

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

IN RE GARY RAY BOWLES,

Petitioner.

On Petition for a Writ of Habeas Corpus

APPLICATION FOR STAY OF EXECUTION

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

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

The State of Florida has scheduled the execution of Petitioner Gary Ray Bowles for today, **August 22, 2019, at 6:00 p.m.** Mr. Bowles requests a stay of execution pending the consideration and disposition of the petition for a writ of habeas corpus that he is filing simultaneously with this application.¹

As described in the petition, Mr. Bowles is an intellectually disabled man who is scheduled to be executed without any court having considered the strong evidence that he is intellectually disabled, despite Mr. Bowles's continuous efforts to present

¹ Petitioner requests expedited consideration of the petition. See Petition at 1 n.1.

that evidence to the state courts for almost two years. As Mr. Bowles has an IQ score between 71 and 75, he could not previously qualify as intellectually disabled in the State of Florida. Once a diagnosis was possible, Mr. Bowles has attempted to present his ineligibility for the death penalty in every court possible, under every avenue possible, to no avail. Rather than multiple courts finding against Mr. Bowles on the merits of his claim, the denials have all been procedural. This stay application and accompanying habeas petition concerns Mr. Bowles's subsequent efforts to present the merits of his claim to the federal courts, and the Eleventh Circuit's misinterpretation of the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Some Members of this Court have recently expressed reservations with "last-minute" litigation by death row prisoners under warrant. *See, e.g., Price v. Dunn*, 139 S. Ct. 1533 (Thomas, Alito, and Gorsuch, JJ., concurring in the denial of certiorari). Mr. Bowles does not fall into that category. As the petition describes, Mr. Bowles's intellectual disability claim had been pending for nearly two years when the Governor signed his death warrant. The expedited nature of this litigation was not the result of Mr. Bowles filing a claim in response to a death warrant, but the Governor signing a death warrant in the middle of Mr. Bowles's intellectual disability litigation.

Since 2017, Mr. Bowles developed and proffered evidence of his intellectual disability.² Regarding significantly subaverage intellectual functioning, Mr. Bowles

² Following *Hall v. Florida*, 572 U.S. 701 (2014), Florida courts have held a definition of intellectual disability that includes: "(1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3) manifestation of the condition before age eighteen." *Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) (quoting *Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016)).

provided evidence that every mental health professional who is known to have evaluated Mr. Bowles's intellectual functioning admits either that they did not assess Mr. Bowles for intellectual disability, or that Mr. Bowles is intellectually disabled or has intellectual functioning consistent with an intellectually disabled person. Mr. Bowles also has neuropsychological testing results indicating brain damage consistent with an intellectual disability stemming from early childhood. Regarding adaptive deficits, Mr. Bowles proffered sworn statements from a dozen individuals establishing that Mr. Bowles had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. No mental health professional who has conducted an evaluation on Mr. Bowles currently disputes Mr. Bowles's intellectual disability diagnosis.

Nevertheless, as a result of the rule first announced by the Florida Supreme Court in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), which provides that certain intellectual disability claims filed after *Hall v. Florida*, 572 U.S. 701 (2014), are time-barred and no evidence supporting those claims can even be considered, Mr. Bowles was denied the opportunity to litigate his intellectual disability claim on the merits in state court. Mr. Bowles has filed a separate stay application and certiorari petition in this Court addressing the Florida Supreme Court's ruling. *See Bowles v. Florida*, No. 19-5617.

One day after the Florida Supreme Court's decision refusing to review his claim, Mr. Bowles filed a second-in-time petition, along with a stay motion, in the United States District Court for the Middle District of Florida asserting his

intellectual disability claim. The district court dismissed Mr. Bowles's petition for lack of subject matter jurisdiction, finding the petition to be successive. After Mr. Bowles lodged an appeal before the Eleventh Circuit and filed a motion for stay pending appeal, the Eleventh Circuit denied Mr. Bowles's stay motion in that court. *See Bowles v. Sec'y, Dept. of Corr.*, __ F.3d __, 2019 WL 3890201 (11th Cir. Aug. 21, 2019). Mr. Bowles has filed a petition for writ of certiorari and application for a stay in that case. *See Bowles v. Sec'y, Dept. of Corr.*, No. 19-5672.

Simultaneously with his Eleventh Circuit appeal, Mr. Bowles sought authorization to file a successive petition on the grounds that (1) it would be a miscarriage of justice to deny federal review here because he is actually innocent of the death penalty, and (2) his intellectual disability claim was previously unavailable based on Florida's unconstitutional diagnostic standards. In his application, Mr. Bowles highlighted the Eleventh Circuit's precedent that conflicted with rulings by this Court and by other courts of appeals.

In the accompanying petition for a writ of habeas corpus, Mr. Bowles presents questions of constitutional import that have divided the courts of appeals on when and how a successive petition is warranted. But, because these issues only arise during a circuit court's decision on an application for leave to file a second or successive habeas petition, they are unreviewable by certiorari review or on appeal. Accordingly, this Court should grant Mr. Bowles's stay and take this opportunity to address these important questions in an original writ of habeas corpus.

The provisions of AEDPA should not serve to deprive Mr. Bowles of the Eighth Amendment's protection against the execution of the intellectually disabled, particularly given the state courts' refusal to consider his claim on the merits. This Court's intervention is urgently needed to prevent the imminent execution of Mr. Bowles, whom the evidence strongly suggests is intellectually disabled and thus categorically exempt from the death penalty.

The Court should stay Mr. Bowles's execution and grant his petition to address the important constitutional and AEDPA questions in this case.

Respectfully submitted,

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