No. 19-5682

In the

Supreme Court of the United States

IN RE GARY RAY BOWLES, *Petitioner*,

PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF IN OPPOSITION
TO PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS

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CAPITAL CASE

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

QUESTION PRESENTED

Whether this Court should grant an original writ raising a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014).

INTRODUCTION

Bowles seeks an original writ of habeas corpus from this Court asserting that he is intellectually disabled. But Bowles is not intellectual disabled as his school records demonstrate. Bowles cannot establish a *prima facie* case of intellectual disability. The original writ should be denied.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Gary Ray Bowles was on probation for robbery when he met the victim, Walter Hinton, at Jacksonville Beach. Hinton allowed Bowles to move into his mobile home in exchange for Bowles helping him move. On November 16, 1994, Hinton, Bowles, and a friend smoked some marijuana and drank some beers. After dropping the friend off at the train station, Hinton went to sleep in his bedroom. Bowles went outside the mobile home and picked up a 40-pound concrete stepping stone. Shortly thereafter, Bowles went into Hinton's bedroom and dropped the concrete stone on Hinton's head, fracturing Hinton's face from cheek to jaw. Bowles then strangled Hinton. Bowles stuffed toilet paper down Hinton's throat and shoved a rag into Hinton's mouth, smothering him. Hinton died of asphyxiation. *See generally Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998); *Bowles v. State*, 979 So.2d 182, 184 (Fla. 2008). Afterward, Bowles drove to get some liquor and then picked up a woman on the beach and brought her back to Hinton's home. *Bowles v. DeSantis*, 2019 WL 3886503, *2 (11th Cir. Aug. 19, 2019). Bowles was arrested about six days later, driving Hinton's car and wearing Hinton's watch. *Id.* at *2. Bowles confessed to the murder both orally and in writing. *Bowles*, 979 So.2d at 184. Bowles entered a guilty plea to first-degree murder. *Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998).

Warrant litigation in federal court

On July 11, 2019, Bowles, represented by the CHU-N, filed a civil rights action, pursuant to 42 U.S.C. § 1983, in federal district court, asserting that he had a federal statutory right, under 18 U.S.C. § 3599, for his federal habeas counsel to represent him during the state clemency proceedings, despite the state providing clemency counsel. *Bowles v. DeSantis, Gov. of Fla., et al.*, No. 4:19-cv-00319 (N.D. Fla. 2019). Bowles also filed a motion to stay the execution. (Doc. #5). On July 17, 2019, the Defendants filed a response to the motion to stay. (Doc. #19). Bowles filed a reply. (Doc. #22). On July 19, 2019, the district court denied the stay. (Doc. #25). On July 24, 2019, the Defendants filed a motion to dismiss the § 1983 action for failure to state a claim. (Doc. #26).

On August 1, 2019, Bowles filed an appeal of the district court's denial of the stay to litigate his § 1983 action in the Eleventh Circuit Court of Appeals. *Bowles v. DeSantis, Gov. of Fla., et al.*, No. 19-12929-P. Bowles also filed a motion to stay his execution to allow time for "meaningful" review of his appeal in the Eleventh Circuit. On August 9, 2019, the Defendants filed a response to the motion to stay. On August 19, 2019, the Eleventh Circuit denied the motion to stay in a published opinion. *Bowles v. DeSantis, Gov. of Fla.*, ___ F.3d ___, 2019 WL 3886503 (11th Cir. Aug. 19, 2019) (No. 19-12929-P).

On August 20, 2019, Bowles then filed a petition for a writ of certiorari in this Court from the Eleventh Circuit's opinion. *Bowles v. DeSantis, Gov. of Fla., et al.*, No. 19-5651. Bowles also filed an application for a stay of the execution. *Bowles v. DeSantis, Gov. of Fla.*, No. 19A203. On August 21, 2019, Defendants filed their brief in opposition and a response to the application for a stay. The petition from the Eleventh Circuit's denial of the stay is still pending in this Court.

On August 14, 2019, Bowles represented by the CHU-N, filed a second federal habeas petition in the federal 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 v. Sec'y, Fla. Dept. of Corr.*, 3:19-cv-00936 (M.D. Fla. 2019) (Doc. #1). Bowles also filed a motion to stay the execution. (Doc. #2). On August 16, 2019, the State filed a motion to dismiss the second petition asserting it was a successive habeas petition filed without the statutory required authorization from the Eleventh Circuit. (Doc. #8). The State noted that Bowles' first federal habeas petition which was filed in 2008 had raised ten claims, but an *Atkins* claim was not raised in the first habeas petition, despite *Atkins* being decided over six years earlier in 2002. (Doc. #8 at 3 citing *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)). The State also asserted that filing a habeas petition under 28 U.S.C. § 2241 could not be used as a means to evade the Congressional limitations on successive habeas petitions by state prisoners. (Doc. #8 at 13-20). On August 16, 2019, the State of Florida also filed a response to the motion to stay. (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 dismissed the second petition for lack of jurisdiction concluding that the petition was actually a successive § 2254 petition filed without authorization from the Eleventh Circuit and denied the stay as moot. (Doc. #11).

On August 19, 2019, Bowles filed an application for authorization to file a successive habeas petition in the Eleventh Circuit Court of Appeals. *In re Bowles*, No. 19-13149 (11th Cir. Aug. 19, 2019). Bowles also filed a motion to stay the execution. On August 20, 2019, the State of Florida filed a response to the application and a response to the motion to stay. On August 21, 2019, the CHU-N filed a reply. On August 22, 2019, the Eleventh Circuit denied the application to file a successive habeas petition in a published opinion. *In re Bowles*, ___ F.3d ___ (Fla. Aug. 22, 2019) (No. 19-13149-P).

Bowles appealed the district court's dismissal for lack of jurisdiction to the Eleventh Circuit. *Bowles v. Sec'y, Fla. Dept. of Corr.*, No. 19-13150-P (11th Cir. 2019). Bowles also filed a motion for a stay of execution. Respondents filed a response in opposition to the motion to stay. On August 21, 2019, the Eleventh Circuit denied the stay in a published opinion. *Bowles v. Sec'y, Fla. Dept. of Corr.*, ___ F.3d ___, 2019 WL 3946888 (11th Cir. Aug. 21, 2019) (No. 19-13150-P).

On August 22, 2019, Bowles filed a petition for a writ of certiorari in this Court from the Eleventh Circuit's opinion denying the stay of execution in the appeal of the district court's dismissal. *Bowles v. Inch, Sec'y, Fla. Dept. of Corr.*, No. 19-5672. Bowles also filed an application for a stay of the execution in this Court. *Bowles v. Inch, Sec'y, Fla. Dept. of Corr.*, No. 19A213. On August 22, 2019, Respondents filed a brief in opposition and a response to the motion to stay.

On August 22, 2019, less than one hour before the scheduled execution, Bowles filed a original habeas petition in this Court. This is the State of Florida's response to the original petition.

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF HABEAS CORPUS RAISING A CLAIM OF INTELLECTUAL DISABILITY BASED ON *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), AND *HALL V. FLORIDA*, 572 U.S. 701 (2014).

Beeks seeks an original writ of habeas corpus from this Court asserting that he is intellectually disabled. But Bowles is not intellectually disabled. His achievement tests and grades in elementary school conclusively rebut his claim of intellectual disability. Bowles cannot establish a *prima facie* showing of intellectual disability sufficient to warrant this Court remanding for an evidentiary hearing on the claim. This Court's decision in *Hall v. Florida*, 572 U.S. 701 (2014), does not apply for two reasons. First, the third prong of onset is at issue in this case. *Hall v. Florida* does not apply to a defendant who fails the third prong, as Bowles does. Second, Bowles does not fall within the Hall v. Florida range because his collective IQ score is above 75. *Hall v. Florida* does not apply to a defendant who IQ scores are above 75. No evidentiary hearing is required. Therefore, this Court should deny the petition.

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*, 139 S.Ct. 2671 (June 3, 2019) (No. 18-8653).

This Court has employed similar three prong tests. *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).

The standard tests for intellectual disability has three prongs, all of which must be established. 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").

All of the IQ scores in this case are from defense experts. But 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.[1] An IQ of 77 is not significantly subaverage intelligence. Bowles' collective IQ score is above 75. So, it falls outside of the statistical error of measurement of 75 or below set by this Court in *Hall v. Florida*. Bowles fails the first prong.

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[1] 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. **All** three IQ scores were from **defense experts.**

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. 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.

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-V), *cert. denied, Wright v. Florida*, 2019 WL 1458194 (June 3, 2019).

Bowles does not have significant deficits in adaptive functioning. Bowles 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"); *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). 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 had may well 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 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 another 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 also fails the 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 that Bowles is not intellectually disabled.

Professional manuals

Bowles relies heavily on the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), published in 2013, which is the professional manual of the American Psychiatric Association. But as this Court in *Hall v. Florida* explained, the views of the medical community should inform but not dictate a court's decision. *Hall v. Florida*, 572 U.S. 701, 721 (2014). It is a court's duty to interpret the Constitution, and, while it does not do so in isolation, a "legal determination of intellectual disability is distinct from a medical diagnosis." *Id.* While current medical standards should not be totally disregarded, "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, 137 S.Ct. 1039, 1049 (2017).

Bowles seeks to have the law dictated to this Court by the American Psychiatric Association with each new publication of the DSM. *Hall v. Florida*, 572 U.S. at 731 (Alito, J., dissenting) (explaining that our society's standards, are the standards of the American people, not the standards of professional associations, which represent only the views of a small professional elite). Under such a view, Congress' prohibition on successive habeas petitions, enacted as part of the AEPDA, must bow to an unelected group of psychiatrists, many of whom are anti-death penalty advocates.

Furthermore, considering the DSM-V as part of any "previously unavailable" analysis, as the Fifth Circuit did in *In re Johnson*, 2019 WL 3814384 (5th Cir. Aug. 14, 2019), is improper. "Previously unavailable" should be based only on new cases from

this Court, not on professional manuals. *In re Bowles*, ___ F.3d ___ (Fla. Aug. 22, 2019) (No. 19-13149-P) (a new rule of constitutional law "depends solely on Supreme Court decisions, not on the issuance of a new diagnostic manual by the American Psychiatric Association or in a decision of a sister circuit"). The statutory exception for filing successive habeas petitions in § 2244(b)(2)(A) refers to new rules of constitutional law from this Court, not professional manuals.

The Flynn Effect

None of the IQ scores should be adjusted by the Flynn Effect. The majority of state supreme courts and federal circuit courts reject the use of the Flynn Effect. *Quince v. State*, 241 So.3d 58, 60-62 (Fla. 2018) (quoting the expert testimony at the evidentiary hearing and concluding that *Hall v. Florida* does not require that IQ scores be adjusted for the Flynn Effect cited numerous federal circuit court cases), *cert. denied*, *Quince v. Florida*, 139 S.Ct. 202 (2018) (No. 18-5018); *Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017) (noting that neither *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), nor *Hall v. Florida* requires that IQ scores be adjusted for the Flynn Effect and observing that neither case even mention the concept), *cert. denied*, *Black v. Mays*, 138 S.Ct. 2603 (2018) (No. 17-8275); *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015) (noting it is not common practice to adjust IQ scores for the Flynn Effect); *Smith v. Duckworth*, 824 F.3d 1233, 1244-46 (10th Cir. 2016) (following the Circuit's existing precedent of *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), and rejecting use of the Flynn Effect noting that *Hall v. Florida* says "nothing" about the Flynn Effect and observing that scientific and legal acceptance of this theory is "mixed"), *cert. denied*, *Smith v. Royal*, 137 S.Ct. 1333 (2017) (No. 16-7393); *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); *but see Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005).

And, as the Eleventh Circuit observed in *Ledford*, far from mandating numerically specific Flynn Effect reductions, the DSM-V does "little more than acknowledge the possibility that the Flynn Effect is a 'factor' that 'may' impact an individual's IQ score." *Ledford*, 818 F.3d at 638. The Eleventh Circuit additionally noted, while the DSM-V states that the Flynn Effect may affect intelligence scores, it "does not provide any guidance as to how a clinician should actually apply the Flynn Effect, let alone mandate any 0.3 point-per-year reduction for IQ scores obtained from tests with outdated norms." *Id.*

Considering the Flynn Effect as part of any "previously unavailable" analysis, as the Fifth Circuit did in *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), is improper even in jurisdictions that use the Flynn Effect for other parts of an *Atkins* analysis. The concept of "previously unavailable" should be based only on new cases from this Court, not on studies, such as the Flynn Effect. The statutory exception for filing successive habeas petitions in § 2244(b)(2)(A) refers to new rules of constitutional law from this Court, not studies.

And, regardless of its scientific validity or acceptance within the medical community, the Flynn Effect, which posits that the entire population is becoming smarter over time and all IQ scores must be adjusted based on a bell curve, is fundamentally inconsistent with the entire rationale of *Atkins* itself. If the human race is uniformly becoming more intelligent, then the reasoning underlying *Atkins* is not valid. The Eighth Amendment does not depend on a bell curve.

Bowles' IQ scores should not be adjusted for the Flynn Effect.

Prima facie showing and standard of proof

Bowles fails all three prongs of the test for intellectual disability. Bowles is not intellectually disabled. He certainly cannot make a *prima facie* showing taking into account the standard of proof of clear and convincing evidence required by Florida's intellectual disability statute. *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).

Hall v. Florida does not apply

In *Hall v. Florida*, 572 U.S. 701 (2014), this 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 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) (emphasis added). 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*. *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 or, actually, it is not at issue because Bowles' existing schools record conclusively rebut any claim that he was intellectually disabled as a child. 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. Parts of Bowles' school records from Kankakee Illinois School District 111 were discussed during the 2005 postconviction evidentiary hearing held in the state court. Bowles made As and Bs in first grade. His grades in first grade were an A, a B, another B, and another A in

regular classes. Bowles also 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 elementary school. Additionally, one of the handwritten notations on the numerous achievement tests in his school records is "high normal." A child with intellectual disability cannot make "high normal" scores on numerous achievement tests over the years.

While opposing counsel refers to another 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 also fails the third prong. The school records are the most reliable evidence of his true intellectual abilities.

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.

Second, *Hall v. Florida* does not apply to any defendant whose full-scale IQ score is above 75. It is only defendants with IQ test scores between 70 and 75 or lower that are entitled to an evidentiary hearing. *Hall v. Florida*, 572 U.S. at 722 (explaining that "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.") (citation omitted). As this Court repeated 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. This 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 (emphasis added). As is clear from both *Hall v. Florida* and *Moore v. Texas*, a defendant whose IQ is above 75 is not entitled to an evidentiary hearing. *See also In re Henry*, 757 F.3d 1151, 1161-63 (11th Cir. 2014) (denying a capital petitioner authorization to file a successive habeas petition raising an *Atkins* claim because his IQ score was 78 which was above the *Hall v. Florida* cut-off of 75 and reading *Hall v. Florida* as "squarely" holding that it is only defendants with IQ test scores "between 70 and 75 or lower" that are entitled to an evidentiary hearing); *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*, 139 S.Ct. 2671 (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.[2] His collective IQ

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[2] 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.

score is, at least, 77 which is above 75. So, *Hall v. Florida* does not apply to Bowles.

Hall v. Florida does not apply to this case for both of these reasons. Under this Court's caselaw, no evidentiary hearing is required.

Accordingly, this Court should deny the original writ.

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 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.

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 the mean does not accomplish much the same goal in the case of low scorers. Instead of using the composite score, however, opposing counsel simply ignores the prior IQ score of 80 but that is not mathematically sound. 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. Neither the majority nor the dissent in *Hall* took the position that prior IQ scores were simply to be ignored, much less that prior IQ scores from ***defense*** experts can simply be ignored. *Hall v. Florida*, 572 U.S. at 714 (recommending the use of "composite" scoring); *Hall*, 134 S.Ct. at 2011 & n.13 (Alito, J., dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence"). Bowles' collective IQ is, at least, 77.

CONCLUSION

The petition for a writ of habeas corpus should be denied.

Respectfully submitted,

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