No. 19-5617

In the Supreme Court of the United States

GARY RAY BOWLES, PETITIONER,

v.

STATE OF FLORIDA

(CAPITAL CASE)

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

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS FLORIDA, NATIONAL DISABILITY RIGHTS NETWORK, AND BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF PETITIONER

JOHN C. ULIN
Counsel of Record
ARNOLD & PORTER
KAYE SCHOLER LLP
777 S. Figueroa St., 44th Floor
Los Angeles, CA 90017
(213) 243-4000
john.ulin@arnoldporter.com

ANDREW T. TUTT
STEPHEN K. WIRTH
SAMUEL F. CALLAHAN
KYLE LYONS-BURKE*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

* Member of the Virginia Bar practicing law in the District of Columbia during the pendency of his application for admission to the D.C. Bar under the supervision of lawyers of the firm who are members in good standing of the D.C. Bar.

CAPITAL CASE

QUESTIONS PRESENTED

1. Must an intellectually disabled person be allowed to raise a claim that he is "actually innocent of the death penalty" because of his intellectual disability notwithstanding an otherwise applicable procedural bar, as the Fourth and Sixth Circuits have held, or may such a claim be time barred, as the Fifth Circuit, Eleventh Circuit, Tennessee Supreme Court, and Florida Supreme Court have held?

2. Does the Florida Supreme Court's procedural bar violate the Eighth Amendment by creating an unacceptable risk of executing a person who is intellectually disabled?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE**

Disability Rights Florida is a non-profit organization founded in 1977 to serve as Florida's federally funded Protection and Advocacy (P&A) system for individuals with disabilities statewide. Its mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of people with disabilities through collaboration, education, and advocacy, as well as through litigation and legislative change. Disability Rights Florida has a responsibility to protect the legal and human rights of all persons with disabilities, and it has a deep interest in preserving the rights of the intellectually disabled in the criminal justice system.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated P&A and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and affiliated with the Native American Consortium, including the Hopi, Navajo and San Juan Southern Piute Nations. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

---

* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person, other than *amici curiae* or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified and consented in writing to the filing of this brief.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Through litigation, legislative and administrative advocacy, and public education, the Bazelon Center promotes equal opportunities for individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, community living, voting, and family rights.

Amici submit this brief because they are committed to fighting for the legal rights and inherent dignity of intellectually disabled individuals.

STATEMENT AND SUMMARY OF ARGUMENT

This case is not about when Mr. Bowles became eligible to claim intellectual disability, or when he should have filed his claim based on that eligibility, or whether his delay was "reasonable." This case is about whether Mr. Bowles is intellectually disabled. If he is, this Court's cases make clear that he cannot be executed. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 572 U.S. 701 (2014). But no court has even attempted to determine whether Mr. Bowles is intellectually disabled, despite compelling evidence that he is. Pet. 8-10.

This Court has long recognized that individuals sentenced to death must be permitted an opportunity to show that they are "actually innocent of the death penalty"—*i.e.*, ineligible for the death penalty—even if those claims would otherwise be procedurally barred. *Sawyer v. Whitley*, 505 U.S. 333, 335-336, 347 (1992). That is because, as Justices O'Connor and Kennedy explained, "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., joined by Kennedy, J., concurring).

Courts are divided over whether an intellectually disabled person may raise a claim of "actual innocence of the death penalty." Two federal courts of appeals have squarely held that the "actual innocence" gateway is open to individuals who can establish that they are ineligible for the death penalty because they are intellectually disabled. *See Prieto v. Zook*, 791 F.3d 465, 469 (4th Cir. 2015) (Motz, J.); *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014) (Moore, J.); *but see id.* at 506-507 (Sutton, J., dissenting in relevant part). In contrast, a divided panel of the Fifth Circuit has held that intellectually disabled individuals may not take advantage of the "actual innocence" gateway. *Henderson v. Thaler*, 626 F.3d 773, 779-781 (5th Cir. 2010) (Jolly, J.); *but see id.* at 783-789 (Wiener, J., dissenting). As has a divided panel of the Eleventh Circuit. *See In re Hill*, 715 F.3d 284, 296-301 (11th Cir. 2013) (Hull, J.); *but see id.* at 305-307 (Barkett, J., dissenting). A divided Tennessee Supreme Court reached a similar conclusion. *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). The Supreme Court of Florida has now joined the Fifth Circuit, the Eleventh Circuit, and the Tennessee Supreme Court on one side of this split, holding that Mr. Bowles—who has never had the opportunity to establish his intellectual disability to any court—may be forever barred from doing so.

The Florida Supreme Court, the Fifth Circuit, the Eleventh Circuit, and the Tennessee Supreme Court are incorrect. At minimum, an intellectually disabled person must be allowed, *at some point* prior to his execution, to prove that he is in fact ineligible for the death penalty. Whether because it is contrary to contemporary "standards of decency," *Hall*, 572 U.S. at 708 (Kennedy, J.), or "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or is offensive to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Herrera v. Collins*, 506 U.S.

390, 407-408 (1993) (Rehnquist, C.J.), this Court's precedents make clear that "[t]o impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708.

Just last term, this Court in *Madison v. Alabama* reaffirmed that a person cannot be put to death if he can no longer appreciate the reason for his punishment—no matter the cause, and no matter when that inability to comprehend takes hold. 139 S. Ct. 718 (2019). The point in *Madison*, fully applicable here, was that the Eighth Amendment categorically forbids the execution of someone who cannot understand why he is being put to death. The Court thus need not wade into any of the timing issues that drove the Supreme Court of Florida to deny Mr. Bowles relief. It need only stay Mr. Bowles execution, grant his petition for certiorari, and remand this case for a determination of whether he is in fact intellectually disabled.

ARGUMENT

I. Courts are Split Over Whether a Defendant Can Be Time-Barred From Claiming Categorical Ineligibility for the Death Penalty

In holding that Mr. Bowles's claim of intellectual disability is time-barred, the Supreme Court of Florida joined a split among state and federal courts on a question of critical importance. Courts are sharply divided over whether a procedural bar (typically a time bar) can prevent a defendant from claiming that he is categorically ineligible for the death penalty. This Court should grant certiorari to resolve the split.

This Court has held that procedural rules do not stand as a barrier to a defendant's claim that he is "actually innocent of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Under this rule—often called the

"fundamental miscarriage of justice" exception—"a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims … on the merits notwithstanding the existence of a procedural bar to relief." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). This Court has "applied the miscarriage of justice exception to overcome various procedural defaults" including "failure to observe state procedural rules." *Id.* at 392-393.

State courts, no less than federal courts, are required to excuse a prisoner's failure to observe state procedural rules where the application of the time bar would result in a miscarriage of justice. *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) ("The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"); *see McQuiggin*, 569 U.S. at 393-394. If State courts were not required to recognize the miscarriage of justice exception, federal habeas courts would have no power to look past otherwise adequate state procedural bars to review federal constitutional claims. *See Coleman v. Thompson*, 501 U.S. 722, 730-731, 750 (1991) (explaining that a federal court sitting in its habeas jurisdiction should not have greater powers to correct a State court judgment than a federal court on direct review). Federal courts emphatically do have that power. *Ibid.*; *McQuiggin*, 569 U.S. at 393.

Courts have sharply divided over how the fundamental miscarriage of justice exception applies to claims of intellectual disability. Multiple courts have refused to apply the exception to look past procedural barriers in cases where the defendant claims not that he is "*factually innocent*" of the underlying crime (*i.e.*, that someone else committed the murder), but rather that, guilt notwithstand-

ing, he is categorically ineligible for the death penalty.[1] Tennessee's Supreme Court, for example, in a divided opinion, declined to apply an "ineligibility for the death penalty" exception based on a claim of intellectual disability to the state's time-bar rules. *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). The dissent explained that the Court's holding violated due process. *Id.* at 617-619 (Wade, C.J., dissenting).

The Fifth Circuit has held similarly that a claim of ineligibility for the death penalty due to intellectual disability does not overcome the 1-year time bar in the Antiterrorism and Effective Death Penalty Act (AEDPA) under this Court's cases. *Henderson v. Thaler*, 626 F.3d 773, 779-781 (5th Cir. 2010) (Jolly, J.). Judge Wiener, dissenting, would not have applied the "actual innocence" analysis at all. *Id.* at 784-785. "An *Atkins* claim asserts a per se violation of the Eighth Amendment on the ground that the intellectually disabled petitioner is *constitutionally immune* from—'legally ineligible for,' rather than 'actually innocent of'—the death penalty." *Id.* at 784. "If we were to condone the barring of Henderson's *Atkins* claim by the AEDPA's statute of limitations, without ever

---

[1] This question is the subject of a broad split over whether the AEDPA extinguished the ability of prisoners to use the actual innocence gateway to establish that they are legally ineligible for the death penalty. The Fifth, Seventh, and Eleventh Circuits are aligned on one side in holding that actual innocence claims founded on legal ineligibility for the death penalty did not survive the enactment of the AEDPA. *See In re Hill*, 715 F.3d 284, 301 (11th Cir. 2013); *Henderson v. Thaler*, 626 F.3d 773, 779-81 (5th Cir. 2010); *Hope v. United States*, 108 F.3d 119, 119-20 (7th Cir. 1997). The Fourth, Sixth, and Ninth Circuits are aligned on the other side in holding that the actual innocence gateway may still be used to establish legal ineligibility for the death penalty. *See Prieto v. Zook*, 791 F.3d 465, 469 (4th Cir. 2015); *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014); *Thompson v. Calderon*, 151 F.3d 918, 924 & n.4 (9th Cir. 1998).

affording him a federal opportunity to demonstrate his intellectual disability, then allowing the State to execute him would not only be 'fundamentally unjust'; it would be unconstitutional *per se*." *Id.* at 788.

A divided panel of the Eleventh Circuit has also barred an intellectually disabled prisoner from accessing the actual innocence gateway. *See In re Hill*, 715 F.3d 284, 296-301 (11th Cir. 2013) (Hull, J.). In dissent, Judge Barkett explained that she would have held that prisoners may bring claims of actual innocence to establish their legal ineligibility for the death penalty because, among other reasons, "it simply cannot be that Congress would have intended AEDPA to preclude a federal court from hearing the claim of a juvenile or mentally retarded offender who obtains, albeit after the conclusion of his prior federal habeas proceedings, irrefutable proof that his status constitutionally bars his execution forever." *Id.* at 307 (Barkett, J., dissenting).

The Florida Supreme Court has now joined the Fifth Circuit, the Eleventh Circuit, and the Tennessee Supreme Court, applying a state-law time bar to preclude Mr. Bowles from even presenting his claim that he is categorically ineligible for the death penalty due to his intellectual disability. Cert. App. 5-6. Citing a slew of prior decisions in which the court had denied other intellectual-disability claims under the same procedural rule, the Florida Supreme Court held that "the record conclusively shows that Bowles' intellectual disability claim is untimely under our precedent." *Id.* at 6.

In contrast to the Fifth Circuit, the Eleventh Circuit, the Tennessee Supreme Court, and the Florida Supreme Court, a divided panel of the Sixth Circuit has held that intellectually disabled individuals may bring claims of "actual innocence of the death penalty" notwithstanding a failure to follow State procedural rules. *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014) (Moore, J.).

Applying *Sawyer*, the Sixth Circuit majority held that "a death-row prisoner can escape procedural default if he can 'show by clear and convincing evidence'" that he is intellectually disabled. *Ibid.* Judge Sutton dissented from the Court's holding that the petitioner could take advantage of the actual innocence gateway. *Id.* at 506-507 (Sutton, J., dissenting in relevant part). Judge Sutton explained that in his view, a prisoner may only bring an "actual innocence" claim where the constitutional error *caused* the individual to fail to observe state procedural rules. *See ibid.* "Otherwise, the concept of procedural default would *never* apply to *Atkins* claims—a remarkable irony given the Court's decision to delegate to state courts the best way to implement and enforce *Atkins*." *Id.* at 507.

The Fourth Circuit has similarly held that individuals may bring *Atkins* claims through the "actual innocence" gateway. In *Prieto v. Zook*, the Fourth Circuit explained that "'actual innocence' may also mean 'innocent of death' in the sentencing context." *Prieto v. Zook*, 791 F.3d 465, 469 (4th Cir. 2015) (Motz, J.). The Court thus held that the Court would excuse the petitioner's procedural default, if he could show that, "if instructed properly under *Hall* and *Atkins*, 'no reasonable juror' could have found him eligible for the death penalty under Virginia law." *Ibid.*

In addition to the Sixth and Fourth Circuits, numerous federal courts of appeals have recognized that the "actual innocence" gateway permits individuals to bring claims that they are "ineligible" for the death penalty. *See Sasser v. Norris*, 553 F.3d 1121, 1125 n.4 (8th Cir. 2009) ("A petitioner is 'actually innocent' of the death penalty where he is ineligible for the death penalty."), *abrogated on other grounds by Wood v. Milyard*, 566 U.S. 463 (2012); *Moran v. McDaniel*, 80 F.3d 1261, 1272 (9th Cir. 1996); *Black v. Workman*, 682 F.3d 880, 915 (10th Cir. 2012) ("This [actual-innocence] exception applies to those

who are actually innocent of the crime of conviction and those 'actually innocent' of the death penalty (that is, not eligible for the death penalty under applicable law)."); *Magwood v. Warden, Alabama Dep't of Corr.*, 664 F.3d 1340, 1346 (11th Cir. 2011) ("The actual innocence requirement focuses on those elements that render a defendant eligible for the death penalty.").

The Florida Supreme Court's holding that Mr. Bowles can—consistent with due process and the Eighth Amendment—be time barred from raising his *Atkins* claim deepens a nationwide split among the courts of appeals and State high courts. This case presents an ideal vehicle to resolve that split and hold that intellectually disabled individuals must be provided an opportunity to establish that they are ineligible for the death penalty notwithstanding their failure to observe State procedural rules. Mr. Bowles has introduced compelling evidence that he is actually innocent of the death penalty, such that application of a time bar to his claim of intellectual disability would cause a fundamental miscarriage of justice under this Court's cases. Pet. 8-10.

II. Executing a Person Who Is Intellectually Disabled Violates the Eighth Amendment

This Court should independently grant certiorari because the Florida Supreme Court's application of a time bar squarely violates the Eighth Amendment under this Court's cases.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). In accordance with human dignity and the Eighth Amendment, there are some people the State simply cannot execute. It cannot execute a pregnant woman. It cannot execute a juvenile or someone who was a juvenile at the time of his offense. *Roper v. Simmons*, 543 U.S. 551 (2005). It cannot execute someone who is clearly and indisputably innocent. *Schlup v. Delo*,

513 U.S. 298, 324-325 (1995); *see also Herrera*, 506 U.S. at 417. It cannot execute someone convicted of a crime where death did not result. *Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008); *Enmund v. Florida*, 458 U.S. 782, 795-797 (1982); *Coker v. Georgia*, 433 U.S. 584, 591-592 (1977). It cannot execute someone unable to rationally understand the reason for his execution. *Madison v. Alabama*, 139 S. Ct. 718, 729-731 (2019). And it cannot execute someone who is intellectually disabled. *Atkins*, 536 U.S. at 321.

Executing a person who is intellectually disabled violates the Eighth Amendment because "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 572 U.S. at 708. It is "the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 572. Every time we execute a person who is intellectually disabled, we fail this duty.

None of the rationales that support application of the death penalty apply to people with intellectual disabilities. *See Atkins*, 536 U.S. at 318-320. Deterrence does not apply because "those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale." *Hall*, 572 U.S. at 709. Likewise, retribution is inapplicable; "[t]he diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment." *Ibid.* Most importantly, execution of an intellectually disabled person "offends morality." *See Madison*, 139 S. Ct. at 729. A person who is intellectually disabled has "a 'diminished ability' to 'process information, to learn from experience, to engage in logical reasoning, or to control impulses." *Hall*, 572 U.S. at 709. He is thus likely unable to "'process the information of the possibility of execution as a penalty.'" *Ibid.*

This "diminished ability" to process, to consider, to understand "the possibility of execution as a penalty"

persists well past the commission of a crime. In fact, it is probably most difficult for a person with an intellectual disability on death row to comprehend "why he has been singled out to die." *Madison*, 139 S. Ct. at 729 (quoting *Ford v. Wainwright*, 477 U.S. 399, 409 (1986)). And, as this Court has held, it "offends humanity" and "offends morality" to execute a person who cannot comprehend the "meaning and purpose of the punishment." *Id.* at 727, 729.

The standard laid out in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and affirmed in *Madison* "focuses on whether a mental disorder has had a particular effect: an inability to rationally understand why the State is seeking execution." *Madison*, 139 S. Ct. at 728. "[T]hat standard has no interest in establishing any precise cause: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension." *Ibid.* A person with an intellectual disability, much like a person who has suffered cognitive decline, lacks the ability to understand why he deserves to die.

It no less "offends morality" to execute a person who is intellectually disabled because the intellectual disability remains unproven due to a procedural barrier. When a state refuses to decide whether the defendant is intellectually disabled before executing him because of a time bar, the state "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Hall*, 572 U.S. at 724. State procedural rules are no justification for "deny[ing] the basic dignity the Constitution protects." *Ibid.* A state could not execute a minor because it did not see his birth certificate until the eleventh hour. Nor could it execute a pregnant woman because it did not realize she was pregnant until "too close" to the execution date. Just the same, a state cannot go forward with an execution without considering a prisoner's claim that mental illness or cognitive decline

render him ineligible for execution. *See Madison,* 139 S. Ct. at 725-726. Intellectual disability, like age, pregnancy, and mental illness, is a categorical bar to execution. A state cannot hide behind procedural time bars and refuse to adjudicate a claim of intellectual disability; this would deny the basic dignity the Constitution protects. *See Hall*, 572 U.S. at 724.

Procedural bars in the context of intellectual disability are not just immoral, but senseless. The "evolving standards of decency that mark the progress of a maturing society" mean that a claim for intellectual disability could arise at any time. *See Atkins*, 536 U.S. at 311-312 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The medical consensus on what it means to be intellectually disabled, as well as the legal landscape defining at what point intellectual disability renders a person ineligible for execution, are constantly changing. *See Hall*, 572 U.S. at 710; *In re Johnson*, No. 19-20552, 2019 WL 3814384 at *5 (5th Cir. Aug. 14, 2019) (granting a stay of execution where defendant was found not to be intellectually disabled under the DSM-IV but "meets the criteria for a diagnosis of Intellectual Disability under the DSM-5.").

This is not a case where a defendant seeks to raise a successive claim of intellectual disability, nor is he seeking to have this Court overrule a prior determination that he is not intellectually disabled. On the contrary, no court has yet adjudicated Mr. Bowles's claim for intellectual disability on the merits—despite the fact that he has been pressing it since 2017. This is akin to a court sentencing a teenager to death and thereafter never allowing him to prove that he was 17 (and therefore ineligible for the death penalty) at the time he committed the crime. Mr. Bowles is requesting the opportunity to have a Florida court hear and adjudicate his credible claim for intellectual disability on the merits.

III. There Is No Legitimate Reason to Let Florida's Time Bar Block Mr. Bowles's Eighth Amendment Claim

This Court has never recognized an exception to the Eighth Amendment's flat prohibition on executing an intellectually disabled person. There is no reason to start now. While in some cases state procedural bars can validly foreclose meritorious Eighth Amendment claims, this is not such a case. There is no legitimate reason to prioritize Florida's claimed procedural bar over the human dignity protected by the Eighth Amendment.

This Court regularly refuses to stand idly by when state procedural bars would impede the consideration of federal constitutional claims. This Court, for example, does not treat the state's "exorbitant application of a generally sound rule" as sufficient to foreclose review. *Lee v. Kemna*, 534 U.S. 362, 376 (2002). It has looked past procedural bars when they "would further no perceivable state interest." *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (quoting *James v. Kentucky*, 466 U.S. 341, 349 (1984)).

And, key here, courts consider credible claims of "actual innocence … notwithstanding the existence of a procedural bar to relief" on the ground that refusal to consider such a claim would be a "'fundamental miscarriage of justice.'" *McQuiggin*, 569 U.S. at 392 (quoting *Herrera*, 506 U.S. at 404). This Court has specifically "held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines." *Id.* at 393 (citing *Coleman*, 501 U.S. at 750). At an absolute minimum, Mr. Bowles must be permitted to raise his claim under this well-established doctrine: he has made "a truly persuasive demonstration" that he is categorically ineligible to be executed by reason of his intellectual disability. *Herrera*, 506 U.S. at 417.

Requiring the state to consider Mr. Bowles's credible claim of intellectual disability will not "reward[] gamesmanship" or "threaten[] to make last-minute stay

applications the norm instead of the exception." *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Mem.) (Thomas, J., concurring in the denial of certiorari). Quite the contrary, capital defendants with intellectual disabilities have every incentive to raise those claims as soon as the disability develops, or as soon as the law or medical consensus make a claim available. As this Court has recognized, proving intellectual disability involves not just submitting IQ scores, but also proffering "additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 572 U.S. at 723; *see ibid.* ("Intellectual disability is a condition, not a number."). A defendant who waits too long to establish his intellectual disability runs the risk that witnesses will become unavailable, their memories will fade, or other documentary evidence like medical records will become stale. In the context of proving that a defendant cannot be executed consistent with the Eighth Amendment, the impermanence of evidence counsels *against* time limitations, not for them. *See Herrera*, 506 U.S. at 406 ("[U]nlike the question of guilt or innocence, which becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution." (discussing *Ford*, 477 U.S. 399).

Indeed, Mr. Bowles's own case suggests that many defendants will raise these claims well before their executions, and that any alleged "delay" in bringing their claims will be justified by changes in law, fact, or medical consensus. Mr. Bowles raised his intellectual disability claim in October 2017 once the Florida Supreme Court established that this Court's decision in *Hall* was retroactive. Pet. 2-3, 20. He diligently pursued his claim until a death warrant cut it short. *Id.* at 7-8.

In any event, were this Court concerned about "dilatory litigation strategies" involving intellectual disability claims, *Price*, 139 S. Ct. at 1538 (Thomas, J., concurring in the denial of certiorari), the Court in future cases could

consider allowing states to impose reasonable procedural requirements to ensure that claims were brought sometime before the eve of execution. That line need not be drawn here. Mr. Bowles brought his claim years before the governor signed his death warrant. This Court should not allow Mr. Bowles's execution just because it is worried that *other* defendants might behave strategically.

Moreover, a rule that states may not time-bar intellectual disability claims does not mean that there can be no rules whatsoever governing such claims. If this Court were concerned that eliminating time bars would prompt defendants to raise these claims repeatedly until their execution dates, it could respond by requiring states to give defendants at least a single chance to prove an intellectual disability claim before their executions. It would be one thing if Florida barred Mr. Bowles's second or successive attempt at proving intellectual disability where no relevant facts or law had changed. But Florida's rule has foreclosed Mr. Bowles from bringing his *first* claim of intellectual disability—years before his execution. Indeed, Florida's rule foreclosed even an evidentiary hearing.

The theoretical possibility of gamesmanship does not warrant allowing, without any meaningful review, the execution of intellectually disabled defendants in swaths of cases. When an intellectually disabled defendant is, for whatever reason, unable to bring the claim early enough to comply with a state's procedural rule, that does not warrant an execution in direct violation of this Court's command that "States may not execute anyone in 'the *entire category* of intellectually disabled offenders.'" *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (alterations incorporated) (quoting *Roper*, 543 U.S. at 563-564).

Nor will forbidding time bars for intellectual disability claims open the floodgates for other constitutional claims at late stages of death-penalty litigation. Intellectual disability claims—like claims that the defendant's

mental deterioration makes him unable to remember his crime—are special; they assert categorical prohibitions on death sentences for individuals with certain attributes. They arise from the defendant's "incomprehension of why he has been singled out to die." *Madison*, 139 S. Ct. at 729 (alteration incorporated) (quoting *Panetti*, 477 U.S. at 409). To the extent that other Eighth Amendment claims do not implicate a categorical bar on execution, states may have the legitimate authority to impose procedural limits on constitutional claims.

But this is not the case to resolve these nuances. Florida's time bar creates a material risk that an intellectually disabled individual—one who has never had his claim adjudicated on the merits—will be executed on August 22. This Court's cases require that Mr. Bowles be given an avenue to prove his credible claim of intellectual disability and to avoid being executed in violation of the Eighth Amendment.

* * *

The question whether an intellectually disabled individual may be forever barred from showing that he is ineligible for the death penalty is undeniably important, and this case is an ideal vehicle to resolve it. The importance of this issue is hard to overstate. A truly breathtaking number of people on death row today may be legally ineligible for the death penalty yet barred from raising meritorious claims under the Florida Supreme Court's rule. Approximately 15% of defendants on death row as of June 2014 had a credible claim of intellectual disability. *See* Robert J. Smith et al., *The Failure of Mitigation*, 65 Hastings L.J. 1221, 1231 (2014). And as of 2009, "[n]early forty percent of all defendants who allege[d] [intellectual disability] ha[d], in fact, proved it." John H. Blume et al., *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 628 (2009). "This is substantially higher than the frequency with which

defendants succeed on allegations of incompetence to stand trial, allegations of ineffective assistance of counsel, or any other claim of which we are aware." *Ibid.*

Moreover, this case is an ideal vehicle to resolve this important question. No jurisdictional or other barriers stand in the way of this Court's review. This is not a successive attempt to raise a claim of disability. Nor is this a last minute claim brought on the eve of execution. And Mr. Bowles has disclosed substantial evidence that he is, in fact, intellectually disabled. This claim has a strong likelihood of establishing Mr. Bowles' ineligibility for the death penalty, if only he could raise it.

The Court should decide this question now. This is a recurring question that has divided federal and state courts. Only this Court can correct the Florida Supreme Court's erroneous interpretation of the requirements of due process and the Eighth Amendment. As The Chief Justice explained last term, this Court's "articulation of how courts should enforce the requirements of *Atkins v. Virginia* lack[s] clarity." *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (Roberts, C.J., concurring). And "[i]t still does." *Ibid.* This Court should grant the petition for certiorari and take this opportunity to clarify that individuals with colorable claims of intellectual disability may not be time barred from showing that they are not eligible for the death penalty in light of *Atkins*.

CONCLUSION

The Court should grant the application for a stay of execution and grant the petition for a writ of certiorari.

Respectfully submitted.

JOHN C. ULIN
Counsel of Record
ARNOLD & PORTER
KAYE SCHOLER LLP
777 S. Figueroa St., 44th Floor
Los Angeles, CA 90017
(213) 243-4000
john.ulin@arnoldporter.com

ANDREW T. TUTT
STEPHEN K. WIRTH
SAMUEL F. CALLAHAN
KYLE LYONS-BURKE*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

* Member of the Virginia Bar practicing law in the District of Columbia during the pendency of his application for admission to the D.C. Bar under the supervision of lawyers of the firm who are members in good standing of the D.C. Bar.

AUGUST 2019