–that § 2241 provides a separate avenue for a state prisoner to challenge the legality of his state court judgment without the strictures of § 2254 and AEDPA–finds no support in the decisions of the Supreme Court or the Eleventh Circuit.

The Supreme Court has stated that the federal courts' "authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State court.'" Felker v. Turpin, 518 U.S. 651, 662 (1996) (quoting 28 U.S.C. § 2254(a)). The Eleventh Circuit's "cases hold that a prisoner collaterally attacking his conviction or sentence may not avoid the various procedural restrictions imposed on § 2254 petitions . . . by nominally bringing suit under § 2241." Antonelli v. Warden, U.S.P. Atlanta, 542 F.3d 1348, 1351 (11th Cir. 2008) (citing, inter alia, Medberry v. Crosby, 351 F.3d 1049, 1060-61 (11th Cir. 2003)). While Petitioner argues that § 2241 creates a separate vehicle for a person in custody under a state court's judgment to challenge the legality of his sentence without AEDPA's restrictions, the Eleventh Circuit has repeatedly rejected that argument. Johnson v. Warden, Ga. Diagnostic & Classification Prison, 805 F.3d 1317, 1322-23 (11th Cir. 2015); Thomas, 371 F.3d at 785-87; Medberry, 351 F.3d at 1060-61.

In Medberry, the Eleventh Circuit found "[t]here is no evidence of any intent" for § 2254 and § 2241 to provide "independent, alternative remed[ies]." 351 F.3d at 1058. Instead, "the writ of habeas corpus is a single post-conviction remedy principally governed by two different statutes." Id. at 1059. The first, § 2241, provides the general grant of authority for federal courts to issue a writ of habeas corpus in certain situations, including where the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." Id. (quoting 28 U.S.C. § 2241(c)(3)). The second, § 2254, "applies to a subset of those to whom § 2241(c)(3) applies–it applies to 'a person in custody pursuant to the judgment of a State court' who is 'in custody in violation of the Constitution or laws or treaties of the United States.'" Id. (quoting 28 U.S.C. § 2254(a)). Section 2254 is not "anything more than a limitation on the preexisting authority under § 2241(c)(3) to grant the writ of habeas corpus to state prisoners." Id. at 1060. Thus, §§ 2241 and 2254 are not "discrete and independent source[s] of post-conviction relief." Id.

Applying "the canon of statutory construction that the more specific takes precedence over the more general," the Eleventh Circuit found that "an application for a writ of habeas corpus by a state prisoner serving his sentence is subject to the requirements of § 2254." Id. (citing Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001)). Agreeing with Coady, the Eleventh Circuit observed "that 'both Sections 2241 and 2254 authorize [petitioner's] challenge to the legality of his continued state custody,' but that allowing him to file his 'petition in federal court pursuant to Section 2241

without reliance on Section 2254 would . . . thwart Congressional intent.'" Medberry, 351 F.3d at 1060 (quoting Coady, 251 F.3d at 484-85). The court explained:

> Our reading of §§ 2241 and 2254 as governing a single post-conviction remedy, with the § 2254 requirements applying to petitions brought by a state prisoner in custody pursuant to the judgment of a State court, gives meaning to § 2254 without rendering § 2241(c)(3) superfluous. . . . To read §§ 2241 and 2254 other than as we do would effectively render § 2254 meaningless because state prisoners could bypass its requirements by proceeding under § 2241.
>
> If § 2254 were not a restriction on § 2241's authority to grant the writ of habeas corpus, and were instead a freestanding, alternative post-conviction remedy, then § 2254 would serve no function at all. It would be a complete dead letter, because no state prisoner would choose to run the gauntlet of § 2254 restrictions when he could avoid those limitations simply by writing "§ 2241" on his petition for federal post-conviction relief. All of Congress's time and effort in enacting § 2254, amending it in 1966, and further amending it in 1996 with AEDPA would have been a complete waste. Section 2254 would never be used or applied, and all of the thousands of decisions over the past half-century from the Supreme Court and other federal courts interpreting and applying the provisions of § 2254 would have been pointless. Section 2254 would be a great irrelevancy because a state prisoner could simply opt out of its operation by choosing a different label for his petition.

Id. at 1060-61. The court summarized:

> [A] state prisoner seeking post-conviction relief from a federal court has but one remedy: an application for a writ of habeas corpus. All applications for writs of habeas corpus are governed by § 2241, which generally authorizes federal courts to grant the writ—to both federal and state prisoners. Most state prisoners' applications for writs of habeas corpus are subject also to the additional restrictions of § 2254. That is, if a state prisoner is "in custody pursuant to the judgment of a State court," his petition is subject to § 2254. If, however, a prisoner is in prison pursuant to something other than a judgment of a state court, e.g., a

> pre-trial bond order, then his petition is not subject to § 2254.

Id. at 1062. The Eleventh Circuit repeated and affirmed these principles in Thomas, 371 F.3d at 785-87 (concluding that "[a] state prisoner cannot evade the procedural requirements of § 2254 by filing something purporting to be a § 2241 petition. If the terms of § 2254 apply to a state habeas petitioner, i.e., if he is 'in custody pursuant to the judgment of a State court'–then [the court] must apply its requirements to him.").

The Eleventh Circuit's application of Medberry in Johnson, 805 F.3d 1317, is on point. There, like here, a death-sentenced state prisoner attempted to circumvent the restrictions on second or successive § 2254 petitions by filing a petition under § 2241. See id. at 1321-22. The prisoner asserted that new evidence supported his claim of innocence. Id. at 1322. "The district court found that Johnson's § 2241 petition was truly a second or successive § 2254 petition that he did not have [the Eleventh Circuit's] authorization to file," and dismissed the petition. Id. The Eleventh Circuit affirmed, explaining:

> Under 28 U.S.C. § 2244(b), a state prisoner who wishes to file a second or successive habeas corpus petition "under Section 2254" must move the court of appeals for an order authorizing the district court to consider such a petition. See 28 U.S.C. § 2244(b)(2), (b)(3)(A). That requirement cannot be evaded by characterizing the petition as one filed under § 2241 instead of § 2254. Johnson's position—that a habeas petitioner can evade any and all of the [AEDPA] restrictions set out in §§ 2244 and 2254 by the simple expedient of labeling the petition as one filed under § 2241—has no merit whatsoever. Among other things, it would render the AEDPA amendments to §§ 2244 and 2254 a nullity and mean that scores of Supreme Court decisions, and thousands of lower court decisions, are utterly pointless.

Johnson, 805 F.3d at 1323.[13]

Applying this settled Eleventh Circuit precedent, Petitioner cannot circumvent AEDPA's requirements merely by labeling his petition as one under § 2241. Petitioner is challenging the legality of his sentence, and Petitioner "is in custody pursuant to the judgment of [a] Florida court. Therefore § 2254 applies to [Petitioner's] petition." Thomas, 371 F.3d at 787.[14] As such, his Petition is subject to the "second or successive" provisions of § 2244, and § 2241 provides him no relief from those requirements.[15]

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[13] The Eleventh Circuit has consistently adhered to the holdings of Medberry and Thomas in other cases as well. See, e.g., Rhodes v. Hardee C.I. Warden, 722 F. App'x 947, 950 (11th Cir. 2018) ("The habeas petitions of prisoners held in custody under the judgment of a state court must comply with the restrictions in § 2254, which include a one-year limitation period.") (citing Thomas, 371 F.3d at 787, and Medberry, 351 F.3d at 1060, 1064); Morris v. Fla. Dep't of Corr., 519 F. App'x 990, 990 (11th Cir. 2013) ("Prisoners, like Morris, who are in custody pursuant to the judgment of a state court may not avoid the procedural restrictions imposed on § 2254 petitions by nominally bringing suit under § 2241.") (citing Medberry, 351 F.3d at 1060-61, and Antonelli, 542 F.3d at 1351-52).

[14] In his Reply, Petitioner contends that there is a "distinction between a constitutional error and a constitutional bar," such that a state prisoner who asserts a "constitutional bar" to his sentence can proceed under § 2241 without AEDPA's constraints. Doc. 10 at 16. However, the Eleventh Circuit's holdings in Medberry, 351 F.3d at 1062, Thomas, 371 F.3d at 787, and Johnson, 805 F.3d at 1323, leave no room for this purported distinction. Indeed, Johnson involved a death-sentenced prisoner who claimed he was actually innocent of the crime itself. Johnson, 805 F.3d at 1322.

[15] The Seventh Circuit's decision in Webster, 784 F.3d 1123, does not suggest a different result. In Webster, the Seventh Circuit sitting en banc, permitted a federal prisoner to avail himself of § 2255(e)'s savings clause and to file a § 2241 habeas petition to present newly discovered evidence of intellectual disability that would allegedly show he was ineligible for the death penalty. Id. at 1125. However, Webster did not involve a person in custody pursuant to the judgment of a state court who was challenging the legality of his state court judgment. This distinction is not arbitrary: the difference is that § 2255 contains a savings clause whereas § 2254 does not. McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1095 (11th Cir. 2017) (en banc) ("Both remedies include a nearly identical bar on successive

It is

**ORDERED:**

1. Respondents' Motion to Dismiss the Successive Habeas Petition for Lack of Jurisdiction (Doc. 8) is **GRANTED** as stated herein, and Petitioner's Emergency Petition Under 28 U.S.C. §§ 2254 and 2241 for a Writ of Habeas Corpus (Doc. 1) is **DISMISSED without prejudice** for lack of jurisdiction.[16]

2. Petitioner's Emergency Motion for a Stay of Execution (Doc. 2) is **DENIED as moot**.

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attacks, 28 U.S.C. §§ 2244(b), 2255(h), but only the federal remedy includes a saving clause."), cert. denied sub nom. McCarthan v. Collins, 138 S. Ct. 502 (2017). Indeed, the very same circuit that decided Webster also held 13 years earlier that "section 2254 provides the exclusive federal remedy for a person who, being in state custody pursuant to the judgment of a state court, wishes to challenge a sanction that affects the length of his custody." Harris v. Cotton, 296 F.3d 578, 579 (7th Cir. 2002) (emphasis added).

Additionally, Webster appears to conflict with the Eleventh Circuit's subsequent en banc decision in McCarthan. In McCarthan, the Eleventh Circuit held that a federal prisoner can avail himself of § 2255(e)'s savings clause in only two circumstances: (1) where the prisoner challenges not the legality of his conviction or sentence, but the execution of his sentence, and (2) where the sentencing court is unavailable. 851 F.3d at 1092-93.

[16] A certificate of appealability is not required. See Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004); ("Section 2253(c) has no application here because the district court's decision dismissing the Amended Petition is not 'a final order in a habeas corpus proceeding' within the meaning of the statute."); see also United States v. Palmer, 773 F. App'x 576, 576 (11th Cir. 2019) (recognizing that a "dismissal for lack of subject matter jurisdiction is not a 'final order' within the meaning of § 2253(c), and a COA is not required to appeal such an order of dismissal"); Hutto v. Lawrence Cty., Ala., 717 F. App'x 960, 960 (11th Cir. 2018) ("A certificate of appealability . . . is not required for an appeal of an order dismissing a petitioner's filing as a successive habeas petition.").

3. The Clerk shall enter judgment dismissing the Petition without prejudice for lack of jurisdiction and close the file.[17]

**DONE AND ORDERED** at Jacksonville, Florida, this 18th day of August, 2019.

TIMOTHY J. CORRIGAN
United States District Judge

c:
Counsel of Record

[17] The Court declines to transfer this case to the Eleventh Circuit under 28 U.S.C. § 1631 as requested by Petitioner in his Reply. See Griham v. United States, --- F. Supp. 3d --- , 2019 WL 2469896, at *8-*10 (N.D. Ala. June 13, 2019).

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

**GARY R. BOWLES,**

Petitioner-Appellant,

v.

**MARK S. INCH, et al.,**

Respondents-Appellees

_____/

CASE NO. 19-13150-P

**CAPTIAL CASE**

**DEATH WARRANT SIGNED**
**EXECUTION SCHEDULED FOR**
**AUGUST 22, 2019, AT 6:00 P.M.**

## EMERGENCY MOTION FOR A STAY OF EXECUTION

Appellant Gary R. Bowles is a death-sentenced Florida prisoner scheduled to be executed on August 22, 2019, at 6:00 p.m. He is appealing the Middle District of Florida's August 18, 2018, order dismissing his petition under 28 U.S.C. § 2254 and § 2241 for lack of subject matter jurisdiction. His petition asked the district court to vacate his death sentence on the grounds that he is intellectually disabled and ineligible for execution under *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); and *Atkins v. Virginia*, 536 U.S. 304 (2002). The district court's decision was wrong and should be overturned. Mr. Bowles moves for this Court to stay his execution in order to allow for a meaningful appeal of the district court's order and to prevent the execution of an intellectually disabled man.

28 U.S.C. § 2251(a)(1) provides that "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may . . . 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." Here, a stay of execution is warranted to allow for full and fair consideration of Mr. Bowles's appeal from the district court's order dismissing his § 2254 petition for lack of jurisdiction, Doc. 11, and simultaneously filed application for authorization to file a successive petition under 28 U.S.C. § 2244(b), 11th Cir. No. 19-13149-C. *See Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (holding that a court may stay an execution if needed to resolve issues in an initial petition).

This appeal and Mr. Bowles's § 2244(b) application include important issues, including whether Mr. Bowles's § 2254 petition asserting an intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), while second in time, was not actually successive, and whether § 2241 applies to prisoners with state convictions. Careful consideration by this Court outside the expediency of warrant litigation is appropriate, and the issues presented in this case are weighty enough that this Court should grant a stay of execution pending Mr. Bowles's appeal. *See Lonchar*, 517 U.S. at 320 (district court is obligated to stay execution while habeas corpus case is pending whenever necessary to adjudicate the application in due course and avoid mootness); *Barefoot*, 463 U.S. at 880, 893-94 (court of appeals is obligated to stay execution where necessary to decide the merits of any appeal in a habeas corpus case over which it is exercising jurisdiction before a prisoner may be executed).

Meaningful consideration of Mr. Bowles's petition is due in this case, where he has raised a claim that his intellectual disability renders him constitutionally ineligible for the death penalty, but the Florida state courts dismissed his claim without a hearing based on an inadequate state procedural bar. To date, no court has ever considered Mr. Bowles's intellectual disability claim on the merits. A stay is necessary here to ensure that an impermissible and irreversible execution not occur.

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's appeal and application establish all four of these prongs of the stay analysis. First, Mr. Bowles satisfies all three diagnostic criteria for intellectual disability and has a substantial likelihood of success on the merits of his appeal and/or successor application. As will be detailed further in Mr. Bowles's initial brief, Mr. Bowles can make a strong showing that he is likely to succeed in his argument that his *Atkins* claim is not successive, or that he should be allowed to pursue relief

under § 2241. Alternatively, Mr. Bowles's has a substantial likelihood of success in his pursuit of authorization to file a successive petition. *See, e.g.*, *In re Johnson*, No. 19-20552, 2019 WL 3814384, at *9 (5th Cir. Aug. 14, 2019) (granting leave to file a successive § 2254 based on a newly-raised *Atkins* claim).

Second, the harm here is obvious and irreparable. The absence of a stay will result in the unconstitutional execution of an intellectually disabled prisoner.

Third, Mr. Bowles has been on death row since the 1990s, and his appeals have been exhausted in the Eleventh Circuit since 2010. Mr. Bowles first raised his intellectual disability in October 2017, and the State did not file its answer to this claim until July of 2019—almost a two year delay—and not until ordered to do so by the Florida circuit court. Thus, the delay to this point has been due to the State's own inaction, and Respondent 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 constitutional rights.

Finally, there is a public interest in preventing the execution of an intellectually disabled prisoner. *Atkins* held the death penalty is cruel and unusual punishment in violation of the Eighth Amendment when imposed on the intellectually disabled. *Atkins*, 536 U.S. at 321. Much of the decision in *Atkins* rested on the evolving standards of decency and the overwhelming trend of the states to preclude those with intellectual disabilities from receiving death sentences. *See id.*

at 316. There is a public interest in both preserving the constitution and ensuring that capital sentencing reflects modern societal standards.

A stay of execution should be granted.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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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 19, 2019.

/s/ Terri Backhus
Terri Backhus

**IN THE UNITED STATES COURT OF APPEAL**
**FOR THE ELEVENTH CIRCUIT**

**CASE NO. 19-13150-P**

CAPITAL CASE

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

GARY R. BOWLES,

*Petitioner*,

_____/

RESPONSE TO MOTION TO STAY EXECUTION PENDING APPEAL

On August 19, 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), three days before his scheduled execution, filed a motion to stay his execution to allow for "meaningful" consideration of his pending appeal. Bowles has filed a notice of appeal of the district court's order dismissing for lack of jurisdiction a second habeas petition for being an unauthorized successive habeas petition filed without authorization from this Court. Bowles had filed an emergency habeas petition in the district court raising an intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*,

572 U.S. 701 (2014). Bowles also filed a motion for stay of execution to allow for a "meaningful" appeal. The motion to stay should be denied because there is no chance of success on appeal. This is a meritless appeal. There is literally a string cite of controlling precedent from this Court holding that district courts lack jurisdiction to entertain successive habeas petitions filed without authorization from this Court which are all based on the applicable statute. Furthermore, bring the *Atkins* claim in this manner was a delay tactic. Far from granting a stay, this Court should simply dismiss this appeal. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (advocating courts invoke their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion).

Litigation in district court regarding intellectual disability claim

On August 14, 2019, Bowles, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, filed an emergency habeas petition under 28 U.S.C. § 2254 and 28 U.S.C. § 2241 in the district court raising an intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014).

On August 16, 2019, the State of Florida filed a motion to dismiss the petition for lack of jurisdiction. (Doc. #9).

On August 17, 2019, the CHU-N filed a reply citing the Fifth Circuit cases of *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), and *In re Johnson*, 2019 WL 3814384 (5th Cir. Aug. 14, 2019). (Doc. #10).

On August 18, 2019, the district court granted the motion to dismiss for lack of jurisdiction and denied the motion to stay as moot. (Doc. #11).

On August 19, 2019, the CHU-N appealed the district court's order dismissing the habeas petition for lack of jurisdiction to this Court. The initial brief has not been filed, however. On August 19, 2019, Bowles also filed a motion for stay pending his appeal. This is the State's response to the motion for stay.

**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 granted 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. *Long*, 924 F.3d at 1176 (listing these four factors for granting a stay of execution); *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (stating that it is now "hornbook law that a court may grant a stay of execution ***only*** if the moving party establishes" these four factors citing *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir.2011) (emphasis in original);

*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 a fifth factor: 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).

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 *Atkins* claim. *Mann*, 713 F.3d at 1310 (declining to consider the remaining factors for granting a stay of execution because the defendant failed the first factor); Long, 924 F.3d at 1178 (observing that if "Long had truly

intended to challenge Florida's lethal injection protocol instead of just seeking to delay his execution, he would not have deliberately waited to file this lawsuit until a decision on the merits would require entry of a stay" and noting this Court has refused to grant stays in cases involving delayed filings before citing cases and concluding "Long's delay was even more pronounced and less justifiable.").

**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 chance of success regarding his appeal of the district court's dismissal of the habeas petition as being a successive habeas petition filed without authorization over which the district court lacked jurisdiction.

No jurisdiction over the successive habeas petition

The district court properly ruled it had no jurisdiction over the successive habeas petition. A habeas petitioner must obtain authorization from the Eleventh Circuit before filing a second habeas petition in the district court as required by 28 U.S.C. § 2244(b)(3)(A). The district court's ruling was correct under the applicable statute.

This Court's precedent commands that district courts lack jurisdiction over unauthorized successive habeas petitions that are filed without permission from the Eleventh Circuit.[1] The district court properly followed this Court's precedent.

Bowles filed his first federal habeas petition in the district court on August 8, 2008, in which he raised ten claims. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla. 2008); *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010) (denying a claim regarding the prosecutor's use of peremptory challenges to remove prospective jurors who express reservations about the death penalty and affirming the

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[1] *Pavon v. Attorney Gen., Fla.*, 719 Fed.Appx. 978, 979 (11th Cir. 2018) (affirming the district court's dismissal of a successive petition because without authorization, the district court lacks jurisdiction to consider a second or successive habeas petition citing *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003), and explaining once a court determines that it lacks subject matter jurisdiction, it is powerless to continue), *cert. denied*, *Pavon v. Jones*, 139 S.Ct. 828 (2019); *Jimenez v. Sec'y, Fla. Dept. of Corr.*, 758 Fed.Appx. 682, 686 (11th Cir. 2018) (explaining that because Jimenez did not receive prior authorization from the Eleventh Circuit to file his second or successive application, the district court lacked jurisdiction to consider it citing 28 U.S.C. § 2244(b)(2)), *cert. denied*, *Jimenez v. Jones*, 139 S.Ct. 659 (2018); *Lambrix v. Sec'y, Dept. of Corr.*, 872 F.3d 1170, 1180 (11th Cir. 2017) (explaining a habeas petitioner seeking to file a second or successive § 2254 petition must seek authorization from the Eleventh Circuit before the district court may consider his petition and when a "petitioner fails to seek or obtain such authorization, the district court lacks jurisdiction to consider the merits of the petition"), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 312 (2017); *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259 (11th Cir. 2009) (explaining that § 2244(b)(3)(A) requires a district court to dismiss for lack of jurisdiction a second or successive petition unless the petitioner has obtained an order from the appellate court authorizing the district court to consider it citing *Williams v. Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007)).

denial of habeas relief). The initial petition did not include an *Atkins* intellectual disability claim, despite *Atkins* being decided over six years earlier. *Atkins* was available at the time of the filing of the initial habeas petition but the intellectual disability claim was not pursued.

Because the second petition was a successive petition, Bowles must have prior authorization from the Eleventh Circuit before filing the petition. Because Bowles did not obtain permission from the Eleventh Circuit, the district court properly dismissed it for lack of jurisdiction.

Second habeas petitions and *Panetti*

Bowles argued his habeas petition is a second petition, not a successive petition relying on the exception established in *Panetti v. Quarterman*, 551 U.S. 930 (2007). But the *Panetti* exception does not apply under this Court precedent. As this Court has explained, the *Panetti* exception to successive habeas petitions is limited to claims that were not ripe at the time the first habeas petition was filed, such as a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), which was the claim at issue in *Panetti*. *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (noting the *Panetti* case involved a *Ford* claim and the High Court was careful to limit its holding to *Ford* claims and reasoning that, in

contrast to Panetti, the claims Tompkins wanted to raise were claims that "can be and routinely are raised in initial habeas petitions"); *Jimenez v. Sec'y, Fla. Dept. of Corr.*, 758 Fed.Appx. 682, 686 (11th Cir. 2018) (rejecting a *Panetti* exception argument citing *Tompkins* and finding a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), to be successive and affirming the district court's dismissal for lack of jurisdiction of the second habeas petition as a successive habeas petition), *cert. denied*, *Jimenez v. Jones*, 139 S.Ct. 659 (2018); *see also Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019) (contrasting *Ford* claims with *Atkins* claims explaining that while incompetency is not a permanent condition but one that "may occur at various points after conviction, and it may recede and later reoccur" but intellectual disability by definition is a permanent condition and concluding for that reason it is not proper to apply the law regarding *Ford* claims wholesale to *Atkins* claims).

Under *Tompkins*, which is binding precedent, any habeas claim that can be, and routinely is, raised in initial habeas petitions does not fall into the *Panetti* exception. Rather, such claims are considered successive habeas claims for which authorization from the Eleventh Circuit is required and which must be dismissed for lack of jurisdiction by the district court. *Jimenez*, 758 Fed.Appx. at 686 (Carnes, C.J., and Tjoflat, J., concurring) (*"Tompkins* is binding precedent in this circuit."); *Scott v.*

*United States*, 890 F.3d 1239, 1256-57 (11th Cir. 2018) (concluding "*Tompkins* controls" because it is "our precedent").

Intellectual disability claims based on *Atkins* claim are ripe to be challenged at any time after the sentence is imposed. *Davis v. Kelley*, 854 F.3d 967, 971-72 (8th Cir. 2017) (concluding that *Atkins* claim are ripe when the sentence is imposed and observing that *Panetti* "has no force or applicability"). In this case, the *Atkins* claim could have been raised in the first habeas petition filed in 2008 which was years after *Atkins* was decided in 2002 Under this Court's reasoning in *Tompkins*, any claim that can be, and routinely are, raised in initial habeas petitions, do not fall within the *Panetti* exception. *Tompkins*, 557 F.3d at 1260. *Atkins* claims can be, and routinely are, raised in initial habeas petitions, so such claims do not fall within the *Panetti* exception under *Tompkins*. The *Panetti* exception does not apply to *Atkins* intellectual disability claims and therefore, this intellectual disability claim remains a successive habeas claim over which the district court lacked jurisdiction.

Miscarriage of justice and intellectual disability claims

Bowles argued that under the miscarriage of justice in *Sawyer v. Whitley*, 505 U.S. 333 (1992), his claim of intellectual disability must be heard by the district court regardless of its successive nature. The *Sawyer* Court, in a pre-AEDPA decision,

held that to establish actual innocence of the death penalty, a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" *Id*. at 349.

But there is no miscarriage of justice exception to the statutory requirement that Bowles obtain prior authorization before filing a successive petition. *In re Lambrix*, 776 F.3d 789, 796 (11th Cir. 2015) (explaining that regardless of any "fundamental miscarriage of justice showing under *Schlup*" § 2244(b)(2)(B) still "undeniably requires" a petitioner to seek leave to file a second or successive petition citing *In re Davis*, 565 F.3d 810, 824 (11th Cir. 2009)). Regardless of any exception, Bowles is still required to obtain prior authorization as required by § 2244(b)(3)(A).

Additionally, *Sawyer,* a pre-AEDPA decision, did not survive the AEDPA under this Court's precedent. This Court has directly stated that "the *Sawyer* actual-innocence-of-the-death-penalty exception did not survive the AEDPA." stated *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015) (explaining that application to file a successive habeas petition under § 2244(b)(2)(B) may not be based on a sentencing claim even in death cases citing *In re Hill*, 715 F.3d 284, 297 (11th Cir. 2013)); *In re Hill*, 715 F.3d 284, 297 (11th Cir. 2013) (explaining, in a case raising an *Atkins* claim, that given "the plain and unambiguous language in the statute, this Court repeatedly has held that federal law does not authorize the filing of a successive application

under § 2244(b)(2)(B) based on a sentencing claim even in death cases citing Eleventh Circuit cases and relying on *In re Webster*, 605 F.3d 256, 258-59 (5th Cir. 2010)); *Davis v. Kelley*, 854 F.3d 967, 971 (8th Cir. 2017) (concluding that the miscarriage of justice exception was inapplicable to an *Atkins* claim). The AEDPA limits the exception to the bar on successive petition to claims of innocence of the "underlying offense" and does not extend to claims of innocence of the death penalty.

But even applying the miscarriage of justice standard, Bowles does not meet the requirement of *Sawyer* that he establish by clear and convincing evidence he is intellectually disabled. As the State explained in detail in its motion to dismiss, Bowles is not intellectually disabled, so *Sawyer* does not apply to him. Bowles fails all three of the prongs of the test for intellectual disability. There is no miscarriage of justice regarding this *Atkins* claim.

*Hall v. Florida* does not apply

Furthermore, even if this were an initial habeas petition and the *Hall v. Florida* claim had been properly exhausted in state court, Bowles is not entitled to an evidentiary hearing regarding his intellectual disability claim under *Hall v. Florida*. *Hall v. Florida* does not apply to any defendant whose full-scale IQ score is above

75, such as Bowles. Considered collectively, Bowles' IQ is at least 77.[2] His collective score is above 75. So, *Hall v. Florida* does not apply to Bowles.

And *Hall v. Florida* also does not apply to Bowles because he fails the third prong of the test for intellectual disability, that of the age of onset. Bowles was not intellectually disabled as a child. Bowles was not in special education classes. Bowles made As and Bs in the first grade in regular classes. His grades in first grade were an A, a B, another B, and another A. Bowles made As and B+s in math in the early grades of elementary school. A child who is intellectually disabled does not

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[2] There are three IQ scores in the current record. A score on the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in 1995 which was 80. (PCR 196, 239). A second IQ score on the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003 was 83. A third IQ scores on the WAIS-IV in 2017 was 74. So, the three IQ scores in the existing record are 80, 83, and 74. The average of Bowles' three IQ scores is 79. The median of Bowles' three IQ scores is 78.5. Opposing counsel objects to the use of the score of 83 because it was obtained using an abbreviated IQ test. But even discounting that score, Bowles' collective IQ remains above 75. Using only the two IQ scores of 80 and 74, the average of 80 and 74 is 77. And the median of those two scores is 77. Either way, Bowles' collective IQ score is above 75.

Opposing counsel also insist that the prior IQ score of 80 be adjusted for the Flynn Effect. But this Court has held that such an adjustment is not required. *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 635-40 (11th Cir. 2016) (holding a district court is not required to apply the Flynn Effect because the medical community has not reached a consensus regarding the concept and noting some of the experts had testified that the Flynn Effect is not scientifically sound and not used in clinical practice), *cert. denied*, *Ledford v. Sellers*, 137 S.Ct. 1432 (2017) (No. 16-6444). Regardless of its scientific validity or acceptance within the medical community, the Flynn Effect, which posits that the population is becoming smarter over time, is fundamentally inconsistent with the entire rationale of *Atkins* itself. One does not have to be near the top of a Bell Curve to know murder is wrong.

make As in math in regular classes in elementary school. Furthermore, one of the handwritten notations on his achievement tests in his school records is "high normal." A child with intellectual disability cannot make "high normal" scores on achievement tests. Bowles did not have significantly subaverage intellectual functioning as a child. Therefore, by definition, Bowles is not intellectually disabled. *Hall v. Florida* does not apply to Bowles because he fails the third prong. Under Supreme Court precedent, for both these reasons, no evidentiary hearing was required.

Bowles does not have a substantial likelihood of success on the merits of this appeal. Bowles does not meet the first, and one of the two most critical factors, for being granted a stay of execution.

**Irreparable injury**

Second, Bowles must establish that he will suffer irreparable injury unless the stay issues. Bowles establishes this factor under this Court's precedent. *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."). But this one factor is not determinative according to the United States Supreme Court. *Nken v. Holder*, 556 U.S. 418, 433 (2009) ("A stay is not a matter of right, even if irreparable injury might otherwise result" quoting *Virginian Ry. Co. v. United States*, 272 U.S.

658, 672 (1926)). The other factors remain and outweigh the second factor. 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. But, as this Court has repeatedly observed, each "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); *Schwab v. Sec'y, Dept. of Corr.*, 507 F.3d 1297, 1301 (11th Cir. 2007) (noting the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts" quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006), and quoting *Thompson*, 714 F.2d at 1506); *Grayson v. Allen*, 491 F.3d 1318, 1326 (11th Cir. 2007) (stating that after "a quarter century of delay, Grayson is not entitled to another reprieve" quoting *Thompson*, 714 F.2d at 1506 (11th Cir.1983), and concluding given "the strong presumption against the grant of dilatory equitable relief, we conclude that the district court did not abuse its discretion in dismissing Grayson's § 1983 action due to his unnecessary delay."). 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"); This Court has "long emphasized the State's and the victims' interests in the finality and timely enforcement of valid criminal judgments." *Bowles v. DeSantis*, 2019 WL 3886503, at *13 (11th Cir. Aug. 19, 2019) (citing cases).

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 an appeal of a dilatory appeal of a successive petition raising an *Atkins* claim when the defendant is not intellectually disabled. 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). This Court has also emphasized "the State's and the victims' interests in the finality and timely enforcement of valid criminal judgments." *Bowles v. DeSantis*, 2019 WL 3886503, *13 (11th Cir. Aug. 19, 2019) (citing cases). Hinson's family and the families of Bowles' other two murder victims have been waiting for nearly 25 years for justice to be done.[3] 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.

[3] There may well be more than three victims and their families. Bowles confessed to additional murders to a defense mental health expert. But the State will limit its arguments to the murders in which convictions have been obtained, which are the murders of John Roberts and Albert Morris shortly before the murder of the victim in this case, Walter Hinton.

**No delay in bringing the claim**

Fifth, Bowles must establish that he did not delay in bringing the *Atkins* claim which he cannot do.

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). 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"); *Long*, 924 F.3d 1171, 1176-77 (holding that the district court did not abuse its discretion in denying a stay of execution due to "inexcusable delay").

The *Atkins* intellectual disability claim was filed more than 17 years after *Aktins* itself was decided in 2002. And it was filed more than five years after *Hall v. Florida* was decided in 2014. It was filed after in engaging in delaying tactics in the state postconviction court of not complying with the applicable Florida rule of court requiring the named expert file full reports, not just vague and conclusory declarations regarding the three prongs or, in the case of Dr. Krop, not attaching his original report with the IQ score of 83 at all.[4]

Bowles engaged in delaying tactics in relation to this appeal as well. Bowles wasted the district court's time in filing a successive habeas petition which was required to be dismissed for lack of jurisdiction under the controlling precedent. If Bowles was serious about litigating his intellectual disability claim in federal court, he would have filed an application to file a successive habeas petition in this Court raising the *Atkins* claim rather than filing an unauthorized petition in the district court. The CHU-N offers no explanation for why they proceeded in the district court in the

[4] None of this would be tolerated in federal court. *Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019) (observing in federal court, an expert witness must produce all data she has considered in reaching her conclusions citing Fed. R. Civ. P. 26(a)(2)(B)); Fed. R. Civ. P. 26(a)(2)(b)(i) (providing that the expert report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them"). The appendix submitted with the application violates rule 26(a)(2)(B) and rule 26(a)(2)(b)(i). *McBride v. Sharpe*, 25 F.3d 962, 967 (11th Cir. 1994) (noting that the Federal Rules of Civil Procedure apply in habeas corpus proceedings "to the extent that they are not inconsistent with" the Habeas Rules).

first place. This is a meritless appeal with a literal string cite of controlling Eleventh Circuit precedent regarding jurisdiction against it that was filed three days before the execution. Far from granting a stay, this Court should simply dismiss this appeal. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (advocating courts invoke their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion).

Bowles does not meet the fifth factor, which is the other of the two most critical factors, 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 motion to stay the execution for the appeal 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 5,068 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 MOTION TO STAY EXECUTION PENDING APPEAL 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 20th day of August, 2019.

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

*In Re Gary Ray Bowles* CASE NO. 19-13150-P

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, petitioner

Honorable Timothy J. Corrigan, U.S. District Judge, Middle District of Florida

Jennifer Donahue, Assistant Attorney General, counsel for the State of Florida

Sean Gunn of the CHU-N, federal habeas counsel

Charmaine Millsaps, Assistant Attorney General, counsel for the State of Florida

Honorable Ashley Moody, Attorney General of Florida

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

| | | |
|---|---|---|
| **GARY R. BOWLES** | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | **CASE NO. 19-13150-P** |
| | ) | |
| | ) | |
| | ) | |
| **MARK S. INCH,** | ) | |
| | ) | **CAPITAL CASE;** |
| Secretary, Florida | ) | **Death Warrant Signed;** |
| Department of Corrections, | ) | **Execution Scheduled for** |
| | ) | **August 22, 2019, at 6:00 PM** |
| Respondent, | ) | |
| | ) | |
| **ASHLEY MOODY,** | ) | |
| | ) | |
| Attorney General of Florida, | ) | |
| | ) | |
| Additional Appellee. | ) | |
| _____ | ) | |

**REPLY TO RESPONSE TO MOTION FOR STAY OF EXECUTION**

On August 14, 2019, Gary R. Bowles, a Florida death row prisoner with an execution date of August 22, 2019, filed an emergency petition under 28 U.S.C. § 2254 and 28 U.S.C. § 2241 for writ of habeas corpus by a person in state custody and incorporated memorandum of law. Doc. 1.[1] He simultaneously filed an emergency motion for a stay of execution. Doc. 2. On August 18, 2019, the district

[1]All Doc. __ citations refer to the electronic docket for district court case number 3:19-cv-936-J-32JBT.

court entered an order dismissing the petition for lack of subject matter jurisdiction and denying the stay motion. Doc. 11. On August 19, 2019, Mr. Bowles appealed and filed a motion for stay of execution in this Court. On August 20, 2019, the State filed its response to the stay motion. Because the State's response does not provide sufficient justification for denying a stay or affirming the district court, this Court should stay Mr. Bowles's scheduled August 22, 2019, execution and consider Mr. Bowles's appeal without the expediency of active warrant litigation.[2]

## I. Substantial Likelihood of Success on the Merits

The State erroneously posits that the district court did not have jurisdiction over Mr. Bowles's petition under §§ 2254 and 2241. However, as Mr. Bowles asserted in the court below, his § 2254 petition was second-in-time but not successive. Alternatively, Mr. Bowles pursued relief under 28 U.S.C. § 2241, an avenue which the State failed to even discuss in its response.

[2] The State points out that Mr. Bowles' initial brief has not yet been filed. Resp. at 3. Upon the opening of this docket, Mr. Bowles was instructed that his initial brief is due "40 days from 8/19/2019." Mr. Bowles assumes that, in light of his pending execution, this Court expects expedited briefing on this appeal. Like the State, he awaits further instruction from this Court. And, of course, if this Court is inclined not to truncate the briefing schedule, that is all the more reason to grant a stay of execution. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983) (explaining that circuit courts should grant stays of execution "where necessary to prevent the case from becoming moot by the petitioner's execution").

### A. Mr. Bowles's *Atkins* Claim was Not Ripe at the Time of his Initial Petition

As Mr. Bowles asserted below, his second-in-time petition is not successive under *Panetti v. Quarterman*, 551 U.S. 930 (2007). *See also Magwood v. Patterson*, 561 U.S. 320 (2010) (citing *Panetti*, 551 U.S at 944) (the phrase "second or successive" is a "term of art" and "it is well settled that the phrase does not simply 'refe[r] to all § 2254 applications filed second or successively in time.'").

In *Panetti*, the petitioner raised a claim that he was not competent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti*, 551 U.S. at 934-35. The Supreme 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*. The Supreme 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.

The State claims that *Panetti* does not apply here. The State argues that under this Court's precedent, any claims that can be raised in an initial habeas petition cannot fall under the *Panetti* exception. *See* Resp. at 10 (citing *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009).

However, the State here—and the district court below—fails to distinguish between claims concerning the imposition of a death sentence, which can be raised in an initial habeas petition, and claims concerning an execution, which do not become ripe until an execution has been scheduled. The issue of whether Mr. Bowles is constitutionally eligible for execution became ripe for resolution only when the Governor of Florida signed his death warrant, thereby making his execution imminent. *See 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.'"). Thus, contrary to the State's argument, Mr. Bowles' claim was not one that could be routinely raised in an initial habeas petition, *see* Doc. 8 at 4, citing to *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009), and "there was accordingly no need for [Mr. Bowles] to apply for authorization to file a second or successive petition." *Martinez-Villareal*, 523 U.S. at 642.

**B. Mr. Bowles's Execution Would be a Miscarriage of Justice**

Mr. Bowles has asserted that it would be a miscarriage of justice to execute him when, as a person with intellectual disability, the *Atkins* categorical exemption makes him actually innocent of the death penalty. Citing *In re Lambrix*, 776 F.3d 789, 796 (11th Cir. 2015), the State claims that there is no miscarriage of justice

exception to the statutory requirement that Mr. Bowles obtain prior authorization before filing a successive petition. Resp. at 12.

The State's reliance on *In re Lambrix* is misplaced, as that case involved a freestanding actual innocence claim in an application to the Eleventh Circuit seeking an order authorizing the district court to consider a successive petition for a writ of habeas corpus. *Id*. at 790. The Eleventh Circuit denied the application, finding that Lambrix failed to establish a constitutional violation in conjunction with his claim of actual innocence. *Id*. at 796. Conversely, Mr. Bowles's claim is grounded on a constitutional right, the Eighth Amendment's prohibition on executing the intellectually disabled. As such, *In re Lambrix* has no bearing on Mr. Bowles's case.

The State further asserts that the United States Supreme Court's decision in *Sawyer v. Whitley*, 505 U.S. 333 (1992), did not survive AEDPA under this Court's precedent, and therefore innocence of the death penalty is not a cognizable claim in a successive petition. Doc. 8 at 6, citing to *In re Hill*, 777 F.3d 1214 (11th Cir. 2015).

While recognizing this Court's precedent, Mr. Bowles submits that it is at odds with other circuits, as well as the Supreme Court itself, and should be overturned. As Judge Martin explained in her dissenting opinion in *In re Hill*:

> [T]he Courts of Appeals are now divided on the question of whether Sawyer's holding that an inmate can be innocent of the death penalty survived AEDPA's gatekeeping provisions. Compare *In re Hill*, 715 F.3d at 301 (holding that post-AEDPA, "there is no *Sawyer* exception to the bar on second or successive habeas corpus petitions for claims asserting 'actual innocence of the death penalty'"), and *Hope v. United*

> *States*, 108 F.3d 119, 120 (7th Cir.1997) (holding that the *Sawyer* exception did not survive AEDPA), with *Thompson v. Calderon*, 151 F.3d 918, 924 & n. 4 (9th Cir.1998) (holding that the *Sawyer* exception survived AEDPA); see also *LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir.2001) (noting "there is a split among the ... circuits that have addressed the question," but not resolving the "difficult question because even assuming § 2244(b)(2)(B)(ii) does encompass challenges to a death sentence," the petitioner's claim would fail). I understand the Supreme Court itself to have indicated, in the context of reviewing an appeals court's recall of its mandate, that Sawyer's "miscarriage of justice standard is altogether consistent ... with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence." *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S.Ct. 1489, 1502, 140 L.Ed.2d 728 (1998).

*Id*. at 1228 (Martin J., dissenting).

*McQuiggin* and *Sawyer* establish that a petitioner who is able to show actual innocence of the death penalty may proceed in federal court with a habeas claim that would otherwise be barred by AEDPA's statute of limitations. As a person with intellectual disability who is categorically exempt from the death penalty pursuant to the Eighth Amendment, *Atkins*, 536 U.S. at 318, Mr. Bowles satisfies the criteria for this exception.

### C. A Categorical Bar Cannot be Waived

Mr. Bowles has asserted that a categorical bar to the death penalty like intellectual disability cannot be waived. The State did not respond to this argument.

Especially in light of the State's lack of opposition, Mr. Bowles has a

substantial likelihood of succeeding on the merits of this claim. Like the Eighth Amendment prohibition on executing the incompetent, the Eighth Amendment prohibition on executing the intellectually disabled is "a substantive restriction on the State's power to take the life" of an inmate. *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). Thus, the Eighth Amendment categorically excludes the imposition of death on intellectually disabled persons because of their reduced moral culpability. *See Atkins*, 536 U.S. at 321. The Supreme Court has held that "death is not a suitable punishment for [an intellectually disabled] criminal" and the execution of such individuals does not "measurably advance the deterrent or the retributive purpose of the death penalty." *Id.*

Therefore, any procedural obstacle to the consideration of a claim of intellectual disability must cede to the categorical protections of the Eighth Amendment. Just as *Roper v. Simmons*, 543 U.S. 551 (2005), would prevent the execution of a juvenile at any point from the time of sentencing until the moment of execution, so too *Atkins* protects intellectually disabled individuals from execution regardless of when the claim is brought.

**D. Mr. Bowles Should Be Allowed to Proceed Under 28 U.S.C. § 2241**

As with the argument that a categorical bar to the death penalty cannot be waived, the State failed to respond to Mr. Bowles's argument that he could proceed

on his intellectual disability claim under § 2241.

Mr. Bowles has a substantial likelihood of succeeding on the merits of this claim. As the initial brief has not yet been filed, Mr. Bowles adopts in full the arguments presented in the petition and reply filed in the district court, *see* Doc. 1 at 45-56; Doc. 10 at 10-17. The pleadings below address how AEDPA's text—which differentiates between state prisoners filing under § 2254 and state prisoners more generally, includes a provision dictating access to § 2241 for federal prisoners where it does not for state prisoners, and includes language differentiating between § 2254 prisoners and § 2241 prisoners—demonstrate Congress's intent to preserve two channels of habeas review. *See generally Thomas v. Crosby*, 371 F.3d 782, 802 (11th Cir. 2004) (Tjoflat, J., concurring) (explaining the various principles leading to the conclusion that § 2241 and § 2254 provide two separate avenues to seek habeas corpus); *see also Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 132-33 (1989) ("[G]iven the parallel structures of these provisions [of the Warsaw Convention] it would be a flouting of the text to imply in [one provision] a sanction not only withheld there but explicitly granted elsewhere."). As Judge Tjoflat has previously

observed: "Congress knew how to restrict access to § 2241 when it wanted to, and it chose not to do so for state prisoners. We must respect this choice." *Thomas*, 371 F.3d at 807 (Tjoflat, J., concurring).

While this Circuit has precedent finding that § 2241 does not apply to state prisoners, none of it undermines AEDPA's constitutionality the way such a finding would here. These cases involve claims of general constitutional error commonly asserted in § 2254 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 v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003) (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 it to 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.* Mr. Bowles is not seeking to use § 2241 in a way to litigate renewed or defaulted claims of constitutional import. Instead, it is in this rare circumstance—where a categorical bar to the death penalty did not previously apply to prisoners like Mr. Bowles with an IQ score over 70, but now after a mandate by the Supreme Court, the State is still precluding Mr. Bowles from establishing that he falls within the bar and Eleventh Circuit case law similarly

indicates that § 2254 will not be a viable avenue of relief—that § 2241 is appropriate. Any reading of AEDPA to preclude this review would leave the federal courts unable to stop an unconstitutional execution, rendering these provisions of AEDPA themselves unconstitutional.[3]

Accordingly, Mr. Bowles can show the district court erred in dismissing his petition. This Court has found that the gatekeeping function does not apply to petitions filed under § 2241. *Antonelli*, 542 F.3d at 1350. The State's many assertions regarding the timeliness of Mr. Bowles's § 2254 do not preclude the district court from considering the petition under § 2241.

**E. Mr. Bowles is Intellectually Disabled**

The State suggests that Mr. Bowles cannot show that *Hall* applies here because "Mr. Bowles' IQ is at least 77." Resp. at 14.

The State's arguments are inaccurate, misleading, and refuted by Mr. Bowles's factual proffers and the medical community. First, Mr. Bowles scored 74

[3] Mr. Bowles also argued below (1) allowing intellectually disabled § 2255 prisoners to access § 2241, *see In re Webster*, 784 F.3d 1123, 1139 (7th Cir. 2015), but not § 2254 would be an equal protection violation, again rendering such a reading of AEDPA unconstitutional; (2) the doctrine of implied repeal provides that "repeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest" *Rodgriguez v. United States*, 480 U.S. 522, 524 (1987) (internal marks and citations omitted), so "[the courts] should not interpret elaborate restrictions Congress established for § 2254 . . . as curtailing or eliminating a convicted state prisoner's right to seek relief under § 2241." *Thomas*, 371 F.3d at 808 (Tjoflat, J., concurring).

on the WAIS-IV, without consideration of the Flynn Effect or the SEM. That alone places him within the range of being intellectually disabled. Second, the State's suggestion that Mr. Bowles's IQ scores over time should be averaged, or alternatively, considered in "median," is a creation not found in resources by the medical or psychological community.

Further, the State makes a number of inaccurate representations in the interpretation of IQ scores. The State conflates Mr. Bowles's full-scale IQ scores on the WAIS-R and the WAIS-IV with his score of 83 on the WASI (Wechsler Abbreviated Scale of Intelligence). As Mr. Bowles's experts would testify if given the chance, the WASI is not a full-scale IQ test, it is a short form screening test of intellectual functioning, and the score resulting from it should not be considered in the assessment of intellectual disability (and particularly not for disqualification for the diagnosis). *See*, *e.g.*, American Association on Intellectual and Developmental Disabilities Manual (11th ed. 2010) (AAIDD-11), p. 41 ("Short forms of screening tests are not recommended, and it is critically important to use tests with relatively recent norms."); User's Guide to the AAIDD-11, p. 17 ("Short forms or screening tests are not recommended or professionally accepted for diagnostic purposes.").

The State also argues that application of the Flynn Effect is "fundamentally inconsistent with the entire rationale of *Atkins* itself" because "[o]ne does not have to be near the top of a Bell Curve to know murder is wrong." Resp. at 14 n.2. This

demonstrates that it is the State, not Mr. Bowles, who misunderstands even the most basic tenets of *Atkins*. *See, e.g.*, *Atkins*, 536 U.S. at 318 (explaining that the intellectually disabled "frequently know the difference between right and wrong").

The State also argues Mr. Bowles does not have a substantial likelihood of success because the third prong—onset before age 18—is in dispute because he got good grades "in the early grades of elementary school." This is an inaccurate analysis, however; as one expert who has evaluated Mr. Bowles noted, Mr. Bowles struggled in school and achieved failing grades "once academic requirements "beg[an] to move from concrete concepts . . . to more abstract concepts." Mr. Bowles has 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." 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. The State's bare assertion that Mr. Bowles's intellectual disability is conclusively refuted by the record —a record which has never had the benefit of testimony from any expert who has evaluated Mr. Bowles for intellectual disability—is not supported by the reality

of this case. He has a substantial likelihood of successfully showing he is intellectually disabled.

## II. A Stay would Not Substantially Harm the State

The State is incorrect that a stay here would cause it substantial harm. The State refers to its interest in seeing the finality of the criminal judgment against Mr. Bowles and the delay since the underlying crime was first committed in 1994.

However, 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 the State 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).

In making this argument, the State did not provide any explanation for the delay in seeking an execution when Mr. Bowles exhausted his initial habeas litigation seven years ago or in moving forward with the *Hall* litigation in state court, filed two years before Mr. Bowles's warrant. It also did not indicate financial or any other hardship. Ultimately, a brief stay to resolve the issues of great constitutional import before this Court would not cause the State substantial harm.

**III. Adverse to Public Interest**

The State further asserts that a delay of Bowles's execution would be adverse to the public interest in the finality of criminal judgments. Resp. at 17. According to the State, the victim's family has been waiting nearly 25 years for justice to be done and the people of the State of Florida and the surviving victims deserve better. Resp. at 18.

Ignored by the State's argument is that it is clearly in the public interest to ensure that an intellectually disabled individual is not executed in violation of the Eighth Amendment. *See 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."). The public's interest in this case is especially in favor of Mr. Bowles because, to date, he has been denied the opportunity to have his claim of intellectual disability heard by any state or federal court on the merits.

Further, 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."). Although the public has a general interest in the finality of judgments, the State falls short of showing how a brief stay would be adverse to the public interest.

**IV. No Delay in Bringing the Claim**

While the State seemingly concedes that Mr. Bowles will suffer irreparable injury unless the stay issues, Resp. at 5-6, the State adds a fifth factor, that Mr. Bowles must establish there was no delay in bringing the action. Resp. at 6.

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 v. Palmer*, 713 F.3d 1306, 1310 (11th Cir. 2013). 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); *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).

The State's contention that there exists a fifth factor, that Mr. Bowles affirmatively establish there was "no delay" in the filing of petition, 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 the State cites 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).

In any event, Mr. Bowles did not delay filing his action. Mr. Bowles filed his postconviction motion on October 19, 2017, with a diagnosis of intellectual disability from two psychologists that rely, in part, on his IQ score of 74 on the WAIS-IV. *See* PCR-ID at 780, 783, 799-801. Only after the Supreme Court's decision in *Hall* did this IQ score legally qualify to establish his intellectual disability

in Florida—prior to that, such a score would have been fatal to the entire claim. *See Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) ("[T]his state formerly required proof of an IQ score of 70 or below to establish the first prong, and failure to produce such evidence was fatal to the entire claim.").

There is no question that when the Supreme Court decided *Atkins*, it announced a new, substantive rule of constitutional law that was necessarily retroactive. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1172-73 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in *Atkins* is retroactively applicable to cases on collateral review."). However, because the law in Florida indicated that only IQ scores of 70 or below were qualifying, *see Cherry v. State*, 959 So. 2d 702 (Fla. 2007), it was not until the Supreme Court decided *Hall v. Florida* that individuals like Mr. Bowles with IQ scores between 70 and 75 had a viable legal claim for intellectual disability. *See Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017) ("Instead, the language [in *Hall*] justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70.").

While *Hall* expanded the range of IQ scores that could establish that an individual was ineligible for execution, it was not until the Florida Supreme Court made *Hall* retroactive in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), that Mr. Bowles could file his R. 3.851 motion. Indeed, Fla. R. Crim. P. 3.851(d)(2)(B) provides for

the timeliness of a successive R. 3.851 motion where "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Mr. Bowles timely filed his Rule 3.851 motion within one year of *Walls*.

As Mr. Bowles's petition describes, his 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. And while the federal petition was filed after Mr. Bowles's warrant had been signed, this was *one day* after state court proceedings had concluded and Mr. Bowles could meet § 2254's exhaustion requirement. Contrary to the State's assertion, there was no last-minute gamesmanship on Mr. Bowles's part.

## V. Conclusion

For the reasons above, in his stay motion, and in his district court briefing, this Court should stay Mr. Bowles's execution to meaningfully consider his appeal without the time constraints of an active death warrant.

Respectfully submitted,

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**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 21, 2019.

/s/ Terri Backhus
Terri Backhus

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

| | | |
|---|---|---|
| **GARY R. BOWLES** | ) | |
| | ) | **EMERGENCY PETITION** |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **CASE NO. _____** |
| | ) | (Related Case No. 3:08-cv-00791-HLA-MCR) |
| | ) | |
| | ) | |
| **MARK S. INCH,** | ) | |
| | ) | **CAPITAL CASE;** |
| Secretary, Florida | ) | **Death Warrant Signed;** |
| Department of Corrections, | ) | **Execution Scheduled for** |
| | ) | **August 22, 2019, at 6:00 PM** |
| Respondent, | ) | |
| | ) | |
| **ASHLEY MOODY,** | ) | |
| | ) | |
| Attorney General of Florida, | ) | |
| | ) | |
| Additional Respondent. | ) | |
| _____ | ) | |

**EMERGENCY PETITION UNDER 28 U.S.C. § 2254 AND 28 U.S.C. § 2241 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND INCORPORATED MEMORANDUM OF LAW**

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The Petitioner, Gary R. Bowles, moves the Court to grant a writ of habeas corpus directed to the Respondents, pursuant to 28 U.S.C. § 2254 and 28 U.S.C. § 2241, and vacate his convictions and sentences, including his sentence of death. Mr. Bowles also moves the Court to stay his execution, presently scheduled to take place on August 22, 2019, at 6:00 PM, in order to meaningfully analyze the significant constitutional claims presented herein without the urgency dictated by the imminent execution date. Mr. Bowles is currently in the custody of the Florida Department of Corrections, and is housed on death row at Florida State Prison in Raiford, Florida.

## INTRODUCTION

Mr. Bowles acknowledges that the instant petition is his second-in-time petition brought under 28 U.S.C. § 2254. However, for the reasons explained herein, Mr. Bowles submits that this is not a "second or successive" petition within the meaning of 28 U.S.C. § 2244(b)(2); and that this Court has the jurisdiction and authority to address the merits of the constitutional claims he brings at this time.

Alternatively, as will also be discussed herein, the text of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Supreme Court jurisprudence regarding statutory interpretation also provide that Mr. Bowles should be permitted to proceed via § 2241.

**EVIDENTIARY HEARING IS WARRANTED**

Mr. Bowles requests an evidentiary hearing on his intellectual disability claim. 28 U.S.C. § 2254(e)(2) as amended by the AEDPA governs evidentiary hearings in federal habeas corpus cases. It is clear that "where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court." *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998). As the United States Supreme Court reiterated in *Williams v. Taylor*, 529 U.S. 420, 432 (2000), "Under the opening clause of § 2254 (e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."

If, as in Mr. Bowles's case, the petitioner sought an evidentiary hearing but was denied such a hearing on a claim, "§ 2254(e)(2) does not apply" and "the AEDPA does not preclude [the petitioner] from receiving an evidentiary hearing." *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998). In such instances, the federal court essentially looks to pre-AEDPA law—that is, the standards set forth in *Townsend v. Sain*, 372 U.S. 293 (1963)—to determine the need for an evidentiary hearing.

Under *Townsend*, a federal court evidentiary hearing is required to be held "[i]f (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Townsend*, 372 U.S. at 313.

Here, the merits of the factual dispute were never resolved as to Mr. Bowles's claim of intellectual disability as no evidentiary hearing was granted in his most recent state court proceeding. "It is well established that a habeas petitioner is entitled to an evidentiary hearing on a claim if he or she alleges facts that, if proved at the hearing, would entitle petitioner to relief." *Meeks v. Singletary*, 963 F.2d 316, 319 (11th Cir. 1992) (quoting *James v. Singletary*, 957 F.2d 1562, 1573 n.17 (11th Cir. 1992)). Mr. Bowles is entitled to an evidentiary hearing on his grounds for relief.

**PRIOR PROCEEDINGS**

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 the United States Supreme 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 relief pursuant to 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, ECF No. 1 (M.D. Fla. Aug. 8, 2008). Mr. Bowles's petition was denied on December 23, 2009. *Id*. (ECF No. 18). 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).

In March 2013, Mr. Bowles filed a successive motion for state postconviction relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). The circuit court summarily denied this motion, and it was not appealed.

On June 14, 2017, Mr. Bowles filed a second successive motion for state postconviction relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The circuit court denied relief, and the Florida Supreme Court affirmed. *Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (2018).

On October 19, 2017, Mr. Bowles filed a third successive motion for postconviction relief, arguing that he is intellectually disabled and that his execution would therefore 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 v. Virginia*, 536 U.S. 304 (2002). *See* Record on Appeal, *State v. Bowles*, No. 19-1184 (Fla. 2019) (hereinafter PCR-ID) at 1-13.

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 Mr. Bowles's new state-appointed counsel. PCR-ID at 108-09. On March 26, 2019, CCRC-N attorney Karin Moore entered an

appearance in the case. 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).

On July 11, 2019, the 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). *See* PCR-ID at 1344-53. 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 the United States Supreme Court's ruling in *Hall v. Florida*, 572 U.S. 701 (2014), which was held retroactively applicable to Florida litigants 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, 2019 WL 3789971 (Fla. August 13, 2019).

## GROUNDS FOR RELIEF

### I. INTRODUCTION

On June 11, 2019, the Governor of Florida signed a warrant for the execution of Mr. Gary Bowles, who had been trying to litigate his intellectual disability—a categorical Eighth Amendment bar to his execution— in the circuit court of Duval County for nearly two years. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

Mr. Bowles's claim was dispatched with haste, and he was not afforded an opportunity to establish his entitlement to relief. In fact, as of this date, Mr. Bowles's intellectual disability claim has not been reviewed on the merits by any state or federal court.

The Eighth Amendment requires that persons "facing that most severe sanction . . . have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724 ("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[.]") (emphasis added); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (explaining that the holding of *Hall* was "that it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an I.Q. above 70.") (internal citation omitted).

Significant evidence establishes that Mr. Bowles is exempt from execution. Mr. Bowles merely seeks that to which he is entitled, the opportunity to have this evidence heard by a court. To hold otherwise would "create[] an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S. at 704, in violation of the Eighth Amendment.

## II. MR. BOWLES'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT BECAUSE HE IS INTELLECTUALLY DISABLED

### A. The Legal Standard for Intellectual Disability

In 2002, the United States Supreme Court first held that execution of the intellectually disabled violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, 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 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 the reliability and fairness of capital proceedings against [intellectually disabled] defendants.

536 U.S. at 306-07.

*Atkins* further explained that while intellectually disabled persons frequently know the difference between right and wrong and are competent to stand trial, "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 the reaction of others." *Id*. at 318. Because of their diminished capacity and culpability, the Court concluded that neither of the two rationales supporting capital punishment—retribution and deterrence—properly applies to intellectually disabled individuals. *Id*. at 319-20.

The Supreme Court also discussed how the reduced capacity of intellectually disabled individuals provides a second justification for categorically exempting them from the death penalty:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, [ ] but also by the lesser ability of [intellectually disabled] defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. [Intellectually disabled] defendants may be less able to give meaningful

> assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted lack of remorse for their crimes.

*Id*. at 320-21 (footnote omitted).

Put simply, "[n]o legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 572 U.S. 701, 708 (2014).

*Atkins* referred to the prevailing clinical definitions as helpful in the task of determining whether an individual should be exempted from the death penalty. 536 U.S. at 308 n.3, 317. The Supreme Court cited the definition for intellectual disability established by the American Association on Mental Retardation, which has since been renamed the American Association on Intellectual and Developmental Disabilities ("AAIDD"). The Supreme Court also cited the definition contained in the American Psychiatric Association's ("APA") Diagnostic and Statistical Manual of Mental Disorders – 4th Edition – Text Revision ("DSM-IV-TR"), which was the most significant diagnostic guide for mental health practitioners in the United States at the time of the Supreme Court's opinion. The DSM-IV-TR has since been replaced by the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition ("DSM-5").

Although *Atkins* left to each State the task of formulating the definition of intellectual disability, states do not have "unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 719; *Moore*, 137 S. Ct. at 1052-53 (same). "The medical community's current standards supply one constraint on states' leeway in this area. Reflecting improved understanding over time . . . current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Moore*, 137 S. Ct. at 1053 (quoting DSM-5 at 7). Accordingly, *Atkins* and its progeny do not "license disregard of current medical standards." *Id.* at 1049.

Pursuant to the definitions set forth by the APA and the AAIDD and endorsed by the Supreme Court in *Atkins*, *Hall* and *Moore*, there are three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) onset before age 18. *See* DSM-5 at 33; *Intellectual Disability: Definition, Classification, and Systems of Supports – 11th Edition*, American Association on Intellectual and Developmental Disabilities (2010) ("AAIDD-2010") at 5; *Atkins*, 536 U.S. at 307 n.3 (enumerating the criteria for a diagnosis of intellectual disability as set forth by the AAIDD and the APA).

### B. Mr. Bowles Meets the Criteria for Intellectual Disability

#### i. Mr. Bowles Has Significantly Subaverage Intellectual Functioning

##### a. Clinical Considerations in the Interpretation of IQ Scores

A determination of whether intellectual disability exists requires significantly subaverage intelligence *approximately* two standard deviations below the mean, and this prong of the diagnosis is typically met through the use of standardized intelligence instruments (IQ tests). *See, e.g.*, User's Guide to AAIDD-11, p. 23. The medical community recognizes, however, that while this can be demonstrated through the use of such IQ tests, the determination of whether this prong is met does not include a "cutoff score." *Id.* As the User's Guide to AAIDD-11 notes: "A fixed point cutoff for [intellectual disability] is not psychometrically justifiable." *Id*. "The diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination." *Id*.

While the AAIDD and DSM acknowledge that IQ testing is a significant consideration in whether the deficits in intellectual functioning prong exists, such testing must be considered in conjunction with factors that have been observed to affect the interpretation of IQ scores. IQ test scores, for example, must be considered in conjunction with the standard error of measurement (SEM). The DSM-5 instructs:

> Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including

> a margin for measurement error (generally + 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

DSM-5, p. 37. The AAIDD-11 also instructs that a SEM of up to five points be taken into consideration in the interpretation of IQ scores. AAIDD-11, p. 36; *see also Mental Retardation: Definition, classification, and systems of support* (10th ed. 2002), AAMR (AAIDD-10), p. 58-59 ("[T]he SEM is considered in determining the existence of significant subaverage intellectual functioning . . . In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error.").

The Supreme Court has recognized the importance of considering the SEM present in testing instruments, consistent with this guidance from the medical community. *See Hall*, 572 U.S. at 713 ("The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."). Thus, the Supreme Court has held that an IQ score of 75 is "squarely in the range of potential intellectual disability." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015).

Additionally, it has been widely observed that professional authority provides for the correction of IQ scores for norm obsolescence (the 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 Obsolescence ("Flynn") Effect); DSM-5, p. 37 (discussing the Flynn Effect); AAIDD-11, p. 37 (same).

For example, the AAIDD-11 advises: "As discussed in the *User's Guide* (Shalock et al., 2007) that accompanies the 10th editions of this *Manual*, best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11 at 37. Thus, "[b]oth the [AAIDD-11] and this User's Guide recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted." User's Guide to AAIDD-11, p. 23.

In considering whether Mr. Bowles meets the first prong of intellectual disability—significantly subaverage intellectual functioning—his IQ test scores must be considered in conjunction with the factors the medical community uses in their interpretation of the same, including the SEM and the Flynn Effect.

**b. Mr. Bowles's IQ and Neuropsychological Testing**

Relevant to the determination of his intellectual functioning, Mr. Bowles has had two full-scale IQ tests, and has been further evaluated by two neuropsychologists, in 2003 and 2018 (Dr. Harry Krop and Dr. Barry Crown, respectively). This testing supports that Mr. Bowles has significantly subaverage

intellectual functioning, and evidences that Mr. Bowles meets the criteria for the first prong of intellectual disability.

The first relevant full-scale IQ test was given to Mr. Bowles in 1995. Prior to his penalty phase proceeding in 1996, Mr. Bowles was evaluated by psychologist Dr. Elizabeth McMahon. She was the confidential defense expert in Mr. Bowles's case, and Mr. Bowles's trial attorney, Bill White, asked her to evaluate Mr. Bowles only for competence, insanity, and mitigation purposes. *See, e.g.*, Record on Appeal, *Bowles v. State*, 979 So. 2d 182 (Fla. 2008) (hereinafter, "PCR-[Volume Number]"), PCR-II at 196. Dr. McMahon did not write a report. *See, e.g.*, PCR-II at 251 (Dr. Krop noting that Dr. McMahon did not write a report). As part of her general evaluation, Dr. McMahon administered to Mr. Bowles the Wechsler Adult Intelligence Scale, Revised (WAIS-R), in 1995. PCR-II at 199. Mr. Bowles received a full-scale IQ score of 80 on this test. PCR-II at 239 (Dr. Krop's testimony about Dr. McMahon's testing).

The second IQ test that Mr. Bowles was administered was the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which was given to him in 2017 by psychologist Dr. Jethro Toomer. *See* App. at 1-6. Mr. Bowles received an IQ score of 74 on the WAIS-IV. App. at 3.

As both of the recent evaluators of Mr. Bowles, psychologist Dr. Toomer and psychiatrist Dr. Julie Kessel, agree, Mr. Bowles meets the prong of significantly

subaverage intellectual functioning, which is supported by his IQ testing. The WAIS-IV score of 74 that Mr. Bowles received in 2017, considered within the accepted SEM of ± 5 points, gives Mr. Bowles a potential IQ of as low as 69, which is below two standard deviations from the mean. This is sufficient to establish this prong of a diagnosis of intellectual disability. *See*, *e.g.*, *Brumfield*, 135 S. Ct. at 2271 (noting that an IQ score of 75 was "entirely consistent with intellectual disability.").

The only other valid full-scale IQ test that Mr. Bowles was given, the WAIS-R in 1995, returned a score of 80, which was not previously corrected for norm obsolescence. When that correction is made, Mr. Bowles's 1995 WAIS-R testing results in a score between 75-76, which when the SEM is taken into account, puts this IQ score as low as approximately 70. As Dr. Toomer observed: "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." App. at 3. Dr. Kessel likewise notes: "I agree with Dr. Toomer that, at the time of the [trial] 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." App. at 24.

It is also worth noting that Mr. Bowles's IQ score on the WAIS-IV is likely the most accurate gauge of his actual intellectual functioning, because "the WAIS-IV, which was not available to Dr. McMahon, is a more modern, updated, and psychometrically accurate instrument." App. at 3. Dr. Kessel agreed, noting: "The WAIS-R is less psychometrically accurate than the WAIS-IV in this situation and overestimates IQ in non-appropriately normed populations." App. at 24. Even Dr. McMahon herself agreed with the opinions of Dr. Toomer and Dr. Kessel about the WAIS-IV, as she recently observed:

> For the purpose of my general psychological evaluation in the 1990s, I administered the [WAIS-R] to Mr. Bowles. At the time, the WAIS-R was an adequate instrument. The [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.

App. at 58.

Neuropsychological testing conducted by Dr. Barry Crown in 2018 is also consistent with significantly subaverage intellectual functioning. *See* App. at 7-8. Dr. Crown noted that Mr. Bowles performed in one test in the 14th percentile for his age group, and that on the Reitan-Indiana Aphasia Screening Test, "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." App. at 27. On the Shipley Abstractions, Mr. Bowles received an "abstraction age of 11

years, 0 months," and scored in the 12th and 6th percentiles for his age group on other testing. App. at 8. Dr. Crown concluded: "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." *Id*. Dr. Crown noted, "Mr. Bowles's brain damage supports the finding that he is an intellectually disabled person[.]" *Id*.

Dr. Crown's neuropsychological findings are supported by Dr. Harry Krop, who evaluated Mr. Bowles in state postconviction in 2003. In his 2018 review of materials developed in the course of Mr. Bowles's intellectual disability investigation, Dr. Krop found: "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." App. at 13.

**c. Other Evidence of Impaired Intellectual Functioning**

IQ testing, and other formal psychological testing, is the most persuasive evidence of intellectual functioning. However, evidence showing impaired intellectual functioning is nothing new; Mr. Bowles's intellectual limitations have been observed by past evaluators as well as lay witnesses. For example, lay witnesses that have observed Mr. Bowles over the course of his life have described him consistently as "slow" (App. at 38 (Glen Price), 43 (Julian Owens), 55 (Tina

Bozied)), and noted that he could not understand directions or how to do simple tasks (App. at 56 (Tina Bozied), 33-34 (Elain Shagena), 38-39 (Glen Price), 30 (Chester Hodges), 26 (Bill Fields)).

Additionally, Dr. McMahon observed from her 1995 evaluation of Mr. Bowles that he had a number of intellectual limitations. Specifically, Dr. McMahon noted that her testing revealed that Mr. Bowles "doesn't learn by his own mistakes," PCR-II at 203, and that Mr. Bowles was "probably not working with what we would say is an intact brain," PCR-II at 207.

Thus, multiple pieces of evidence, including IQ and neuropsychological testing, as well as the statements of lay witnesses and past evaluators, show that Mr. Bowles has significantly subaverage intellectual functioning, satisfying the first prong of an intellectual disability diagnosis.

**ii. Mr. Bowles Has Significant Adaptive Deficits**

Adaptive deficits "refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5, p. 37; *see also* AAIDD-11, p. 43 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.").

The adaptive deficits prong of an intellectual disability diagnosis "is met when at least one domain of adaptive functioning—conceptual, social, or practical—is

sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." DSM-5, p. 38; *see also* AAIDD-11, p. 43 (noting the same). Importantly, this prong of intellectual disability is met by clinical judgment of deficits, and is not negated by strengths. *See, e.g.*, User's Guide to AAIDD-11, p. 26 (noting that it is an incorrect stereotype that "[p]ersons with [intellectual disability] are characterized only by limitations and do not have strengths that occur concomitantly with the limitations").

Although Mr. Bowles need only exhibit deficits in one adaptive deficits domain, he has evidence of deficits in all three of these domains.

**a. Mr. Bowles Has Deficits in Conceptual Skills**

The conceptual domain includes skills such as "language; reading and writing; and money, time, and number concepts." AAIDD-11, p. 44. For individuals with mild intellectual disability, "abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (i.e., reading, money management), are impaired." DSM-5, p. 34.

Mr. Bowles has significant adaptive deficits in skills within the conceptual domain. Notably, he struggled in school, particularly after primary school. This was significant to Dr. Kessel, who wrote:

> 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.

App. at 17-18.

Mr. Bowles also has significant deficits in his executive functioning and short-term memory, which have been observed by both mental health professionals and lay witnesses. For example, Dr. Toomer administered the Scales of Independent Behavior-Revised (SIB-R) for Mr. Bowles with two third-party reporters, Julian Owens and Ken White. *See* App. at 10. On this standardized assessment tool, which is designed to measure adaptive deficits, Dr. Toomer found that Mr. Bowles had deficits in a number of areas relevant to the conceptual domain, including deficits in language comprehension and expression and understanding of money and value. *Id*.

Further, neuropsychologist Dr. Barry Crown found that Mr. Bowles had brain damage. App. at 18. Mr. Bowles's brain damage indicates that he specifically struggles with deficits in the conceptual domain. *Id*. Dr. Crown found:

> 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 . . . Given [Mr. Bowles's] underlying impairments, the existence of conceptual deficits is manifest.

*Id*. That Dr. Crown found that Mr. Bowles would have trouble, based on his brain damage, with impulsivity and understanding consequences is supported by the experiences of lay witnesses with Mr. Bowles. *See* App. at 38-39 (Glen Price: "[Gary] 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."); 30 (Chester Hodges: "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 . . . if he wanted something, he just took it, like a toddler. He did not have self-control.").

In addition to being impulsive, Mr. Bowles also struggled with planning for the future. App. at 53 (Roger Connell: "[Gary] was impulsive, and never seemed to think about his future . . . He only thought of what his next immediate need was."); 56 (Tina Bozied: "Gary wasn't able to plan in advance. If he didn't have it when he needed it he would have just gone without.").

Additionally, many others have observed deficits in Mr. Bowles's short-term memory. Julian Owens recalled from time he spent with Mr. Bowles in his young adulthood:

> 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 so 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.

App. at 43-44.

**b. Mr. Bowles Has Deficits in Social Skills**

The social domain includes skills such as "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e. wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." AAIDD-11, p. 44. Adults with mild intellectual disability are "immature in social interactions," and may have "difficultly in accurately perceiving peers' social cues." DSM-5, p. 34. Such individuals may also have "difficulties regulating emotion and behavior in age-appropriate fashion" and have "limited understanding of risk in social situations," which means they are "at risk of being manipulated by others (gullibility)." *Id*.

Mr. Bowles has significant deficits in skills in the social domain. Dr. Toomer, in his assessment of Mr. Bowles's deficits using the SIB-R, found that Mr. Bowles had deficits in social interaction. *See* App. at 10-11. Furthermore, Mr. Bowles spent

much of his youth being victimized, including being the victim of sexual abuse. *See* App. at 17. Moreover, Mr. Bowles is consistently described by those who have known him from his childhood and through his adulthood as "gullible," "naïve," and frequently getting "taken advantage of." App. at 38 (Glen Price); 46 (Julian Owens); 55 (Tina Bozied); 48-49 (Ken White). Additionally, many individuals described social situations in which Mr. Bowles floundered without help. For example, Julian Owens noted:

> 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.

App. at 46. Other individuals describe Mr. Bowles as "immature," and having childlike interests. App. at 32 (Diana Quinn); 45-46 (Julian Owens). Tina Bozied, who knew Mr. Bowles when they were both teenagers, described:

> 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.

App. at 55.

**c. Mr. Bowles Has Deficits in Practical Skills**

The practical domain includes skills such as "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." AAIDD-11, p.

44. Adults with mild intellectual disabilities "may function age-appropriately in personal care," but "need some support with complex daily living tasks in comparison to peers." DSM-5, p. 34. These adults typically need help with "grocery shopping, transportation, home and child-care organization, nutritious food preparation, and banking and money management." *Id*. Additionally, these "[i]ndividuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently." *Id*.

Mr. Bowles has deficits in his practical skills. Dr. Toomer, in his assessment of Mr. Bowles's deficits using the SIB-R, found that Mr. Bowles had deficits in personal living skills, community living skills, personal self-care, time and punctuality, and work skills. *See* App. at 10-11.

Through his late adolescence and adulthood, Mr. Bowles struggled with travel and public transportation. Julian Owens noted of Mr. Bowles in his adulthood:

> [Gary] had trouble using the public bus in Jacksonville Beach. Back then, the bus system was much simpler than it is now, there was basically 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.

App. at 45. Likewise, Tina Bozied recalled:

> 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 place. The whole process was out of Gary's abilities, and it was obvious it overwhelmed him.

App. at 56.

Other individuals also noted that Mr. Bowles lacked basic skills to care for himself, well into his adulthood. He struggled especially with using money, from paying for items with cash and counting appropriate change, to being able to save money, or pay for larger items like hotel rooms, rent, or other bills. *See* App. at 44-45 (Julian Owens); 55-56 (Tina Bozied). Mr. Bowles frequently used others as a "crutch," App. at 53 (Roger Connell), because he could not otherwise provide for himself. He relied on other people to let him live with them, which they allowed for free, and to care for him. *See* App. at 47 (Ken White); 55 (Tina Bozied); 53 (Roger Connell); 44-45 (Julian Owen). Additionally, while Mr. Bowles was for the most part not formally employed during his adult life, he required assistance in finding employment, *see* App. at 47 (Ken White), and was not successful at the jobs that he did have. For example, one of his former employers, Elain Shagena, remembered:

> [Gary] did not do any tasks that required any level of sophistication or complexity, even if it was a slightly complex task. . . . We tried to train Gary to use [a four-step] 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. Gary also came so 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.

App. at 33. Because of his inability to provide for himself, Gary turned to prostitution and temporary living situations with others. As Dr. Kessel summarized:

> 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 has 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 childhood.

App. at 21.

Mr. Bowles has displayed significant practical domain deficits as a result of his intellectual limitations, which have pervaded his entire life, and thus, on that basis alone and in combination with his deficits in the other domains described above, he meets the second prong for a diagnosis of intellectual disability.

#### iii. Mr. Bowles's Intellectual Disability Onset Before 18 Years of Age

The third prong of an intellectual disability diagnosis requires the "[o]nset of intellectual and adaptive deficits during the developmental period," DSM-5, p. 33, which is generally referred to as prior to the age of 18 years old, *see* AAIDD-11, p.

5. *See also Foster*, 260 So. 3d at 178. This prong refers only to "recognition that intellectual and adaptive deficits are present during childhood or adolescence," and can be met by "history or current presentation." DSM-5, p. 38. Mr. Bowles need not prove the exact origin of his disability, be it in utero, due to progressive damage such as malnutrition, or due to acquired disease or injury (such as traumatic brain injury) to meet this prong of the diagnosis. *See* AAIDD-11, p. 27 (noting that "disability does not necessarily have to have been formally identified").

Mr. Bowles's intellectual and adaptive deficits existed before he was 18 years old. Several individuals note deficits for Mr. Bowles who knew him in his early childhood, *see* App. at 38-39 (Glen Price); 25-26 (Bill Fields); 29-30 (Chester Hodges), and who knew him in his teenaged-years and young adulthood, *id.* at 55-56 (Tina Bozied); 47-49 (Ken White). Moreover, Mr. Bowles struggled in school, achieved failing grades once academic requirements "beg[an] to move from concrete concepts . . . . to more abstract concepts." *See* App. at 4 (Report of Dr. Toomer). And Dr. Crown noted that his brain damage was consistent from a source in his childhood, possibly his juvenile use of inhalants (such as paint, glue, or gasoline), or potentially even earlier, such as a perinatal origin. App. at 8. Drs. Kessel, Toomer, and Krop likewise found that evidence existed of his poor intellectual functioning in his childhood. *See* App. at 17-18; 23; 23; 4-6.

### iv. Mr. Bowles Has Numerous Risk Factors for Intellectual Disability

Evidence of risk factors is not required for the diagnosis of intellectual disability either by medical communities or courts. But the medical community considers "risk factors" as "cause to explore the prospect of intellectual disability further." *Moore*, 137 S. Ct. at 1051. Thus, risk factors are persuasive evidence that an intellectual disability may exist or develop. *See Moore*, 137 S. Ct. at 1051 ("At least one or more of the risk factors described in the [DSM] will be found in every case of intellectual disability.") (internal brackets and quotation marks omitted) (quoting AAIDD-11, p. 60). Mr. Bowles had multiple risk factors for intellectual disability before and after age 18.

**Prenatal Risk Factors.** Prior to Mr. Bowles's birth, a number of risk factors for intellectual disability existed. For example, as Dr. Kessel observed, risk 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." App. at 23. Furthermore, "[e]motional risk factors related to his mother's health also include the sudden death of her spouse during pregnancy with Gary and her tendency to depression." *Id*.

**Poverty, Abandonment, and Rejection of Parental Caretaking**. Mr. Bowles was not yet born when his father died at the age of 23. Record on Appeal,

*Bowles v. State*, 804 So. 2d 1173 (Fla. 2001) ("R.") at 864-65; App. at 16. His mother was left at the age of 17 with an infant, Mr. Bowles's elder brother Frank, and pregnant with Mr. Bowles. Their family was impoverished, living in rural West Virginia, and many members of the family were illiterate and alcoholics. After her husband's death, Mr. Bowles's mother was described as "emotionally unwell," App. at 40, and at points after Mr. Bowles's birth, she left Mr. Bowles and Frank in West Virginia with extended family members, with no indication where she had gone, *see id*. at 55 (Geraldine Trigg). The inadequate family support, familial poverty, malnutrition, and rejection of parental caretaking and abandonment present in Mr. Bowles's early childhood constitute additional risk factors for intellectual disability. *See* AAIDD-11, p. 60.

**Abuse, Neglect, and Domestic Violence**. Mr. Bowles suffered physical abuse throughout his childhood. R. at 830-31, 868-71, 876-77. Mr. Bowles's mother, following the death of his father, subsequently married severely abusive men. R. at 866, 874. Mr. Bowles was also often kicked out of his house when he was a child, sleeping wherever he could. R. at 878, 882-83. Mr. Bowles's mother was not around much to care for him. PCR-II at 218, R. at 837, 869-71, 877-78. She was an alcoholic. R. at 876, 888.

Mr. Bowles's first step-father, Bill Fields, abused Mr. Bowles and his brother. R. at 831, 868-70. In contrast, their half-brother and half-sister, Fields's biological

children, received preferential treatment. R. at 828, 868-69. Fields also physically abused Mr. Bowles's mother, particularly if she tried to defend Mr. Bowles from Fields's abuse. R. at 871. Fields physically abused Mr. Bowles and his brother two to three times a week, starting for Mr. Bowles at the age of six or eight. R. at 831. Although Fields beat both Mr. Bowles and his brother, Mr. Bowles's beatings were worse. R. 828, 830. Fields punched Mr. Bowles, knocked him down, hit him with fists, R. at 869, used a board, PCR-II at 2019, used branches, and used a black leather strap. Fields hit Mr. Bowles across the forehead with a broom handle. Mr. Bowles needed medical attention after several of the beatings, but his parents never sought it out for him. Eventually Fields's beatings forced Mr. Bowles and his brother to run away from home. R. at 873.

Mr. Bowles's second step-father, Chester "Chet" Hodges, was also abusive. R. at 835, 877. Hodges was an alcoholic, R. at 875, and he would often pummel, slap, and punch Mr. Bowles and his brother. He too beat Mr. Bowles with his belt. A photo from Mr. Bowles's 13th birthday actually displays a black eye inflicted by Hodges. R. at 885-86. And Hodges would also kick Mr. Bowles out of the house in the winter while it was snowing and cold. He boarded up the garage windows when he discovered Mr. Bowles was getting into the garage. Mr. Bowles was in the home on some occasions when his mother was being beat and injured from Hodges. R at 876. She was hospitalized on at least three occasions. R at 876. Her injuries included

broken ribs, R. at 876, a broken arm, R. at 876, and a laceration to her neck that necessitated the removal of part of her larynx, R. at 835-36, in addition to black eyes and bruises. The abuse became so bad that Mr. Bowles's mother attempted suicide before she eventually divorced Hodges. R. at 878-81.

On an especially brutal occasion of abuse, Hodges held Mr. Bowles, then 13 or 14 years old, by the throat, beating him with a hammer and a rock, ultimately lacerating his neck. R. at 882. Mr. Bowles's brother had just come home on leave from military service when he witnessed this scene and stepped in to stop it. R. at 836. Mr. Bowles then ran away, and he did not have a stable home or any parental support or guidance for the remainder of his childhood. R. at 882-83.

Mr. Bowles's suffering of abuse, abandonment, and trauma constitute risk factors for intellectual disability. *See* DSM-5, p. 39; *see also Moore*, 137 S.Ct. at 1051 (acknowledging that "childhood abuse and suffering" is a risk factor for intellectual disability).

**Alcohol and Drug Abuse.** Mr. Bowles became a substance abuser in his childhood. R. at 832-34, 872-73, 880. He started using drugs and alcohol between the ages of 8 and 10. R. at 833. He began smoking marijuana, and then started sniffing glue and huffing paint thinner. R. at 833. Mr. Bowles and other children would steal the glue, and they would huff it. R. at 833. On one occasion, Mr. Bowles's glue-sniffing resulted in hospitalization. He also developed a drinking

problem. R. at 872. Mr. Bowles's substance abuse, which began before the age of eighteen and continued into his adulthood, constitutes another risk factor for intellectual disability. *See* AAIDD-11, p. 60.

### C. Conclusion

Mr. Bowles is an intellectually disabled person. He suffers from significant deficits in intellectual and adaptive functioning, which have been present since early in the developmental period. Because Mr. Bowles is mentally disabled, he "should be categorically excluded from execution." *Atkins*, 536 U.S. at 318.

## III. THE STATE COURT'S PROCEDURAL DETERMINATION WAS INADEQUATE AND CONTRARY TO CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT

The state circuit court, in its written order denying Mr. Bowles's postconviction motion, ruled that Mr. Bowles's intellectual disability claim was time-barred under the Florida Supreme Court's rulings in *Rodriguez*, 250 So. 3d 616, *Blanco*, 249 So.3d 536, and *Harvey*, 260 So. 3d 906, because it was not filed within 60 days of the promulgation of Fla. R. Crim. P. 3.203 (2004).

Despite *Atkins's* categorical bar to executing the intellectually disabled, the Florida Supreme Court affirmed the circuit court's order, finding that Mr. Bowles's claim was untimely. According to the court, "Bowles waited until October 19, 2017 to raise an intellectual disability claim for the first time. Therefore, the record conclusively shows that Bowles' intellectual disability claim is untimely under our

precedent." *Bowles v. State*, 2019 WL 3789971 at *2. Further, the Florida Supreme Court determined that Mr. Bowles had not established good cause for failing to seek a determination of his intellectual disability claim within 60 days of October 1, 2004. *Id*. The court stated:

> At that time, the Supreme Court had held that the Eighth Amendment prohibits the execution of an intellectually disabled offender, and it is reasonable to expect Bowles then to have raised any argument that Florida's standards for determining intellectual disability were constitutionally deficient. Bowles' inaction should not be ignored on the basis of the perceived futility of his claim.

*Id.*

The Florida Supreme Court's procedural ruling does not constitute an adequate state ground barring federal review. *See, e.g., Conner v. Hall*, 645 F.3d 1277, 1287 (11th Cir. 2011). Federal law governs whether a procedural bar is adequate, *see Cone v. Bell*, 556 U.S. 449, 465 (2009), and under federal law, a procedural bar is not an adequate state ground barring subsequent federal review unless the state rule was "firmly established and regularly followed" at the time it was applied. *See Ford v. Georgia*, 498 U. S. 411, 423-424 (1991). Moreover, the state court cannot have applied the bar in "an inconsistent or manifestly unfair manner." *Upshaw v. Singletary*, 70 F.3d 576, 579 (11th Cir. 1995*)*; *see also Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state rule was not "consistently or regularly" applied).

Mr. Bowles filed his postconviction motion with a diagnosis of intellectual disability from two psychologists that rely, in part, on his IQ score of 74 on the WAIS-IV. *See* PCR-ID at 780, 783, 799-801. Only after the Supreme Court's decision in *Hall* would this IQ score legally qualify to establish his intellectual disability in Florida—prior to that, such a score would have been fatal to the entire claim. *See Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) ("[T]his state formerly required proof of an IQ score of 70 or below to establish the first prong, and failure to produce such evidence was fatal to the entire claim.").

There is no question that when the Supreme Court decided *Atkins*, it announced a new, substantive rule of constitutional law that was necessarily retroactive. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1172-73 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in *Atkins* is retroactively applicable to cases on collateral review."). However, because the law in Florida indicated that only IQ scores of 70 or below were qualifying, *see Cherry v. State*, 959 So. 2d 702 (Fla. 2007), it was not until the Supreme Court decided *Hall v. Florida* that individuals like Mr. Bowles with IQ scores between 70 and 75 had a viable legal claim for intellectual disability. *See Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017) ("Instead, the language [in *Hall*] justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70.").

While *Hall* expanded the range of IQ scores that could establish that an individual was ineligible for execution, it was not until the Florida Supreme Court made *Hall* retroactive in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), that Mr. Bowles could file his R. 3.851 motion. Indeed, Fla. R. Crim. P. 3.851(d)(2)(B) provides for the timeliness of a successive R. 3.851 motion where "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

The Florida Supreme Court issued its opinion in *Walls* on October 20, 2016, and Mr. Bowles filed his R. 3.851 motion on October 19, 2017, within one year of *Walls*. *See, e.g.*, *Foster v. State*, 260 So. 3d 174, 179 (Fla. 2018) (noting a renewed *Atkins* claim was "timely" filed because it was within the *Walls* deadline). Because Mr. Bowles could not have filed this motion before the decisions in *Hall* and *Walls*, and he timely filed within one year of *Walls*, his motion should have been deemed timely pursuant to Fla. R. Crim. P. 3.851(d)(2)(B). Instead, the Florida Supreme Court ignored the plain meaning of the rule in favor of a one page order (in *Rodriguez*) issued prior to Mr. Bowles's intellectual disability claim and two orders (*Harvey* and *Blanco*) issued subsequent to his motion. The Florida Supreme Court's procedural ruling was inadequate, as it was not firmly established or regularly followed.

Moreover, the Florida Supreme Court's determination was contrary to clearly established United States Supreme Court precedent. In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme 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.

The Supreme 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*, the Supreme 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).

The Supreme 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. The Supreme 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 state procedural rule—rather, the procedure must give way to the constitutional prohibition. The United States Constitution prohibits the execution of the intellectually disabled, and by virtue of the Supremacy Clause, that substantive federal prohibition cannot be frustrated by a state procedural rule that blocks any assessment of Mr. Bowles's condition on the merits. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) ("A conviction or sentence imposed in violation of a substantive rule [of the Eighth Amendment] is not just erroneous but contrary to law and, as a result, void," so that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule."). Contrary to the state court's determination, because Mr. Bowles is categorically ineligible for execution, his claim cannot be defaulted or waived.

## IV. MR. BOWLES'S PETITION IS NOT SECOND OR SUCCESSIVE

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, the United States Supreme 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. The Supreme 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. The Supreme 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*. The Supreme 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), the Supreme 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). The Supreme 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.

Mr. Bowles's present 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 Panetti*, 551 U.S. at 945; *Martinez-Villareal*, 523 U.S. at 644-45; *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.'"). 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* may also be raised prior to the imposition of the sentence of death and prior to the actual execution of that sentence. Indeed, in *Atkins*, the Supreme 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).

Mr. Bowles is exempt from execution due to the fact of his intellectual disability. Because the basis for his claim did not exist prior to his warrant being signed, Mr. Bowles's numerically second motion is not "second or successive," and AEDPA's gatekeeping provision does not apply. *See*, *e.g.*, *Stewart*, 646 F.3d at 865. Mr. Bowles's claim, like the *Ford* claim at issue in *Martinez-Villareal*, is now ripe for review.

## V. A CLAIM OF INTELLECTUAL DISABILITY CANNOT BE BARRED

Like the Eighth Amendment prohibition on executing the incompetent, the Eighth Amendment prohibition on executing the intellectually disabled is "a substantive restriction on the State's power to take the life" of an inmate. *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). Thus, the Eighth Amendment categorically excludes the imposition of death on intellectually disabled persons because of their reduced moral culpability. *See Atkins*, 536 U.S. at 321. The Supreme Court has held that "death is not a suitable punishment for [an intellectually disabled] criminal" and the execution of such individuals does not "measurably advance the deterrent or the retributive purpose of the death penalty." *Id.*

Therefore, any procedural obstacle to the consideration of a claim of intellectual disability must cede to the categorical protections of the Eighth Amendment. Just as *Roper v. Simmons*, 543 U.S. 551 (2005), would prevent the

execution of a juvenile at any point from the time of sentencing until the moment of execution, so too *Atkins* protects intellectually disabled individuals from execution regardless of when the claim is brought.

## VI. RELIEF IS NECESSARY IN MR. BOWLES'S CASE TO PREVENT A MISCARRIAGE OF JUSTICE

To the extent that any procedural default is found, Mr. Bowles is able to overcome it by demonstrating a fundamental miscarriage of justice. In *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), the Supreme Court held that a claim of actual innocence empowers a federal court to adjudicate a habeas petition filed outside the § 2241(d)(1) statute of limitations. In so doing, the Court explained that a claim of actual innocence is not a basis for "equitable tolling" of the statute of limitations, but rather is an "equitable exception" to statutory limitations periods that requires no showing of exceptional circumstances of diligence. *Id*. at 391-92 (emphasis in original).

The *McQuiggin* equitable exception flows from the long-recognized "fundamental miscarriage of justice exception" to procedural bars that would otherwise operate to deny relief. *Id*. (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). The Supreme Court has made clear that a fundamental miscarriage of justice occurs when the petitioner is actually innocent of the crime, *see Schlup v. Delo*, 513

U.S. 298, 324-27 (1995), *or* is ineligible for the death penalty, *Sawyer v. Whitley*, 505 U.S. 333 (1992). Specifically, in *Sawyer*, the Court held that the miscarriage of justice exception allows a court to hear a federal habeas claim that would otherwise be "successive, abusive, or defaulted" where the petitioner can show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 335; *see also Dretke v. Haley*, 541 U.S. 386, 393 (2004) (recognizing that the miscarriage of justice exception based on "actual innocence" had been extended "to claims of capital sentencing error"); *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) ("[A] movant's procedural default is excused if he can show that he is actually innocent . . . , in the capital sentencing context, of the sentence itself."). Stated differently, a petitioner must demonstrate that he is "innocent of the death penalty." *Sawyer*, 505 U.S. at 345.

*McQuiggin* and *Sawyer* establish that a petitioner who is able to show actual innocence of the death penalty may proceed in federal court with a habeas claim that would otherwise be barred by AEDPA's statute of limitations. As a person with intellectual disability who is categorically exempt from the death penalty pursuant to the Eighth Amendment, *Atkins*, 536 U.S. at 318, Mr. Bowles readily satisfies the

criteria for this exception.

## VII. ALTERNATIVELY, MR. BOWLES MAY PURSUE A WRIT OF HABEAS CORPUS PURSUANT 28 U.S.C. § 2241

### A. A Literal Reading of AEDPA's Text Demonstrates That § 2241 Applies to State Prisoners

Alternatively, Mr. Bowles should be granted relief under 28 U.S.C. § 2241, the text of which makes plain that state prisoners are eligible for such relief.

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.

28 U.S.C. § 2241.

This provision is a separate avenue for relief than 28 U.S.C. § 2254, so that, even if this Court finds that it does not have jurisdiction under § 2254, it should still consider Mr. Bowles' intellectual disability claim under § 2241. *See Thomas v. Crosby*, 371 F.3d 782, 802 (11th Cir. 2004) (Tjoflat, J., concurring) (the statutory text of §§ 2241 and 2254 "creates a separate route through which a petitioner may seek federal habeas corpus relief"). "[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).

Justice Tjoflat's concurrence in *Thomas v. Crosby*—supported by decades of Supreme Court precedent regarding statutory interpretation—is instructive of how Congress intended §§ 2241 and 2254 to offer separate avenues of relief for state prisoners. First, the text of each provision refers to different classes of petitioners. Section 2241 "applies to persons in custody regardless of whether final judgment has been rendered." *Stacey v. Warden, Apalachee Corr. Inst.*, 854 F. 2d 401, 403 n.1 (11th Cir. 1988). In contrast, § 2254 only applies to state prisoners who have already been convicted. Other than this limitation in § 2254, the language in § 2254(a) and § 2241 is identical. Accordingly, the courts are "forced to give these sections their plain and natural meaning and conclude that the claim may be filed under either." *Thomas*, 371 F. 3d at 803 (Tjoflat, J., concurring); *see also Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.").

There is historical precedent for Congress allowing two separate avenues of habeas relief. Changes to one do not affect the other unless specified by Congress. In the Judiciary Act of 1789, Congress gave federal district and circuit courts original jurisdiction and the United States Supreme Court appellate jurisdiction over federal prisoners' habeas petitions. Later, in 1867, Congress passed another statute establishing jurisdiction over habeas petitions. In 1868, Congress repealed the part of the 1867 Act allowing the Supreme Court to review a lower court's habeas denial.

In *Ex Parte Yerger*, 75 U.S. 85 (1868), the Supreme Court considered whether the repeal of its appellate jurisdiction in the 1868 Act also applied to its jurisdiction to consider appeals based on the 1789 Act. *Yerger*, 75 U.S. at 103. The Court held it did not, explaining that the Act of 1867 had not repealed the Act of 1789, and that by the text of the 1868 repeal, it applied only to the Act of 1867. *Id.* at 105. Thus, there were two separate statutes under which a prisoner could seek habeas relief, and only one of them precluded review by the Supreme Court. As Justice Tjoflat explained in *Thomas*:

> [T]he *Yerger* opinion is crucial . . . in two respects. First, when two habeas statutes each extended the writ of habeas corpus to federal prisoners, the Supreme Court treated each as an independent vehicle through which relief could be sought.
>
> [. . .]
>
> Second, *Yerger* shows us that Congress has previously enacted redundant habeas statutes for certain classes of prisoners. . . . [W]e should not be overly concerned about concluding that a state prisoner may seek relief under either §§ 2241 or 2254; this would not be the first time Congress made habeas relief available to people under two separate statutes.

*Thomas*, 371 F.3d at 805-06 (Tjoflat, J., concurring).

The text of AEDPA as a whole lends further credence to the suggestion that state prisoners may seek habeas relief under either § 2241 or § 2254. For example, in § 2255, the provision outlining habeas procedures for federal prisoners, Congress

included a limitation on federal prisoners filing under § 2241: "An application for a writ of habeas corpus [under § 2241] in behalf of a prisoner who is authorized to apply for relief pursuant to [§2255] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion [under § 2255]." Justice Tjoflat explained: "Since § 2255 needs an exclusivity provision to prevent convicted federal prisoners from seeking relief under § 2241, it stands to reason that § 2254 would need an exclusivity provision to prevent convicted state prisoners from seeking relief under § 2241." *Thomas*, 371 F. 3d at 806 (Tjoflat, J., concurring). This is because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Granderson*, 511 U.S. 39, 63 (1994) (Kennedy, J., concurring) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)); *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 132-33 (1989) ("[G]iven the parallel structures of these provisions [of the Warsaw Convention] it would be a flouting of the text to imply in [one provision] a sanction not only withheld there but explicitly granted elsewhere.").

Justice Tjoflat went on to note:

> Indeed, were we to interpret the mere enactment of § 2254 as precluding state prisoners from seeking § 2241 relief, this same interpretation would necessarily apply to § 2255, thereby rendering § 2255's

> exclusivity provision superfluous and meaningless. However, '[a]n interpretation of statutory language that causes other language within the statute to be meaningless contravenes the 'elementary canon of [statutory] construction that a statute should be interpreted so as not to render one part inoperative.' *In re City of Mobile*, 75 F.3d 605, 611 (11th Cir. 1996).

*Thomas*, 371 F.3d at 807 (Tjoflat, J., concurring). Instead, Justice Tjoflat notes: "Congress knew how to restrict access to § 2241 when it wanted to, and it chose not to do so for state prisoners. We must respect this choice." *Id.*

Similarly, Congress offered guidance on when a federal prisoner filing under § 2255 may apply for habeas relief under § 2241 in a provision commonly referred to as the savings clause—where "the remedy by [a § 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). No similar language exists in § 2254. While some circuits have read the absence of the savings clause to preclude state prisoners from filing under § 2241 altogether, *see, e.g.*, *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003), under the canon of statutory interpretation, a more accurate interpretation of AEDPA leads to the conclusion that Congress did not need to include the savings clause to state prisoners. Unlike federal prisoners who are bound by the exclusivity clause in § 2255(e), state prisoners *already have unfettered access to § 2241*.

Other provisions in AEDPA differentiate between classes of state prisoners. Section 2244 includes language that differentiates claims by prisoners seeking relief

under § 2254 and state prisoners more generally, indicating that Congress intended to preserve separate avenues of relief. *See Smith v. United States*, 508 U.S. 223, 235 (1993) (holding that related statutory provisions should be given different meanings where Congress "carefully varied the statutory language" used in each); *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992) (applying "the canon of statutory construction requiring a change in language to be read, if possible, to have some effect"). In some provisions of § 2244, Congress explicitly provides rules for § 2254 petitions. *See, e.g.*, 28 U.S.C. § 2244(b)(1) (governing second and successive habeas petitions under § 2254); *id.* & 2244(b)(2)(B) (regarding claims based on newly discovered evidence of innocence in petitions filed under § 2254). However, other provisions of § 2244 apply to any "habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court." *See, e.g.*, *id.* § 2244(c) (law of the case doctrine applied to habeas cases involving state prisoners); *id.* § 2244(d) (establishing the one-year statute of limitations for federal claims by state prisoners). These provisions, while referring to state petitioners and thus precluding federal petitioners, do not contain any specification tying them solely to § 2254. If Congress intended § 2254 to serve as the only avenue to seek federal habeas relief by federal prisoners, then it need not have included language in § 2244 limiting certain provisions to state prisoners filing under § 2254 while others applied to state prisoners generally. Instead, "[s]ome of the restrictions within § 2254 were intended

to apply to *all* habeas petitions brought by state prisoners, regardless of the statutory provision (§ 2241 or § 2254) under which they were brought. Other restrictions, however, were expressly intended to apply only to petitions brought under § 2254." *Thomas*, 371 F.3d at 807 (Tjoflat, J., concurring).

Some circuits have found that §§ 2241 and 2254 serve different purposes because "[p]etitions under § 2241 are used to attack the execution of a sentence, in contrast to § 2254 habeas and § 2255 proceedings, which are used to collaterally attack the validity of a conviction and sentence." *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997) (internal citations omitted); *see also Vargas v. Sikes*, No. 1:98-CV-0651-TWT, 1998 U.S. Dist. LEXIS 22232, at *9 (N.D. Ga. Feb. 9, 1998) ("Ostensibly an action under 28 U.S.C. § 2254, [petitioner's habeas suit] was an action under 28 U.S.C. § 2241 because it challenged the execution of the petitioners' sentence and not the conviction or the imposition of the sentence."). The Eleventh Circuit has ruled on the merits of a claim involving parole revocation, not the underlying conviction and sentence, brought under § 2241 and assessed jurisdiction under § 2241 without indicating that it should have instead been brought under § 2254. *See Van Zant v. Fla. Parole Comm'n*, 104 F.3d 325 (11th Cir. 1997). Such a reading of AEDPA limiting § 2241 to the execution of a sentence still does not preclude Mr. Bowles from seeking relief under § 2241 because the

execution of a death sentence against an intellectually disabled prisoner is precisely the harm complained of in this petition.

### B. The Canons of Statutory Interpretation Support a Reading of AEDPA That Allows State Prisoners to File for Habeas Relief Under § 2241, Separately From § 2254

The canons of statutory interpretation support a reading of AEDPA that allows state prisoners to file for habeas relief under § 2241, separately from § 2254. First, the Supreme 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).

In the present case, it cannot be forgotten that "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). And it is indisputable that *Atkins* precludes the use of the death penalty on the intellectually disabled. *Atkins*, 536 U.S. at 321. Even if this Court declines to read AEDPA in a way that finds § 2241 generally available to state prisoners, it should find § 2241 available in the narrow circumstance of a categorically unconstitutional execution. This Court cannot not read AEDPA in a way that "leaves [it] 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); *see also N.L.R.B.*,

301 U.S. at 30 (this Court's "plain duty" is to interpret AEDPA in a way that will "save the act").

The interpretation of AEDPA in a way that precludes intellectually disabled prisoners with state-court convictions from seeking relief under § 2241 is even more constitutionally infirm when considering the fact that such an exception exists for federally sentenced prisoners. In *Webster v. Daniels*, 784 F.3d 1123 (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. *Webster*, 784 F.3d at 1132. 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). 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.

After *Webster*, then, it is clear that in some instances, federal prisoners may pursue their *Atkins*-related claims under § 2241. But *Atkins*' preclusion applies not just to the federal government, but to the states as well. To interpret AEDPA as allowing some prisoners to bring a claim that their execution would violate the constitution under *Atkins* and not allow it for others based solely on the origination of their capital conviction violates equal protection.

As an equal protection matter, the application of § 2241 to intellectually disabled federal prisoners and not to intellectually disabled state prisoners for reasons that are, as argued previously, not even supported by the habeas statute, treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Yet, a "rational[]" explanation is constitutionally required where two classes are created to receive different treatment, the question is "whether there is some ground of difference that rationally explains the different treatment . . . ." *Eisenstadt*, 405 U.S. at 447. Here, the Supreme Court had not even decided *Atkins* yet at the

time of AEDPA's enactment, so Congress could not have intended to bar relief to one class of intellectually disabled prisoners and not another.

This Court should not retroactively read this distinction into the federal habeas statute where it will lead to unconstitutional executions and disparate treatment of intellectually disabled prisoners—which would be unconstitutional—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.

Finally, the canon against implied repeal also supports an interpretation that §§ 2241 and 2254 provide two separate habeas procedures. The Supreme Court has instructed that "repeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodgriguez v. United States*, 480 U.S. 522, 524 (1987) (internal marks and citations omitted); *see also Knight v. Georgia*, 992 F.2d 1541, 1546 (11th Cir. 1993) ("[t]he canon of statutory construction strongly disfavors findings of implied repeal"). Here, "Section 2254 . . . does not explicitly purport to amend, repeal, limit, or revise § 2241. Consequently, [the courts] should not interpret elaborate restrictions Congress established for § 2254 . . . as curtailing or eliminating a convicted state prisoner's right to seek relief under § 2241." *Thomas*, 371 F.3d at 808 (Tjoflat, J., concurring). More bluntly put: "It is not up to [the] court[s] to rewrite federal habeas statutes." *Id.* at 812. Therefore, this Court

should review Mr. Bowles' intellectual disability claim as properly raised under § 2241.

## CONCLUSION

Petitioner Gary Bowles is intellectually disabled, and his death sentence and impending execution violate the Constitution of the United States. Mr. Bowles therefore asks that the Court stay his execution to conduct an evidentiary hearing on his intellectual disability claim, grant a writ of habeas corpus vacating his unconstitutional sentence, and grant such other and further relief as is justified by law, equity, and the circumstances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2019, a copy of the foregoing has been furnished via ECF to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com; and Assistant Attorney General Jennifer A. Donahue at jennifer.donahue@myfloridalegal.com; and via electronic mail to the Florida Supreme Court at warrant@flcourts.org.

/s/ Terri L. Backhus
Terri L. Backhus

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

| | |
|---|---|
| **GARY R. BOWLES**<br><br>Petitioner,<br><br>v.<br><br>**MARK S. INCH,**<br><br>Secretary, Florida Department of Corrections,<br><br>Respondent,<br><br>**ASHLEY MOODY,**<br><br>Attorney General of Florida,<br><br>Additional Respondent. | **EMERGENCY MOTION**<br><br>**CASE NO. _____**<br>(Related Case No. 3:08-cv-00791-HLA-MCR)<br><br>**CAPITAL CASE;**<br>**Death Warrant Signed;**<br>**Execution Scheduled for**<br>**August 22, 2019, at 6:00 PM** |

## EMERGENCY MOTION FOR A STAY OF EXECUTION

The Petitioner, Gary R. Bowles, has filed an emergency petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 and 28 U.S.C. § 2241, to vacate his death sentence on the grounds that he is ineligible for execution under *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); and *Atkins v. Virginia*, 536 U.S. 304 (2002). ECF No. 1.[1] Mr. Bowles now moves, in connection

[1] As Mr. Bowles's petition explains, although the petition is second-in-time with respect to § 2254, it should not be considered "second or successive" within the

with his petition, for this Court to stay his execution, presently scheduled to take place on August 22, 2019, at 6:00 p.m., in order to meaningfully analyze his significant and complex constitutional claims regarding intellectual disability without the urgency dictated by the imminent execution date. Mr. Bowles is currently in the custody of the Florida Department of Corrections, and is housed on death row at Florida State Prison in Raiford, Florida.

Meaningful consideration of Mr. Bowles's petition is due in this case, where he has raised a claim that his intellectual disability renders him constitutionally ineligible for the death penalty, but the Florida state courts dismissed his claim without a hearing based on an inadequate state procedural bar. To date, no court has ever considered Mr. Bowles's intellectual disability claim on the merits. A stay is necessary here to ensure that an impermissible and irreversible execution not occur.

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

meaning of § 2224(b)(2), and this Court has the authority to and should rule on the merits of Mr. Bowles's constitutional claims under either §§ 2254 or 2241. *See id.*

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's habeas petition shows that he can meet all four of these prongs. First, as discussed in the petition, Mr. Bowles meets all three prongs for intellectual disability and has a substantial likelihood of success on the merits of his claim.

Second, the harm here is obvious and irreparable. The absence of a stay will result in the unconstitutional execution of an intellectually disabled prisoner.

Third, Mr. Bowles has been on death row since the 1990s, and his appeals have been exhausted in the Eleventh Circuit since 2010. Mr. Bowles first raised his intellectual disability in October 2017, and the State did not file its answer to this claim until July of 2019—almost a two year delay—and not until ordered to do so by the Florida circuit court. Thus, the delay to this point has been due to the State's own inaction, and Respondent 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 constitutional rights.

Finally, there is a public interest in preventing the execution of an intellectually disabled prisoner. *Atkins* held the death penalty is cruel and unusual punishment in violation of the Eighth Amendment when imposed on the intellectually disabled. 536 U.S. at 321. Much of the decision in *Atkins* rested on the

evolving standards of decency and the overwhelming trend of the states to preclude those with intellectual disabilities from receiving death sentences. *See id.* at 316. There is a public interest in both preserving the constitution and ensuring that capital sentencing reflects modern societal standards.

A stay of execution should be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2019, a copy of the foregoing has been furnished via ECF to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com; and Assistant Attorney General Jennifer A. Donahue at jennifer.donahue@myfloridalegal.com; and via electronic mail to the Florida Supreme Court at warrant@flcourts.org.

/s/ Terri L. Backhus
Terri L. Backhus

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

**GARY RAY BOWLES**,

*Petitioner*,

v

CASE NO.: 3:19-cv-00936-TJC-JBT
CAPITAL CASE

MARK S. INCH,
Secretary,
Florida Department of Corrections

and

ASHLEY MOODY,
Attorney General of Florida;

*Respondents*,

_____/

MOTION TO DISMISS THE SUCCESSIVE HABEAS PETITION FOR LACK OF JURISDICTION

On August 14, 2019, Bowles, a Florida death row inmate with an active warrant, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, filed an emergency habeas petition under 28 U.S.C. § 2254 and 28 U.S.C. § 2241 raising an intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). The second habeas petition should be dismissed as an unauthorized successive habeas petition

which this Court lacks jurisdiction to hear because it was filed without authorization from the Eleventh Circuit.

**No jurisdiction over the successive habeas petition**

A habeas petitioner must obtain authorization from the Eleventh Circuit before filing a second habeas petition in the district court as required by 28 U.S.C. § 2244(b)(3)(A). District courts lack jurisdiction over unauthorized successive habeas petitions that are filed without permission from the Eleventh Circuit. *Pavon v. Attorney Gen., Fla.*, 719 Fed.Appx. 978, 979 (11th Cir. 2018) (affirming the district court's dismissal of a successive petition because without authorization, the district court lacks jurisdiction to consider a second or successive habeas petition citing *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003), and explaining once a court determines that it lacks subject matter jurisdiction, it is powerless to continue), *cert. denied*, *Pavon v. Jones*, 139 S.Ct. 828 (2019); *Jimenez v. Sec'y, Fla. Dept. of Corr.*, 758 Fed.Appx. 682, 686 (11th Cir. 2018) (explaining that because Jimenez did not receive prior authorization from the Eleventh Circuit to file his second or successive application, the district court lacked jurisdiction to consider it citing 28 U.S.C. § 2244(b)(2)), *cert. denied*, *Jimenez v. Jones*, 139 S.Ct. 659 (2018); *Lambrix v. Sec'y, Dept. of Corr.*, 872 F.3d 1170, 1180 (11th Cir. 2017) (explaining a habeas petitioner seeking to file a second or successive § 2254 petition must seek authorization from the Eleventh Circuit before the district court may consider his petition and when a "petitioner fails

to seek or obtain such authorization, the district court lacks jurisdiction to consider the merits of the petition"), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 312 (2017); *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259 (11th Cir. 2009) (explaining that § 2244(b)(3)(A) requires a district court to dismiss for lack of jurisdiction a second or successive petition unless the petitioner has obtained an order from the appellate court authorizing the district court to consider it citing *Williams v. Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007)).

Bowles filed his first federal habeas petition in the district court on August 8, 2008, in which he raised ten claims. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla. 2008); *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010) (denying a claim regarding the prosecutor's use of peremptory challenges to remove prospective jurors who express reservations about the death penalty and affirming the denial of habeas relief). The initial petition did not include an *Atkins* intellectual disability claim, despite *Atkins* being decided over six years earlier. *Atkins* was available at the time of the filing of the initial habeas petition but the intellectual disability claim was not pursued.

Because this is a successive petition, Bowles must have prior authorization from the Eleventh Circuit before filing the petition. Because Bowles did not obtain permission from the Eleventh Circuit, this Court lacks jurisdiction to hear the intellectual disability claim.

**Second habeas petitions and *Panetti***

Bowles argues his habeas petition is a second petition, not a successive petition relying on the exception established in *Panetti v. Quarterman*, 551 U.S. 930 (2007). Pet. at 39. But the *Panetti* exception does not apply. As the Eleventh Circuit has explained, the *Panetti* exception to successive habeas petitions is limited to claims that were not ripe at the time the first habeas petition was filed, such as a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), which was the claim at issue in *Panetti. Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (noting the *Panetti* case involved a *Ford* claim and the High Court was careful to limit its holding to *Ford* claims and reasoning that, in contrast to Panetti, the claims Tompkins wanted to raise were claims that "can be and routinely are raised in initial habeas petitions"); *Jimenez v. Sec'y, Fla. Dept. of Corr.*, 758 Fed.Appx. 682, 686 (11th Cir. 2018) (rejecting a *Panetti* exception argument citing *Tompkins* and finding a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), to be successive and affirming the district court's dismissal for lack of jurisdiction of the second habeas petition as a successive habeas petition), *cert. denied*, *Jimenez v. Jones*, 139 S.Ct. 659 (2018); *see also Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019) (contrasting *Ford* claims with *Atkins* claims explaining that while incompetency is not a permanent condition but one that "may occur at various points after conviction, and it may recede and later reoccur" but intellectual disability by definition is a permanent condition and concluding for that

reason it is not proper to apply the law regarding *Ford* claims wholesale to *Atkins* claims).

Under *Tompkins*, which is binding precedent, any habeas claim that can be, and routinely is, raised in initial habeas petitions does not fall into the *Panetti* exception. Rather, such claims are considered successive habeas claims for which authorization from the Eleventh Circuit is required and which must be dismissed for lack of jurisdiction by the district court. *Jimenez*, 758 Fed.Appx. at 686 (Carnes, C.J., and Tjoflat, J., concurring) ("*Tompkins* is binding precedent in this circuit."); *Scott v. United States*, 890 F.3d 1239, 1256-57 (11th Cir. 2018) (concluding "*Tompkins* controls" because it is "our precedent").

Intellectual disability claims based on *Atkins* claim are ripe to be challenged at any time after the sentence is imposed. *Davis v. Kelley*, 854 F.3d 967, 971-72 (8th Cir. 2017) (concluding that *Atkins* claim are ripe when the sentence is imposed and observing that *Panetti* "has no force or applicability"). And *Atkins* claims "can be, and routinely are, raised in initial habeas petitions." *Tompkins*, 557 F.3d at 1260. Under *Tompkins*, the *Panetti* exception does not apply to intellectual disability claims. The *Panetti* exception does not apply to *Atkins* claims.

In this case, the *Atkins* claim could have been raised in the first habeas petition filed in 2008 which was years after *Atkins* was decided in 2002. The *Panetti* exception does not apply and therefore, this intellectual disability claim remains a successive habeas claim over which this Court lacks jurisdiction.

**Miscarriage of justice and intellectual disability claims**

Bowles argues that under the miscarriage of justice in *Sawyer v. Whitley*, 505 U.S. 333 (1992), his claim of intellectual disability must be heard. Pet. at 43. The *Sawyer* Court, in a pre-AEDPA decision, held that to establish actual innocence of the death penalty, a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" *Id*. at 349.

But there is no miscarriage of justice exception to the statutory requirement that Bowles obtain prior authorization before filing a successive petition. *In re Lambrix*, 776 F.3d 789, 796 (11th Cir. 2015) (explaining that regardless of any "fundamental miscarriage of justice showing under *Schlup*" § 2244(b)(2)(B) still "undeniably requires" a petitioner to seek leave to file a second or successive petition citing *In re Davis*, 565 F.3d 810, 824 (11th Cir. 2009)). Regardless of any exception, Bowles is still required to obtain prior authorization as required by § 2244(b)(3)(A).

Additionally, *Sawyer,* a pre-AEDPA decision, did not survive the AEDPA under Eleventh Circuit precedent. This Court has directly stated that *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015) ("the *Sawyer* actual-innocence-of-the-death-penalty exception did not survive the AEDPA" and explaining that application to file a successive habeas petition under § 2244(b)(2)(B) may not be based on a sentencing claim even in death cases citing *In re Hill*, 715 F.3d 284, 297 (11th Cir. 2013)); *In re Hill*, 715 F.3d 284, 297 (11th Cir. 2013) (explaining, in a case raising an *Atkins* claim,

that given "the plain and unambiguous language in the statute, this Court repeatedly has held that federal law does not authorize the filing of a successive application under § 2244(b)(2)(B) based on a sentencing claim even in death cases citing Eleventh Circuit cases and relying on *In re Webster*, 605 F.3d 256, 258-59 (5th Cir. 2010)); *Davis v. Kelley*, 854 F.3d 967, 971 (8th Cir. 2017) (concluding that the miscarriage of justice exception was inapplicable to an *Atkins* claim). The AEDPA limits the exception to the bar on successive petition to claims of innocence of the "underlying offense" and does not extend to claims of innocence of the death penalty.

But even applying the miscarriage of justice standard, Bowles does not meet the requirement of *Sawyer* that he establish by clear and convincing evidence he is intellectually disabled. As the State will explain in detail in another section, Bowles is not intellectually disabled, so *Sawyer* does not apply to him. There is no miscarriage of justice regarding this *Atkins* claim.

**Eleventh Circuit precedent regarding successive habeas petitions raising *Atkins* claims**

The Eleventh Circuit will not grant Bowles permission to raise an intellectual disability claim in a second habeas petition. Neither of the two exceptions to the prohibition on successive habeas petitions in § 2244(b)(2) apply under Eleventh Circuit precedent.[1]

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[1] The "two narrow statutory exceptions in § 2244(b)(2)" are:

(A) the applicant shows that the claim relies on a new rule of

The Eleventh Circuit has held that the decision in *Hall v. Florida* is not a basis for filing a successive habeas petition under the first exception. *In re Henry*, 757 F.3d 1151, 1153 (11th Cir. 2014) (holding the exception in § 2244(b)(2)(A) does not apply to claims of intellectual disability based on *Hall v. Florida* because the United States Supreme Court has not made *Hall v. Florida* retroactive); *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015) (explaining that *Hall v. Florida* is not retroactive because the decision "merely provides new procedures for ensuring that States do not execute members of an already protected group" and therefore, Hill was not entitled to file a successive habeas petition); *cf. Kilgore v. Sec'y, Fla. Dept. of Corr.*, 805 F.3d 1301, 1312-14 (11th Cir. 2015) (determining, in an initial habeas petition, not a successive petition, that *Hall v. Florida* is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989)).

The Eleventh Circuit has also held that the second exception in § 2244(b)(2)(B) does not apply to claims of intellectual disability because an intellectual disability claim challenges only "eligibility for a death sentence," not the guilt of the underlying

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> constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant ***guilty*** of the underlying offense.

*In re Hill*, 715 F.3d 284, 295 (11th Cir. 2013) (emphasis added).

offense and therefore, such a claim "does not fall within the narrow statutory exception in § 2244(b)(2)(B)(ii) anyway." *In re Hill*, 715 F.3d 284, 285 (11th Cir. 2013) (denying permission to file a successive habeas petition raising an intellectual disability claim).

Additionally, the successive habeas petition was pursued in a dilatory manner. The intellectual disability claim was not raised until 17 years after *Atkins* was decided and alternatively, was not raised until over five years after *Hall v. Florida* was decided. Indeed, the *Atkins* claim was not raised in federal court until eight days before the scheduled execution. Any application for permission to file a successive habeas petition would be considered dilatory. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (advocating courts invoke their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion); *Long v. Sec'y, Fla. Dept. of Corr.*, 924 F.3d 1171, 1176-77 (11th Cir. 2019) (denying a stay of execution to litigate a § 1983 action and noted that the United States Supreme Court had reiterated the importance of these principles three times this year 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)), *cert. denied*, *Long v. Inch*, 139 S.Ct. 2635 (2019).

Alternatively, regardless of the statutory exceptions and any dilatory concerns, the Eleventh Circuit would still not grant Bowles permission to file a successive habeas claim raising an intellectual disability claim in this Court. The Eleventh Circuit requires there is a "reasonable likelihood" that the defendant is actually intellectually disabled before they will authorize any successive habeas petition to be filed in the

district court. *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014) (refusing to authorize the filing of a second or successive habeas petition because Henry had not made a sufficient showing of possible merit to his *Atkins* claim); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (explaining that a capital defendant must demonstrate that there is a reasonable likelihood that he is in fact intellectually disabled to be entitled to file a successive habeas raising an *Atkins* claim). A "prima facie showing" is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *In re Holladay*, 331 F.3d at 1173 (citing *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

But, as the State will explain in detail in another section, Bowles is not intellectually disabled. He does not meet any of the three prongs of Florida's statutory test for intellectual disability. So, any application to file a successive habeas petition raising the *Atkins* claim would be denied on the merits by the Eleventh Circuit, as well.

**Intellectual disability claims can be time barred**

There is no case from the United States Supreme Court holding, or even hinting, that an *Atkins* claim may not be time barred. Rather, the United States Supreme Court has stated that constitutional claims can be forfeited if not raised in a timely manner. *Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (observing that the "most basic rights of criminal defendants are similarly subject to waiver" citing cases including *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle

is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.")). Indeed, the United States Supreme Court has observed that a "constitutional claim can become time-barred just as any other claim can." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983). And there certainly are cases from the United States Supreme Court holding that claims pursued in a dilatory manner in capital cases should be dismissed. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories"); *Calderon v. Thompson*, 523 U.S. 538, 585 (1998) ("The federal courts can and should protect States from dilatory or speculative suits.").

Opposing counsel really seems to be asserting that the Eighth Amendment prohibits all time bars, all waivers, and all procedural bars in any capital case or, at least, in any capital case raising a "fundamental" constitutional claim. But both the Supreme Court and lower federal courts routinely enforce time bars and procedural bars in capital habeas cases by dismissing the entire habeas petition as time barred, including in capital habeas petitions raising "fundamental" constitutional claims. *Lawrence v. Florida*, 549 U.S. 327, 337 (2007) (affirming the dismissal of a capital habeas petition as untimely). The circuit courts have rejected challenges to the habeas statute of limitations which acts as a time bar to any federal habeas review of all types of constitutional claims. *See, e.g., Hill v. Dailey*, 557 F.3d 437 (6th Cir. 2009) (holding

the statute of limitations for habeas petitions did not violate Suspension Clause); *Martin v. Ayers*, 52 Fed.Appx. 917 (9th Cir. 2002) (holding that the federal habeas statute of limitations did not violate Suspension Clause); *Wyzykowski v. Dept. of Corr.*, 226 F.3d 1213 (11th Cir. 2000) (holding the AEDPA's one-year statute of limitations was not *per se* unconstitutional as violative of Suspension Clause).

And, while the Supreme Court created an actual innocence exception to the federal habeas statute of limitations, the Court also concluded that delays in bringing the actual innocence claim may be considered to reject the claim of innocence and enforce the time bar. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Indeed, in *Perkins* itself, on remand, the district court again concluded that the habeas petition "was properly dismissed as being barred by the statute of limitations" despite the claim of innocence. *Perkins v. McQuiggin*, 2013 WL 4776285, *3 (W.D. Mich. Sept. 4, 2013).

This is a habeas case and in an AEPDA habeas case, the lack of Supreme Court precedent is fatal to the claim. *Premo v. Moore*, 562 U.S. 115, 127 (2011) (explaining that novelty alone is a reason to reject a claim under AEDPA because it renders the relevant rule less than "clearly established"). Bowles must point to a Supreme Court case directly holding that an *Atkins* claim cannot be time barred, which, of course, he cannot do. *Barnes v. Sec'y, Dept. of Corr.*, 888 F.3d 1148, 1155 (11th Cir. 2018) (explaining for purposes of AEDPA, clearly established federal law includes only the holdings of Supreme Court decisions, not Supreme Court dicta citing *White v. Woodall*, 572 U.S. 415, 419 (2014)), *cert. denied*, *Barnes v. Jones*, 139 S.Ct. 945 (2019). This

Court is not free in a habeas case, in the absence of Supreme Court precedent, to rule that *Atkins* claims cannot be time barred. *Dombrowski v. Mingo*, 543 F.3d 1270, 1274 (11th Cir. 2008) (explaining that "when no Supreme Court precedent is on point, a state court's conclusion cannot be contrary to clearly established Federal law as determined by the U.S. Supreme Court" quoting *Washington v. Crosby*, 324 F.3d 1263, 1265 (11th Cir. 2003)). *Atkins* claims can be time barred.

**28 U.S.C. § 2241**

Bowles attempts to invoke 28 U.S.C. § 2241 to evade the statutory limitations on filing a successive habeas petition in 28 U.S.C. § 2254. Pet. at 45. But Bowles may not file a § 2241 petition under Eleventh Circuit precedent. "It is axiomatic that § 2254 applies where a prisoner is in custody pursuant to the judgment of a State court," not § 2241. *Johnson v. Warden, Ga., Diagnostic & Classification Prison*, 805 F.3d 1317, 1323 (11th Cir. 2015) (denying authorization to file a successive habeas petition in a case where a state petitioner filed a § 2241 petition in an active warrant case citing *Thomas v. Crosby*, 371 F.3d 782, 787 (11th Cir. 2004)). Section 2241 petitions may be filed by state prisoner only if § 2254 does not apply, such as a state prisoner in pre-trial detention. *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003); *see e.g., Thomas v. Crosby*, 371 F.3d 782, 783 (11th Cir. 2004) (challenging in a § 2241 petition the parole release date set by the Florida Parole Commission). Otherwise, allowing state prisoners to file § 2241 petitions would render § 2254 a "complete dead letter" that

serves "no function at all." *Medberry*, 351 F.3d at 1060. A state prisoner directly attacking his conviction or sentence must use § 2254 to do so. *In re Wright*, 826 F.3d 774 (4th Cir. 2016) (dismissing a § 2241 petition and holding a convicted state prisoner challenging his sentence is required to apply for authorization to file a successive habeas petition regardless of how it "was styled" and noting the majority view of the circuits is that § 2241 habeas petitions from convicted state prisoners challenging the execution of a sentence are governed by § 2254 citing circuit cases including the Eleventh Circuit case of *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003)).[2] Bowles is directly challenging his death sentence, therefore he must proceed under § 2254. Bowles may not file a § 2241 petition raising an *Atkins* claim challenging his death sentence.

Furthermore, § 2241 is not an avenue around the limits on successive habeas petitions including the limits on successive petitions contained in § 2244(b) and the requirement of prior authorization in § 2244(b)(3)(A). As the Eleventh Circuit has explained, "a state prisoner cannot evade the procedural requirements of § 2254 by characterizing his filing as a § 2241 petition." *Johnson*, 805 F.3d at 1323; *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 (11th Cir. 2008) (stating that "a prisoner

[2] Only the Tenth Circuit permits § 2241 petitions to be filed in place of § 2254 petitions but that circuit has imposed limitations on such § 2241 petitions. *In re Wright*, 826 F.3d at 778 (citing *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002)). Indeed, Bowles' § 2241 petition would be considered untimely in the Tenth Circuit. *In re Wright*, 826 F.3d at 778 (noting that § 2241 petitions by state prisoners are subject to the one-year statute of limitations citing *Dulworth v. Evans*, 442 F.3d 1265, 1267-68 (10th Cir. 2006)). So, there is no circuit in which Bowles could file his *Atkins* claim in a § 2241 petition and be heard on the merits.

collaterally attacking his conviction or sentence may not avoid the various procedural restrictions imposed on § 2254 petitions ... by nominally bringing suit under § 2241"). It would "thwart Congressional intent" to allow state prisoners to file § 2241 petitions rather than being required to file § 2254 petitions. *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003); *see also In re Wright*, 826 F.3d 774, 780-81 (4th Cir. 2016) (explaining that allowing state prisoners to proceed under § 2241 alone, and ignoring § 2254, would "undermine the limitations created by § 2254" and "we do not believe Congress intended to undermine a carefully drawn statute like section 2254 through a general provision like section 2241"). Bowles may not invoke § 2241 to evade the restrictions in § 2254 and § 2244.

The cases cited by opposing counsel involved a federal prisoners and are § 2255 cases which depend on the saving clause in § 2255(e). The "saving clause" in § 2255(e) provides: "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." But there is no equivalent to § 2255(e) in § 2254.[3] The saving clause

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[3] There is a provision in § 2254 (b)(1), which provides:

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

is limited to federal prisoners and § 2255 cases; it does not apply to state prisoners and § 2254 cases.

Alternatively, even if the saving clause applied to § 2254 case, it would still not apply under controlling en banc Eleventh Circuit precedent. In *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc), *cert. denied*, *McCarthan v. Collins*, 138 S.Ct. 502 (2017) (No. 17-85), the Eleventh Circuit

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(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

But § 2254 (b)(1)(B) is an exception to the exhaustion requirement, not a saving clause provision. It merely provides that a federal habeas petition does not have to exhaust a claim in state court if there are no means to do so or if there are unusual circumstances preventing exhaustion. This is not the same as the provision governing federal prisoners in 2255(e). While there is the odd case applying the saving clause reasoning to a state prisoner in § 2254 cases, there is no statutory basis for doing so. These few odd cases often involve unusual facts but they do not explain why saving clause reasoning applies in § 2254 cases when § 2254 does not contain a saving clause provision.

Moreover, even as an excuse from exhaustion, § 2254(b)(1)(B)(ii) does not apply to this case. There are no unusual circumstances that prevented proper exhaustion of the *Atkins* claim in state court. And to the extent that opposing counsel is attempting to use the ineffectiveness of state postconviction counsel for not raising the claim during the initial state postconviction proceedings or ineffectiveness of federal habeas counsel for not raising the *Atkins* claim in the initial petition, that is not an unusual circumstance. Indeed, § 2254 prohibits the use of ineffectiveness of postconviction counsel in federal habeas proceedings as a basis for relief. § 2254(i) (providing: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

Furthermore, the problem here is not merely failure to properly exhaust the *Atkins* claim, but, rather, that the *Atkins* claim is both unexhausted and ***successive***. There certainly is no statutory basis for invoking § 2254 (b)(1)(B)(ii) to evade the limitations on successive petitions. So, even if § 2254 (b)(1)(B)(ii) is applied to excuse the failure to exhaust the *Atkins* claim, the limitations on successive claims would remain.

held that a change in caselaw does not make a motion to vacate a prisoner's sentence "inadequate or ineffective to test the legality of his detention" under 28 U.S.C. § 2255(e). *Id*. at 1080. The Eleventh Circuit en banc followed the text of § 2255(e), joining the Tenth Circuit in doing so. *Id*. (citing *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.)). McCarthan was a *federal* prisoner, who had pled guilty to being a felon in possession of a firearm in 2003. *Id*. His sentence was enhanced. He filed a § 2255 petition but did not challenge the enhancement. After his first § 2255 petition was denied, the United States Supreme Court changed the statutory interpretation of the enhancement statute used to enhance his sentence. He then filed a § 2241 petition rather than a successive § 2255 petition which was permitted under the existing Eleventh Circuit precedent. In the § 2241 petition, he asserted that he was "actually innocent" of the sentencing enhancement.

On appeal, the Eleventh Circuit determined that the saving clause, 28 U.S.C. § 2255(e), which applies when a motion to vacate is "inadequate or ineffective to test the legality of his detention," only applies when a motion to vacate cannot remedy a particular kind of claim. *Id*. at 1081, 1099. Because McCarthan was free to bring a challenge to the enhancement in his initial motion to vacate, the first motion was an "adequate and effective means for testing such an argument." *Id*. at 1099 (citing *Prost*, 636 F.3d at 580). And, therefore, according to the en banc court, McCarthan was not entitled to invoke the saving clause and file a § 2241 habeas petition. *Id*. at 1099-1100.

But Bowles is a state prisoner to whom the saving clause of § 2255(e) does not

apply at all, but even if he were a federal prisoner, he could not use *McCarthan* as a basis to file the § 2241 petition. Because Bowles was free to bring an *Atkins* challenge to his death sentence in his initial habeas petition, he is not entitled to file a § 2241 petition under *McCarthan*. The initial habeas petition was an "adequate and effective means" of raising an *Atkins* claim and therefore, his § 2241 petition would be prohibited, even if he was a federal prisoner.

Opposing counsel's reliance on the Seventh Circuit case of *Webster v. Daniels,* 784 F.3d 1123 (7th Cir. 2015) (en banc), is seriously misplaced. Pet. at 45. In *Webster*, the Seventh Circuit held there was no bar against use of the saving clause and § 2241 petitions to allow a habeas petitioner to bring a claim that new evidence shows the Constitution categorically prohibits a certain penalty, such as the death penalty for an intellectually disabled defendant. Webster was that "rare case" where records bearing directly on his *Atkins* claim, which *predate* the trial, were found after the initial habeas petition was denied. *Id*. at 1140 (emphasis in original). The *Webster* Court was at pains to point out there would never be any finality to *Atkins* litigation if such claims were allowed to be raised in § 2241 petitions based solely on new IQ scores because it is always "possible to conduct more I.Q. and adaptive functioning tests in the prison. *Id*. at 1140.

But *Webster* was a federal prisoner § 2255 case, not a state prisoner § 2254 case, as this case is. *Webster*, 784 F.3d at 1124 (noting "Webster was convicted in the Northern District of Texas of the federal crimes" and filed a § 2255 habeas petition).

Again, the saving clause does not apply to state prisoners. Moreover, *Webster* is not the law of the Eleventh Circuit, *McCarthan* is. This Court must follow Eleventh Circuit precedent. Furthermore, even in the Seventh Circuit, Bowles would not be allowed to use *Webster* to file a § 2241 petition. It was critical to the Seventh Circuit's decision that the records Webster relied on to establish the onset prong of intellectual disability, his Social Security records and special education classes in school, were not available at the time of his first habeas petition. *Webster,* 784 F.3d at 1140 (noting that Webster was a "rare" case involving records that "predate the trial" but are found much later); *Poe v. LaRiva*, 834 F.3d 770, 774 (7th Cir. 2016) (holding that a federal prisoner's challenge to his conviction could not be brought in a § 2241 petition and explaining that the *Webster* holding was "narrow in scope" and limited to rare cases involving records found after the initial habeas petition was denied). But Bowles' school records were available at the time of his first habeas petition in 2008. Indeed, Bowles' school records were available, and obtained by trial counsel, at the time of his trial. And those school records establish that Bowles fails the third prong anyway. *Webster* is factually distinguishable on both of those bases. And *Webster* does not legally help Bowles either. The Seventh Circuit made it clear that capital defendants could not file § 2241 petitions raising successive *Atkins* claims based merely on new IQ tests generated after the initial habeas petition was denied. *Webster*, 784 F.3d at 1140. But new a IQ score generated after the initial habeas petition was denied is the entire basis for Bowles' second habeas petition. Bowles would not be permitted to file a §

2241 petition raising this *Atkins* claim under *Webster*, even if he were federal prisoner in the Seventh Circuit.

But, in the end, neither *McCarthan* nor *Webster* apply to Bowles because he is a state prisoner to which § 2255(e) does not apply at all. Bowles may not use the saving clause that applies only to federal prisoners as a bridge to file a § 2241 petition.

**The *Atkins* claim**

Even if this were an initial habeas petition and the *Atkins* claim had been properly exhausted in state court, the *Atkins* claim should be denied. Bowles is not intellectually disabled.

Under both the Florida statute and Florida Supreme Court precedent, a capital defendant must establish three prongs to show intellectual disability: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. (2018); *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016). If a defendant fails to prove any one of these three prongs, "the defendant will not be found to be intellectually disabled." *Quince v. State*, 241 So.3d 58, 62 (Fla. 2018). Under the statute, a capital defendant must show that he is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat. (2018); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) ("a defendant must make this showing by clear and convincing evidence" citing § 921.137(4), Fla. Stat.), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June

3, 2019) (No. 18-8653). But Bowles fails all three prongs.

Significant subaverage intellectual functioning

The first prong of the test for intellectual disability is significant subaverage intellectual functioning. Bowles' current intellectual functioning is not "significantly subaverage." When multiple IQ scores are present, they should be considered collectively. *Hall*, 572 U.S. at 714 (stating that the "analysis of multiple IQ scores jointly is a complicated endeavor" citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in The Oxford Handbook of Child Psychological Assessment 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds., 2013)); *Hall*, 572 U.S. at 742 (Alito, J., dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence").

The three defense experts' IQ scores of 80, 83, and 74, considered collectively, do not establish significantly subaverage general intellectual functioning. Considered collectively, Bowles' IQ is between 77 and 79.[4] An IQ of 77 or 79 is not significantly

[4] There are three IQ scores in the current record. Dr. Elizabeth McMahon, the defense expert hired by the Public Defender's Office prior to the first penalty phase, testified via depositions in the state postconviction proceedings. Dr. McMahon administered the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in 1995. According to Dr. McMahon, Bowles' full-scale IQ score was 80. (PCR 196, 239). Dr. Harry Krop, the defense expert in the initial state postconviction proceedings, administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003. Dr. Krop, in his written report dated April 21, 2003, reported Bowles' IQ to be 83. Dr. Jethro Toomer, the defense expert in the current successive postconviction motion, stated that he administered the WAIS-IV to Bowles in October of 2017. According to Dr. Toomer's report, Bowles' full scale IQ score was 74.

So, the three IQ scores in the existing record are 80, 83, and 74. The average of

subaverage intelligence. His collective score is above 75. So, it falls outside of the statistical error of measurement of 75 or below set by the United States Supreme Court in *Hall v. Florida*. Bowles fails the first prong.

Adaptive functioning

The second prong is significant deficits in adaptive functioning. Deficits in adaptive functioning is currently defined as deficits in one of three broad categories or "domains": conceptual, social, and practical. *Wright v. State*, 256 So.3d 766, 773 (Fla. 2018) (citing DSM-5), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019).

Bowles does not have significant deficits in adaptive functioning. Bowles

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Bowles' three IQ scores is 79. The median of Bowles' three IQ scores is 78.5. Opposing counsel objects to the use of the score of 83 because it was obtained using an abbreviated IQ test. While the State disagrees, even discounting that score, Bowles' collective IQ remains above 75. Using only the two IQ scores of 80 and 74, the average of 80 and 74 is 77. And the median is 77 as well. Either way, Bowles' collective IQ score is above 75.

Another means of considering IQ scores collectively, referred to by the *Hall* majority, is a "composite" score. *Hall v. Florida*, 572 U.S. at 714 (citing to Schneider, *Principles of Assessment of Aptitude and Achievement* at 289-91). Schneider has a formula for determining the "composite" score. The author acknowledges that an average is a "rough approximation of a composite score," but he advocates the use of a "composite" score in cases of low and high scorers. *Id*. at 290. But the author does not explain why using the median instead of the mean does not accomplish much the same goal in the case of low scorers.

But, instead of using the composite score, opposing counsel simply ignores the prior IQ score of 80 but that is not mathematically sound. Neither the majority nor the dissent in *Hall* took the position that prior IQ scores were simply to be ignored, much less the position that prior IQ scores from ***defense*** experts should be ignored. Regardless of the particular method, the IQ scores should be considered collectively as is standard mathematical practice when measuring the same phenomena, such as IQ scores.

obtained his General Education Development (GED) diploma. Dr. McMahon, the defense mental health expert hired pre-trial, testified in her deposition that Bowles obtained his GED diploma while incarcerated at DeSoto Correctional Institution. (Depo at 62). Dr. Krop also testified at the 2005 evidentiary hearing that Bowles had obtained his GED. (PCR Vol. II 148). Obtaining a GED is "***clear evidence***" and "***direct proof***" that the defendant does not suffer from adaptive deficits. *Dufour v. State*, 69 So.3d 235, 251 (Fla. 2011) (stating that obtaining a GED diploma, which involves "a battery of questions that generally emphasize the ability to read, write, think, and solve mathematical problems" is "clear evidence" and "direct proof" that "a deficit in adaptive behavior does not exist") (emphasis added); *see also Williams v. State*, 226 So.3d 758, 773 (Fla. 2017) (stating the "fact that Williams successfully obtained his GED diploma supports the conclusion that he does not suffer from adaptive deficits" citing *Dufour*, 69 So.3d at 250), *cert. denied*, *Williams v. Florida*, 138 S.Ct. 2574 (2018). The Florida Supreme Court in *Williams* recounted Dr. Prichard's testimony that he "has not encountered an intellectually disabled person who can pass even a single section of the GED test, let alone the entire examination." *Williams*, 226 So.3d at 771.

Bowles made many statements in his confession which contradict any claim of adaptive deficits. Bowles talked about making phone calls and driving victims' cars. (TR 581, 636-38, 748, 776-77). Though Bowles had his own driver's license, he procured fake identification with his picture under the name of Timothy Whitfield by

using a Social Security card and birth certificate found at one of his victim's homes. (TR 605, 699). A driver's license is evidence of adaptive functioning, not adaptive deficits. *State v. Rodriguez*, 814 S.E.2d 11, 20 (N.C. 2018) (recounting the testimony of the State's expert, Stephen Kramer, M.D., a forensic neuropsychiatrist and professor of psychiatry at Wake Forest Baptist Medical Center, who testified that the ability to pay taxes and to obtain a driver's license showed that defendant had a level of adaptive functioning beyond that expected of those with intellectual disability and the testimony of one of the defense experts, Dr. John Olley, a professor at the University of North Carolina at Chapel Hill and a psychologist at the Carolina Institute for Developmental Disabilities, who testified that only one-third of mildly intellectually disabled persons are able to obtain a driver's license or learner's permit); *Oats v. State*, 181 So.3d 457, 464 (Fla. 2015) (noting that "Oats was never able to obtain a driver's license" which could be evidence of deficits in adaptive functioning).

Bowles admitted in the confession that he was planning to drive the victim's car from Florida to his mother's in Branson, Missouri, but ran out of money in Tennessee, so he left the car and got a bus ticket to travel the rest of the way. (TR 783). So, Bowles knows how to travel and use the national bus system. *Wright v. State*, 256 So.3d 766, 778 (Fla. 2018) (explaining that the testimony that he "knew how to use the city bus system" which cuts "against a finding of adaptive deficits in the conceptual domain" and affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits); *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong

of adaptive deficits, noting Hodges was capable of traveling independently to and from work and from Ohio to Alabama and Florida and was capable of driving without anyone instructing him on how to get to his destination and of arranging travel by bus).

Furthermore, Bowles can read and write which also cuts against a finding of adaptive deficits. Bowles reads at a high school level and is at a sixth or seventh grade level "in terms of spelling and arithmetic." (PCR Vol. 148). As part of the confession, Bowles was also required to understand and sign rights forms, fill out written statements, and read his statements before signing them. (TR 634, 700, 703-04, 755, 764). One of the defense experts, Dr. Kessel, noted in her report that Bowles "would write letters to his mother constantly" and that he can "write and read a sentence." Bowles' ability to read and write rebuts any claim of adaptive deficits. *Hodges v. State*, 55 So.3d 515, 535 (Fla. 2010) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's ability to read and write).

Additionally, Bowles' employment history negates the claim of adaptive deficits. *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (affirming the trial court's finding that the defendant failed to prove the second prong of adaptive deficits based in part on the defendant's jobs as a short-order cook, a garbage collector, and a dishwasher which are job skills that people with mental retardation normally lack and recounting that the defense expert admitted that a position "as a short-order cook was an 'unusually high level job'" for someone who is intellectually disabled). Bowles had various jobs

including working on an oil rig for two years. (Record at 754-60; Depo at 62). Bowles was also employed as a machinist and a roofer. (PCR 2019 at 796).

Moreover, any deficits that Bowles may have, could be due to his anti-social personality disorder and not a function of his intellectual ability at all. In the initial postconvition proceedings, the defense expert, Dr. Krop, diagnosed Bowles with anti-social personality disorder. (PCR Vol. II at 110, 137). Poor impulse control is also one of the symptoms of anti-social personality disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 706 (rev. 4th ed. 2000) (DSM-IV) (detailing the seven criteria for anti-social personality disorder including impulsivity). Bowles fails the second prong as well.

Onset as a minor

The third prong is onset of the condition prior to age 18. Bowles was not intellectually disabled as a child. Parts of Bowles' school records from Kankakee Illinois School District 111 were discussed during the 2005 postconviction evidentiary hearing. Bowles was not in special education classes. Bowles made As and Bs in the first grade in regular classes. His grades in first grade were an A, a B, another B, and another A. Bowles made As and B+s in math in the early grades of elementary school. A child who is intellectually disabled does not make As in math in regular classes in elementary school. Furthermore, one of the handwritten notations on his achievement tests in his school records is "high normal." A child with intellectual disability cannot make "high normal" scores on achievement tests.

The school records show that Bowles' grades declined over the years with his declining attendance. Indeed, one comment in the school records regarding the extent of his absences was that Bowles was "never present!!" The defense mental health expert, Dr. McMahon, testified that in sixth or seventh grade, Bowles' "grades went from A's, B's, and C's to D's and F's as he started skipping school." (Depo at 66, 72, 74). Bowles' grades dropping coincides with the start of his drug use around ten years old. (Depo 66). Bowles also fails the third prong.

Bowles fails all three prongs of the test. Bowles is not intellectually disabled.

Bowles asserts that he has "risk factors" for intellectual disability. Pet at 28. But *Atkins* is limited to actual intellectual disability; it does not extend to being "at risk" for intellectual disability. Nor does the concept of being "at risk" for intellectual disability make much sense in an adult, especially given that onset of the condition is required as a minor.

**The *Hall v. Florida* claim**

Even if this were an initial habeas petition and the *Hall v. Florida* claim had been properly exhausted in state court, an evidentiary hearing should not be conducted. Bowles is not entitled to an evidentiary hearing regarding his intellectual disability claim under *Hall v. Florida.*

In *Hall v. Florida*, 572 U.S. 701 (2014), the United States Supreme Court held that Florida's interpretation of its statute prohibiting the imposition of the death sentence upon an intellectually disabled defendant establishing a strict IQ test score

cutoff of 70 was unconstitutional because the rigid rule created "an unacceptable risk that persons with intellectual disability will be executed." *Id*. at 704. Instead of applying the strict cutoff when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement (SEM) of IQ tests. And, when a defendant's IQ test score falls within the SEM, the defendant must be allowed to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. *Id*. at 723.

But *Hall v. Florida* does not apply to this case for two independent reasons.

First, *Hall v. Florida* does not apply to any defendant whose full-scale IQ score is above 75. As the Court clarified in *Moore v. Texas*, 137 S.Ct. 1039 (2017), it is only capital defendants whose IQ score is 75 or below that are entitled to an evidentiary hearing to explore the other two prongs. The *Moore* Court wrote that "*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement." *Id*. at 1049. The Court in *Moore* explained that "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls ***within*** the clinically established range for intellectual-functioning deficits." *Id*. at 1050 (emphasis added). The *Moore* majority explained that "because the lower end of Moore's score range falls at or below 70," the Texas courts "had to move on to consider Moore's adaptive functioning." *Id*. at 1049.

But, as is clear from the *Moore* decision, a defendant whose IQ is above 75 is not

entitled to an evidentiary hearing under *Hall v. Florida*. *See also Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) (explaining, it is only "when a defendant establishes an IQ score range — adjusted for the SEM — at or below 70," that "a court must move on to consider the defendant's adaptive functioning" citing *Moore*, 137 S.Ct. at 1049), *cert. denied*, *Wright v. Florida*, 2019 WL 1458194 (June 3, 2019) (No. 18-8653).

*Hall v. Florida* does not apply at all to a defendant whose collective IQ score is above 75. Considered collectively, Bowles' IQ is between 77 and 79. His collective score is above 75. So, *Hall v. Florida* does not apply to Bowles.

Second, *Hall v. Florida* does not apply because the third prong of the test for intellectual disability, that of the age of onset, is at issue in this case. The standard test for intellectual disability has three prongs, all of which must be established. *Hall v. Florida*, 572 U.S. at 710 (explaining that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), ***and*** onset of these deficits during the developmental period") (emphasis added); *Moore v. Texas*, 137 S.Ct. at 1045 (noting "the generally accepted, uncontroversial intellectual-disability diagnostic definition" requires "three core elements": (1) intellectual-functioning deficits; (2) adaptive deficits; ***and*** (3) the onset of these deficits while still a minor). Both *Hall v. Florida* and *Moore v. Texas* were cases where the third prong of the test, the age of onset, was explicitly ***not*** at issue. *Hall v. Florida*, 572 U.S. at 710 ("This last factor, referred to as 'age of

onset,' is not at issue."); *Moore v. Texas*, 137 S.Ct. at 1045, n.3 ("The third element is not at issue here."). It was only the first prong of intellectual functioning and the second prong of adaptive deficits that were at issue in *Hall v. Florida* and *Moore v. Texas*. *Hall v. Florida*, 572 U.S. at 711 ("The first and second criteria—deficits in intellectual functioning and deficits in adaptive functioning—are central here."). But, here, the third prong of age of onset is at issue.

Because all three prongs are necessary for a diagnosis of intellectual disability, *Hall v. Florida* does not apply to a case where the defendant fails the third prong of onset. No evidentiary hearing is required to explore the other prongs of the test for intellectual disability in a case where the defendant fails the onset prong, such as this one.

Bowles was not intellectually disabled as a child. Bowles was not in special education classes. Bowles made As and Bs in the first grade in regular classes. His grades in first grade were an A, a B, another B, and another A. Bowles made As and B+s in math in the early grades of elementary school. A child who is intellectually disabled does not make As in math in regular classes in elementary school. Furthermore, one of the handwritten notations on his achievement tests in his school records is "high normal." A child with intellectual disability cannot make "high normal" scores on achievement tests.

Bowles did not have significantly subaverage intellectual functioning as a child. Therefore, by definition, Bowles is not intellectually disabled. *Hall v. Florida* does not apply to Bowles because he fails the third prong.

*Hall v. Florida* does not apply to this case for both of these reasons. Under Supreme Court precedent, no evidentiary hearing was required. Bowles' claim of an entitlement to an evidentiary hearing under *Hall v. Florida* is meritless.

Accordingly, the successive habeas petition should be dismissed for lack of jurisdiction.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO DISMISS THE SUCCESSIVE HABEAS PETITION FOR LACK OF JURISDICTION 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; **KELSEY PEREGOY**, 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: Kelsey_Peregoy@fd.org this 16th day of August, 2019.

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

**GARY RAY BOWLES**,

*Petitioner*,

v.

CASE NO.: 3:19-cv-00936-TJC-JBT
CAPITAL CASE

MARK S. INCH,
Secretary,
Florida Department of Corrections

and

ASHLEY MOODY,
Attorney General of Florida;

*Respondents*,

_____/

RESPONSE TO MOTION TO STAY THE EXECUTION

On August 14, 2019, Bowles, a Florida death row inmate with an active warrant, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, filed an emergency habeas petition under 28 U.S.C. § 2254 and 28 U.S.C. § 2241 raising an intellectual disability claim

based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). Bowles also filed a motion to stay arguing a stay should be granted to allow time for this Court to "meaningfully analyze" his "significant and complex" constitutional claim. This is the State's response to the motion to stay.

This Court does not need any time to analyze the intellectual disability claim because this Court lacks jurisdiction to entertain the successive habeas claim that was filed without authorization from the Eleventh Circuit. This Court is required under the statute, as well as controlling Eleventh Circuit precedent, to simply dismiss the successive habeas petition for lack of jurisdiction. The habeas petition should be dismissed and the motion for a stay of execution should be denied.

**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), the Eleventh Circuit 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. The *Long* 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)). The 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)). The 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). The Eleventh Circuit 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 a fifth factor: that 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 action.

**Substantial likelihood of success on the merits**

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

The habeas petition should be dismissed because it was filed without authorization from the Eleventh Circuit to file a successive habeas petition as required by 28 U.S.C. § 2244(b)(3)(A). Under both the statute and a literal string cite of Eleventh Circuit cases, the successive petition must be dismissed for lack of jurisdiction. As the State explained in detail with citation to controlling Eleventh Circuit precedent in its motion to dismiss for lack of jurisdiction, Bowles' § 2254 petition is a unauthorized successive habeas petition that does not fall into any exception to the prohibition on successive habeas petitions and he is not permitted to evade that prohibition by filing a § 2241 petition instead. (Doc. #8). And the underlying claim of intellectual disability is meritless as well. A petition that is

required to be dismissed for lack of jurisdiction does not, and cannot, have any chance of success, much less a substantiallikelihood 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. *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."). 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 the Eleventh Circuit 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 successive habeas petition raising an untimely, procedurally barred, and meritless *Atkins* claim. Bowles is not intellectually disabled as the State explains in detail in the accompanying motion to dismiss the successive habeas petition.

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 *Atkins* claim which he cannot do. Bowles delayed in bringing the *Atkins* claim 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), the Eleventh Circuit 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. The 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*. The 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.

The CHU asserts in the motion to stay that the delays in the *Atkins* litigation in state court were due to the State not filing an answer to the rule 3.203 motion for two years. (Doc. #2 at 3). This is not an accurate description of the state court litigation regarding the *Atkins* intellectual disability claim. The State filed a motion

to strike the 3.203 motion raising the intellectual disability claim because it did not comply with rule 3.203 shortly after it was filed. The CHU offers no explanation for why they did not file a proper motion that complied with the applicable rule of court. Indeed, the State filed a motion to require the CHU comply with the rule during the recent warrant litigation. And the trial court granted that motion in part and ordered CHU to comply with the rule by filing the Dr. Krop's report with the Court. Furthermore, when state postconviction counsel changed from registry counsel to Capital Collateral Regional Counsel - North (CCRC-N), the state trial court understandably gave new postconviction counsel, CCRC-N, 90 days to become familiar with the case and to decide if they wanted to file an amended rule 3.203 motion. The delays in state court were ***not*** due to the State's inaction.

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 motion to stay should be denied.

Respectfully submitted,

ASHLEY MOODY
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO MOTION TO STAY THE 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; **KELSEY PEREGOY**, 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: Kelsey_Peregoy@fd.org this 16th day of August, 2019.

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

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

| | | |
|---|---|---|
| **GARY R. BOWLES** | ) | |
| | ) | **EMERGENCY PETITION** |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **CASE NO. 3:19-cv-00936-TJC-JBT** |
| | ) | (Related Case No. 3:08-cv-00791-HLA-MCR) |
| | ) | |
| **MARK S. INCH,** | ) | |
| | ) | **CAPITAL CASE;** |
| Secretary, Florida | ) | **Death Warrant Signed;** |
| Department of Corrections, | ) | **Execution Scheduled for** |
| | ) | **August 22, 2019, at 6:00 PM** |
| Respondent, | ) | |
| | ) | |
| **ASHLEY MOODY,** | ) | |
| | ) | |
| Attorney General of Florida, | ) | |
| | ) | |
| Additional Respondent. | ) | |
| _____ | ) | |

**CONSOLIDATED RESPONSE TO RESPONDENT'S MOTION TO DISMISS THE SUCCESSIVE HABEAS PETITION FOR LACK OF JURISDICTION AND REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STAY THE EXECUTION**

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On August 14, 2019, petitioner Gary R. Bowles, a Florida death row prisoner with an execution date of August 22, 2019, filed an emergency petition under 28 U.S.C. § 2254 and 28 U.S.C. § 2241 for writ of habeas corpus by a person in state custody and incorporated memorandum of law. He simultaneously filed an emergency motion for a stay of execution. On August 16, 2017, the State filed a motion to dismiss the successive habeas petition for lack of jurisdiction and its response to the motion to stay the execution. Because the State did not provide any valid reason for this Court to dismiss Mr. Bowles's petition, this Court should grant a stay and consider Mr. Bowles's petition without the expediency of active warrant litigation. In the alternative, if this Court is inclined to deem Mr. Bowles's petition an unauthorized successor, this Court should instead transfer the matter to the Eleventh Circuit so the circuit court can determine whether a successor is authorized.

## I. RESPONSE TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

### A. Mr. Bowles's Petition is Not Second or Successive

The State initially asserts that this Court should dismiss Mr. Bowles's petition because he did not first seek authorization from the Eleventh Circuit to file a second or successive petition pursuant to 28 U.S.C. § 2254(b). Doc. 8 at 1-2.

Ignored by the State is the fact that while Mr. Bowles's petition is second-in-time, it is not second or successive given that Mr. Bowles's intellectual disability claim was not ripe when he filed his initial habeas petition. *See Panetti v.*

*Quarterman*, 551 U.S. 930, 945 (2007); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). The issue of whether Mr. Bowles is constitutionally eligible for execution became ripe for resolution only when the Governor of Florida signed his death warrant, thereby making his execution imminent. *See 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.'"). Thus, contrary to the State's argument, Mr. Bowles' claim was not one that could be routinely raised in an initial habeas petition, see Doc. 8 at 4, citing to *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1259-60 (11th Cir. 2009), and "there was accordingly no need for [Mr. Bowles] to apply for authorization to file a second or successive petition." *Martinez-Villareal*, 523 U.S. at 642.

**B. Miscarriage of Justice**

Citing to *In re Lambrix*, 776 F.3d 789, 796 (11th Cir. 2015), the State claims that there is no miscarriage of justice exception to the statutory requirement that Mr. Bowles obtain prior authorization before filing a successive petition. Doc. 8 at 6.

The State's reliance on *In re Lambrix* is misplaced, as that case involved a freestanding actual innocence claim in an application to the Eleventh Circuit seeking an order authorizing the district court to consider a successive petition for a writ of habeas corpus. *Id*. at 790. The Eleventh Circuit denied the application, finding that

Lambrix failed to establish a constitutional violation in conjunction with his claim of actual innocence. *Id*. at 796. Conversely, Mr. Bowles's claim is grounded on a constitutional right, the Eighth Amendment's prohibition on executing the intellectually disabled. As such, *In re Lambrix* has no bearing on Mr. Bowles's case.

The State further asserts that the United States Supreme Court's decision in *Sawyer v. Whitley*, 505 U.S. 333 (1992), did not survive the AEDPA under Eleventh Circuit precedent, and therefore innocence of the death penalty is not a cognizable claim in a successive petition. Doc. 8 at 6, citing to *In re Hill*, 777 F.3d 1214 (11th Cir. 2015).

While recognizing the Eleventh Circuit's precedent, Mr. Bowles submits that it is at odds with other circuits as well as the Supreme Court itself. As Judge Martin explained in her dissenting opinion in *In re Hill*:

> [T]he Courts of Appeals are now divided on the question of whether Sawyer's holding that an inmate can be innocent of the death penalty survived AEDPA's gatekeeping provisions. Compare *In re Hill*, 715 F.3d at 301 (holding that post-AEDPA, "there is no *Sawyer* exception to the bar on second or successive habeas corpus petitions for claims asserting 'actual innocence of the death penalty'"), and *Hope v. United States*, 108 F.3d 119, 120 (7th Cir.1997) (holding that the *Sawyer* exception did not survive AEDPA), with *Thompson v. Calderon*, 151 F.3d 918, 924 & n. 4 (9th Cir.1998) (holding that the *Sawyer* exception survived AEDPA); see also *LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir.2001) (noting "there is a split among the ... circuits that have addressed the question," but not resolving the "difficult question because even assuming § 2244(b)(2)(B)(ii) does encompass challenges to a death sentence," the petitioner's claim would fail). I understand the Supreme Court itself to have indicated, in the context of reviewing an appeals court's recall of its mandate, that Sawyer's "miscarriage of

> justice standard is altogether consistent ... with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence." *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S.Ct. 1489, 1502, 140 L.Ed.2d 728 (1998).

*Id*. at 1228 (Martin J., dissenting).

**C. Mr. Bowles was Not Dilatory**

The State claims that Mr. Bowles's petition was pursued in a dilatory manner. Doc. 8 at 9 ("The intellectual disability claim was not raised until 17 years after *Atkins* was decided and alternatively, was not raised until over five years after *Hall v. Florida* [572 U.S. 701 (2014)] was decided. Indeed, the *Atkins* claim was not raised in federal court until eight days before the scheduled execution.").

The State's argument is disingenuous in that it ignores the fact that until *Walls v. State*, 213 So. 340 (Fla. 2016), found that *Hall* was retroactive in Florida, Mr. Bowles did not have a viable intellectual disability claim. This is so because Mr. Bowles did not possess an IQ score of 70 or below, which had been required by the Florida courts prior to *Hall*. *See, e.g., Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).

Further ignored by the State is the fact that following *Walls*, Mr. Bowles timely filed his intellectual disability claim in the state court, and that he filed his federal habeas petition the day after his claim was exhausted upon the affirmance of

the denial of relief by the Florida Supreme Court. Contrary to the State's assertion, Mr. Bowles was not dilatory.

**D. A Claim of Intellectual Disability Cannot be Barred**

The State frames Mr. Bowles's argument as being based on the assertion that "the Eighth Amendment prohibits all time bars, all waivers, and all procedural bars in any capital case or, at least, in any capital case raising a 'fundamental' constitutional claim." Doc. 8 at 11. The State asserts that the United States Supreme Court has held that constitutional claims can be forfeited if not raised in a timely manner. Doc. 8 at 10. Thus, according to the State, an *Atkins* claim can be time barred. Doc. 8 at 13.

Ignored by the State is the fact that Mr. Bowles's claim is limited to the narrow situation where the Supreme Court has created a categorical bar to execution, one which emanates from the Eighth Amendment, and which concerns "the characteristics of the offender" that make such persons ineligible for execution. *Graham v. Florida*, 560 U.S. 48, 60 (2010). Indeed, the Supreme Court has clearly stated the Eighth Amendment only prohibits the execution of two types of offenders: juveniles and the intellectually disabled. *Id.* at 61. For individuals who were juveniles at the time of their offense, their age, an immutable and indisputable characteristic of said offender, renders them ineligible for execution. So too are the intellectually disabled ineligible for execution—intellectual disability is a lifelong

and incurable characteristic. As Mr. Bowles argued in his petition, the Supreme Court continually cites *Roper v. Simmons*, 543 U.S. 551 (2005), which first held the execution of juveniles to be unconstitutional, in its *Atkins* jurisprudence. The State completely ignores this corollary, in favor of a sky is falling argument involving all time bars, waivers and procedural bars, because it logically results in the narrow conclusion that Mr. Bowles has been arguing all along: intellectual disability is a categorical bar to execution that cannot be waived or defaulted, just as is juvenile status at the time of a capital offense. Courts cannot refuse to consider the merits of an intellectual disability claim any more than courts may refuse to consider whether an individual had reached the age of eighteen at the time of a capital offense.

**E. Mr. Bowles is Intellectually Disabled**

Finally, the State argues that Mr. Bowles's intellectual disability is conclusively refuted by the record because: (1) Mr. Bowles's IQ scores, "considered collectively" reflect that his "IQ is between 78 and 79," Doc. 8 at 29; (2) records indicate that Mr. Bowles obtained a GED while incarcerated, Doc. 8 at 23; (3) Mr. Bowles obtained a fake identification card, Doc. 8 at 23-24; (4) Mr. Bowles had driven long distances and ridden in buses, Doc. 8 at 24; (5) Mr. Bowles can read and write, Doc. 8 at 25; and (6) Mr. Bowles has had jobs including "working on an oil rig," "as a machinist and a roofer," Doc. 8 at 26.

The State's arguments are inaccurate, misleading, and refuted by Mr. Bowles's factual proffers and the medical community. First, the State's suggestion that Mr. Bowles's IQ scores should be averaged, or alternatively, considered in "median," is a creation not found in resources by the medical or psychological community. Further, the State makes a number of inaccurate representations in the interpretation of IQ scores. The State conflates Mr. Bowles's full-scale IQ scores on the WAIS-R and the WAIS-IV with his score of 83 on the WASI (Wechsler Abbreviated Scale of Intelligence). As Mr. Bowles's experts would testify to if given the chance, the WASI is not a full scale IQ test, it is a short form screening test of intellectual functioning, and the score resulting from it should not be considered in the assessment of intellectual disability (and particularly not for disqualification for the diagnosis). *See, e.g*., American Association on Intellectual and Developmental Disabilities Manual (11th ed. 2010) (AAIDD-11), p. 41 ("Short forms of screening tests are not recommended, and it is critically important to use tests with relatively recent norms."); User's Guide to the AAIDD-11, p. 17 ("Short forms or screening tests are not recommended or professionally accepted for diagnostic purposes.").

The State's suggestion that Mr. Bowles does not have adaptive deficits is likewise baseless. Principally, it is critical to understand that these specific potential strengths—even if true, which Mr. Bowles's factual proffer disputes—do not themselves negate an intellectual disability diagnosis, which focuses on deficits, not

strengths, and does not pit strengths against weaknesses in adaptive functioning. *See* AAIDD-11, p. 7 (noting a fundamental assumption in defining intellectual disability is that "[w]ithin an individual, limitations often coexist with strengths."); *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017) ("In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. . . . But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.") (emphasis in original). Even where a crime itself seems sophisticated, this does not disqualify an individual from an intellectual disability diagnosis. *See, e.g., Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (noting that while the crime suggested that Brumfield possessed some adaptive skills including "advanced planning and acquisition of a car and guns" it did not conclusively dispute an intellectual disability diagnosis).

The State's arguments against adaptive deficits are also erroneous because they ignore Mr. Bowles's factual proffer, the record in this case, and the guidance of the medical community. For example, that Mr. Bowles could read and write, and drive a car or hold a driver's license, does not dispute his adaptive limitations in other areas and does not bear on his intellectual disability diagnosis. In fact, the AAIDD specifically warns against these improper stereotypes. *See* AAIDD-11, p. 162 (noting that intellectually disabled individuals can, with support, obtain skills such as "academic skills" or "survival skills," such as learning to use a bus system);

User's Guide to the AAIDD-11, p. 26 (noting it is an "incorrect stereotype" that "[p]ersons with ID cannot get driver's licenses, buy cars, or drive cars"). The State's argument also ignores Mr. Bowles's factual proffer, in which he provided sworn statements that into his adulthood he struggled with using bus systems without help, *see* PCR-ID at 822, could not have navigated air travel without significant help, *id*. at 833, and that his GED is suspect because another individual present at the time of the testing recalled that the administrator of the exam gave the test takers the answers to the questions, *id*. at 818.

Moreover, the State's argument that Mr. Bowles worked as a "machinist," and thus does not have adaptive deficits, is intentionally misleading. The State's citation for this proposition (PCR-ID at 796) is one of Mr. Bowles's expert reports, which refers to a sworn statement that Mr. Bowles provided from his previous employer at a temporary labor position at a manufacturing company. This report and corresponding sworn statement is evidence of Mr. Bowles's *deficits*, not strengths—his previous employer describes him as "slow intellectually," "childlike," noted he had to be moved from a four-step machine to a one-step machine because they "were not able to train Gary," and that although he "tr[ied] very hard" he "continually made mistakes," *id*. at 810-11. Likewise, the State's argument that Mr. Bowles worked on an oil rig for two years and that he worked as a roofer, were from Mr. Bowles's self-reports, and do not at all bear on how successful he was at these jobs. Additionally,

the medical community cautions against self-reported information in the assessment of intellectual disability. *See, e.g.*, AAIDD-11, p. 52 (noting that due to several factors, including the stigma associated with intellectual disability, "strong acquiesce bias," and masking behaviors, "the authors of this *Manual* caution against relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for the purpose of establishing a diagnosis" of intellectual disability).

Here, an evidentiary hearing is required because Mr. Bowles has alleged that he is intellectually disabled pursuant to *Atkins*, and if proven, he would be entitled to relief. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963).

## II. RESPONSE TO THE STATE'S ARGUMENT THAT § 2241 DOES NOT APPLY TO MR. BOWLES'S PETITION RAISING AN INTELLECTUAL DISABILITY CLAIM

The State asserts that § 2241 does not apply to state prisoners. Doc. 8 at 13. However, the State's superficial analysis of the relationship between §§ 2241 and 2254 failed to address the numerous arguments regarding statutory interpretation Mr. Bowles made in his petition, or the effect of the constitutional matter at hand on that interpretation.[1]

[1] Any arguments not made by the State in its motion are waived. *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004).

Importantly, and as Mr. Bowles asserted in his petition, *see* Doc. 1 at 52, this Court cannot interpret a statute in a way that renders it unconstitutional where a valid interpretation exists. *See N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). This is relevant here, where Mr. Bowles has raised a claim that the State is constitutionally barred from executing him, *see Atkins*, 536 U.S. at 321, and the "core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence", *see Webster v. Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015).

The cases the State relies on to argue that § 2241 does not apply to state prisoners do not undermine AEDPA's constitutionality the way such a finding would here. The State cites to cases determining the applicability of § 2241 to claims of general constitutional error commonly asserted in § 2254 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 v. Crosby*, 351 F.3d 1049, 1062 (11th

Cir. 2003) (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.* Mr. Bowles is not seeking to use

§ 2241 in a way to litigate renewed or defaulted claims of constitutional import. Instead, it is in this rare circumstance—where a categorical bar to the death penalty did not previously apply to prisoners like Mr. Bowles with an IQ score over 70, but now after a mandate by the Supreme Court, the State is still precluding Mr. Bowles from establishing that he falls within the bar and Eleventh Circuit case law similarly indicates that § 2254 will not be a viable avenue of relief—that § 2241 is appropriate.

Even *Poe v. LaRiva*, 834 F.3d 770, 774 (7th Cir. 2016)—the Seventh Circuit case the State relies on to suggest that the Seventh Circuit would not apply its own *Webster* exception to Mr. Bowles—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 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.[2]

The State's only real attempt at grappling with the requirements of statutory interpretation is its reliance on *Medberry v. Crosby* to suggest that allowing convicted state prisoners to seek relief under § 2241 in addition to § 2254 would

[2] The Eleventh Circuit has also acknowledged disagreement among the members of the Court over whether there is only one avenue of relief for state prisoners or separate avenues under both § 2241 and § 2254. *Antonelli*, 542 F.3d at 1351 n.1.

render § 2254 "dead letter." *See* Doc. 8 at 13; *Medberry*, 351 F.3d at 1060. As with the rest of the State's arguments, this discussion ignored the distinction between a constitutional error and a constitutional bar. *Medberry* concerned a prisoner seeking federal review of a prison administrative disciplinary hearing, where there was no constitutional bar to the punishment he received from the prison. *See Medberry*, 351 F.3d at 1052-53.

Moreover, the United States Supreme Court's actions in *Felker v. Turpin*, 518 U.S. 651 (1996), and *In re Davis*, 557 U.S. 952 (2009) (Mem.), undermines the State's concern. In *Felker*, the Supreme Court found that it still has jurisdiction to review an original writ of habeas corpus under § 2241, even after the passing of AEDPA. 518 U.S. at 661. An original writ would necessarily circumvent the lower courts that would otherwise have heard a habeas petition under § 2254, regardless of any procedural gatekeeping the lower courts may have imposed. Then, in *In re Davis*, the Supreme Court considered an original writ raising claims that a state-sentenced prisoner otherwise would have brought in a successive habeas petition. 557 U.S. at *1. The *Davis* Court ordered the petition transferred to the district court—not the court of appeals for a determination on whether to authorize a successor—and ordered it be heard on the merits. *Id.* The Court's actions in both *Felker* and *Davis* preserved the availability of an original writ under § 2241 and bypassed any procedural gatekeeping in § 2254 or § 2255. It did not decline to do so

out of concern that, in doing so, it rendered those gatekeeping provisions dead law. Indeed, Justice Scalia, in dissenting from the Court's decision in *Davis*, lamented that allowing federal relief of the petitioner's claims "would make a nullity of § 2254(d)(1)," an argument the majority ignored. *Id.* at *3.

Finally, the State argues that even if § 2241 were available to state prisoners in a similar manner to that in *Webster*, Mr. Bowles would not meet the criteria anyway. The State suggests this is because Mr. Bowles had the evidence of his intellectual disability when he filed his initial habeas petition, where the petitioner in *Webster* did not, so his claim now is untimely. In support of this argument, the State emphasizes that Mr. Bowles did not file an intellectual disability claim after the Supreme Court decided *Atkins*, suggesting that this claim would have been available to Mr. Bowles throughout his federal litigation.

In *In re Johnson*, No. 19-20552, 2019 WL 3814384 (5th Cir. Aug. 14, 2019), just decided on August 14, 2019, the Fifth Circuit explained "availability" of a claim in the context of intellectual disability and based availability on the viability of the claim at the time of the initial habeas petition. It found the publication of the DSM-5 important because "[t]he new diagnostic guidelines included significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment." *Id.* at *5. This affected when Johnson could assert an *Atkins* claim because "[t]he previous diagnostic manual, in effect when Johnson filed

his initial federal habeas petition, did not classify Johnson as intellectually disabled because of his IQ," *id.*, while the new DSM-5 potentially extended the diagnosis to Mr. Johnson. The Fifth Circuit found it notable that in *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), another case where it authorized a successive intellectual disability claim, and in *Johnson*, counsel had been "presented . . . with reasons that made an *Atkins* claim possibly meritorious when it had not previously been." *Johnson*, 2019 WL 3814384, at *6. The Fifth Circuit explained that "it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*." *Id.*

Moreover, while the DSM-5 opening the door to Mr. Johnson's intellectual disability claim had been published on May 18, 2013, Mr. Johnson did not assert an intellectual disability claim until 2019. Yet, the Fifth Circuit suggested that the ineffectiveness of Mr. Johnson's conflicted counsel may provide cause to equitably toll the delay in raising his claim. *Id.* It found that the district court was best positioned to make this determination. *Id.*

Here, this Court need not look solely to the difference in the DSM-5 to see why Mr. Bowles' intellectual disability claim was unavailable to him at the time of his initial habeas petition in 2008. In Florida, prisoners with IQ scores between 70 and 75, including Mr. Bowles, did not have a viable claim before the Supreme Court decided *Hall*, 572 U.S. at 701. The State speciously asserts that Mr. Bowles waited

seventeen years after *Atkins* to file an intellectual disability claim and completely ignores any discussion of *Hall* and the Florida Supreme Court's decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), finding *Hall* retroactive. Contrary to the State's assertions that Mr. Bowles only filed a claim under *Atkins* and *Hall* once he received a qualifying IQ score, *see* Doc. 8 at 18, the change in diagnostic standards is what deemed Mr. Bowles's IQ score qualifying in the first place, and the change in the law triggered his claim under *Hall*. Any suggestion by the State that Mr. Bowles would not fit into *Webster*'s exception because of any timeliness issue is erroneous.[3]

Ultimately, the State's arguments do not provide any reason to deny Mr. Bowles's *Hall* claim under § 2241. Any reading of AEDPA to preclude this review would leave the federal courts unable to stop an unconstitutional execution, rendering these provisions of AEDPA themselves unconstitutional.

## III. IF THIS COURT FINDS THE PETITION TO BE AN UNAUTHORIZED SUCCESSOR, IT SHOULD TRANSFER THE MATTER TO THE ELEVENTH CIRCUIT PURSUANT TO 28 U.S.C. § 1631

Alternatively, if this Court is inclined to find that this is an unauthorized successive petition under 28 U.S.C. § 2254 or § 2241, the proper remedy would be

[3] The State argues that even under § 2241, the gatekeeping function in § 2253 would still apply. This is false. The Eleventh Circuit has found that the gatekeeping function does not apply to petitions filed under § 2241. *Antonelli*, 542 F.3d at 1350. The State argues that Mr. Bowles fails on the merits under § 2241. As argued in greater detail in Mr. Bowles' petition, *see* Doc. 1 at 12-33, and *supra*, Mr. Bowles can establish all three prongs of an intellectual disability diagnosis.

to transfer this matter to the Eleventh Circuit as an application for authorization to file a successive petition rather than dismissal. Under 28 U.S.C. § 1631:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court *shall*, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought at the time it was filed or noticed . . . .

It is in the interest of justice for this Court to transfer this petition to the Eleventh Circuit rather than dismissing it. Mr. Bowles's execution is scheduled for August 22, 2019, five days from the filing of this reply. Should Mr. Bowles be successful in seeking authorization to file a successor, this petition will be back before this Court. To ensure both courts have as much time as possible to determine whether a stay is necessary to provide Mr. Bowles a full and fair opportunity to present his intellectual disability claim, this Court should take the viable option before it of limiting the procedural steps that need be taken.

Where the district courts in this circuit have declined to grant a transfer, it was because any transfer would be futile, such as where the petitioner's successive claim was time-barred. *See, e.g.*, *Jones v. Jones*, No. 18-CIV-24290-SCOLA, 2018 WL 7200641, at *4 (S.D. Fla. Nov. 20, 2018). Here, Mr. Bowles timely filed his state post-conviction claim and this petition under *Hall*. Moreover, an application for leave to file a successor based on an intellectual disability claim would not be substantively futile considering that other circuits have granted leave on these same

grounds, and a days-old decision by the Fifth Circuit indicates that an increasing number of circuits are doing so. *See, e.g.*, *In re Johnson*, Nos. 19-20552 & 19-70013, 2019 WL 3814384, at *8 (5th Cir. Aug. 14, 2019) (finding that changes in diagnostic standards not available during the initial habeas litigation meets the requirements of a successor under § 2244(2)(A)), *Pizzutto v. Blades*, No. 16-36082, 2019 WL 3807973, at *6 (9th Cir. Aug. 14, 2019) (noting the Ninth Circuit had previously granted leave to file a successor based on a newly-raised intellectual disability claim).

The Eleventh Circuit has accepted petitions like this as applications for authorization after a § 1631 transfer. For example, in *In re Green*, 215 F.3d 1195 (11th Cir. 2000), the district court found the petitioner's § 2255 petition to be successive. 215 F.3d at 1196. "Rather than dismiss the motion, the court transferred the case to [the Eleventh Circuit] pursuant to 28 U.S.C. § 1631" and asked the petitioner to submit an application for leave to file a successor with the Eleventh Circuit. *Id.* at 1196. The Eleventh Circuit considered whether the petition was successive, ultimately finding it was not. *Id.*; *see also Maurino v. United States*, No. 16-22322, 2017 WL 8292804, at *1 (S.D. Fla. 2017) (Eleventh Circuit granted leave to file successive § 2255 after motion had initially been filed in district court and transferred to Eleventh Circuit for authorization).

Other Florida district courts have similarly ordered a transfer. *See e.g.*, *Witherspoon v. United States*, No. 14-22312-CIV-SEITZ, 2018 WL 369158 (S.D. Fla. Jan. 10, 2018) (following the petitioner's submission of a § 2255 petition raising a successive claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Southern District of Florida "transferred the case to the Eleventh Circuit Court of Appeals to determine whether Petitioner's claims merit the necessary authorization to file a successive petition under § 2255"); *Maurino*, 2017 WL 8292804, at *1 (S.D. Fla. 2017) (movant's § 2255 was transferred to the Eleventh Circuit as an application for leave to file a successor, which the Eleventh Circuit granted in part).

Finally, other circuits have likewise found it appropriate to transfer unauthorized successive petitions to the circuit court in lieu of dismissal. *See, e.g.*, *Poindexter v. Nash*, 333 F.3d 372, 382 (2d Cir. 2003) (when unauthorized successor is filed in district court, "the district court must transfer the motion" to the circuit court); *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (same); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (same).

The proper court to file an application for authorization to file a successive petition in this case would be the Eleventh Circuit. *See* 28 U.S. § 2244(b)(3)(A). To the extent that this Court finds Mr. Bowles's petition to constitute an unauthorized successor, it should transfer the action under § 1631.

## IV. REPLY TO STATE'S OPPOSITION TO STAY MOTION

This Court should grant Mr. Bowles's stay motion because he can establish all four factors for a stay, and the State's arguments in opposition are insufficient.

First, the State's argument that Mr. Bowles cannot establish substantial likelihood of success on the merits mirrored the State's procedural and substantive arguments in its motion to dismiss. *See* Doc. 9 at 5-6. Accordingly, Mr. Bowles relies on the assertions that he is intellectually disabled and that this Court has jurisdiction to consider his *Atkins*/*Hall* claim in the petition and reply. *See generally* Doc. 1. Similarly, the State conceded to irreparable injury, so no further argument on that prong is necessary.

The State's only argument as to the substantial harm and adversity to the public interest prongs is the State's interest in going forward with the execution and that the State of Florida and surviving victims "deserve better." Doc. 9 at 6-7. In making this argument, the State did not provide any explanation for the delay in seeking an execution when Mr. Bowles exhausted his initial habeas litigation seven years ago or in moving forward with the *Hall* litigation in state court, filed two years before Mr. Bowles's warrant.[4] It also did not indicate financial or any other hardship.

[4] The State does suggest that part of the delay on Mr. Bowles's *Hall* claim in state court was that Mr. Bowles did not follow Fla. R. Cr. P. 3.203 in attaching an expert report, *see* Doc. 9 at 10-11, but contrary to the State's assertions, Mr. Bowles did timely respond to the motion to dismiss in state court, both in 2017 and later in 2019. This was not cause for the two year delay in state court.

The State's purported harms in not being able to move forward with this execution before full and fair consideration of Mr. Bowles's intellectual disability do not outweigh Mr. Bowles's Eighth Amendment rights. Otherwise, stays of execution would never be granted. *But see Madison v. Alabama*, 138 S. Ct. 943 (2018) (Mem.), and *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (United States Supreme Court granted stay to consider whether prisoner was incompetent under *Ford v. Wainwright*, 477 U.S. 399 (1986), which would render execution unconstitutional); *In re Johnson*, No. 19-20552, 2019 WL 3814384, at *8 (5th Cir. Aug. 14, 2019) (Fifth Circuit granted stay to consider whether prisoner was intellectually disabled, which would render execution unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002)).

Finally, the State suggests that any delay in filing the claim must be taken into account. Doc. 9 at 3. The State noted that the Supreme Court has "reiterated the importance of these principles three times this year." Doc. 9 at 4. However, Eleventh Circuit precedent is clear that there are four stay factors, which do not include delay. *Gissendaner*, 779 F.3d at 1280 (Eleventh Circuit instructs a stay is "appropriate only if the moving party establishes all the following four elements"); *see also* Doc. 9 at 4 (the State's motion to dismiss lists the four *Gissendaner* stay factors). Instead, the State's addition of a delay factor stems from the United States Supreme Court's dicta in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019), and *Dunn v. Ray*, 139 S. Ct.

661 (2019), which warned lower courts to consider delay where a claim was filed after a warrant has been signed. *See also* Doc. 9 at 3 (the State includes language from *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004), and *Long*, noting 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"). The State's reliance on this line of cases is curious here where Mr. Bowles's claim of intellectual disability was filed in state court almost two years before his warrant. While the current petition was filed after Mr. Bowles's warrant had been signed, this was necessarily *one day* after state court proceedings had concluded and Mr. Bowles could meet the § 2254 requirement that his claim be exhausted in state court. The expedited nature of these proceedings are a result of the Governor signing Mr. Bowles's warrant during the pendency of his intellectual disability litigation, not any last-minute gamesmanship on Mr. Bowles's part.

Despite the State's arguments to the contrary and for the reasons provided in Mr. Bowles's motion, *see* Doc. 2, this Court should grant a stay.

## V. CONCLUSION

For the reasons above, in the petition, and in the stay motion, this Court should stay Mr. Bowles's execution to conduct an evidentiary hearing on his intellectual disability claim, grant a writ of habeas corpus vacating his unconstitutional death

sentence, and grant such other and further relief as is justified by law, equity, and the circumstances.

Respectfully submitted,

/s/ Terri L. Backhus
Terri L. Backhus
Kelsey Peregoy
Sean Gunn
Capital Habeas Unit
Federal Public Defender
Northern District of Florida
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301-1300
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2019, a copy of the foregoing has been furnished via ECF to Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com; and Assistant Attorney General Jennifer A. Donahue at jennifer.donahue@myfloridalegal.com; and via electronic mail to the Florida Supreme Court at warrant@flcourts.org.

/s/ Terri L. Backhus
Terri L. Backhus

**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

**Barry M. Crown, Ph.D., FACPN**
**Barry M. Crown, Ph.D. and Associates, P.A.**
**105 E. Gregory Square, Suite 2A**
**Pensacola, Florida 32502**
**Telephone: (850) 439-5550**
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**bmcrown@barrycrown.com**

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.

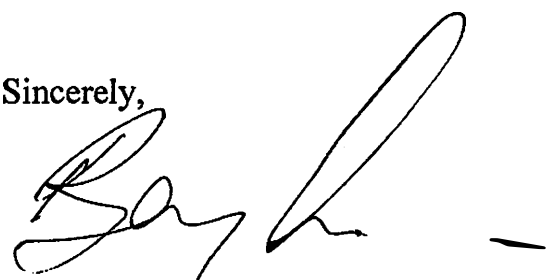
On the Shipley Abstractions, he received an abstraction age of 11 years, 0 months. Mr. Bowles also performed below average in categorical fluency, in the 12th percentile for his age range, and letter naming, in the 6th percentile, on the Test of Verbal Conceptualization and Fluency. This indicates mild 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

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 Trigg, who being first duly sworn on oath, deposes and says:

May 8, 1999

My name is Geraldine Trigg. 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 Doris took the boys to Rainelle W.VA, put them on a bus to

Kanketell, ULC. 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 Momssey

NOTARY PUBLIC

Brian D Momssey
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

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

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 (HC) 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 C546072530100.

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