NO. 19A217

IN THE SUPREME COURT OF THE UNITED STATES

GARY RAY BOWLES,

Petitioner,

v.

MARK INCH, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

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COUNSEL FOR RESPONDENTS

To: The Honorable Clarence Thomas, Associate Justice of the United States Supreme Court

On August 22, 2019, the day of the scheduled execution, Bowles filed a stay of execution to litigate his pending petition for writ of habeas corpus raising an intellectual disability claim that was raised for the first time in federal court 17 years after *Atkins v. Virginia,* 536 U.S. 304 (2002), was decided and over five years after *Hall v. Florida,* 572 U.S. 701 (2014), was decided. Bowles did not raise an *Atkins* intellectual disability claim in his initial federal habeas petition which was filed in 2008, despite the fact that the first petition was filed more than six years after this Court decided *Atkins.* Nor did Bowles file an application for authorization to file a successive habeas petition with the Eleventh Circuit shortly after *Hall v. Florida* was decided in 2014. Instead, he waited until four days before the scheduled execution to file a proper application in the Eleventh Circuit. The Eleventh Circuit denied Bowles' request for authorization to file a successive habeas petition and stay of execution. Because Bowles is essentially seeking review of the actions of the Eleventh Circuit Court of Appeals in denying his application to file a successive habeas petition, he is requesting that this Court exceed its jurisdiction as this Court possesses no supervisory jurisdiction over circuit court proceedings seeking permission to file a successive habeas petition under 28 U.S.C. § 2244(b)(3)(E). Respondents object to any stay of execution by this Court because Bowles does not meet the standard for being granted a stay.

Stays of execution

Bowles is not entitled to a stay of execution merely because his petition for writ of habeas corpus is pending. Stays of execution are not a matter of right, even if irreparable injury results. *Nken v. Holder,* 556 U.S. 418, 433 (2009). As this Court recently observed, last-minute stays of execution "should be the extreme exception, not the norm." *Bucklew v. Precythe,* 139 S.Ct. 1112, 1134 (2019). This Court explained that the last-minute nature of an application for stay in relation to a claim that "could have been brought earlier" may show an "attempt at manipulation," which is itself grounds to deny the stay. *Id.* at 1134. Both the majority and the dissent in *Bucklew* agreed that the long delays that now typically occur in capital cases are "excessive." *Id* at 1134; *id.* at 1144 (Breyer, J., dissenting).

Claim raised in a dilatory manner

Furthermore, a capital defendant must also establish that the claim was not raised in a dilatory manner because there is "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell,* 541 U.S. 637, 650 (2004). But Bowles' application to this Court as an original writ of habeas corpus was pursued in a dilatory manner. Bowles' waited literally minutes before his scheduled execution to file this petition.

While the intellectual disability claim was first raised in 2017 in state court, before the warrant was signed, the intellectual disability claim was not raised in federal court until after the warrant was signed. The application for authorization

to file a successive habeas petition raising the *Atkins* claim was not filed in the Eleventh Circuit until four days before the scheduled execution. And that application was filed over five years after *Hall v. Florida* was decided in 2014.

And even then, the *Atkins* claim was raised in a manner in federal court that was certain to cause delay. The Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU·N), did not directly file an application for authorization to file a successive habeas petition in the Eleventh Circuit as required by the statute. Instead, the CHU·N first improperly filed the *Atkins* claim in the federal district court. But the district court lacked jurisdiction to consider the claim under controlling Eleventh Circuit precedent and dismissed the claim for lack of jurisdiction. So, a proper application to raise this *Atkins* claim in a successive habeas petition was only filed in the correct court four days before the scheduled execution. The strong equitable presumption against a stay applies in such a situation.

There is not a reasonable probability that his petition for writ of habeas corpus will be granted by four Justices. Bowles, in his petition, seeks to have this Court declare, that a capital habeas petitioner may file a successive habeas petition, or an original habeas petition to this Court, raising intellectual disability regardless of whether they meet the statutory exceptions for filing successive habeas petitions. This Court has shown no inclination to disregard the AEDPA's restrictions on successive habeas petitions. Such a ruling would positively invite more dilatory tactics in capital cases when the majority of this Court condemns such tactics.

And even if some members of this Court are interested in some aspect of this case, because the underlying intellectual disability claim is meritless, this would not be a particularly compelling case to grant a petition to decide the issue. As the State explains in detail in the multiple briefs in opposition pending in this Court, Bowles is not intellectually disabled. His school records conclusively show that he was not intellectually disabled as a child and therefore, by definition, Bowles is not intellectually disabled now.

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. 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). While Bowles fails all three prongs, as the Respondents explained in detail in the brief in opposition, the Respondents will focus on the third prong in this response.

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.* But here the third prong of onset is at issue, though Bowles does not meet the second prong, adaptive functioning deficits, as the record at trial and from post-conviction, such as his procuring false identification, successful navigation of public transit, obtaining a GED, etc., conclusively rebuts his claims.

The third prong of the test for intellectual disability 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 a 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 fails the critical 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 Bowles is not intellectually disabled.

Bowles is not intellectually disabled. He certainly cannot make a *prima facie*

showing as required to file a successive habeas petition taking into account the standard of proof of clear and convincing evidence as required by the federal statute to warrant filing a successive habeas petition. Therefore, Bowles does not have a fair prospect of winning on the merits of his *Atkins* claim. Bowles does not meet the second factor for being granted a stay of execution.

Bowles cannot establish that the balance between the harm to him versus the harm to the State and the public interest is in his favor. But it is not in his favor. As this Court recently noted, "both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew,* 139 S.Ct. at 1133. Unwarranted delays undermine the deterrent effect of the death penalty. As this Court has observed, without finality, "the criminal law is deprived of much of its deterrent effect." *Calderon v. Thompson,* 523 U.S. 538, 555-56 (1998). There is substantial harm to the State when its executions are cancelled. "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Ferguson v. Sec'y, Fla. Dept. of Corr.,* 494 Fed.Appx. 25, 28 (11th Cir. 2012) (Carnes, J., concurring) (quoting *Thompson v. Wainwright,* 714 F.2d 1495, 1506 (11th Cir. 1983)).

Bowles must also establish that a stay would not be adverse to the public interest. But as this Court recently observed regarding the protracted litigation in a capital case where the murder occurred in 1996, the people of the state and the surviving victims of the murder "deserve better." *Bucklew,* 139 S.Ct. at 1134. This murder occurred in 1994, which was two years before the murder in *Bucklew.* The

people of Florida and the surviving victims of Bowles' three Florida victims "deserve better" than to have the execution stayed to litigate an untimely and meritless *Atkins* claim. Three Justices of this Court have recently stated that enabling the delay of executions is a "miscarriage of justice" to the State, the victim, and the victim's family. *Price v. Dunn,* 139 S.Ct. 1533, 1540 (2019) (Thomas, J., concurring in the denial of certiorari). A stay would be adverse to both the State's and the public's interest. Bowles does not meet the fourth factor for being granted a stay of execution. Bowles fails three of the four factors for being granted a stay.

Accordingly, the stay of execution should be denied.

Conclusion

Respondents respectfully submit that the stay of execution should be denied.

Respectfully submitted,
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Certificate of Service

I, Carolyn M. Snurkowski, a member of the Bar of this Court, hereby certify that on this 22nd day of August 2019, a copy of the Respondent's Response to Application for Stay of Execution in the above entitled case was furnished by email and by United States mail, postage prepaid, to TERRI BACKHUS, Esq., terri_backhus@fd.org, KELSEY PEREGOY, Esq., kelsey_peregoy@fd.org, SEAN GUNN, Esq., sean_gunn@fd.org, and KATHERINE BLAIR, Esq., Katherine_blair@fd.org, Office of the Federal Public Defender, Northern District of Florida, Capital Habeas Unit, 227 North Bronough Street, Suite 4200, Tallahassee, Florida 32301.

Respectfully submitted,

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