No. 19A213
CAPITAL CASE

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

In the
Supreme Court of the United States

GARY RAY BOWLES, *Petitioner,*

v.

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

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

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

On August 22, 2019, the day of the scheduled execution, Bowles filed a stay of execution to litigate his pending petition for writ of certiorari raising an intellectual disability claim that was raised for the first time in federal court 17 years after *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided and over five years after *Hall v. Florida*, 572 U.S. 701 (2014), was decided. The Eleventh Circuit denied a stay of execution to litigate whether Bowles may raise his claim of intellectual disability in a successive habeas petition. Bowles did not raise an *Atkins* intellectual disability claim in his

initial federal habeas petition which was filed in 2008, despite the fact that the first petition was filed more than six years after this Court decided *Atkins*. Nor did Bowles file an application for authorization to file a successive habeas petition with the Eleventh Circuit shortly after *Hall v. Florida* was decided in 2014. Instead, he waited until four days before the scheduled execution to file a proper application in the Eleventh Circuit. Respondents object to any stay of execution because Bowles does not meet the standard for being granted a stay.

Stays of execution

Bowles is not entitled to a stay of execution merely because his petition is pending. Stays of execution are not a matter of right, even if irreparable injury results. *Nken v. Holder*, 556 U.S. 418, 433 (2009). As this Court recently observed, last-minute stays of execution "should be the extreme exception, not the norm." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). This Court explained that the last-minute nature of an application for stay in relation to a claim that "could have been brought earlier" may show an "attempt at manipulation," which is itself grounds to deny the stay. *Id.* at 1134. Both the majority and the dissent in *Bucklew* agreed that the long delays that now typically occur in capital cases are "excessive." *Id.* at 1134; *id.* at 1144 (Breyer, J., dissenting).

To be granted to a stay, Bowles must establish four factors: 1) there is a reasonable probability that the petition for writ of certiorari will be granted; 2) there is a fair prospect that a majority of the Court will conclude that the decision below was

erroneous; 3) irreparable harm is likely to result from the denial of a stay; and 4) the balance between the harm to the party seeking the stay and the harm to the other party and the public interest. *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (noting a four-part showing is required); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (same). Bowles has the burden to establish all four factors. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (stating that the party requesting a stay bears the burden). Despite having the burden, Bowles did not discuss these factors in his application for stay.

Reasonable probability that the petition will be granted

First, Bowles must establish that there is a reasonable probability that his petition for writ of certiorari will be granted by four Justices. Bowles, in his petition, seeks to have this Court declare that a capital habeas petitioner may file a successive habeas petition raising intellectual disability regardless of whether they meet the statutory exceptions for filing successive habeas petitions or that capital defendants may simply evade the Congressional limitation on successive habeas petitions by filing § 2241 petitions instead. This Court has shown no inclination to disregard the AEDPA's restrictions on successive habeas petitions. Such a ruling would positively invite more dilatory tactics in capital cases when the majority of this Court condemns such tactics.

And even if some members of this Court are interested in some aspect of this case, because the underlying intellectual disability claim is meritless, this would not be a particularly compelling case to grant a petition to decide the issue. As the State

explains in detail in its brief in opposition, Bowles is not intellectually disabled. His school records conclusively show that he was not intellectually disabled as a child and therefore, by definition, Bowles is not intellectually disabled now.

For these reasons, the petition is unlikely to garner the necessary votes. Bowles has not established a reasonable probability that the petition will be granted. Bowles does not meet the first factor for being granted a stay of execution.

Fair prospect that the decision below was erroneous

Second, Bowles must establish that there is a fair prospect that if the petition is granted, he would win on the merits. Bowles would not prevail on the merits. Even if this Court granted the petition, this Court is unlikely to hold that successive habeas petitions raising intellectual disability may be filed regardless of whether they meet the statutory exceptions for filing successive habeas petitions or that capital defendants may simply evade the Congressional limitation on successive habeas petitions by filing § 2241 petitions instead.

Nor would Bowles prevail on the merits. To be entitled to file a successive habeas petition Bowles must establish a *prima facie* case of intellectual disability taking into account the clear and convincing standard of proof in the § 2244(b)(2)(B)(ii) exception. *Prieto v. Zook*, 791 F.3d 465, 469-73 (4th Cir. 2015) (emphasizing the standard of proof necessary to obtain authorization to file a successive habeas petition raising an intellectual disability claim and holding the defendant did not meet that standard); *Frazier v. Jenkins*, 770 F.3d 485, 497-99 (6th Cir. 2014) (emphasizing the standard of

proof necessary to obtain authorization to file a successive habeas petition raising an intellectual disability claim and holding the defendant did not meet that standard).

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. 1039, 1045 (2017) (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) (emphasis added). While Bowles fails all three prongs, as the Respondents explained in detail in the brief in opposition, the Respondents will focus on the third prong in this response.

Both *Hall v. Florida* and *Moore v. Texas* were cases where the third prong of the test, the age of onset, explicitly was ***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*. But here the third prong of onset is at issue.

Onset as a minor

The third prong of the test for intellectual disability 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 also 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). While opposing counsel refers to a defense expert's opinion that Bowles' declining grades were due to moving from concrete concepts to abstract concepts in the higher grades, such a statement does not negate the other explanation for his declining grades from another ***defense*** mental health expert that he was skipping school or the

contemporaneous notation in the actual school records that Bowles was "never present" and certainly not by ***clear and convincing*** evidence. And regardless of the reason for his declining grades, Bowles cannot establish the third prong in the face of the "high normal" scores on numerous achievement tests. Bowles did not have any problem with abstract concepts when taking achievement tests. Again, a child with intellectual disability cannot make "high normal" scores on achievement tests. Bowles fails the critical third prong.

As the Pennsylvania Supreme Court has explained, the onset prong is often the most reliable evidence of intellectual disability because it is generated at a time when there is no incentive to slant the evidence. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014) (noting capital defendants have a "powerful incentive to malinger and to slant evidence" after *Atkins*, making the third prong crucial). Bowles' school records are the most reliable evidence of his intellectual functioning and those records establish Bowles is not intellectually disabled.

Bowles is not intellectually disabled. He certainly cannot make a *prima facie* showing as required to file a successive habeas petition taking into account the standard of proof of clear and convincing evidence as required by the federal statute to warrant filing a successive habeas petition. Therefore, Bowles does not have a fair prospect of winning on the merits of his *Atkins* claim. Bowles does not meet the second factor for being granted a stay of execution.

Irreparable harm

Third, Bowles must establish that he will suffer irreparable injury unless the stay issues. While he can meet the third factor, Bowles must establish all of the factors including lack of delay in raising the claim, not just one factor. Moreover, this one factor is not determinative. *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 balance of harm to the State and the public interest

Fourth, Bowles must establish that the balance between the harm to him versus the harm to the State and the public interest is in his favor. But it is not in his favor. As this Court recently noted, "both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S.Ct. at 1133. Unwarranted delays undermine the deterrent effect of the death penalty. As this Court has observed, without finality, "the criminal law is deprived of much of its deterrent effect." *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). There is substantial harm to the State when its executions are cancelled. "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)).

Bowles must also establish that a stay would not be adverse to the public interest. But as this Court recently observed regarding the protracted litigation in a capital case

where the murder occurred in 1996, the people of the state and the surviving victims of the murder "deserve better." *Bucklew*, 139 S.Ct. at 1134. This murder occurred in 1994, which was two years before the murder in *Bucklew*. The people of Florida and the surviving victims of Bowles' three Florida victims "deserve better" than to have the execution stayed to litigate an untimely and meritless *Atkins* claim. Three Justices of this Court have recently stated that enabling the delay of executions is a "miscarriage of justice" to the State, the victim, and the victim's family. *Price v. Dunn*, 139 S.Ct. 1533, 1540 (2019) (Thomas, J., concurring in the denial of certiorari). A stay would be adverse to both the State's and the public's interest. Bowles does not meet the fourth factor for being granted a stay of execution.

Bowles fails three of the four factors for being granted a stay.

Claim raised in a dilatory manner

Furthermore, a capital defendant must also establish that the claim was not raised in a dilatory manner because 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 v. Campbell*, 541 U.S. 637, 650 (2004). But Bowles' application to file a successive habeas petition was pursued in a dilatory manner.

While the intellectual disability claim was first raised in 2017 in state court, before the warrant was signed, the intellectual disability claim was not raised in federal court until after the warrant was signed. The application for authorization to file a

successive habeas petition raising the *Atkins* claim was not filed in the Eleventh Circuit until four days before the scheduled execution. And that application was filed over five years after *Hall v. Florida* was decided in 2014.

And even then, the *Atkins* claim was raised in a manner in federal court that was certain to cause delay. The Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU-N), did not directly file an application for authorization to file a successive habeas petition in the Eleventh Circuit as required by the statute. Instead, the CHU-N first improperly filed the *Atkins* claim in the federal district court. But the district court lacked jurisdiction to consider the claim under controlling Eleventh Circuit precedent and dismissed the claim for lack of jurisdiction. So, a proper application to raise this *Atkins* claim in a successive habeas petition was only filed in the correct court four days before the scheduled execution. The strong equitable presumption against a stay applies in such a situation.

Accordingly, the stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carolyn Snurkowski, a member of the Bar of this Court, hereby certify that on this 22th day of August, 2019, a copy of the RESPONSE TO APPLICATION FOR STAY OF EXECUTION was furnished by United States mail and by email to TERRI BACKHUS, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough Street, Suite 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; and 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.

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