No. 19-5617

In the

Supreme Court of the United States

GARY RAY BOWLES, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ASHLEY MOODY
Attorney General of Florida

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
**Counsel of Record*

CHARMAINE M. MILLSAPS
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
capapp@myfloridalegal.com

CAPITAL CASE

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

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court holding that the claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), was untimely as matter of state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

In the

Supreme Court of the United States

No. 19-5617

GARY RAY BOWLES, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Bowles v. State*, ___ So.3d ___, 2019 WL 3789971 (Fla. Aug. 13, 2019) (SC19-1184).

JURISDICTION

On August 13, 2019, the Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. The Florida Supreme Court issued the mandate on the same day. Bowles, represented by Capital Collateral Regional Counsel - North (CCRC-N) and the Capital Habeas Unit of the Federal Public Defender Office

of the Northern District of Florida (CHU-N), then filed this petition for writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

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

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

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. Bowles confessed to the murder both orally and in writing. *See generally Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998); *Bowles v. State*, 979 So.2d 182, 184 (Fla. 2008). Bowles entered a guilty plea to first-degree murder. *Bowles v. State*, 716 So.2d 769, 770 (Fla. 1998). Following the penalty phase, the first jury recommended a death sentence and the trial court imposed a death sentence.

On direct appeal to the Florida Supreme Court, Bowles raised ten issues. *Bowles v. State*, 716 So.2d 769, 770, n.2 (Fla. 1998) (listing issues raised in the direct appeal). The Florida Supreme Court affirmed Bowles' conviction for premeditated first-degree murder but remanded for a second sentencing proceeding because the prosecution had made Bowles' hatred of homosexuals a feature of the first penalty phase. *Bowles*, 716 So.2d at 773.

At the second penalty phase in May 1999, Bowles was again represented by Chief Assistant Public Defender Bill White and new co-counsel Assistant Public Defender Brian Morrisey. Following the second penalty phase, the second jury recommended a death sentence unanimously. *Bowles v. State*, 804 So.2d 1173, 1175

(Fla. 2001).

The trial court found five aggravating circumstances: 1) Bowles was convicted of two other capital felonies and two other violent felonies; 2) Bowles was on felony probation when he committed the murder due to a 1991 Volusia County conviction; 3) the murder was committed during a robbery or an attempted robbery, and the murder was committed for pecuniary gain (merged into one factor); 4) the murder was heinous, atrocious, or cruel (HAC); and 5) the murder was cold, calculated, and premeditated (CCP). *Id.* at 1175. The trial court assigned "tremendous weight" to the prior violent capital felony convictions. *Id.* Indeed, the trial court found the March 15, 1994, prior murder of John Roberts to be "eerily similar" to the facts of the Hinton murder (sentencing order at 106). In the prior Roberts murder, a few days after moving into the victim's home, Bowles approached the victim from behind and hit him with a lamp. *Id.* at 1176. A struggle ensued during which Bowles strangled the victim and stuffed a rag into his mouth. Bowles then emptied the victim's pockets, took his credit cards, money, keys, and wallet. *Id.* Bowles also murdered Albert Morris in May of 1994 in Nassau County. In the prior Morris murder, the victim befriended Bowles and allowed Bowles to stay at his home. *Id.* Bowles and the victim got into a fight in which Bowles hit the victim over the head with a candy dish and then shot the victim in the chest. Bowles also strangled the victim and tied a towel over his mouth. *Id.* Regarding the remaining aggravators, the trial court assigned great weight to the HAC and CCP aggravators, significant weight to the robbery-pecuniary gain aggravator, and some weight to the "on probation" aggravator. *Id.*

The trial court rejected both statutory mental mitigators. *Bowles*, 804 So.2d at 1176. The trial court found the following nonstatutory mitigating factors: significant weight to Bowles' abusive childhood; some weight to Bowles' history of alcoholism and absence of a father figure; little weight to Bowles' lack of education; little weight to Bowles' guilty plea and cooperation with police in this and other cases; and little

weight to Bowles' use of intoxicants at the time of the murder. *Id.* The trial court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances and imposed a death sentence. *Id.*

On appeal to the Florida Supreme Court from the resentencing, Bowles raised 12 issues. *Bowles v. State*, 804 So.2d 1173, 1175 (Fla. 2001). The Florida Supreme Court affirmed the death sentence concluding that the death sentence was proportionate. *Id.* at 1184.

Bowles then filed a petition for writ of certiorari in the United States Supreme Court raising three issues: 1) the prosecutor's use of peremptory challenges to remove prospective jurors who expressed reservations about the death penalty; 2) the trial court erred in refusing to give a special jury instruction defining mitigation; and 3) the trial court erred in refusing to give a special jury instruction informing the jury to consider mental mitigation in weighing the HAC aggravator. On June 17, 2002, the United States Supreme Court denied the petition. *Bowles v. Florida*, 536 U.S. 930 (2002) (No. 01-9716). So, Bowles' conviction and death sentence became final on June 17, 2002.

On December 9, 2002, Bowles, represented by registry counsel Frank Tassone, filed an initial postconviction motion in state court. On August 29, 2003, Bowles filed an amended postconviction motion asserting nine claims. *Bowles v. State*, 979 So.2d 182, 186, n.2 (Fla. 2008) (listing the 3.851 claims in a footnote). Bowles also filed a "Motion to Reopen Testimony," arguing that *Crawford v. Washington*, 541 U.S. 36 (2004), required reversal because he was denied the opportunity to confront his accusers. *Bowles*, 979 So.2d at 186.

The Honorable Jack Marvin Schemer presided at the original penalty phase, the second penalty phase, and the postconviction proceedings in state court. On February 8, 2005, the trial court held an evidentiary hearing. During the postconviction evidentiary hearing in state court, among the defense witnesses was Dr. Harry Krop,

a licensed clinical psychologist, with a specialization in forensic psychology. Dr. Krop evaluated Bowles on three separate occasions between 2003 and 2004. (Vol. III 89). Dr. Krop had administered a comprehensive neuropsychological examination to Bowles which revealed among other things, that Bowles' IQ was in the "low 80's." (Vol. III 118). Dr. Krop acknowledged that he had diagnosed Bowles with both anti-social personality disorder as well as conduct disorder. (Vol. III 137-38, 139). On August 15, 2005, the state postconviction court denied postconviction relief following the evidentiary hearing as well as the motion to reopen testimony.

In the postconviction appeal to the Florida Supreme Court, Bowles raised five issues. *Bowles*, 979 So.2d at 186. The Florida Supreme Court affirmed the trial court's denial of postconviction relief. Bowles also filed a writ of habeas corpus in the Florida Supreme Court raising two claims of ineffective assistance of appellate counsel. *Bowles*, 979 So.2d at at 193-94. The Florida Supreme Court rejected the two claims of ineffective assistance of appellate counsel.

On August 8, 2008, Bowles, represented by Frank Tassone, filed a federal habeas petition in the Middle District of Florida. *Bowles v. Sec'y, Dept. of Corr.*, 3:08-cv-791 (M.D. Fla. 2008). The federal habeas petition raised 10 claims. On December 23, 2009, the federal district court denied the habeas petition but granted a certificate of appealability (COA) on ground 1 regarding whether a prosecutor is prohibited from peremptorily striking jurors who express reservations about the death penalty. (Doc. #18).

Bowles then appealed to the Eleventh Circuit arguing the prosecutor's use of peremptory challenges to remove prospective jurors who express reservations about the death penalty violates the Sixth Amendment right to a jury; Due Process; and Equal Protection. On June 18, 2010, the Eleventh Circuit affirmed the district court's denial of the habeas petition. *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010).

Bowles then filed a petition for writ of certiorari in the United States Supreme

Court raising the peremptory challenge claim. On November 29, 2010, the United States Supreme Court denied the petition. *Bowles v. McNeil*, 562 U.S. 1068 (2010) (No. 10-6587).

On April 10, 2013, Bowles filed a successive 3.851 postconviction motion raising two claims of ineffective assistance of appellate counsel relying on *Martinez v. Ryan*, 566 U.S. 1 (2012). On July 17, 2013, the trial court denied the successive postconviction motion. Bowles did not appeal the denial of the successive motion to the Florida Supreme Court.

On June 14, 2017, Bowles filed a second successive postconviction motion in the state trial court raising a claim that his death sentence violated *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S.Ct. 2161 (2017) (No. 16-998). On August 22, 2017, the trial court denied the successive postconviction motion concluding that *Hurst* did not apply retroactively to Bowles. Bowles appealed the summary denial of the successive *Hurst* claim to the Florida Supreme Court. On January 29, 2018, the Florida Supreme Court affirmed the trial court's denial of the *Hurst* claim. *Bowles v. State*, 235 So.3d 292 (Fla. 2018) (SC17-1754), *cert. denied*, *Bowles v. Florida*, 139 S.Ct. 157 (2018) (SC 17-1754). The Florida Supreme Court concluded that *Hurst* did not apply retroactively to Bowles.

On October 19, 2017, Bowles filed a third successive postconviction motion 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). The State filed a motion to strike because the successive postconviction motion did not attached reports from all the named experts, as required by Florida Rule of Criminal Procedure rule 3.203(c)(2). Furthermore, after registry counsel withdrew and Capital Collateral Regional Counsel - North (CCRC-N), was appointed as state postconviction counsel, the trial court gave the new attorneys 90 days to familiarize themselves with the case and decide whether they would adopt the pending motion or file an amended successive postconviction

motion.

Warrant litigation

On June 11, 2019, Governor DeSantis signed a death warrant setting the execution for Thursday, August 22, 2019 @ 6:00 p.m. (Succ. PCR 2019 at 404-405).

On July 1, 2019, Bowles, now represented by Capital Collateral Regional Counsel - North (CCRC-N) and the Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU-N), filed another successive 3.851 postconviction motion in the state trial court raising a single claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014). (PCR 2019 at 732-835).[1] On July 3, 2019, the State filed an answer to the successive postconviction motion. (PCR 2019 at 899-923). The State asserted that the intellectual disability claim was untimely under *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied*, *Blanco v. Florida*, 139 S.Ct. 1546 (2019), and *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed*, *Harvey v. Florida*, No. 18-1449 (May 17, 2019). Alternatively, the State asserted that the claim was meritless

---

[1] On March 25, 2019, the state trial court allowed Francis Shea to withdraw and appointed Capital Collateral Regional Counsel-North (CCRC-N) as state postconviction counsel. On March 26, 2019, Karin Moore of CCRC-N entered a notice of appearance. On September 27, 2017, the federal district court permitted Frank Tassone and Rick Sichta to withdraw as federal habeas counsel and appointed the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N) as federal habeas counsel. *Bowles v. Sec'y, Dept. of Corr.*, No. 3:08-cv-791 (M.D. Fla.) (Doc. #33). On December 6, 2017, the federal district court also authorized the CHU-N to appear in state court as state postconviction co-counsel. *Bowles*, No. 3:08-cv-791 (Doc. #36). On June 13, 2019, the State of Florida filed a motion in federal district court to disqualify the CHU-N from appearing in state court. *Bowles*, No. 3:08-cv-791 (Doc. #39). On June 25, 2019, the federal district court denied the State's motion to disqualify the CHU-N as state postconviction co-counsel. *Bowles*, 3:08-cv-791 (Doc. #47). So, Bowles is currently represented in state court by CCRC-N and the CHU-N and in federal court by the CHU-N.

because it was conclusively rebutted by the existing record.

On July 11, 2019, the state trial court entered a written order summarily denying the intellectual disability claim. (PCR 2019 at 1344-53). The state trial court concluded that the claim of intellectual disability was untimely under Florida Supreme Court precedent and waived under rule 3.203(f).

Bowles appealed the summary denial of his successive postconviction motion to the Florida Supreme Court raising two issues: 1) the intellectual disability claim; and 2) a public records claim. *Bowles v. State*, ___ So.3d ___, 2019 WL 3789971 (Fla. Aug. 13, 2019) (SC19-1184). Bowles also filed a successive state habeas petition in the Florida Supreme Court raising a claim that the death penalty itself violates the Eighth Amendment. *Bowles v. Inch*, ___ So.3d ___, 2019 WL 3789971 (Fla. Aug. 13, 2019) (SC19-1264). Bowles also filed a motion to stay the execution in both cases.

On August 13, 2019, the Florida Supreme Court affirmed the trial court's summary denial of the successive postconviction motion. *Bowles*, 2019 WL 3789971 at *1. The Florida Supreme Court rejected the intellectual disability claim as untimely relying on their existing precedent. *Id.* at *2-*3. The Florida Supreme Court also denied the state habeas petition relying on the conformity clause in the state constitution and on this Court's precedent rejecting Eighth Amendment challenges to the death penalty. *Id.* at *4. Additionally, the Florida Supreme Court denied both motions to stay the execution. *Id.* at *1.

Bowles, represented by CCRC-N and CHU-N, then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's opinion.[2]

---

[2] The CHU-N's appearance in state court as state postconviction co-counsel violates this Court's decision in *Harbison v. Bell*, 556 U.S. 180 (2009). This Court in *Harbison* emphasized that § 3599 provides for counsel "***only*** when a state petitioner is unable to obtain adequate representation." *Id.* at 189 (emphasis added). The *Harbison* Court explained that "state-furnished representation renders him ***ineligible*** for § 3599 counsel." *Id.* (emphasis added).

This is the State of Florida's brief in opposition.

Federal habeas counsel may not appear in state court as state postconviction counsel, if the state provides state postconviction counsel which Florida does. § 27.7001, Fla. Stat. (2016) (stating that it was "the intent of the Legislature . . . to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings . . . may be commenced in a timely manner . . ."); *State v. Kilgore*, 976 So.2d 1066, 1068 (Fla. 2007) ("Florida has an explicit statutory scheme in place to provide postconviction counsel to all capital defendants" citing § 27.7001, Fla. Stat.). Florida has increased its minimum qualifications for lead state postconviction counsel and they are now among the highest in the nation. Fla. R. Crim. P. rule 3.112(k); *In Re: Amendments to the Fla. Rules of Judicial Admin.; the Fla. Rules of Criminal Procedure; and the Fla. Rules of Appellate Procedure — Capital Postconviction Rules*, 148 So.3d 1171, 1173 (Fla. 2014) (adopting rule 3.112(k) and requiring that all lead postconviction attorneys appointed after the effective date of April of 2015 have three years of prior capital postconviction litigation experience). Florida provides more than adequate representation.

The federal district courts in Florida are ignoring this Court's decision in *Harbison* and are routinely improperly authorizing the CHU to appear as state postconviction counsel, despite Florida providing highly-qualified postconviction counsel, just as the district court did twice in this case. *See, e.g., Alston v. Sec'y, Fla. Dept. of Corr.*, No. 3:04-cv-257 (M.D. Fla. Doc. #118); *Archer v. Jones*, No. 3:06-cv-312 (N.D. Fla. Doc. #78); *Bailey v. Jones*, No. 5:14-cv-333 (N.D. Fla. Doc. #51); *Booker v. Jones*, No. 1:08-cv-143 (N.D. Fla. Doc. #60); *Bowles v. Sec'y, Dept. of Corr.*, No. 3:08-cv-791 (M.D. Fla.) (Docs. #36 & #47) (this case); *Carter v. Sec'y, Fla. Dept. of Corr.*, No. 3:15-cv-1198 (M.D. Fla. Doc. #22); *Foster v. Jones*, No. 5:03-cv-108 (N.D. Fla. Doc. #63); *Grim v. Jones*, No. 3:08-cv-002 (N.D. Fla. Doc. #64); *Guardado v. Jones*, No. 4:15-cv-256 (N.D. Fla. Doc. #20); *Heath v. Jones*, No. 1:09-cv-148 (N.D. Fla. Doc. #115); *Hertz v. Jones*, No. 4:06-cv-507 (N.D. Fla. Doc. #51); *Hutchinson v. Jones*, No. 3:13-cv-128 (N.D. Fla. Doc. #69); *Lawrence v. Jones*, No. 3:03-cv-97 (N.D. Fla. Doc. #87); *McMillian v. Sec'y, Fla. Dept. of Corr.*, No. 3:16-cv-923 (M.D. Fla. Doc. #10); *Rigterink v. Sec'y, Fla. Dept. of Corr.*, No. 8:16-cv-1680 (M.D. Fla. Doc. #9); *Stephens v. Sec'y, Fla. Dept. of Corr.*, No. 3:08-cv-260 (M.D. Fla. Doc. #28); *Wade v. Sec'y, Fla. Dept. of Corr.*, No. 3:15-cv-200 (M.D. Fla. Doc. #26). This Court should follow its own decision in *Harbison*, even if the Florida district courts refuse to do so, and not permit federal habeas counsel, the CHU-N, to appear as counsel of record in this case because it is an appeal from a state postconviction proceeding in which Florida provided state postconviction counsel, specifically CCRC-N.

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE CLAIM OF INTELLECTUAL DISABILITY BASED ON *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), AND *HALL V. FLORIDA*, 572 U.S. 701 (2014), WAS UNTIMELY AS MATTER OF STATE LAW.

Petitioner Bowles seeks review of the Florida Supreme Court's decision holding that his claim of intellectual disability based on *Atkins* and *Hall v. Florida* was untimely under state law. This Court should not grant review of an issue that is time barred under state law. This Court does not review decisions that are based solely on state law. Furthermore, there is no conflict between this Court's decision and the Florida Supreme Court's decision. This Court has repeatedly held that a constitutional right may be forfeited by the failure to timely assert the right. Nor is there any conflict between the Florida Supreme Court's decision that the claim is untimely and that of any other federal appellate court or state supreme court. Opposing counsel cites to no majority opinion from any federal appellate court or state supreme court holding that intellectual disability claims may not be time barred. Alternatively, the intellectual disability claim does not warrant an evidentiary hearing under this Court's precedent. This Court's decision in *Hall v. Florida* does not apply on two different bases. Even if the claim had been timely, Bowles would not be entitled to an evidentiary hearing under *Hall v. Florida*. Because the petition presents an issue that is time barred as a matter of state law about which there is no conflict, this Court should deny review of this claim.

The Florida Supreme Court's decision in this case

Bowles appealed the state trial court's denial of his successive postconviction motion as time barred to the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's summary denial of the intellectual disability claim as

untimely. *Bowles v. State*, ___ So.3d ___, 2019 WL 3789971 (Fla. Aug. 13, 2019) (SC19-1184). The Florida Supreme Court held that Bowles' intellectual disability claim was untimely relying on their prior precedent of *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), *cert. denied, Blanco v. Florida*, 139 S.Ct. 1546 (2019) (No. 18-7226); *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *pet. for cert. filed, Harvey v. Florida,* No. 18-1449 (May 17, 2019); and *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016) (unpublished). *Bowles*, 2019 WL 3789971 at *2. The Florida Supreme Court found that the claim was untimely because the claim should have been raised years ago shortly after this Court's decision in *Atkins* was issued rather than being raised for the first time in 2017. *Id.* at *2. The Florida Supreme Court also rejected an argument regarding the good cause exception to Florida Rule of Criminal Procedure, rule 3.203(f). *Id.*

Untimely as a matter of state law

The Florida Supreme Court concluded that the claim of intellectual disability was untimely under their existing precedent and the applicable Florida rule of court, Florida Rule of Criminal Procedure, rule 3.203. The Florida Supreme Court found that the claim was untimely because it should have been raised years ago in the wake of the *Atkins* decision, as required by rule 3.203, not over a decade later in 2017. *Bowles*, 2019 WL 3789971 at *2. But rule 3.203 is a matter of state law.

This Court does not grant review of claims that are a matter of state law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining that respect for the "independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground" for the decision). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041. As Justice Story explained, over 200 years ago, the Judiciary Act of 1789 vested this Court with

no jurisdiction unless a federal question is being raised. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (citing *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809)). There is no federal question presented in the petition.

The Florida Supreme Court decided the timeliness of the claim as a matter of state law and therefore, the Florida Supreme Court's decision is not subject to review by this Court. On this basis alone, review should be denied.

No conflict with this Court's jurisprudence

Furthermore, there is no conflict with this Court's decisions. There is no case from this Court holding, or even hinting, that an *Atkins* claim may not be time barred. This Court has stated that constitutional claims can be forfeited if not raised in a timely manner. *Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (observing that the "most basic rights of criminal defendants are similarly subject to waiver" citing cases including *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.")). Indeed, this Court has observed that a "constitutional claim can become time-barred just as any other claim can." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983). And there certainly are cases from this Court holding that claims pursued in a dilatory manner in capital cases should be dismissed. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories"); *Calderon v. Thompson*, 523 U.S. 538, 585 (1998) ("The federal courts can and should protect States from dilatory or speculative suits.").

Opposing counsel really seems to be asserting that the Eighth Amendment prohibits all time bars, all waivers, and all procedural bars in any capital case or, at

least, in any capital case raising a "fundamental" constitutional claim. But both this Court and lower federal courts routinely enforce time bars and procedural bars in capital habeas cases, including in capital habeas cases raising "fundamental" constitutional claims. *Lawrence v. Florida*, 549 U.S. 327, 337 (2007) (affirming the dismissal of a capital habeas petition as untimely). The circuit courts have rejected challenges to the habeas statute of limitations which acts as a time bar to any federal habeas review of all types of constitutional claims. *See, e.g., Hill v. Dailey*, 557 F.3d 437 (6th Cir. 2009) (holding the statute of limitations for habeas petitions did not violate Suspension Clause); *Martin v. Ayers*, 52 Fed.Appx. 917 (9th Cir. 2002) (holding that the federal habeas statute of limitations did not violate Suspension Clause); *Wyzykowski v. Dept. of Corr.*, 226 F.3d 1213 (11th Cir. 2000) (holding the AEDPA's one year statute of limitation was not per se unconstitutional as violative of Suspension Clause). And, while this Court created an actual innocence exception to the federal habeas statute of limitations, this Court also concluded that delays in bringing the actual innocence claim may be considered to reject the claim of innocence and enforce the time bar. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Indeed, in *Perkins* itself, on remand, the district court again concluded that the habeas petition "was properly dismissed as being barred by the statute of limitations" despite the claim of innocence. *Perkins v. McQuiggin*, 2013 WL 4776285, *3 (W.D. Mich. Sept. 4, 2013).

There is no conflict between this Court's view of the forfeiture of constitutional rights and the Florida Supreme Court's holding in this case.

No conflict with any federal appellate court or state supreme court

There is no conflict between the Florida Supreme Court's decision and that of any federal appellate court or state court of last resort decision either. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning

of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). In the absence of such conflict, certiorari is rarely warranted.

The State is not aware of any federal circuit court opinion or state supreme court decision holding that *Atkins* claims cannot be time barred. And any such opinion would have to explain this Court's observations to the contrary in *Peretz*, *Yakus*, and *Block*.

Instead of a majority opinion of a state supreme court, opposing counsel relied on dicta from the dissenting opinion in *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 757 (Mo. 2015) (Stith, J., dissenting). The dissenting opinion in *Clayton* asserted without citation that a claim of intellectual disability cannot be time barred. But the majority opinion of the Missouri Supreme Court rejected the *Atkins* claim as an *Atkins* claim because, while an injury had damaged the capital defendant's mental abilities, the defendant was of average intelligence as a child and therefore, he "cannot be intellectually disabled." *Id.* at 753. The majority concluded that the claim of brain damage was properly classified as a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), not as an *Atkins* intellectual disability claim. *Id.* at 753-54. The majority did not discuss whether *Atkins* claims can be time barred, because the majority did not view the claim as an *Atkins* claim. A petitioner may not rely on a dissenting opinion, much less a sole dissent, to establish conflict under this Court's rules.

There is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court.

Hall v. Florida does not apply

Even ignoring the time bar, this Court should not grant review of the intellectual disability claim because there is no conflict with this Court's jurisprudence

regarding the underlying *Atkins* claim.

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 to any defendant whose full-scale IQ score is above 75. As this Court clarified in *Moore v. Texas*, 137 S.Ct. 1039 (2017), it is only capital defendants whose IQ score is 75 or below that are entitled to an evidentiary hearing to explore the other two prongs. The *Moore* Court wrote that "*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement." *Id.* at 1049. 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.

But, as is clear from the *Moore* decision, a defendant whose IQ is above 75 is not entitled to an evidentiary hearing under *Hall v. Florida*. *See also Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) (explaining, it is only "when a defendant establishes an IQ

score range — adjusted for the SEM — at or below 70," that "a court must move on to consider the defendant's adaptive functioning" citing *Moore*, 137 S.Ct. at 1049), *cert. denied, Wright v. Florida*, 2019 WL 1458194 (June 3, 2019) (No. 18-8653). *Hall v. Florida* does not apply at all to a defendant whose collective IQ score is above 75.

Considered collectively, Bowles' IQ is between 77 and 79. His collective IQ score is above 75.[3] So, *Hall v. Florida* does not apply to Bowles. The state trial court and

---

[3] There are three IQ scores in the current record. Dr. Elizabeth McMahon, the defense expert hired by the Public Defender's Office prior to the first penalty phase, testified via depositions in the state postconviction proceedings. Dr. McMahon administered the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in 1995. According to Dr. McMahon, Bowles' full-scale IQ score was 80. (PCR 196, 239). Dr. Harry Krop, the defense expert in the initial state postconviction proceedings, administered the Wechsler Abbreviated Scale of Intelligence (WASI) in April of 2003. Dr. Krop, in his written report dated April 21, 2003, reported Bowles' IQ to be 83. Dr. Jethro Toomer, the defense expert in the current successive postconviction motion, stated that he administered the WAIS-IV to Bowles in October of 2017. According to Dr. Toomer's report, Bowles' full scale IQ score was 74. So, the three IQ scores in the existing record are 80, 83, and 74. The average of Bowles' three IQ scores is 79. The median of Bowles' three IQ scores is 78.5.

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

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"). Regardless of the particular method, the IQ scores should be

Florida Supreme Court did not violate this Court's directions in *Hall v. Florida*, as clarified in *Moore v. Texas*, by refusing to conduct an evidentiary hearing on the claim of intellectual disability. *Hall v. Florida* does not apply and therefore, Bowles was not entitled to an evidentiary hearing.

Second, *Hall v. Florida* does not apply because the third prong of the test for intellectual disability, that of the age of onset, is at issue in this case. The standard test for intellectual disability has three prongs, all of which must be established. *Hall v. Florida*, 572 U.S. at 710 (explaining that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual

---

considered collectively as is standard mathematical practice when measuring the same phenomena, such as IQ scores.

But 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). Regardless of its scientific validity or acceptance within the medical community, the Flynn Effect, which posits that the population is becoming smarter over time, is fundamentally inconsistent with the entire rationale of *Atkins* itself.

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.

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 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).

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

Hall v. Florida does not apply to this case for both of these reasons. Under this Court's caselaw, no evidentiary hearing was required. Even if the intellectual disability claim had been timely, Bowles' claim of an entitlement to an evidentiary hearing under *Hall v. Florida* is meritless. The Florida Supreme Court properly affirmed the denial of the intellectual disability claim without an evidentiary hearing.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

Carolyn M. Snurkowski
Associate Deputy Attorney General
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)
email: capapp@myfloridalegal.com
charmaine.millsaps@myfloridalegal.com