No. _____

IN THE

Supreme Court of the United States

IN RE GARY RAY BOWLES,

Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS

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

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner Gary Ray Bowles is an intellectually disabled man who is scheduled to be executed by the State of Florida on August 22, 2019, at 6:00 p.m. Absent this Court's intervention, Mr. Bowles may be executed without any court having considered the merits of his claim. Mr. Bowles's attempts to be heard have been rebuffed by the Florida Circuit Court for the Fourth Judicial Circuit, the Florida Supreme Court, the United States District Court for the Middle District of Florida, and by the United States Court of Appeals for the Eleventh Circuit Court. This petition invokes the extraordinary jurisdiction of this Court because all other traditional avenues for relief have thus far been foreclosed.

The questions presented are:

1. Should this Court use its power to grant a writ of habeas corpus to a capital defendant who has no other available forum to raise his compelling claim of intellectual disability?

2. Whether 28 U.S.C. § 2244(b)(2)(B)(ii) permits a habeas petitioner to file a successive habeas petition based on a claim that he is innocent of the death penalty?

3. Whether a state's diagnostic standards for intellectual disability deemed unconstitutional by this Court after a petitioner's initial habeas proceedings render an *Atkins v. Virginia* claim previously unavailable for the purposes of 28 U.S.C. § 2244(b)(2)(A)?

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PARTIES TO THE PROCEEDINGS

Petitioner Gary Ray Bowles, a death-sentenced Florida prisoner scheduled for execution on August 22, 2019, was the movant in a habeas corpus proceeding before the United States Court of Appeals for the Eleventh Circuit. Mr. Bowles is in the custody of Mark S. Inch, the Secretary of the Florida Department of Corrections. Mr. Bowles has separately filed petitions for writs of certiorari to the Eleventh Circuit and the Florida Supreme Court.

PETITION FOR A WRIT OF HABEAS CORPUS

Gary Ray Bowles respectfully petitions for a writ of habeas corpus.

DECISION BELOW

This petition for a writ of habeas corpus is an original proceeding in this Court, but relates to a decision of the Eleventh Circuit denying leave to file a successive 28 U.S.C. § 2254 petition in the district court. The Eleventh Circuit's decision is not yet reported but is available in the Appendix (App.) at 1a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to its authority under 28 U.S.C. §§ 2241 and 2254 to grant a writ of habeas corpus, as well as pursuant to Rule 20.4 of the Rules of this Court and the All Writs Act, 28 U.X.C. § 1651(a). *See Felker v. Turpin*, 518 U.S. 651 (1996).

STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

Rule 20.4 requires an original petition for writ of habeas corpus by a state prisoner (1) to "comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the 'reasons for not making application to the district court of the district in which the appellant is held'"; (2) to "set out specifically how and where the petitioner has exhausted available remedies in the state courts"; (3) to "show that exceptional circumstances warrant the exercise of the Court's discretionary powers"; and (4) to show "that adequate relief cannot be obtained in any other form or from any other court." Mr. Bowles meets these requirements.

(1) On August 15, 2019, Mr. Bowles filed a federal habeas petition in the district court alleging that his death sentence is unconstitutional under the Eighth Amendment because he is intellectually disabled. Mr. Bowles acknowledged that the petition was his second-in-time petition brought under 28 U.S.C. § 2254. However, Mr. Bowles asserted that it was not a "second or successive" petition within the meaning of 28 U.S.C. § 2244(b)(2); and that the district court had the jurisdiction and authority to address the merits of the constitutional claims presented therein. Mr. Bowles also asserted that the text of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and this Court's jurisprudence regarding statutory interpretation provided that he should be permitted to proceed via § 2241.

The district court issued an order stating that it was without authority to consider Mr. Bowles's claim without approval from the Eleventh Circuit because the petition was second or successive. Doc. 11 at 15. According to the district court, "Petitioner's path is to seek permission from the Eleventh Circuit to file a successive petition." Doc. 11 at 15. Mr. Bowles filed a notice of appeal as well as an application in the Eleventh Circuit for leave to file a successive habeas petition. The appeal was denied on August 21, 2019, and Mr. Bowles's application was denied on August 22, 2019. Mr. Bowles is seeking certiorari from the affirmance of the district court's dismissal in a petition being filed on this same date. *See Bowles v. Inch*, No. 19-5672.

(2) Mr. Bowles filed a post-conviction motion in the Florida state courts raising the same substantive issue presented here. The Florida courts refused to review the merits of the claim under Florida law that forecloses such review. Mr.

Bowles is seeking certiorari from that denial in a petition filed on August 16, 2019. *See Bowles v. Florida*, No. 19-5617.

(3) Exceptional circumstances warrant the exercise of this Court's discretionary power to issue a writ of habeas corpus for the reasons set forth, *infra*, in the Statement of Facts and Part I of the Reasons for Granting the Writ.

(4) Unless this Court grants one or more of the certiorari petitions referenced above, then "adequate relief cannot be obtained in any other form or from any other court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the following provisions of the United States Constitution:

Article I, Section 9, Clause 2, of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

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

Section 2244(b), Title 28 of the U.S.C. Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
> (A) the applicant shows that the claim relies on a new rule of 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.
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> ***
>
> 3(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of [§ 2244(b)].
>
> ***
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

I. Introduction

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

At the time that *Atkins* was decided, this Court "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall v.*

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

In *Hall v. Florida*, this Court invalidated Florida's IQ-score cutoff because it unacceptably risked execution of individuals within the Eighth Amendment's categorical exemption, given the SEM. *See* 572 U.S. at 724. The Florida Supreme Court subsequently held, in *Walls v. State,* 213 So. 340 (Fla. 2016), that *Hall* was retroactive in Florida.

Following *Hall* and *Walls*, in October 2017, Mr. Bowles filed his intellectual disability claim in state court. Mr. Bowles thereafter proffered a qualifying IQ score of 74, expert reports of three mental health professionals diagnosing or finding

evidence of intellectual disability, more than a dozen sworn statements evidencing Mr. Bowles's significant adaptive deficits throughout his childhood, adolescence, and adulthood, and the declarations of the only two mental health professionals who had previously evaluated Mr. Bowles, attesting that they had not evaluated him for intellectual disability, and did not dispute his present diagnosis.

This Court's intervention is urgently needed to prevent the imminent execution of Mr. Bowles, who the evidence strongly suggests is intellectually disabled and therefore categorically exempt from the death penalty. Because every court to date has refused to consider the evidence of Mr. Bowles's intellectual disability, Mr. Bowles files the instant petition for writ of habeas corpus.

II. Procedural History

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

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

A new penalty phase was held in May 1999, after which the jury unanimously recommended a death sentence, and the trial court again followed the jury's recommendation. *See Bowles v. State*, 804 So. 2d 1173, 1175 (Fla. 2001). On direct

appeal, the Florida Supreme Court affirmed, *id*. at 1184, and this Court denied certiorari on June 17, 2002. *Bowles v. Florida*, 536 U.S. 930 (2002).

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

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

B. Mr. Bowles's Intellectual Disability Litigation

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

On March 12, 2019, while the motion was pending, Mr. Bowles's state postconviction counsel, Francis Jerome ("Jerry") Shea, unexpectedly moved to withdraw from the case. PCR-ID at 62. On March 25, 2019, the state court granted Mr. Shea's motion and appointed a lawyer from the Office of the Capital Collateral Regional Counsel—North (CCRC-N) as new state-appointed counsel. PCR-ID at 108-09. On March 26, 2019, CCRC-N attorney Karin Moore entered an appearance. PCR-

ID at 110. On April 11, 2019, Ms. Moore filed a motion for additional time to either reply to the State's recently filed answer memorandum or to amend the postconviction motion that had been filed by Mr. Shea. *See* PCR-ID at 131-35.

On April 15, 2019, the circuit court granted Ms. Moore an additional 90 days to either file a reply to the State's answer or move to amend Mr. Bowles's intellectual disability claim, should she determine that an amendment was necessary. PCR-ID at 136. Under the state court's order, Ms. Moore's reply or motion to amend was due July 14, 2019. But on June 11, 2019—less than 80 days after Ms. Moore first entered an appearance in the case, and more than a month before the state court's deadline for her to review the case and decide whether to file a reply or motion to amend—the Governor signed Mr. Bowles's death warrant, scheduling the execution for August 22, 2019. The Florida Supreme Court thereafter ordered Mr. Bowles's intellectual disability proceedings expedited, and required the circuit court to decide Mr. Bowles's intellectual disability claim *in total* by July 17, 2019. Death Warrant Scheduling Order, *Bowles v. State*, Nos. SC89-261, SC96-732 (Fla. June 12, 2019).

Beginning in 2017, and up until his final amended postconviction motion was filed on July 1, 2019, Mr. Bowles developed and proffered extensive evidence of his intellectual disability.[1] Regarding significantly subaverage intellectual functioning, Mr. Bowles provided evidence that every mental health professional who is known to

[1] Since *Hall*, Florida courts have held a definition of intellectual disability that includes: "'(1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3) manifestation of the condition before age eighteen.'" *Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) (quoting *Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016)).

have evaluated Mr. Bowles's intellectual functioning—including Dr. McMahon (1995, pretrial); Dr. Krop (2003, initial state postconviction); Dr. Toomer (2017); Dr. Crown (2018); and Dr. Kessel (2018-19)—admits either that they did not assess Mr. Bowles for intellectual disability (Dr. McMahon, *see* PCR-ID at 835, and Dr. Krop, PCR-ID at 789-790), or that Mr. Bowles is intellectually disabled or has intellectual functioning consistent with an intellectually disabled person (Dr. Toomer, PCR-ID at 778-83; 786-88, Dr. Crown, PCR-ID at 784-85, Dr. Kessel, PCR-ID at 791-801).

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

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

indicate he has brain damage consistent with an intellectual disability. *See* PCR-ID at 784-85 (Dr. Crown's report).

Regarding adaptive deficits, Mr. Bowles proffered sworn statements from a dozen individuals establishing that he had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. *See* App. at 185-217, PCR-ID at 802-34 (sworn statements of lay witnesses); App. at 161-184, PCR-ID at 741-45 (discussing how sworn lay witness observations establish significant adaptive deficits in each domain).

Mr. Bowles also proffered evidence that his intellectual disability manifested before the age of 18—nearly half of the lay witnesses knew Mr. Bowles in his childhood or teenage 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.

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

regardless of this Court's ruling in *Hall*, which was held retroactive in Florida by the Florida Supreme Court in *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

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

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

On August 19, 2019, Mr. Bowles filed a notice of appeal in the district court and a motion for stay pending appeal in the Eleventh Circuit. He simultaneously filed an application for leave to file a successive petition with the Eleventh Circuit and motion for a stay to resolve the application. On August 21, the Eleventh Circuit denied Mr. Bowles's motion for a stay pending appeal, finding he did not have a substantial likelihood of success on the merits of whether his second-in-time petition is successive.

On August 22, 2019, the Eleventh Circuit denied Mr. Bowles's successor application, finding it depended on this Court's ruling in *Hall*, which the Eleventh

Circuit does not recognize as retroactive. App. 1, 16. It also denied Mr. Bowles's stay motions. App. 1.

THE ELEVENTH CIRCUIT'S RULING BELOW

On August 22, 2019, the Eleventh Circuit denied Mr. Bowles's successor application. *In re: Gary Ray Bowles*, No. 19-13149-P (11th Cir. August 22, 2019). The court found that all of the cases which Mr. Bowles relied on were either previously available to him or were not made retroactive to cases on collateral review. *Id*. at 8. The court also rejected Mr. Bowles's argument that his *Atkins* claim was not available to him previously because it lacked merit under existing case law at the time. *Id*. at 11. The court stated that there is no futility exception to AEDPA's restrictions on second and successive petitions. *Id*. at 11. Finally, relying on *In re Hill*, 715 F.3d 284 (11th Cir. 2013), the Eleventh Circuit stated that Mr. Bowles's claim that he is innocent of the death penalty does not fall within the narrow statutory exception in § 2244(b)(2)(B)(ii).

In a concurring opinion, Judge Martin stated, "I wish it were not so, but this Court's precedent constrains me to deny Bowles's application . . .". *Id*. at 22 (Martin, J., concurring). Judge Martin stated, "For me, the hurdles Mr. Bowles has faced present unacceptable (perhaps unconstitutional) barriers to vindicating the right articulated in Atkins." *Id*. at 22 (Martin, J., concurring).

Judge Martin further noted that, "Tragically, in my view, the Florida courts refused to even consider the merits of Mr. Bowles's claim." *Id*. at 27 (Martin, J., concurring). Judge Martin believed that Florida's time bar created an unacceptable

risk that persons with intellectual disability will be executed, and that it "dilutes Atkins's constitutional mandate for Florida death row inmates." *Id*. at 27 (Martin, J., concurring).

Judge Martin further observed that circuits have divided over whether *Sawyer*'s actual innocence exception survived the passage of AEDPA. *Id*. at 34 (Martin, J., concurring). Criticizing the Eleventh Circuit's opinion in *In re Hill*, Judge Martin cited to *Holland* for the proposition that AEDPA did not wipe away the existing equitable doctrines related to the writ of habeas corpus. *Id*. at 36 (Martin, J., concurring).

In closing, Judge Martin stated:

> The time bar imposed by the Florida courts and this Court's interpretation of the requirements of AEDPA mean that Florida will end Mr. Bowles's life without ever knowing whether his execution violates the Eighth Amendment. I am bound by the law of this Circuit to concur in the denial of his application for leave to file a successive habeas petition. But I do not consider this decision to be a just one.

Id. at 37 (Martin, J., concurring).

REASONS FOR GRANTING THE WRIT

I. Exceptional Circumstances Warrant the Exercise of This Court's Original Habeas Jurisdiction

This case presents several exceptional circumstances. First, as the aforementioned facts indicate, Mr. Bowles's evidence of intellectual disability is substantial.

Second, Mr. Bowles's claim of intellectual disability has never been adjudicated by any court, and the state and federal courts have both refused to address it, as set forth in the related certiorari petitions before this Court.

Third, Mr. Bowles's imminent execution presents an exigent circumstance requiring this Court's intervention, without which Mr. Bowles will be executed contrary to the Eighth Amendment.

Fourth, in *Felker v. Turpin*, 518 U.S. 651, 661-62 (1996), this Court held that the availability of original habeas jurisdiction in this Court preserves Article III's grant of appellate jurisdiction over the lower federal courts. This petition asks the Court to consider whether a prisoner's innocence of the death penalty, by virtue of intellectual disability or otherwise, satisfies the gatekeeping requirement of 28 U.S.C. § 2244(B)(2)(B)(ii) for the filing of a second or successive petition for writ of habeas corpus, and thus, whether AEDPA preserved the "miscarriage of justice" exception recognized in *Sawyer v. Whitley*, 505 U.S. 333 (1992). Additionally, this petition asks the Court to consider whether a state's diagnostic standards for intellectual disability deemed unconstitutional after a petitioner's initial habeas proceedings render an *Atkins* claim previously unavailable for the purposes of § 2244(b)(2)(A). These questions divide the courts of appeals, and more importantly, this Court cannot reach the questions by certiorari or appeal. The exercise of original habeas jurisdiction would aid the Court in exercising the appellate authority provided to it by Article III, § 2 with respect to these critical questions.

II. This Court Should Resolve the Issue of Whether 28 U.S.C. § 2244(b)(2)(B)(ii) Permits a Habeas Petitioner to File a Successive Habeas Petition Based on a Claim That He is Innocent of the Death Penalty

A. Uncertainty Amongst the Circuits

Prior to AEDPA, it was clear to the circuit courts that a fundamental miscarriage of justice occurred when a petitioner was actually innocent of the crime, *see Schlup v. Delo*, 513 U.S. 298, 324-27 (1995), or was ineligible for the death penalty, *Sawyer v. Whitley*, 505 U.S. 333 (1992). As for the latter, a petitioner needed to 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. Stated differently, a petitioner had to demonstrate that he was "innocent of the death penalty." *Id.* at 345.

AEDPA's statutory language has since caused uncertainty amongst the circuits as to the continuing viability of *Sawyer*. With regard to second or successive petitions, 28 U.S.C. § 2244(b)(2)(B)(ii) states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . 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*." (emphasis added).

1. The Sawyer exception did not survive AEDPA

The Fifth, Seventh, and Eleventh Circuits have held that § 2244(b)(2)(B)(ii) only allows circuit courts to authorize the filing of second or successive petitions when a habeas petitioner's claim asserts innocence of the offense, rather than innocence of the sentence, even for petitioners sentenced to death. *See In re Hill*, 715 F.3d 284, 297 (11th Cir. 2013) ("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."); *In re Webster*, 605 F.3d 256, 258-59 (5th Cir. 2010) ("[T]here is no reason to believe that Congress intended the language 'guilty of the offense' to mean 'eligible for a death sentence.' . . . [Congress] elected to couch § 2255(h)(1), as well as § 2244(b)(2)(B)(ii), in the markedly different, unmistakable terms of guilt of the offense."); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir.1997) ("We conclude that a successive motion under 28 U.S.C. § 2255 (and presumably a successive petition for habeas corpus under section 2254, governing habeas corpus for state prisoners, which has materially identical language) may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence.").

2. The Sawyer exception did survive AEDPA

The Ninth Circuit on the other hand has held that "[w]e interpret the AEDPA's amendments to §2244(b) to permit a petitioner, in a successive petition, to establish that he is ineligible for the death penalty." *Thompson v. Calderon*, 151 F.3d 918, 923

(9th Cir. 1998) (en banc). *See also Landrigan v. Brewer*, 625 F.3d 1132, 1139 n.5 (9th Cir. 2010) (following this interpretation); *Pizzuto v. Blades*, 673 F.3d 1003, 1010 (9th Cir. 2012) (same). The court in *Calderon* reasoned that "the need to cover non-capital habeas petitions best explains the slight difference in wording between the *Sawyer* 'actual innocence' standard and § 2244(b)(2)(B)(ii)." *Id.* at 923-24; *see id.* at 924 n.4 ("We disagree with the Seventh and Eleventh Circuit decisions rejecting a petitioner's claim of innocence of the death penalty as not cognizable under § 2244(b)(2)(B).") (citations omitted).

3. Recognizing Sawyer without addressing AEDPA

Without addressing the statutory text of § 2244(b)(2)(B), the Sixth Circuit has recognized that pursuant to *Sawyer*, "a death-row prisoner can escape procedural default if he 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.'" *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014). *See also id.* at 506-07 (Sutton, J., concurring in part and concurring in the judgment) ("Because *Atkins* establishes that the Constitution prohibits the imposition of capital sentences on the mentally disabled, the majority reasons, an inmate who can show by clear and convincing evidence that he was mentally disabled at the time of the crime will always be 'actually innocent' of the death penalty and thus be excused from traditional cause-and-prejudice requirements for overcoming the default.").

Similarly, without specifically addressing the statutory text of § 2244(b)(2)(B), the Fourth Circuit has allowed petitioners to overcome procedural default upon showing that, "if instructed properly under *Hall* and *Atkins*, 'no reasonable juror' could have found him eligible for the death penalty under Virginia law"). *Prieto v. Zook*, 791 F.3d 465, 469 (4th Cir. 2015).

4. Leaving the issue open

Finally, the Tenth Circuit, while recognizing a split amongst the circuits, has declined to address the issue. *See 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).

B. This Court should resolve the split in the circuits

The circuit split merits this Court's attention.[3] In one concurring opinion, Judge Weiner of the Fifth Circuit noted "the absurdity of [AEDPA's] Kafkaesque result: "Because [a petitioner] seeks to demonstrate only that he is constitutionally ineligible for the death penalty—and not that he is factually innocent of the crime—we must sanction his execution." *Webster*, 605 F.3d at 259 (Weiner, J., concurring). In dissent from the Eleventh Circuit's rejecting the existence of any *Sawyer* exception

[3] While this Court's analysis in *McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013), provides support for the proposition that the miscarriage of justice exception should be available to petitioners to excuse any potential procedural bar, including a petitioner such as Mr. Bowles invoking actual innocence of the death penalty to proceed under § 2241(b)(2), the various circuits continue to be in disagreement.

in § 2244(b)(2), Judge Wilson remarked that this circuit split is "of exceptional importance," noting "we need Supreme Court guidance." *In re Hill*, 777 F.3d 1214, 1227 (11th Cir. 2015)(Wilson, J., dissenting). The dissent noted that "the 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," and that "the Supreme Court itself [has] indicated . . . 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.'" *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 558 (1998)). In an earlier opinion where the Eleventh Circuit held 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,'" *In re Hill*, 715 F.3d 284, 301 (11th Cir. 2013), another dissenting opinion noted "[t]he perverse consequence of such an application of AEDPA is that a federal court must acquiesce to, even condone, a state's insistence on carrying out the unconstitutional execution of a mentally retarded person," *id.* at 302 (Barkett, J., dissenting). Such a perverse consequence is again at issue here.

The split of authority on this issue has lingered for too long, making this Court's intervention especially appropriate. See *Keen v. State*, 398 S.W.3d 594, 622–23 (Tenn. 2012) (Wade, C.J., dissenting) (quoting Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 777 (2002) ("Some courts view [the AEDPA's actual innocence

exception to the bar on successive claims] as necessarily including claims of innocence of the death penalty, while other courts read the provision much more narrowly as limited to claims of innocence of the crime. The decisions in the former, more protective category would seem to comport most closely with the available indicia of legislative intent.").

This Court should grant Mr. Bowles's petition for writ of habeas corpus to decide whether a petitioner's innocence of the death penalty enables the petitioner to file a second or successive petition for relief on the basis of a constitutional claim that, "if proven and viewed in light of the evidence as a whole," § 2244(b)(2)(B)(ii), would establish such innocence.

III. The Court Should Review the Question of Whether a State's Diagnostic Standards for Intellectual Disability Deemed Unconstitutional By This Court After a Petitioner's Initial Habeas Proceedings Render an *Atkins* Claim Previously Unavailable for the Purposes of 28 U.S.C. § 2244(b)(2)(A)

Section 2244(b)(2)(A) permits the circuit courts to grant leave to file a successive petition where a new rule of constitutional law made retroactive by this Court was previously unavailable at the time of a petitioner's first federal petition. A split has developed within the circuits as to what circumstances, if any, may be taken into account when a new rule is announced during or before a petitioner's initial habeas petition. This has resulted in inconsistent conclusions about whether an *Atkins* claim was previously unavailable to a petitioner where a state's diagnostic standards were ruled unconstitutional by this Court after his initial habeas proceedings. For example, the Fifth Circuit looks to the circumstances at the time of

the first petition to determine whether the claim would have been "feasible" to determine availability. *See In re Cathey*, 857 F.3d 221, 233 (5th Cir. 2017). Thus, petitioners in the Fifth Circuit are sometimes able to establish previous unavailability based on the relevant diagnostic standards in their case. *See id.* Contrarily, the Eleventh Circuit has a more hardline approach that applies the feasibility standard to cases where a new rule is announced while the initial habeas petition is still pending but precludes any possibility of assessing feasibility if the new rule existed before the petition. *See, e.g.*, *In re Hill*, 113 F.3d 181, 183 (11th Cir. 1997). This preclusion applies to petitioners raising intellectual disability claims, as occurred here. The uncertainty among the circuits regarding the definition of "previously unavailable" and what factors are appropriate for this determination has caused wide variation for intellectually disabled petitioners from one circuit to the next.

A. There is a Circuit Split on how to Define Previous Unavailability for § 2244(b)(2)(A) Purposes

1. The "previously unavailable" analysis takes into account the circumstances at the time of the initial petition, including diagnostic standards

The Fifth Circuit has taken the feasibility standard—which looked at the feasibility of amending a petition to add a claim based on a new rule announced during the pendency of a habeas petition—and broadened it to "a standard that takes into account the particular circumstances of the previous habeas proceeding." *See In re Wood*, 648 F. App'x 388, 391 (5th Cir. 2016) (unpub.). While *Wood* "essentially adopted a rebuttable presumption that a new rule of constitutional law was

previously available if published by the time a district court ruled on a petitioner's initial habeas petition," *see Cathey*, 857 F.3d at 229 (5th Cir. 2017), the Fifth Circuit acknowledged "a gray area of previous unavailability despite technical availability," *see id.* at 230.

This "gray area" is what the Fifth Circuit has now used to determine whether to grant authorization to file a successive *Atkins* claim. *See id.* at 230. First, in *In re Cathey*, the petitioner had a 77 IQ score at the time he filed his initial petition. *Id.* at 230. This petition post-dated *Atkins*, and his score of 77 fell "outside the range that was then understood to satisfy the subaverage intellectual functioning prong of an *Atkins* claim." *Id.* Indeed, under Texas law at the time, the state required a score of 70 or lower, and the Fifth Circuit "observed this baseline score . . . when analyzing *Atkins* claims by Texas petitioners." *Id.* Additionally, Texas had announced the *Briseno*[4] factors, a list of factors to be considered in assessing intellectual disability, two months before Mr. Cathey filed his initial federal petition. *Id.* Mr. Cathey could not meet many of these factors. *Id.* Thus, any *Atkins* claim by Mr. Cathey at that point in time in Texas's state or federal courts would have been meritless.

Following Mr. Cathey's federal litigation, newly discovered evidence showed that Mr. Cathey scored "below 73" on an IQ test conducted after his incarceration. *Id.* at 232. By the time these records were disclosed, the courts recognized a 5-point margin of error, which encompassed Mr. Cathey's score "below 73" and that the Flynn effect likely reduced both of these scores even more. *Id.* at 232-33. Based on this new

[4] *Ex Parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004).

information regarding Mr. Cathey's IQ, the Fifth Circuit found that *Atkins*'s holding was beyond Mr. Cathey's reach before, but he could now establish a prima facie case of intellectual disability. *Id.* at 233. Importantly for the purposes of determining whether to authorize Mr. Cathey's successor, the Fifth Circuit found that the *Atkins* claim was previously unavailable because, without this new information, it had no merit. As *Cathey* explained, "a claim must have some possibility of merit to be considered available." *Id.* at 232.

The Fifth Circuit used this same approach more recently in *In re Johnson*, No. 19-20552, 2019 WL 3814384 (5th Cir. Aug. 14, 2019). This Court ruled in *Atkins* years before Mr. Johnson went through federal review the first time. *Id.* at *5. The Fifth Circuit described this as a "meaningful hurdle" for Mr. Johnson to "demonstrate why [it] should consider that case to be retroactive as to him." *Id.* Like Mr. Cathey, however, Mr. Johnson's IQ score over 70 made an *Atkins* claim futile during his initial federal habeas litigation. *Id.* at *4. Since Mr. Johnson's initial habeas petition, there had been "recent changes to the medical standards for determining intellectual disability." *Id.* Namely, the publication of the DSM-5 included "significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment." *Id.* In contrast, "[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.* Accordingly, the Fifth Circuit granted Mr. Johnson authorization to file a successive petition. *Id.* at 9. The Fifth Circuit found that this situation paralleled that in *Cathey* because "both Cathey and now

Johnson were presented . . . with reasons that an *Atkins* claim is possibly meritorious when it had not previously been." *Id.* at *6. It further found it "correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*." *Id.* at *6.

Using this approach, the Fifth Circuit has also denied authorization where it felt the diagnostic evidence of the petitioner's *Atkins* claim could have been raised in earlier federal proceedings. *See, e.g.*, *Mathis v. Thaler*, 616 F.3d 461, 470 (5th Cir. 2010) (finding applicant could and should have brought *Atkins* claim in prior habeas proceedings). Thus, it is not a guarantee that a change in the law alone will result in authorization.

2. "Previously unavailable" claims are only those depending on a new rule not announced at the time of the initial habeas proceeding

The Eleventh Circuit also has a feasibility standard, but it only applies where this Court announces a new rule during the pendency of initial habeas proceedings. In that instance, the Eleventh Circuit's feasibility standard asks the petitioner "to demonstrate the infeasibility of amending a habeas petition that was pending when the new rule was announced." *In re Hill*, 113 F.3d 181, 183 (11th Cir. 1997); *see also In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015) ("If the new rule was announced while the original § 2254 petition was pending, the applicant must demonstrate that it was not feasible to amend his or her pending petition to include the new claim.").

This does not extend to new rules announced before the initial habeas petitions. As the Eleventh Circuit explained here, it looks only to whether a claim

would have been "cognizable" at the time of the initial habeas proceedings, which is true at the time a new rule is announced regardless of whether it could be meritorious. As Justice Martin noted in her concurrence, because it would have been "utterly fruitless" for Mr. Bowles to pursue an intellectual disability claim in Florida after *Atkins*, "[a]bsent the strictures of [the Eleventh Circuit's] precedent, I would hold that Mr. Bowles has made a *prima facie* showing [of unavailability] under § 2244(b)(2)(A)." App. 24, 31.*See* App. 4; *see also In Re: Omar Blanco*, No. 18-13262 at *18 (11th Cir. Aug. 30, 2018) (unpub.) (denying authorization to file successor based on *Atkins* because it was decided years before petitioner's habeas proceedings and *Hall* is not retroactive under Eleventh Circuit precedent).

3. Precedent from other circuits makes it unclear whether the "previously unavailable" clause applies where the new rule predated initial habeas proceedings

While the Eighth Circuit has addressed the question of "previous availability" in the context of intellectual disability, it is unclear whether it would conform more with the Fifth or Eleventh Circuit's approach. In *Davis v. Nooner*, 423 F.3d 868 (8th Cir. 2005), the Eighth Circuit denied authorization for a successor based on the facts that *Atkins* was argued a month before the petitioner filed his habeas petition, and the evidence in support of his intellectual disability claim was all available during his state court litigation. 423 F.3d at 879. This indicates that the Eighth Circuit aligns more closely with the Eleventh Circuit. However, in *Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017), and *Davis v. Kelley*, 854 F.3d 967 (8th Cir. 2017), both of which post-dated *Hall* and *Moore*, the Eighth Circuit denied the petitioners' *Atkins* claims were

previously unavailable because the evidence in support of their intellectual disability was unhindered by Arkansas's diagnostic standards. *See Williams*, 858 F. 3d at 474 ("The prejudice that Williams asserts, however, is that his counsel failed to obtain available evidence that would have shown Williams to be intellectually disabled, not that evidence of his intellectual disability was rendered ineffectual by out-of-date medical standards."); *Davis*, 854 F.3d at 967 ("But Davis does not allege that Arkansas uses out-of-date medical guides or otherwise fails to follow contemporary medical standards."). This language implies that if presented with a petitioner analogous to prisoners in Florida pre-*Hall* or in Texas pre-*Moore*, the Eighth Circuit might take those unconstitutional diagnostic standards into account when assessing the previous availability of an *Atkins* claim.

Then, in cases not concerning intellectual disability claims, the Fourth and the Tenth Circuits relied on pre-AEDPA doctrine to define "previously unavailable" with even more variation. The Fourth Circuit draws its definition from the abuse of the writ doctrine, which "considered whether the applicant's new claims were available at the time of the most recent federal proceeding." *See In re Williams*, 364 F.3d 235, 240 (4th Cir. 2004). Accordingly, it took the concept of "previously" to mean "a successive [authorization] motion must present claims that rely, at least in part, on evidence or Supreme Court decisions that the applicant could not have relied on in his last [authorization] motion." *Id.* It is unclear whether the Fourth Circuit's language that a claim "rely, at least in part," on new evidence or law would take into

consideration any reliance on the change in diagnostic standards post-*Hall* and *Moore*, even if the successive claim itself is based on *Atkins*.

The Tenth Circuit has determined the "previously unavailable" clause to replace the "narrow[] requirements of the old test for cause" in the cause and prejudice test. *See Daniels v. United States*, 254 F.3d 1180, 1197-98 (10th Cir. 2001). It then followed this Court's definition of cause in *Reed v. Ross*, 468 U.S. 1 (1984), to define unavailability as "'a constitutional claim [] so novel that its legal basis *is not reasonably available*' prior to [a] change in law." *Daniels*, 254 F.3d 1180 (citing *Reed*, 468 U.S. at 16)). The Eleventh Circuit has described *Hall* as a new rule of constitutional law because

> [n]othing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff. This is plainly a new obligation that was never imposed on the states, under the clear language of *Atkins*, and of *Hall* itself.

In re Henry, 757 F.3d 1151, 1159 (11th Cir. 2014).

So if the Tenth Circuit agreed with the Eleventh Circuit's description in *Henry*, it seems plausible the Tenth Circuit would reach the opposite conclusion than that of the Eleventh Circuit and find that an intellectual disability claim reliant on *Hall*'s change in diagnostic standards rendered the claim previously unavailable. Resolution of this issue by any of these circuits in the future will further deepen the split.

B. This Court Should Resolve the Split in the Circuits

Because the circuit courts' varied definitions and factors regarding the "previously unavailable" clause have caused critical discrepancies for successor applicants, and because this question is beyond this Court's reach by certiorari or

appeal, this Court should take this opportunity to address the issue and resolve the split in the circuits.

In recent years, this has become increasingly relevant in the context of intellectual disability claims, as three Circuits have now faced this question under the expediency of a warrant with varied results. *See Bowles*, App. 1 (Eleventh Circuit denied successor authorization); *Johnson*, 2019 WL 3814384, at *9 (Fifth Circuit granted successor authorization); *Williams*, 858 F. 3d at 474 (Eighth Circuit denied successor authorization). The Eleventh Circuit noted that it is "not bound" by the decisions of other circuits, so there is reason to think the division will continue. *See* App. 11. Especially concerning is that a split has developed between the Fifth and Eleventh Circuits, the home circuits to cases originating in Texas and Florida respectively. This Court recently found both states' procedures for determining intellectual disability constitutionally infirm. *See Moore v. Texas*, 137 S. Ct. 1039 (2017) (finding Texas's reliance on factors not based in the teachings of the medical community unconstitutional); *Hall v. Florida*, 572 U.S. 701 (2014) (finding Florida's brightline cutoff requiring a 70 IQ score in contradiction to the standard error of measurement unconstitutional). As a result of the split, prisoners raising intellectual disability claims that would not have qualified under the prior diagnostic standards in each state have the potential for federal review of their intellectual disability claim within the Fifth Circuit, but not the Eleventh.

CONCLUSION

The petition for a writ of habeas corpus should be granted, or, alternatively, transferred to the district court for a hearing and determination.

Respectfully submitted,

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