No. SC19-1184

IN THE

Supreme Court of Florida

GARY RAY BOWLES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

EXECUTION SCHEDULED FOR AUGUST 22, 2019 at 6:00 P.M.

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PRELIMINARY STATEMENT

On June 11, 2019, the Governor signed a warrant for the execution of Mr. Gary Bowles, who had been trying to litigate his intellectual disability—a categorical bar to his execution— in the circuit court of Duval County for nearly two years. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002); Fla. Stat. § 921. 137. Less than 80 days before the signing of the warrant, Mr. Bowles had obtained entirely new state postconviction counsel because his prior counsel was not qualified to represent him under Florida law. After the signing of the warrant, this Court ordered Mr. Bowles's entire circuit court litigation to be concluded in the span of 36 days with his newly appointed state counsel, who had never before litigated under warrant, before a judge who had never before presided over capital case warrant litigation.

Mr. Bowles's intellectual disability claim, which had been filed since 2017, had never been raised previously. As a result of this Court's rulings in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), and two opinions issued after the filing of Mr. Bowles's claim, in *Blanco v. State*, 249 So.3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), the circuit court found that Mr. Bowles was time-barred from obtaining any merits review of his intellectual disability. Although Mr. Bowles raised several constitutional arguments, as well as distinguishing factual bases, for the timeliness of his filing, the circuit court failed to address any of Mr. Bowles's

constitutional challenges or make any fact-specific inquiry about timeliness in this case. Mr. Bowles, whose execution is imminent, has a valid claim that his execution is categorically barred by the Eighth Amendment, and no court has ever reviewed the merits of this claim. For the following reasons, this Court should reverse the findings of the circuit court and remand this proceeding for an evidentiary hearing on the merits of Mr. Bowles's claim.

REQUEST FOR ORAL ARGUMENT

Mr. Bowles respectfully requests oral argument pursuant to Fla. R. App. P. 9.320, and also files a separate motion for oral argument with this brief.

CITATIONS TO THE RECORD

Citations to the Record on Appeal compiled in Mr. Bowles's second direct appeal, *see Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), will be in the format "R. at [page]." Citations to the Record on Appeal compiled in Mr. Bowles's appeal from the denial of his initial postconviction motion, *see Bowles v. State*, 979 So. 2d 182 (Fla. 2008), will be "PCR. [Volume Number] at [page]." Citations to the Record on Appeal compiled for this appeal will be "PCR-ID. at [page]."

STANDARD OF REVIEW

When the circuit court denies postconviction relief without an evidentiary hearing, this Court accepts the defendant's allegations as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla.

2009). The Court "review[s] the trial court's application of the law to the facts de novo." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008).

A postconviction court's decision regarding whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence, and the ruling as to whether a hearing is appropriate is subject to de novo review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

STATEMENT OF THE CASE AND FACTS

A. Trial and Direct Appeal

In 1996, Mr. Bowles pleaded guilty to first-degree murder in the Circuit Court, Fourth Judicial Circuit, Duval County, and following a penalty phase, the jury recommended death by a vote of 10 to 2. *See Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998). Pursuant to Florida's pre-*Hurst*[1] sentencing scheme, the judge imposed a death sentence. *Bowles*, 716 So. 2d at 770. On appeal, the Florida Supreme Court found that Mr. Bowles's death sentence was unreliable because the trial court erred in allowing the State to introduce prejudicial evidence, and thus vacated Mr. Bowles's death sentence and remanded for a new sentencing. *Id.* at 773.

On remand, a new penalty phase was held in 1999, and the jury recommended death by a vote of 12 to 0. *See Bowles*, 804 So. 2d at 1175. The judge again imposed

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

a death sentence after finding five aggravating factors had been proven beyond a reasonable doubt.[2] The judge also found six mitigating factors, but determined they did not sufficiently outweigh the aggravation in the case.[3] *Id*. The Florida Supreme Court affirmed, *id*. at 1184, and the United States Supreme Court denied certiorari on June 17, 2002, *Bowles v. Florida*, 536 U.S. 930 (2002).

B. Initial State Postconviction

In January 2002, the trial court appointed the Capital Collateral Counsel—Northern Region (CCR) to represent Mr. Bowles in state postconviction proceedings. Shortly thereafter, CCR moved to withdraw from his case, and on February 28, 2002, this Court appointed private attorney Frank J. Tassone, Jr. to represent Mr. Bowles. Mr. Tassone filed an initial motion for postconviction relief,

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[2] The trial court found the following aggravating factors: (1) Defendant was convicted of two other capital felonies and two other violent felonies; (2) Defendant was on probation when he committed the murder; (3) Defendant committed the murder during a robbery or an attempted robbery, and the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). *Id*. at 1175.

[3] In mitigation, the trial court found: (1) Defendant had an abusive childhood; (2) Defendant had a history of alcoholism and absence of a father figure; (3) Defendant's lack of education; (4) Defendant's guilty plea and cooperation with police in this and other cases; (5) Defendant's use of intoxicants at the time of the murder; and (6) the circumstances that caused Defendant to leave home and his circumstances after he left home. *Id*.

pursuant to Fla. R. Crim. P. 3.850 and 3.851, on December 9, 2002. Mr. Tassone filed an amended motion on August 29, 2003, raising nine claims. PCR at 21-101.[4]

On February 8, 2005, an evidentiary hearing was held on two claims: that Mr. Bowles's counsel was ineffective for failing to (1) investigate and present mitigating evidence, and (2) discover and present evidence rebutting the State's assertion of the HAC aggravating factor. *See* PCR III. Mr. Tassone presented the testimony of three witnesses: Ronald K. Wright, a medical examiner, Harry Krop, a psychologist, and Bill White, Mr. Bowles's trial attorney. *Id*. On August 12, 2005, the Court denied postconviction relief. On February 14, 2008, the Florida Supreme Court affirmed. *Bowles*, 979 So. 2d at 193.

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[4] The amended postconviction motion raised the following claims: "(1) trial counsel were ineffective for failing to present statutory and nonstatutory mental mitigation, and the trial court erred in finding the two statutory mental mitigators were not proven; (2) the trial court erred in refusing to give the defense's requested jury instructions defining mitigation; (3) the trial court erred in instructing the jury that it could consider victim impact evidence; (4) and (5) Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); (6) *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* required the elements of the offense necessary to establish capital murder be charged in the indictment; (7) *Apprendi* and *Ring* required the jury recommendation of death be unanimous; (8) trial counsel were ineffective for failing to adequately investigate and present mitigating evidence; and (9) trial counsel were ineffective for failing to discover and present evidence rebutting the State's proof of the HAC aggravating factor." *Bowles*, 979 So. 2d at 186 n. 2.

C. Federal Habeas Proceedings

On August 8, 2008, Mr. Bowles filed an initial petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. *Bowles v. Sec'y, Fla. Dep't of Corrs.*, No. 3:08-cv-791-HLA, ECF No. 1 (M.D. Fla. Aug. 8, 2008).[5] The federal district court denied his petition on December 23, 2009. *Id*. (ECF No. 18). The United States Court of Appeals for the Eleventh Circuit affirmed. *Bowles v. Sec'y for Dep't of Corrs.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert. denied*, 562 U.S. 1068 (2010).

D. Successive State Postconviction Motions

In March 2013, Mr. Tassone filed a successive motion for state postconviction relief on Mr. Bowles's behalf, arguing for relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), and the ineffectiveness of trial

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[5] In his federal petition, Mr. Bowles raised 10 claims, including: (1) the State used peremptory strikes to improperly remove jurors who expressed reservations about the death penalty; (2) the trial court erred in permitting evidence of two homicides at the resentencing hearing that were not presented at the original sentencing; (3) the court erred in finding the HAC aggravator; (4) the court erred in giving the HAC jury instruction; (5) Florida's death penalty scheme was unconstitutional; (6) direct appeal counsel was ineffective for failing to appeal the introduction of prejudicial and gruesome photographs; (7) the court erred in finding that Mr. Bowles committed the murder during the course of an attempted robbery or for pecuniary gain; (8) the Florida Supreme Court's finding that Mr. Bowles did not prove the two proposed statutory mitigating circumstances of Extreme Emotional Disturbance (EED) and Diminished Capacity was erroneous; (9) Mr. Bowles's death sentence is disproportionate; and (10) the Florida Supreme Court's holding that Mr. Bowles's trial counsel was not ineffective by failing to introduce Dr. McMahon's testimony regarding mental health mitigation was erroneous.

and appellate counsel. The circuit court summarily denied this motion, and Mr. Tassone did not appeal on Mr. Bowles's behalf.

On August 31, 2015, Mr. Tassone filed a motion to withdraw as Mr. Bowles's counsel, citing medical issues and the fact that he was winding down his practice and intended only to work limited hours in the future. The circuit court granted this request on September 3, 2015, and appointed attorney Francis Jerome ("Jerry") Shea to represent Mr. Bowles.

On June 14, 2017, Mr. Bowles filed a successive motion for postconviction relief in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The circuit court denied *Hurst* relief, and this Court affirmed. *Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (2018).[6]

[6] Mr. Bowles's case is frequently cited as an example of the arbitrariness of Florida's *Hurst*-related retroactivity. On the same day that Mr. Bowles's direct appeal was affirmed in this Court, in a separate decision, this Court affirmed the unrelated death sentence of James Card. *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both prisoners petitioned for a writ of certiorari in the United States Supreme Court. The Supreme Court denied Mr. Bowles's and Mr. Card's certiorari petitions in orders issued 10 days apart. Those are the sole facts—that Mr. Bowles' death sentence became final on June 17, 2002, and Mr. Card's became final on June 28, 2002—that led this Court to hold, more than fifteen years later, that Mr. Bowles must remain on Florida's death row while Mr. Card's death sentence should be vacated under *Hurst*, 136 S. Ct. 616, and his case remanded for a new sentencing proceeding.

E. Mr. Bowles's Intellectual Disability Litigation

On October 19, 2017, Mr. Bowles, through attorney Shea, filed a successive motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, arguing that he is intellectually disabled and that his execution would therefore violate the Eighth Amendment in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 572 U.S. 701 (2014), and *Atkins*, 536 U.S. 304. PCR-ID at 1-13.

On March 12, 2019, while the motion was pending, Mr. Bowles's state postconviction counsel, Mr. Shea, unexpectedly moved to withdraw from the case. PCR-ID at 62. The State did not oppose the motion.[7] On March 25, 2019, the state court granted Mr. Shea's motion and appointed a lawyer from the Office of the Capital Collateral Regional Counsel—North (CCRC-N) as Mr. Bowles's new state-appointed counsel. PCR-ID at 108-09. On March 26, 2019, CCRC-N attorney Karin Moore entered an appearance in the case. PCR-ID at 110. On April 11, 2019, Ms. Moore filed a motion for additional time to either reply to the State's recently filed answer memorandum, or amend the postconviction motion that had been filed by Mr. Shea, who had not been qualified to file the motion. *See* PCR-ID at 131-35.

[7] In two other capital postconviction cases, the Attorney General moved to remove Mr. Shea for his lack of qualifications under Fla. R. Crim. P. 3.112. *See, e.g.*, State's Motion to Determine Postconviction Counsel's Qualifications, *State v. John Freeman*, No. 16-1986-CFO 11599 (Fla. Cir. Ct. Feb. 4, 2019).

On April 15, 2019, the circuit court granted Ms. Moore an additional 90 days to either file a reply to the State's answer or move to amend Mr. Bowles's intellectual disability claim, should she determine that an amendment was necessary. PCR-ID at 136. Under the state court's order, Ms. Moore's reply or motion to amend was due July 14, 2019. But on June 11, 2019—less than 80 days after Ms. Moore first entered an appearance in the case, and more than a month before the state court's deadline for her to review the case and decide whether to file a reply or motion to amend—the Governor signed Mr. Bowles's death warrant, scheduling the execution for August 22, 2019. This Court thereafter ordered Mr. Bowles's intellectual disability proceedings expedited, and required the circuit court to decide Mr. Bowles's intellectual disability claim *in total* by July 17, 2019. Death Warrant Scheduling Order, *Bowles v. State*, Nos. SC89-261, SC96-732 (Fla. June 12, 2019).

When Mr. Bowles's intellectual disability claim was originally filed in 2017, it was assigned to Duval County Circuit Court Judge Bruce Anderson. *See, e.g.*, PCR-ID at 19. In March 2019, it was reassigned to Judge Jack Schemer, who had been Mr. Bowles's original trial judge. *See* PCR-ID at 58-59. After the death warrant was signed, however, it was reassigned back to Judge Anderson. *See* PCR-ID at 168-69. The first proceeding that Judge Anderson had in this case was under warrant, *see* PCR-ID at 520, and he had only been serving as a judge since January 2017 and

had never presided over a capital case under warrant previously.[8] Mr. Bowles's new state counsel had never litigated a case under warrant previously. *See* PCR-ID at 522.

On July 8, 2019, a *Huff* hearing[9] was held regarding Mr. Bowles's intellectual disability claim, after which the circuit court determined that no evidentiary hearing was necessary. Instead, the circuit court summarily denied Mr. Bowles's claim as time-barred as a result of this Court's rulings in *Rodriguez*, 250 So. 3d 616, *Blanco*, 249 So. 3d 536, and *Harvey*, 260 So. 3d 906. *See* PCR-ID at 1344-53. In those rulings, this Court held that individuals who did not previously raise an intellectual disability claim pursuant to Fla. R. Crim. P. 3.203 (2004) were time-barred from doing, regardless of the United States Supreme Court's ruling in *Hall*, 572 U.S. 701, which was held retroactively applicable to Florida litigants by this Court in *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

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[8] *See* Biography of Bruce R. Anderson, available at https://www.jud4.org/Duval-County-Judges-Biographies (last visited July 24, 2019).

[9] Pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (holding that a defendant should have the opportunity to raise objections and alternative suggestions prior to the denial of a postconviction motion).

SUMMARY OF THE ARGUMENT

Mr. Bowles appeals herein the circuit court's order with respect to his intellectual disability claim, as well as its prior rulings denying his access to public records pursuant to Fla. R. Crim. P. 3.852.

With respect to his first claim, Mr. Bowles argues that the circuit court erred in finding his intellectual disability claim time-barred based on this Court's rulings in *Rodriguez*, *Blanco*, and *Harvey* without addressing his important constitutional arguments, and without making any fact-specific inquiry or holding an evidentiary hearing on the timeliness of his filing. Because Mr. Bowles's claim is a categorical bar to his execution, and thus not waivable, and additionally because the circuit court's ruling relied on cases that were wrongly decided or factually distinguishable from Mr. Bowles's case, this Court should reverse the circuit court's ruling and remand for an evidentiary hearing in this case.

With respect to his second claim, Mr. Bowles argues that the circuit court erred in sustaining the objections of the following agencies: the Florida Department of Corrections, the Florida Commission on Offender Review, the State Attorney's Office of the Fourth Judicial Circuit, the Florida Department of Law Enforcement, and the Medical Examiner of the Eighth District.

ARGUMENT

I. The Circuit Court's Ruling that Mr. Bowles was Time-Barred from the Categorical Exemption from Executing the Intellectually Disabled Violates the United States and Florida Constitutions

A. Background of Mr. Bowles's Claim in the Context of Florida's Intellectual Disability History and Jurisprudence

Mr. Bowles pleaded guilty to murder in Duval County Circuit Court in 1996. In his pre-*Atkins* mitigation investigation, in 1995, he was evaluated by psychologist Dr. Elizabeth McMahon, who administered to Mr. Bowles the Wechsler Adult Intelligence Scale, Revised (WAIS-R), *see* PCR-II at 199, on which he received a full-scale score of 80, *see* PCR-II at 239. While evidence of his juvenile inhalant usage, R. at 833, and his failure to complete the eighth grade, R. at 879, were presented at his first penalty phase, Dr. McMahon did not testify, no intellectual disability investigation was conducted, and no evidence about his poor intellectual functioning and lifetime adaptive deficits was presented to his penalty phase jury or judge. *See* PCR-ID at 835 (Dr. McMahon: "When I evaluated Mr. Bowles in the 1990s, I was not asked to evaluate Mr. Bowles for intellectual disability . . . I would not have looked any further into intellectual disability unless I had been specifically asked to."). When the well-known psychometric principle of Norm Obsolescence,

also known as the Flynn Effect, is applied to Mr. Bowles's 1995 WAIS-R score of 80, it adjusted to be properly in the IQ score range of 70-75. *See* PCR-ID at 780.[10]

Following this Court's reversal of Mr. Bowles's initial death sentence, *Bowles*, 716 So. 2d at 773, Mr. Bowles was again sentenced to death in 1999. While his death sentence was on appeal, in 2001, the Florida Legislature enacted Fla. Stat. § 921.137, which barred the execution of the intellectually disabled. *See Kilgore v. State*, 55 So. 3d 487, 507 (Fla. 2010) (quoting *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009)). By its express terms, Fla. Stat. § 921.137 was not applicable to individuals who were sentenced prior to its enactment, such as Mr. Bowles. *See* Fla. Stat. § 921.137(8) ("This section does not apply to a defendant who was sentenced to death before June 12, 2001.").

On June 20, 2002, less than a week later after his death sentence became final on direct appeal, the United States Supreme Court decided *Atkins*. Although the Supreme Court was explicit in *Atkins* about the prohibition on execution of the intellectually disabled, the Supreme Court's decision "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall*, 572 U.S. at 719 (quoting *Atkins*, 536 U.S. at 317)). Because *Atkins* left to states how to

[10] By the time of Mr. Bowles's initial state postconviction stage, the Flynn Effect was an observed principle applied in the death penalty context to claims of intellectual disability. *See, e.g., In re Hick*, 375 F. 3d 1237, 1242-43 (11th Cir. 2004) (J. Birch, dissenting) (noting the Flynn Effect discussion in the petitioner's motion).

implement the constitutional restriction, and thus how to define how to raise a meritorious *Atkins*-based claim, litigants were constrained by the statutory definition in Florida of what intellectual disability meant in pursuing their claims.

At that time, Florida's statutory definition of intellectual disability in Fla. Stat. § 921.137 required that an individual's IQ score be "two or more standard deviations from the mean score on a standardized intelligence test," to qualify him as intellectually disabled. *See Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007) (interpreting the "clear" language of the 2001 statute). Two standard deviations from the mean is an IQ score of 70. *See Hall*, 572 U.S. at 711 ("The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, i.e., a score of approximately 70 points.") (quoting Fla. Stat. § 921.137(1)). Thus, as this Court later confirmed in *Cherry*, 959 So. 2d at 712, a plain reading of the statute between its enactment in 2001, and *Cherry*'s formal holding in 2007, still required individuals asserting an intellectual disability claim to have an IQ score of 70 or below.

Mr. Bowles's initial state postconviction motion under Fla. R. Crim. P. 3.851 was filed on December 9, 2002, and did not assert a claim based on intellectual disability. In 2004, while his initial state postconviction motion was pending, this

Court promulgated Fla. R. Crim. P. 3.203. *See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Mem) (Fla. 2004) (hereinafter "*Amendments*"). With respect to timeliness, in its initial iteration, Rule 3.203(d)(4)(C) provided:

> If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(C).

After the promulgation of Rule 3.203, and the expiration of the time frame in subsection (d)(4)(C), Mr. Bowles's counsel did not amend his Rule 3.851 motion to include a claim of intellectual disability. Following an evidentiary hearing on his postconviction motion in February 2005, during which voluminous information about Mr. Bowles's brain damage, low intellectual functioning, and poor life skills was presented, Mr. Bowles's initial state postconviction motion was formally denied on August 12, 2005.

In 2014, the United States Supreme Court decided *Hall v. Florida*, which invalidated Florida's bright-line IQ score cutoff of 70, and found Florida's statutory scheme for the determination of intellectual disability unconstitutional. *See Hall*, 572 U.S. at 724. Thereafter, on October 20, 2016, this Court decided *Walls*, 213 So. 3d 340. In *Walls*, this Court noted that "[p]rior to the decision in *Hall*, a Florida defendant with an IQ score above 70 could not be deemed intellectually disabled."

Walls, 213 So. 3d at 345. As a result, the *Walls* Court held that under state law, "*Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Id*. at 346. Nowhere in the *Walls* opinion did the Court condition retroactive application of *Hall* to individuals who had previously raised an intellectual disability claim.

Between 2005 and 2017, no investigation into Mr. Bowles's intellectual disability was ever conducted. In September 2017, the Federal Public Defender for the Northern District of Florida, Capital Habeas Unit (CHU), was appointed to represent Mr. Bowles as federal counsel. On October 19, 2017, Mr. Bowles filed an intellectual disability claim in the Duval County Circuit Court, which included an IQ score of 74 on the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which Mr. Bowles had received earlier in 2017.

After his initial filing of his intellectual disability claim, in March 2019, Mr. Bowles amended his motion to include the reports of two psychologists and a neuropsychologist, all of whom diagnosed Mr. Bowles with or found evidence of impaired intellectual functioning consistent with intellectual disability. Mr. Bowles's intellectual disability claim remained pending until the signing of his death warrant, nearly two years later, on June 11, 2019.

B. The Circuit Court's Procedural Ruling

In his amended Fla. R. Crim. P. 3.851 motion, Mr. Bowles asserted four separate arguments as to timeliness, one of which was argued in the alternative, and any one of which would have been sufficient to establish that Mr. Bowles's motion was timely. *See* PCR-ID at 747-55. The circuit court, in its written order denying Mr. Bowles's R. 3.851 motion, found that Mr. Bowles's motion was time-barred because he failed to file his intellectual disability claim within 60 days of the promulgation of Fla. R. Crim. P. 3.203 (2004), and under this Court's rulings in *Rodriguez*, 250 So. 3d 616, *Blanco*, 249 So.3d 536, and *Harvey*, 260 So. 3d 906.

The circuit court made no ruling as to Mr. Bowles's first two arguments on the timeliness of his motion, which argued first that intellectual disability was a categorical bar to execution that could not be waived, and second that to the extent that the Florida Supreme Court's rulings in *Rodriguez* and *Blanco* foreclosed relief to Mr. Bowles, they were unconstitutional under the Eighth Amendment and the Due Process Clause. With respect to Mr. Bowles's third argument for timeliness, the circuit court ruled that Mr. Bowles did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B) because he was not part of the "class" eligible for the retroactive benefit of *Hall v. Florida*, as applied to cases on collateral review in *Walls*, 213 So. 3d 340. Regarding the fourth timeliness argument made by Mr. Bowles, the circuit court found that Mr. Bowles had not established "good cause" under Fla. R. Crim.

P. 3.203(f), either due to his ineligibility for intellectual disability based relief prior to *Walls* or his attorney's gross neglect in failing to previously file an intellectual disability claim.

These rulings were legally erroneous, both as to the timeliness of Mr. Bowles's motion generally as well as because factual issues related to timeliness should have been resolved through an evidentiary hearing. Procedural bar findings are reviewed by this Court de novo.

C. Intellectually Disabled Individuals are Categorically Ineligible for Execution Under the Eighth Amendment, and Such Claims Cannot Be Summarily Barred by State Procedural Rules

With respect to this argument for the timeliness of Mr. Bowles's motion, the circuit court erred in two ways: first, it erred in failing to discuss or rule on this important constitutional argument, and second, it erred in alternatively finding Mr. Bowles's motion procedurally barred on state law grounds.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court delineated its Eighth Amendment jurisprudence, which includes categorical exclusions from the death penalty, noting:

> The Court's cases addressing the [Eighth Amendment] proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

> In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.
>
> * * *
>
> The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551 [] (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 [] (2002).

Graham, 560 U.S. at 59-61. This categorical prohibition, of which there are few, emanates from the Eighth Amendment because to execute the intellectual disabled "violates his or her inherent dignity as a human being." *Hall*, 572 U.S. at 708.

The Supreme Court's post-*Atkins* jurisprudence affirms this categorical ban time and time again, analogizing the execution of the intellectually disabled to the execution of juveniles (and citing to *Roper v. Simmons* in doing so). For example, in 2014 in *Hall v. Florida*, the Court stated:

> The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized. *Ibid*. No person may be sentenced to death for a crime committed as a juvenile. *Roper*, *supra*, at 572, [] And, as relevant for this case, persons with intellectual disability may not be executed. *Atkins*, 536 U.S., at 321[].

Hall, 572 U.S. at 708. In 2017 in *Moore v. Texas* the Court again clearly stated: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 553-564 (2005)) (emphasis in original).

The United States Supreme Court has never held that the Eighth Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver, procedural bar or default. The Supreme Court's continual comparison of the prohibition of the intellectually disabled to that of the execution of juveniles is not accidental. Just as it would be illegal to execute a person who was convicted of committing a murder as a fifteen-year-old and who failed to raise an Eighth Amendment challenge at the appropriate time, *see Roper*, 543 U.S. at 568-69, so too it would be illegal to execute an intellectually disabled person who failed to raise his claim at the appropriate procedural time. *See, e.g.*, *State ex re. Clayton v. Griffith*, 457 S.W. 3d 735, 757 (Mo. 2015) (Stith, J., dissenting) ("[I]f [petitioner] is intellectually disabled, then the Eighth Amendment makes him ineligible for execution . . . [I]f a 14–year–old had failed to raise his age at trial or in post-trial proceedings then [] would [it] be permissible to execute him for a crime he committed while he was a minor? Of course not; his age would make him ineligible for execution. So too, here, if [petitioner] is intellectually disabled, then he is ineligible for execution.").

This Court has, at times, correctly endorsed this reading of the Supreme Court's precedent, noting: "It is unconstitutional to impose a death sentence upon any defendant with [intellectual disability]. *Moore*, 137 S. Ct. at 1048; *Atkins*, 536

U.S. at 321; *see also* § 921.137(2), Fla. Stat. (2017)." *Wright v. State*, 256 So. 3d 766, 770 (Fla. 2018) (internal citation omitted).

The Eighth Amendment's categorical bar on executing intellectually disabled individuals does not give way to a state procedural rule—rather, the procedure must give way to the constitutional prohibition. The United States Constitution prohibits the execution of the intellectually disabled, and by virtue of the Supremacy Clause, that substantive federal prohibition cannot be frustrated by a state procedural rule that blocks any assessment of Mr. Bowles's condition on the merits. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Because Mr. Bowles is categorically ineligible for execution, his claim cannot be defaulted or waived.

"[C]ircuit courts have the power, in all circumstances, to consider constitutional issues." *Fla. Dept. of Agriculture & Consumer Services v. City of Pompano Beach*, 792 So. 2d 539, 547 (Fla. Dist. Ct. App. 2001). The circuit court erred when it did not consider Mr. Bowles's constitutional argument herein, and when it found his motion procedurally barred as a result. This Court should reverse the circuit court's summary denial, and order a hearing on the merits of Mr. Bowles's intellectual disability claim.

D. To the Extent that *Rodriguez*, *Blanco*, and *Harvey* Foreclose Relief to Intellectually Disabled Individuals like Mr. Bowles, They Violate the Eighth Amendment and the Due Process Clause

In its written order, the circuit court found that this Court's decisions in *Rodriguez*, *Blanco*, and *Harvey* foreclosed any review of Mr. Bowles's intellectual disability claim. *See* PCR-ID at 1349-50. The circuit court did not rule on Mr. Bowles's constitutional arguments that these rulings were wrongly decided and could not be constitutionally applied to him.

A brief review of this Court's rulings in *Rodriguez*, *Blanco*, and *Harvey* is warranted. In an unpublished decision in *Rodriguez*, this Court held that the defendant was barred from bringing an intellectual disability claim based on *Hall* because he had not previously raised one pursuant to *Atkins* and within the time frames in Rule 3.203. *Rodriguez*, 250 So. 3d at 616. The circuit court, in its underlying order, also found that Rodriguez's claim was conclusory and "improperly pled." *See* Order Denying Motion for Determination of Intellectual Disability and Successive Motion to Vacate Death Sentences, *State v. Rodriguez*, No. F93-25817B (Miami-Dade Cir. Ct. June 10, 2015). Importantly, while Rodriguez filed his intellectual disability claim relying on a full scale IQ score of 73 on the WAIS-IV, he had prior scores that dated before *Atkins* on the WAIS of 62, and 58, but failed to raise a claim under Rule 3.203 after *Atkins* was decided. *See, e.g.*, Initial Brief of

Appellant at 6-7, *State v. Rodriguez*, No. SC15-1278, 2015 WL 7076431 (Fla. Nov. 4, 2015).

Likewise, this Court's 2018 decision in *Blanco* relied on *Rodriguez* to find again that individuals who failed to raise their intellectual disability claim within the time frames of Rule 3.203 under *Atkins* could have their claims time barred. *See Blanco*, 249 So. 3d at 537. Later in 2018, this Court decided *Harvey*, and again relying on *Rodriguez*, affirmed the lower court's ruling that Harvey's never before raised intellectual disability claim was untimely, and found that this Court's ruling in *Walls*, making *Hall* retroactive to Florida litigants, did not make his claim timely. *Harvey*, 260 So. 3d at 907.

i. *Rodriguez*, *Blanco*, and *Harvey* Violate the Eighth Amendment and *Atkins*, *Hall* and Progeny as Applied in Mr. Bowles's Case Because They Foreclose Any Opportunity for His Intellectual Disability Claim to be Reviewed on the Merits

As with Mr. Bowles's other constitutional claims, the circuit court did not rule on Mr. Bowles's arguments that if *Rodriguez, Blanco,* and *Harvey* foreclosed any merits review of Mr. Bowles's intellectual disability, they violated his rights to due process and created an unacceptable risk under the Eighth Amendment.

As the Supreme Court in *Hall* recognized, while states are left with the task of implementing the constitutional restriction in *Atkins*, they are only free to do so in compliance with the Eighth Amendment. *Hall*, 572 U.S. at 718. They are not free

to create rules, or in this case, procedural bars, that are "rigid" and risk the execution of an intellectually disabled person. The Supreme Court clearly stated that "[i]n *Atkins v. Virginia*, we held that the Constitution 'restrict[s] ... the State's power to take the life of' *any* intellectually disabled individual," not individuals who meet an arbitrary, later-created procedural requirement. *Moore*, 137 S. Ct. at 1048 (citation omitted) (emphasis in original). The execution of the intellectually disabled is inherently risked when they are left without a forum for a merits review of their claims.

Notwithstanding any waiver or provision of Florida law, the Eighth Amendment requires that persons "facing that most severe sanction . . . have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724; *see also Walls*, 213 So. 3d at 348 (Pariente, J., concurring) ("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied."). Thus, to the extent that *Rodriguez*, *Blanco*, and *Harvey* foreclose individuals like Mr. Bowles from obtaining even *review* of their intellectual disability claims in Florida courts, this violates the Supreme Court's proscription in *Atkins* cases, which requires such individuals to at least have an "opportunity to present evidence of [their] intellectual disability." *Hall*, 572 U.S. at

724 ("Freddie Lee Hall may or may not be intellectually disabled, but *the law requires that he have the opportunity* to present evidence of his intellectual disability[.]") (emphasis added); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (explaining that the holding of *Hall* was "that it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an I.Q. above 70.") (internal citation omitted).

Individuals who are categorically ineligible for execution, like Mr. Bowles, cannot be left by states without a forum to at least receive a single merits review of such claims. Such holdings contravene *Atkins*, *Hall*, and progeny because they "create[] an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S. at 704, in violation of the Eighth Amendment. *Rodriguez*, *Blanco*, and *Harvey*, by creating for the first time a procedural impediment that an individual have previously raised an *Atkins* claim, with an IQ score that would have been fatal to the claim, before they can have their intellectual disability claim reviewed on the merits or seek the benefit of *Hall* (available to Florida litigants after *Walls*), creates such an arbitrary and unacceptable risk by depriving such litigants of any forum for review of their intellectual disability claim. Thus, their application in cases like Mr. Bowles's violates the Eighth Amendment.

ii. *Rodriguez, Blanco*, and *Harvey* Violate the Due Process Rights to Notice and Opportunity to be Heard of Intellectually Disabled Individuals like Mr. Bowles

Mr. Bowles filed his intellectual disability claim in 2017, after this Court's unpublished ruling in *Rodriguez*, but before it announced *Blanco* or *Harvey*. Like Blanco, Mr. Bowles has an IQ score that is between 70-75, and his counsel did not raise the issue of Mr. Bowles's intellectual disability within the time frame established by Rule 3.203. This does not mean, however, that Mr. Bowles or his counsel should have known to raise this claim based on *Atkins* prior to *Hall*, or during the time after Fla. R. Crim. P. 3.203 went into effect. *Atkins* explicitly left to states to implement its constitutional restriction, and Florida's statute defined intellectual disability, in essence, to only include IQ scores of 70 and below. This was clear to the Florida Supreme Court in *Cherry*, whose holding was based on the language of Fla. Stat. § 921.137, not the medical definition of intellectual disability, which the Supreme Court would require adherence to in *Hall*. *Cherry* held that the "plain meaning" of the statute defining intellectual disability required a finding of a hard-IQ cutoff of 70, which did not take into account the Standard Error of Measurement (SEM). *Cherry*, 959 So. 2d. at 713 ("[T]he statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear.").

While *Rodriguez*, and those cases like *Blanco* and *Harvey* citing to *Rodriguez* and holding in accordance, ruled that those litigants should have raised their *Atkins*-based claims within the timeframe of Rule 3.203, they ignore that those claims would still have been subject to the statutory language invalidated by *Hall*. Mr. Bowles, like *Blanco* and *Harvey*, had a claim in 2004 that was foreclosed by the statute, not by *Cherry*; *Cherry* merely later confirmed that interpretation of the statute that Mr. Bowles was subject to. That even prior to this Court's 2007 ruling in *Cherry* it was clear that an IQ score between 70-75 was fatal to an intellectual disability claim is borne out in the rulings of Florida courts prior to and subsequent to the promulgation of Rule 3.203. *See, e.g.*, *Cherry v. State*, 781 So. 2d 1040, 1045-46 (Fla. 2000) (finding that IQ score of above 70 did not demonstrate intellectual disability for mitigation purposes); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) ("Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.").

Mr. Bowles was entitled to rely on this "plain meaning" interpretation of the Florida statute defining intellectual disability, which *Cherry* later formally recognized, until the Supreme Court rejected it in *Hall*. Because that statute defined intellectual disability for the purposes of Rule 3.203, and defined it in a manner that Mr. Bowles could not meet—requiring an IQ score of 70 or below—Mr. Bowles was not previously on notice that he should have filed an intellectual disability claim

through Rule 3.203 in 2004. Until that statutory definition changed as a result of *Hall,* and *Hall* was made retroactive to Florida litigants in *Walls,* Mr. Bowles could not have been on notice that he should file such a claim. This Court's rulings in *Rodriguez*, *Blanco*, and *Harvey*, which hold effectively to the contrary, thus violate the due process rights of Mr. Bowles to notice and an opportunity to be heard.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). These principles are critical to the "fundamental fairness" required by the Due Process Clause. *See Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment).

This case presents similar due process concerns as those the Supreme Court grappled with in *Lankford v. Idaho,* 500 U.S. 110 (1991). In *Lankford*, the Court considered whether Mr. Lankford's due process rights had been violated when he was sentenced to death by the trial court after the prosecutor "had formally advised the trial judge and [Lankford] that the State would not recommend the death penalty." *Lankford,* 500 U.S. at 111-12. Lankford was convicted of first-degree murder following a jury trial. *Id*. at 113. Death was a possible punishment for the conviction of first-degree murder, *see id*. at 128 (Scalia, J., dissenting), but prior to his sentencing, the prosecutor gave written notice that the State would not be seeking

the death penalty. *Id*. at 115-16. Thereafter, for the remainder of the proceedings against Lankford—including presentencing motions and proceedings and his sentencing hearing—there was no mention of death as a possible punishment. *Id*. Neither the prosecutor nor Lankford's attorney made any reference to a possible death sentence at his sentencing hearing itself. *Id*. However, following Lankford's sentencing proceeding, and the sentencing proceeding of his co-defendant and brother, Lankford's trial judge reconvened his case and sentenced him to death. *Id*. at 117.

Although death was a possible punishment for his conviction, the Supreme Court observed that the issue was more nuanced than that: "The question, however, is whether it can be said that counsel had adequate notice of the critical issue that the judge *was actually debating*." *Lankford*, 500 U.S. at 120 (emphasis added). After recognizing that the *actual* notice that Lankford had was affected by the specific circumstances in his case—i.e., the prosecutor's notice he would not seek death—the Court observed: "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Without such notice, the Court is denied the benefit of the adversary process." *Id*. at 126-27. The Court ultimately concluded:

> If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error . . . and with that, the possibility of an incorrect result . . . [Lankford's] lack of adequate notice that the judge was contemplating the imposition of the

> death sentence created an impermissible risk that the adversary process may have malfunctioned in this case.

Id. at 127.

While Mr. Bowles, theoretically, could have been on notice to file an *Atkins*-based claim following the promulgation of Rule 3.203 in 2004, this Court cannot ignore the circumstances during that time. Florida courts were routinely holding that under the relevant statute the only qualifying IQ scores for intellectual disability diagnoses under Florida law were those of 70 or below. *Cherry*, 781 So. 2d at 1044-45; *Zack*, 911 So. 2d at 1201. Moreover, the very rule that this Court has held required Mr. Bowles file under or forever default a merits review of his claim, Fla. R. Crim. P. 3.203, required that trial counsel certify that they had a "good faith basis" to file the motion and grounds to believe the individual was intellectually disabled. *See* Fla. R. Crim. P. 3.203(d)(4)(A) (2004). Like in *Lankford*, these actual circumstances changed the calculus for litigants like Mr. Bowles, and made it such that he did not have adequate notice that he either had a qualifying IQ score as later held by *Hall*, or that he had a "good faith basis" to believe he could file a claim of intellectual disability.[11]

[11] It is also worth noting that Mr. Bowles, unlike Rodriguez, had no IQ scores of 70 or below prior to the promulgation of Fla. R. Crim. P. 3.203 in 2004. This, too, materially affected the notice that Mr. Bowles had to his eligibility for *Atkins* relief in a way that is distinguishable from the notice that Rodriguez had, which *Blanco* and *Harvey* cite without acknowledging this distinction.

Here, as in *Lankford*, the inadequate notice that Mr. Bowles had under the specific circumstances of his case and under Florida law created an "increased chance of error" in the continued death sentence of a person who was intellectually disabled. *Lankford*, 500 U.S. at 127. This "impermissible risk," *id*., violated Mr. Bowles's due process rights to notice and an opportunity to be heard. *See also Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

E. The Circuit Court's Finding that Mr. Bowles's Motion was Not Timely Under Fla. R. Crim. P. 3.851(d)(2)(B) in Light of *Harvey* is Incorrect

The circuit court erred when it found Mr. Bowles's motion was not timely under Fla. R. Crim. P. 3.851(d)(2)(B), as a result of *Harvey*, *see* PCR-ID at 1350-51, because *Harvey* was wrongly decided. Fla. R. Crim. P. 3.851(d)(2)(B) provides for the timeliness of a successive R. 3.851 motion where "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

Mr. Bowles files the instant motion with a diagnosis of intellectual disability from two psychologists that relies, in part, on his IQ score of 74 on the WAIS-IV. *See* PCR-ID at 780, 783; 799-801. Only after the Supreme Court's decision in *Hall*

would this IQ score legally qualify to establish his intellectual disability—prior to that, such a score would have been fatal to the entire claim. *See Foster v. State*, 260 So. 3d 174, 178 (Fla. 2018) ("[T]his state formerly required proof of an IQ score of 70 or below to establish the first prong, and failure to produce such evidence was fatal to the entire claim.").

There is no question that when the Supreme Court decided *Atkins*, it announced a new, substantive rule of constitutional law that was necessarily retroactive. *See, e.g., In re Holladay*, 331 F. 3d 1169, 1172-73 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in *Atkins* is retroactively applicable to cases on collateral review."). However, because the law in Florida indicated that only IQ scores of 70 or below were qualifying, *see Cherry*, 959 So. 2d 702, it was not until the Supreme Court decided *Hall v. Florida* that individuals like Mr. Bowles with IQ scores between 70-75 had a viable legal claim for intellectual disability. *See Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017) ("Instead, the language [in *Hall*] justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70.").

Thus, although *Hall* expanded the range of IQ scores that could establish than an individual was ineligible for execution, it was not until the Florida Supreme Court made *Hall* retroactive in *Walls*, 213 So. 3d 340, that Mr. Bowles could file his R.

3.851 motion. The Florida Supreme Court issued its opinion in *Walls* on October 20, 2016, and Mr. Bowles filed his R. 3.851 motion on October 19, 2017, within one year of *Walls*. *See, e.g.*, *Foster*, 260 So. 3d at 179 (noting a renewed *Atkins* claim was "timely" filed because it was within the *Walls* deadline). Because Mr. Bowles could not have filed this motion before the decisions in *Hall* and *Walls*, and he timely filed within one year of *Walls*, his motion should have been deemed timely pursuant to Fla. R. Crim. P. 3.851(d)(2)(B).

This Court should find Mr. Bowles's motion timely pursuant to R. 3.851(d)(2)(B), and should depart from its ruling to the contrary in *Harvey*. In *Harvey*, this Court held that Harvey's intellectual disability claim was not timely although he filed within one year of *Walls*, calling him a "similarly situated" litigant to *Rodriguez*, and denying him the retroactive benefit of *Hall* as a result. *Harvey*, 260 So. 3d at 907. *Harvey* contained no more reasoning than that.

Harvey was wrongly decided for two reasons: first, the retroactivity of *Hall* as delineated in *Walls* was not conditioned on any procedural requirement, let alone a requirement found in an unpublished order from the prior year; and second, *Harvey*'s reliance on *Rodriguez* was misplaced, because they were not similarly situated. With respect to the first reason that *Harvey* was wrongly decided, a plain reading of the *Walls* opinion, in which this Court analyzed retroactivity pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), reveals that it does not contain any

requirement that an individual previously have raised an intellectual disability claim to get the benefit of *Hall* retroactivity. With respect to the second reason *Harvey* was wrongly decided, as Mr. Bowles has argued elsewhere in this brief, Rodriguez was in a materially different circumstance than litigants like Mr. Bowles and those who should be eligible for *Hall*-based relief: Rodriguez had pre-2004 (and pre-*Atkins*) IQ scores that were below 70, and would have arguably qualified him for *Atkins* relief or at the very least, put him on notice that such relief was a possibility for him. *See, e.g.*, Initial Brief of Appellant at 6-7, *State v. Rodriguez,* No. SC15-1278, 2015 WL 7076431 (Fla. Nov. 4, 2015) (noting prior WAIS scores of 62 and 58). Mr. Bowles and litigants like him had no such notice.

This Court's reliance on *Rodriguez*, a case that was decided prior to *Walls* and with materially different facts than those that are present in the cases of individuals raising their intellectual disability for the first time with IQ scores between 70-75, was misplaced. As *Walls* recognized, the category of individuals who had potentially meritorious intellectual disability claims changed with *Hall*, and those litigants should not be deprived of their opportunity to present such evidence based on a case that is critically distinguishable. This Court should thus depart from its ruling in *Harvey*, and find Mr. Bowles's postconviction motion timely pursuant to *Walls* and Fla. R. Crim. P. 3.851(d)(2)(B). Moreover, *Harvey* was wrongly decided to the extent that it forecloses merits review and creates an unacceptable risk of the

execution of the intellectually disabled in violation of the Eighth and Fourteenth Amendments of the United States Constitution, *see supra* section (I)(D).

F. The Circuit Court Erred in Finding that Good Cause Under Fla. R. Crim. P. 3.203(f) Did Not Exist

Mr. Bowles maintains that both the refusal to obtain a merits review of his intellectual disability claim violates his federal constitutional rights, *see supra* section (I)(D), as well as that his eligibility for relief was not foreseeable to him or his counsel until after *Hall* (and the retroactivity ruling in *Walls*) due to his IQ score being between 70-75, which is a qualifying IQ score for an intellectual disability diagnosis that Florida courts did not recognize until after *Hall*, *see supra* section (I)(E).

However, Fla. R. Crim. P. 3.203(f) provides that "[a] claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." To the extent that litigants who have never raised an intellectual disability claim previously can get any merits review under Florida law, it seems that this provision is the only vehicle for timeliness. Additionally, there can be only two scenarios under this Court's rulings in *Rodriguez*, *Blanco*, and *Harvey*: either litigants like Mr. Bowles should have known to file their intellectual disability claims—even with then-non-qualifying IQ scores between 70-75—or they could not have known due to the state of the law in Florida. If the former, this Court erred in

seemingly deciding to the contrary in *Rodriguez*, *Blanco*, and *Harvey*. If the latter, then Mr. Bowles's postconviction counsel was grossly negligent in failing to even investigate the possibility that his brain-damaged client with known poor intellectual functioning was intellectually disabled, and this could and should form the basis of good cause under Rule 3.203(f). Thus, Mr. Bowles argues that good cause exists either due to the unforeseeability of Mr. Bowles's eligibility for relief, *see infra* section (I)(F)(ii), or negligent representation by his counsel if his claim was foreseeable, *infra* section (I)(F)(i).

i. The Circuit Court Misconstrued Mr. Bowles as Raising an Ineffective Assistance of Counsel Claim and Erred in Finding that Attorney Neglect Could Not Form the Basis of Good Cause

In finding Mr. Bowles's motion untimely, the circuit court found that attorney neglect could not form the basis for "good cause" under Fla. R. Crim. P. 3.203(f). *See* PCR-ID at 1348-49. Specifically, the circuit court erroneously found that Mr. Bowles was "effectively arguing good cause exist because postconviction counsel was *ineffective* for failing to file an *Atkins* claim" and "claims of ineffective assistance of postconviction counsel are not cognizable." PCR-ID at 1348 (emphasis in original). The circuit court suggested Mr. Bowles was arguing for "a backdoor for claims of ineffective assistance of postconviction counsel" on this basis. *Id*. This finding mischaracterizes both Mr. Bowles's argument as well as the proper interpretation of the Rule 3.203(f) good cause exception.

This Court has not defined "good cause" within Rule 3.203(f). However, interpretation of the Florida Rules of Criminal Procedure is bound by the rules of statutory construction. *See Rowe v. State*, 394 So. 2d 1059, 1059 (Fla. Dist. Ct. App. 1981) ("When construing court rules, the principles of statutory construction apply.") (citations omitted). Thus, while "good cause" is not defined by R. 3.203, the interpretation of "good cause" in other parts of the Florida Rules of Criminal Procedure which affect motions such as this one, are instructive. *Cf. Ferguson v. State*, 377 So. 2d 709 (Fla. 1979) ("At the outset we note the basic rule of statutory construction that statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and should be construed together and compared with each other.") (citation omitted). Florida courts regularly adopt "good cause" standards as discussed in interpretations from other portions for the Florida Rules of Criminal Procedure. *See, e.g.*, *Davis v. State*, 162 So. 3d 91, 92 (Fla. Dist. Ct. App. 2014) (analogizing good cause as discussed in the R. 3.050 enlargement of time context to good cause for R. 3.134 time for filing formal charges purposes).

What constitutes "good cause" within other provisions of the Florida Rules of Criminal Procedure has been discussed many times by this Court and several district courts of appeals, and these decisions are instructive. Good cause is a "substantial reason, one that affords a legal excuse," *State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003), and can be the result of "excusable neglect," *Parker v. State*, 907 So. 2d 694,

695 (Fla. Dist. Ct. App. 2005) (internal citation omitted). Additionally, an attorney's "mistaken advice can be a valid basis for finding good cause." *Johnson v. State*, 971 So. 2d 212, 215 (Fla. Dist. Ct. App. 2008) (citing *Nicol v. State*, 892 So.2d 1169, 1171 (Fla. Dist. Ct. App. 2005) and *Graham v. State*, 779 So.2d 604 (Fla. Dist. Ct. App. 2001)).

When Mr. Bowles's postconviction counsel, attorney Frank Tassone, undertook representation of Mr. Bowles in February 2002, it was already the law in Florida that the intellectually disabled could not be executed. *See Kilgore*, 55 So. 3d at 507. Then, in June 2002, the Supreme Court announced its decision in *Atkins v. Virginia*, creating a categorical bar against the execution of the intellectually disabled. In June 2002, Mr. Tassone had not yet filed a Mr. Bowles's initial motion for postconviction relief, and would not do so until December 2002. Thereafter, Mr. Tassone even amended the postconviction motion in August 2003. PCR I at 21-101. Mr. Bowles's *Huff* hearing occurred in February 2004, and an evidentiary hearing did not occur until February 2005. *See* PCR III.

In 2004, while Mr. Bowles's initial state postconviction motion was still pending, Rule 3.203 was promulgated. The first iteration of Rule 3.203 specifically divided its application into three categories of defendants: pretrial defendants, defendants for which direct appeal was not complete and convictions were thus not yet final, and defendants whose convictions were final. *See Amendments*, 875 So. 2d

at 565-566. Subsection (d) of the original Rule 3.203 specified procedures for filing intellectual disability claims in conformity with Rule 3.851 for individuals in postconviction postures such as Mr. Bowles. *See* Fla. R. Crim. P. Rule 3.203(d)(4)(A-F) (2004).

If the state of the law is as this Court has held in *Rodriguez, Blanco,* and *Harvey,* then there was no question that in 2001, when Florida law barred the execution of the intellectually disabled, and in 2002, when *Atkins* held that execution of such individuals violated the Eighth Amendment, and in 2004, when the Florida Rules of Criminal Procedure laid out the process by which a death-sentenced individual whose conviction was final could get review of their sentence, that it was clear to attorneys practicing in Florida that intellectual disability claims should be investigated for death-sentenced clients. Mr. Tassone failed to do so in Mr. Bowles's case, despite multiple pieces of record evidence indicating Mr. Bowles had limited intellectual functioning. That Mr. Tassone did not investigate the potential viability of an *Atkins* claim, Mr. Bowles specifically pled, is supported by Dr. Harry Krop, who was retained by Mr. Tassone in state postconviction to conduct neuropsychological testing of Mr. Bowles, and recalled:

> I did not administer a full-scale I.Q. test to Mr. Bowles, as I was not then asked to evaluate Mr. Bowles for intellectual disability, and I have never been asked to do so. I, therefore, did not undertake an intellectual disability assessment which would have included the administration of the full I.Q. test being used at that time as well as a comprehensive assessment of adaptive functioning.

PCR-ID at 789.

Moreover, it is not that an intellectual disability assessment as Dr. Krop describes would not have been warranted; when presented with much of the same information that is presented in this motion, Dr. Krop agreed:

> Based on materials I have reviewed, it is likely that Mr. Bowles is an intellectually disabled person. These materials are consistent with my prior opinion that Mr. Bowles has neuropsychological and cognitive impairments, which have pervaded Mr. Bowles's life. Additionally, the materials I reviewed are consistent with my prior opinion that Mr. Bowles's impairments would have had an origin as early as birth.

PCR-ID at 790.

Mr. Bowles acknowledges that there is no right to effective assistance of postconviction counsel for the purposes of the Sixth Amendment, *see Kokal v. State*, 901 So. 2d 766, 778 (Fla. 2005), but attorney misconduct or neglect could form the basis of "good cause" under R. 3.203(f). If a death-sentenced individual should have known to file an intellectual disability claim immediately after *Atkins* was decided and within the time frames announced in R. 3.203 in 2004, as the Florida Supreme Court has held in *Rodriguez* and *Blanco*, Mr. Tassone's failure to even investigate that possibility, when his client specifically had documented limited intellectual functioning and neuropsychological problems consistent with brain damage, *see* PCR. II at 240, 260, 267-70, constitutes at least "excusable neglect" sufficient for

"good cause" under R. 3.203(f). *Cf. Parker*, 907 So. 2d at 695 (quoting *Boyd*, 846 So. 2d at 460).

"The Florida Rules of Criminal Procedure are designed to promote justice and equity while also allowing for the efficient operation of the judicial system." *Abreu v. State*, 660 So. 2d 703, 704 (Fla. 1995). Rule 3.203(f), and the "good cause" standard, is no different. As this rule has been consistently applied to postconviction litigants, so should its "good cause" standard. This means that, as with other portions of the Florida Rules of Criminal Procedure, Mr. Bowles was entitled to a fact-specific inquiry into his good cause allegations.

This is not a "backdoor" ineffectiveness claim, as the circuit court incorrectly found, but a reasoned interpretation of the good cause standard as elucidated by its use in other contexts. If attorney misadvice can constitute good cause for other portions of the rules, and "excusable neglect" meets the good cause standard, Mr. Bowles should have been at least able to offer proof that his attorney's gross neglect in failing to even investigate the possibility of an intellectual disability claim, when he had known intellectual limitations and brain damage, constituted "good cause" for the circuit court to reach the merits of his important claim that would, if successful, categorically bar him from execution.

ii. The Circuit Court Erred in Finding that Good Cause Could Not Be Established By the Retroactivity Ruling of *Walls v. State*

The circuit court erred in finding that good cause for Fla. R. Crim. P. 3.203(f) purposes could not be established by this Court's retroactivity holding in *Walls*. PCR-ID at 1347-48. The circuit court made this finding only on the basis of this Court's ruling in *Rodriguez*, without an analysis of good cause. PCR-ID at 1347. However, the circuit court's reliance on *Rodriguez* in disposing of Mr. Bowles's claim was misplaced.

First, the circuit court's reliance on *Rodriguez* was misplaced because it is distinguishable from Mr. Bowles's case on the applicable law. Under R. 3.203(f), Rodriguez argued for good cause on the basis of *Hall* alone—not on the basis of the extraordinary retroactivity ruling in *Walls*. There is certainly good reason why this Court might find good cause in a scenario where a law was found to be retroactively applicable to a litigant, as compared with a scenario where no court has held that a new ruling is applicable to individuals whose convictions and sentences are final. Further, a "change in law" has met the "good cause" standard in other contexts for purposes of the Florida Rules of Criminal Procedure. *See, e.g.*, *Moraes v. State*, 967 So. 2d 1100, 1101 (Fla. Dist. Ct. App. 2007) ("We think a change in law . . . constitutes good cause for withdrawal of the plea.").

Second, the circuit court's reliance on *Rodriguez* was misplaced because it failed to account for the specific circumstances in Mr. Bowles's case that made his claim factually distinguishable from Rodriguez's claim. Unlike in other portions of the rules, such as R. 3.851(d)(2)(B) as argued above, R. 3.203 employs the "good cause" standard, which must account for the "peculiar facts and circumstances of each case." *Boyd*, 846 So. 2d at 460. Additionally, good cause for timeliness can be met when "the failure to act was the result of excusable neglect." *Parker v. State*, 907 So. 2d 694, 695 (Fla. Dist. Ct. App. 2005) (quoting *Boyd*, 846 So. 2d at 460).

As Mr. Bowles has previously noted, because his IQ score is between 70-75, and has never been qualifying or below 70, he was not on notice in the same way of his potential eligibility for relief as Rodriguez was until *Hall* was made retroactive to him in *Walls*. The circuit court failed to analyze or make any findings about these particularities that could have established good cause for Mr. Bowles, because his "failure to act" arguably fit the "excusable neglect" standard more easily than in *Rodriguez*. Thus, the circuit court erred in this ruling**.**

G. The Circuit Court Erred in Denying Mr. Bowles an Evidentiary Hearing

i. Mr. Bowles Is Entitled to an Evidentiary Hearing on Timeliness and Good Cause

Whether or not to grant an evidentiary hearing is a "pure question of law, subject to de novo review." *Kelley v. State*, 3 So. 3d 970, 973 (Fla. 2009) (citing *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003)).

Timeliness can be a factual issue requiring an evidentiary hearing. In this case, Mr. Bowles alleged a factual circumstance—that his attorney was grossly neglectful in failing to investigate or file an intellectual disability claim under Rule 3.203 given his known intellectual impairments—that he should have been entitled to develop at an evidentiary hearing. Because this Court has not spoken on good cause within Rule 3.203(f), or a scenario as Mr. Bowles has pleaded, it should look to its prior ruling in *State v. Boyd*, 846 So. 2d 458 (Fla. 2003), which considered whether "good cause" existed for an extension of time under Fla. R. Crim. P. 3.050 for Boyd to file an otherwise untimely R. 3.850 postconviction motion.

As this Court has observed, "[t]he determination of good cause is based on the peculiar facts and circumstances of each case." *Id*. at 460. In *Boyd*, this Court considered the argument that good cause existed because Boyd "was transferred to another prison and his legal files had not arrived." *Boyd*, 846 So. 2d at 460. Reversing a trial court's summary denial of Boyd's R. 3.850 motion as untimely,

Boyd said of these factual circumstances, "[s]uch allegations, if true, may constitute good cause under the rule," for an extension of time, making the postconviction motion timely. *Id*. *Boyd* also specifically instructed that on remand, the lower court proceedings "may include an inquiry into whether the facts alleged in the motion for extension are true." *Id*. (internal quotation omitted).

The *Boyd* instructions on good cause support the principle that the circuit court should have conducted an inquiry into whether the facts underlying his good cause argument "are true." *Id*. This necessarily supported Mr. Bowles's request for an evidentiary hearing, which is the proper forum for the resolution of factual disputes.

In other contexts, Florida courts have regularly held that "good cause," requires specific inquiries into the "circumstances surrounding" the compliance with the Florida Rules of Criminal Procedure, and found circuit courts in error where they did not conduct such an inquiry. *See, e.g.*, *Small v. State*, 608 So. 2d 829, 829 (Fla. Dist. Ct. App. 1992) (reversing trial court's ruling that good cause had not been shown for failure to comply with Fla. R. Crim. P. 3.200, and remanding with instructions to hold a hearing "to determine whether or not good cause existed."). The importance of a hearing for good cause purposes is paramount, as courts have observed: "Even when presented with a motion asserting good cause, a trial court still cannot find good cause without providing *a full and fair opportunity to be heard* and serious consideration of the party's opposition." *State v. Moss*, 194 So. 3d 402,

405 (Fla. Dist. Ct. App. 2016) (citing *Demings v. Brendmoen*, 158 So. 3d 622 (Fla. Dist. Ct. App. 2014)) (emphasis added). Likewise, this Court should vacate the circuit court's order and remand Mr. Bowles's case for an evidentiary hearing on the timeliness issue related to good cause.

ii. Mr. Bowles Is Entitled to an Evidentiary Hearing on the Merits of his Intellectual Disability Claim

Mr. Bowles was entitled to an evidentiary hearing on the merits of his intellectual disability claim. "When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the [trial] court must look at the entire record." *Kelley*, 3 So. 3d at 973 (quoting *Wright v. State*, 995 So. 2d 324, 328 (Fla. 2008)) (internal quotations omitted). "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the [appellant's] allegations as true to the extent they are not conclusively refuted by the record." *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008).

Mr. Bowles proffered voluminous evidence that he is intellectually disabled, including the reports of two experts diagnosing him with intellectual disability, a third expert opining that he had impaired intellectual functioning consistent with intellectual disability and brain damage from a pre-18 origin, and the sworn declarations of a dozen lay witnesses from Mr. Bowles's childhood through his adulthood detailing his lifelong history of adaptive deficits. Moreover, Mr. Bowles presented the sworn statements of the prior experts in his case, Dr. McMahon from

his pre-*Atkins* trial, and Dr. Krop from his initial state postconviction, both of whom acknowledge they had never previously assessed Mr. Bowles for intellectual disability. *See* PCR-ID at 732-835.

In "turn[ing] to the record" in this case, this Court should find that "[Mr. Bowles] has presented sufficient evidence to establish that he meets the statutory definition of intellectual disability." *Hall*, 201 So. 3d at 635. Just as in *Hall*, "[t]he record evidence in this case overwhelmingly supports the conclusion that '[Mr. Bowles] has been [intellectually disabled] his entire life.'" *Hall v. State*, 201 So. 3d 628, 638 (Fla. 2016) (quoting *Hall v. State*, 109 So. 3d 704, 712-14 (Fla. 2012) (Pariente, J., concurring) (first alteration added)).

Mr. Bowles has never had a hearing on his *Atkins*/*Hall* claim and the circuit court's incorrect application of a procedural bar should not preclude Mr. Bowles's constitutional and due process rights. This Court should remand to the circuit court to allow Mr. Bowles to present his evidence at an evidentiary hearing.

II. The Circuit Court Erred by Refusing to Grant Mr. Bowles Access to Public Records Pursuant to Fla. R. Crim. P. 3.852

In 1996, this Court proposed Rule 3.852 to govern the procedure for capital defendants in postconviction proceedings to obtain public records. *See In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production*, 673 So. 2d 483 (Fla. 1996). The Court invited comments to the proposed rule and addressed objections to it when it formally adopted the rule. It

specifically addressed the comments of those who were concerned that the new rule would limit a capital defendant's right to public records, and stated:

> We specifically address the comments of those who are concerned that the rule will unconstitutionally limit a capital postconviction defendant's right to production of public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995). We conclude that the rule does not invade those constitutional and statutory rights.

In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475-76 (Fla. 1996). Justice Anstead, joined by Justices Grimes and Kogan, specially concurred, and explained:

> As a practical matter, and for this rule to work as we hope, capital Defendants should utilize this rule to conduct all discovery, including the discovery that was previously conducted pursuant to chapter 119, and the State and its agencies should respond to their obligations to provide discovery in accord with the spirit of Florida's open records policy. As noted in the majority opinion, **this rule in no way diminishes the right of an individual Florida citizen, including a capital defendant, to access public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995).**

Id. at 477 (emphasis added).

In 1998, after the legislature established a repository for records in capital cases and repealed Rule 3.852, this Court adopted a revised Rule 3.852, and wrote:

> We intend for this rule to serve as a basis for providing to the postconviction process all public records that are relevant or would reasonably lead to documents that are relevant to postconviction issues. We emphasize that it our strong intent that there be efficient and diligent production of all of the records without objection and without conflict. . . .

Amendments to the Florida Rules of Criminal Procedure -- Rule 3.852 (capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 754 So. 2d 640, 642-43 (Fla. 1999).

And in *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000), Justice Anstead further cautioned, "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000).

The spirit of an open records policy in capital postconviction proceedings did not prevail in Mr. Bowles's case.

The death warrant for Mr. Bowles was issued on June 11, 2019. On June 18, 2019, Mr. Bowles filed public records demands pursuant to Fla. R. Crim. P. 3.852 (h) (3) and 3.852 (i) to state, county, and local agencies, including: the Department of Corrections (DOC); the Justice Administration Commission; the State Attorney's Office for the Fourth Judicial Circuit (SAO); the Jacksonville Sheriff's Office (JSO); the Nassau County Sheriff's Office (NCSO); the Volusia County Sheriff's Office (VCSO); the Daytona Beach Police Department (DBPD); the Medical Examiner's Office for the Eighth District (ME); the Florida Department of Law Enforcement (FDLE); and the Florida Commission on Offender Review (FCOR). PCR-ID at 196-337.

Only the Nassau County Sheriff's Office, the Justice Administration Commission, and the Daytona Beach Police Department complied with the demands. PCR-ID at 406-410. The Volusia County Sheriff's Office and the Jacksonville Sheriff's Office filed affidavits that they had no additional records to disclose. PCR-ID at 399-400, 453-456. All other agencies filed objections to the demands that the circuit court sustained at the hearing held on June 21, 2019. PCR-ID at 415-428.

A. The Circuit Court Erred in Denying Mr. Bowles's Request for His Classification Records from the Department of Corrections

The circuit court erred in denying Mr. Bowles's demand for his own inmate classification records from the DOC. This was a denial of due process in that without these records Mr. Bowles was denied the opportunity to gather additional evidence to present at an evidentiary hearing on his intellectual disability claim.

DOC agreed to produce Mr. Bowles's medical and mental health records, but objected to production of any other inmate records on the grounds that Mr. Bowles's request was "overbroad and unduly burdensome" and that he had not alleged how the records requested "would be relevant to a colorable claim for post-conviction relief or lead to the discovery of relevant evidence." PCR-ID at 375.

In his demand, Mr. Bowles's specifically sought his records related to any disciplinary proceedings, movement and housing logs, and visitation logs and

explained that the records might contain reports from DOC employees describing conduct by Mr. Bowles that might be indicative of adaptive deficits or of risk factors for intellectual disability. PCR-ID at 244-245. Had Mr. Bowles been granted an evidentiary hearing on his intellectual disability claim, he could have offered any evidence of adaptive deficits gleaned from the DOC records. The American Association on Intellectual Disability and Development actually instructs lawyers to review their client's prison records for evidence of their intellectual disability in its manual on the death penalty. *See* American Association on Intellectual and Developmental Disabilities, *The Death Penalty and Intellectual Disability* 196 (Edward A. Polloway ed., 2015).

Indeed, recently in *Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015), this Court considered DOC records that indicated that the Defendant might be intellectually disabled, among other evidence, and reversed the circuit court's denial of the Defendant's intellectual disability claim and remanded the matter for reconsideration of the issue.

Moreover, this Court previously found an abuse of discretion where a defendant was denied his own inmate and medical records, which had been requested under 3.852(h)(3) in *Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013). In *Muhammad*, the records demanded under 3.852(h)(3) were both medical and inmate records. Initial Brief of Appellant at 38, *Muhammad v. State*, No. SC13-2105

(Fla. Nov. 8, 2013). Postconviction counsel had previously requested from DOC personnel files of department employees as the crime in *Muhammad* had occurred within a correctional facility. *Id*. After the issuance of the death warrant the defendant in *Muhammad* requested his own medical and inmate records from DOC. *Id*. The circuit court denied *Muhammad's* request. This Court found that the circuit court abused its discretion in denying Muhammad's request for his own inmate and medical records. *Muhammad*, 132 So. 3d at 201.

Under Rule 3.852(h)(3), a defendant under death warrant may request records from "a person or agency from which collateral counsel has previously requested public records." Fla. R. Crim. P. 3.852(h)(3). Under 3.852(h)(3) there is no requirement that the records currently demanded be the same type of records that were previously demanded.

Mr. Bowles had previously requested medical records from DOC before the death warrant was issued. After the death warrant was issued in this cause, Mr. Bowles filed a demand with the Florida Department of Corrections for public records under both 3.852(h)(3) and 3.852(i). In the demand Mr. Bowles stated that the classification records requested, including movement and disciplinary records, were related to or could relate to his claim of intellectual disability. He further alleged that the records could describe interactions between agency employees and Mr. Bowles,

which could relate, or lead to discovery of evidence supporting Mr. Bowles's claim of intellectual disability.

In sustaining the objection filed by the Department of Corrections as to the inmate records, the circuit court attempted to distinguish *Muhammad*, saying that the defendant in Muhammad had previously requested records and therefore the request was not as burdensome. PCR-ID at 421. However, like the defendant in *Muhammad*, Mr. Bowles had also previously requested records from the DOC, so the post-warrant demand for medical and classification records was in fact an "update" and is analogous to *Muhammad.* PCR-ID at 421.

B. The Circuit Court Erred in Denying Mr. Bowles's Request for Records from the State Attorney's Office

The circuit court erred in sustaining the objection to Mr. Bowles's demand for correspondence between the State Attorney's Office and family or friends of the victim.[12] This was a denial of due process in that without these records Mr. Bowles was denied the opportunity to gather additional evidence to present at an evidentiary hearing on his intellectual disability claim. There is record evidence that the victim's brother-in-law, the victim's sister and the victim's neighbor had met Mr. Bowles

[12] In the circuit court's order this is mistakenly referred to as JSO correspondence. The demand to the State Attorney did not include any mention of JSO. Rather, paragraph (7b) refers to correspondence between "any State Attorney employee (including, but not limited to, victim advocates) and the victim's friends/family regarding Gary Bowles, DOB 1/25/1962."

through the victim and may have shared their impressions of Mr. Bowles with the prosecutors. R at 488-499, 499-508, 565-572. It is also violates Mr. Bowles's right to Equal Protection as any other citizen would be able to obtain these records through a public records request where Mr. Bowles, who is facing imminent execution, may not.

Under 3.852(i) records need to be "*relevant* to the subject matter of the post-conviction proceeding" or be "reasonably calculated to lead to the discovery of admissible evidence" Fla. R. Crim. P. 3.852 (emphasis added). For an agency that has already produced records, the relevance is immaterial as the demand falls under 3.852(h)(3). The provisions of 3.852(h)(3) require that the records were not previously objected to, were received or produced since the previous request, and were not produced previously. Fla. R. Crim. P. 3.852.

Mr. Bowles's demand stated that the correspondence between SAO employees and the victim's friends and family could "lead to the discovery of admissible evidence related to the intellectual disability claim filed by predecessor postconviction counsel." PCR-ID at 208. Furthermore, the demand explained that the records may contain descriptions of Mr. Bowles's behavior, consistent with adaptive deficits and/or risk factors for intellectual disability. PCR-ID at 209.

In sustaining the State Attorney's objection, the circuit court articulated that the "stated basis for these records is too attenuated to reasonably lead to a colorable

claim of relief." PCR-ID at 417. As the State Attorney's Office had previously produced records, the demand falls under 3.852(h)(3), which makes relevance a non-issue. Nevertheless, the demanded records do meet the criteria of 3.852(i) in that they are "*relevant* to the subject matter of the postconviction proceeding" and "reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i). The second requirement of proving a claim of intellectual disability requires proof of adaptive deficits that are typically proved through anecdotal observations of Mr. Bowles by others. Since the initial disclosure from the State Attorney's Office in 2002, it is reasonable that the victim's family and acquaintances would still be in contact with the State Attorney's Office about the case. The perceptions of Mr. Bowles by the victim's friends and family are "reasonably calculated to lead to the discovery of admissible evidence" and the circuit court erred in concluding otherwise.

C. The Circuit Court Erred in Denying Mr. Bowles Request for Materials Relating to the Lethal Injection Process from the Medical Examiner's Office, the Department of Corrections, and the Florida Department of Law Enforcement

Mr. Bowles has been denied his rights under due process and equal protection as guaranteed by the Eighth and Fourteenth Amendments. After the signing of the warrant, Mr. Bowles made public records requests pertaining to lethal injection materials to the Medical Examiner of the Eighth District, the Department of Corrections, and the Florida Department of Law Enforcement. The trial court

sustained the objections of the ME, FDLE, and the DOC as to the lethal injection materials. It was Mr. Bowles's position that the record requests were not overbroad and would lead to evidence supporting a colorable claim. In *Bucklew*, Mr. Bucklew was provided with the very discovery that Mr. Bowles was denied. *See Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). While Mr. Bucklew's claim was ultimately denied, he was at least afforded his rights under due process in being given access to materials to substantiate his claim.

Here, Mr. Bowles has been denied access to public records that would be available to any person excluding those required to utilize the 3.852 process. In *Sims v. State*, Justice Anstead cautioned, "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access public records that any other citizen could routinely access." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000). Mr. Bowles has a need for these records, unlike many others. The records would be relevant to a constitutional challenge to Florida's lethal injection protocol by Mr. Bowles. The records relate to the matters Mr. Bowles must show under *Glossip v. Gross*, 135 S. Ct. 1885 (2015) and *Bucklew*. Mr. Bowles must be given a fair opportunity to show his execution will violate the Fourteenth Amendment. *Hall*, 572 U.S. at 724 ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair

opportunity to show that the Constitution prohibits their execution."). The trial court's refusal to safeguard Mr. Bowles's constitutional rights was error.

CONCLUSION

The Court should stay Mr. Bowles's scheduled August 22, 2019, execution, reverse the circuit court's decisions procedurally barring his intellectual disability claim and denying his access to records, and remand for a hearing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Terri Backhus, Chief, Capital Habeas Unit, Federal Public Defender for the Northern District of Florida (terri_backhus@fd.org); Bernie de la Rionda (bdelarionda2@gmail.com); Assistant State Attorney Sheila Ann Loizos (sloizos@coj.net); Assistant Attorney General Jennifer A. Donahue (jennifer.donahue@myfloridalegal.com), Assistant Attorney General Charmaine Millsaps (Charmaine.millsaps@myfloridalegal.com), (capapp@myfloridalegal.com), the Circuit Court of the Fourth Judicial Circuit (pfields@coj.net), and the Florida Supreme Court (warrant@flcourts.org) this 26th day of July, 2019.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi

CERTIFICATION OF FONT

WE HEREBY CERTIFY this petition complies with the font and formatting requirements of Fla. R. App. 9.210(a)(2). A Times New Roman 14 font was used.

/s/ *Karin Moore*	/s/ *Terri Backhus*	/s/*Elizabeth Spiaggi*
Karin Moore	Terri Backhus	Elizabeth Spiaggi