No. SC19-1184

IN THE

Supreme Court of Florida

GARY RAY BOWLES,

Appellant,

v.

STATE OF FLORIDA,

State.

APPELLANT'S REPLY BRIEF

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

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I. The State's Arguments Regarding Timeliness are Incorrect

A. The State Misconstrues or Ignores Mr. Bowles's Federal Constitutional Arguments

In his postconviction motion and initial brief in this Court, Mr. Bowles made three distinct constitutional arguments about the validity of a state procedural bar allowing Florida's courts to refuse merits consideration of certain intellectual disability claims. First, Mr. Bowles argued that intellectual disability claims were not subject to procedural default or waiver, because such intellectually disabled individuals are categorically ineligible for execution under the Eighth Amendment. *See* PCR-ID at 748; Initial Brief (IB) at 18-21. Second, Mr. Bowles argued that to the extent that *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), and *Harvey v. State*, 260 So. 3d 906 (Fla. 2018), foreclose any merits review to litigants like Mr. Bowles, those decisions violates due process, the Eighth Amendment, and *Atkins v. Virginia*, 536 U.S. 304 (2002), and progeny, by creating an unacceptable risk of the execution of the intellectually disabled. *See* PCR-ID at 750; IB at 23-25. Third, Mr. Bowles argued that to the extent that *Rodriguez*, *Blanco*, and *Harvey*, foreclose review to litigants like Mr. Bowles, they violated his due process right to notice and an opportunity to be heard. PCR-ID at 749-750; IB at 26-31. The State's arguments on these points are either cursory, legally inaccurate, or waived.

i. The State Misunderstands Mr. Bowles's Argument that the Eighth Amendment Prohibits the Execution of the Intellectually Disabled and Cannot be Waived or Defaulted

With regard to Mr. Bowles's first timeliness argument, the State seems to argue that the United States Supreme Court would agree that the execution of some intellectually disabled individuals is permissible because, in the State's view, the Court has even approved of the execution of the factually innocent based on procedural rules. *See* Answer Brief (AB) at 19 ("Opposing counsel insists that some claims, such as an *Atkins* clam, are so fundamental, they cannot be time barred . . . But the United States Supreme Court disagrees. The High Court has held that even a claim of actual factual innocence may be rejected based on delay."). These assertions misunderstand and mischaracterize Mr. Bowles's argument as well as the Supreme Court's precedent with regard to intellectual disability claims.

The State fails to recognize that legally intellectual disability claims are not like claims of factual innocence. Unlike actual innocence claims, with which the United States Supreme Court has a long and convoluted history,[1] the Court has been

[1] Additionally, the State's insistence on the constitutionality of the execution of the factually innocent is concerning for a number of reasons, but of relevance here it is important to note that it misstates the United States Supreme Court's precedent touching on this question. Significantly, the Supreme Court has never answered the question of whether it is independently permissible to execute the factually innocent, or whether a freestanding claim of actual innocence exists in habeas proceedings. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The

clear on the issue of executing the intellectually disabled: it is unconstitutional. *See Atkins*, 536 U.S. at 320; *Hall v. Florida*, 572 U.S. 701, 708 (2014); *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015); *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017). This categorical rule originates from the Eighth Amendment, and concerns "the characteristics of the offender" that make such persons ineligible for execution. *Graham v. Florida*, 560 U.S. 48, 60 (2010).

The State's attempts to analogize factual innocence with intellectual disability is ill-fitting—and with good reason. There is one appropriate analogy here, as the Supreme Court has clearly stated the Eighth Amendment only prohibits the execution of two types of offenders: juveniles and the intellectually disabled. *Id.* at 61. For individuals who were juveniles at the time of their offense, their *age*, an immutable and indisputable characteristic of said offender, renders them ineligible for execution. So too are the intellectually disabled ineligible for execution—intellectual disability is a lifelong and incurable characteristic. As Mr. Bowles argued in his initial brief, *see* IB at 20, the Supreme Court continually cites *Roper v. Simmons*, 543 U.S. 551 (2005), which first held the execution of juveniles to be

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quintessential miscarriage of justice is the execution of a person who is entirely innocent."). That the Court in *McQuiggin* found that a showing of actual innocence could serve as a procedural "gateway" for litigants who have filed untimely federal habeas petitions—a narrow issue—does not mean, as the State argues, that the Court finds it constitutionally permissible to execute the factually innocent or that dilatoriness justifies the execution of the factually innocent.

unconstitutional, in its *Atkins* jurisprudence. The State completely ignores this corollary, in favor of a convoluted argument about factual innocence, because it logically results in the conclusion that Mr. Bowles has been arguing all along: intellectual disability is a categorical bar to execution that cannot be waived or defaulted, just as is juvenile status at the time of a capital offense. Courts cannot refuse to consider the merits of an intellectual disability claim any more than courts may refuse to consider whether an individual had reached the age of eighteen at the time of a capital offense.

ii. The State Misunderstands Mr. Bowles's Argument that the Application of the Time Bar Violates his Due Process Rights

The State also misconstrues Mr. Bowles's due process argument that *Rodriguez*, *Harvey*, and *Blanco* denied him notice and an opportunity to be heard, and instead claims that "[f]ollowing this logic, all time bars of any sort violate due process." AB at 22. The State's reading of Mr. Bowles's claim fails to substantively engage with Mr. Bowles's argument. Mr. Bowles does not claim that because a time-bar exists that he was denied notice and an opportunity to be heard. The very concept of a time bar is that a litigant could have raised an issue and chose not to, forfeiting their right to raise it later; here, Mr. Bowles challenges the constitutionality of the time bar because he could not have raised this issue earlier than he did, under a plain reading of the statute that defined intellectual disability, Fla. Stat. § 921.137, which

was held unconstitutional as applied by the Supreme Court in *Hall v. Florida,* and was unavailable to him until it was retroactively applied in *Walls v. State*, 213 So. 340 (Fla. 2016).

Simply, Mr. Bowles could not have been on notice that any such time bar could apply to him if he did not raise an *Atkins*-based claim when Fla. R. Crim. P. 3.203 was promulgated in 2004, because he was not then eligible for relief under Florida law. The State agrees with this reading of the state of Florida law—in another portion of the State's brief, the State argues that Mr. Bowles's counsel could not have known to raise an *Atkins*-based claim for him in 2004 because Fla. Stat. § 921.137, as later confirmed by *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), did not account for the Standard Error of Measurement (SEM) and thus required an IQ score of 70 or below. *See* AB at 27 ("Postconviction counsel cannot be ineffective for not foreseeing that *Cherry* would be overruled by the United States Supreme Court years later."); *id*. at 27 n. 15 ("While *Cherry* had not been decided at the time of initial postconviction proceedings in this case, the holding in *Cherry* was based on the statutory language, the text of the rule, and prior caselaw."); *id*. at 28 ("Postconviction counsel was not ineffective for not investigating intellectual disability further given the state of the law . . .").

The State tacitly agrees that Mr. Bowles could not have been on notice of his eligibility for *Atkins*-based relief in 2004, which is exactly the basis for his argument that he was denied constitutionally required notice and an opportunity to be heard.

iii. The State Has Waived Any Arguments that the Time Bar Violates the Eighth Amendment and Due Process by Creating a Constitutionally Impermissible Risk of the Execution of the Intellectually Disabled

Significantly, the State does not address Mr. Bowles's argument that if *Rodriguez*, *Blanco*, and *Harvey* deny him even *review* of his intellectual disability claim, they violate the Eighth and Fourteenth Amendment. To reiterate, the Eighth Amendment cannot tolerate state or court-created rules that impermissibly risk the execution of the intellectually disabled. *See*, *e.g.*, *Hall*, 572 U.S. at 720 (finding that a legislatively created fixed IQ score cutoff of 70 "conflicts with the logic of *Atkins* and the Eighth Amendment."); *Moore*, 137 S. Ct. at 1051 (finding, in concluding that the judicially created *Briseno* factors violated the Eighth Amendment, "[b]y design and in operation, the *Briseno* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed.") (internal citation omitted).

An unforeseeable and absolute time bar, as created by this Court in *Rodriguez*, *Blanco*, and *Harvey*, creates an unacceptable risk of the execution of the intellectually disabled. By ignoring this argument, the State has waived any arguments to the contrary. *See Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006) (holding that "any arguments not expressly included" in a brief were waived).

B. The State Ignores Mr. Bowles's Arguments Concerning Fla. R. Crim. P. 3.851(d)(2)(B) and that *Harvey* was Wrongly Decided

For the purposes of Fla. R. Crim. P. 3.851(d)(2)(B) analysis, the State argues that the operative date is the date *Hall v. Florida* was decided, and not this Court's decision in *Walls v. State*. *See* AB at 23. But that is not the rule; subsection (d)(2)(B) requires both that "the fundamental constitutional right asserted was not established within the period provided for [the initial postconviction motion] *and* has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B) (emphasis added). *Hall* was not held to be retroactive until *Walls*, and thus the operative deadline is the date of this Court's decision in *Walls*, because only then were both conditions of Fla. R. Crim. P. 3.851(d)(2)(B) met. As the State does not dispute, Mr. Bowles filed within one year of when *Walls* was decided.

Further, the State argues that *Harvey* forecloses review of Mr. Bowles's claim. But the State ignores Mr. Bowles's arguments that *Harvey* was wrongly decided because (1) *Walls* did not condition the retroactivity of *Hall* on any procedural requirement for timeliness, and (2) *Harvey* was wrongly decided because it found that he was "similarly situated" to the litigant in *Rodriguez,* when *Rodriguez* is factually distinguishable from litigants, like Mr. Bowles, who had IQ scores that were above 70 when R. 3.203 was promulgated. These litigants, unlike Rodriguez, who had IQ scores below 70 prior to 2004, were not on notice when R. 3.203 was promulgated because they only had scores that were fatal to intellectual disability

claims in Florida until *Hall*. *See, e.g., 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."). Thus, Harvey and Mr. Bowles are not "similarly situated" to *Rodriguez*, and *Harvey* was wrongly decided on that basis. This Court should consider the State to have waived arguments to the contrary. *See Simmons*, 934 So. 2d at 1117 n.14.

C. The State's Arguments Concerning the Good Cause Exception Contained in Fla. R. Crim. P. 3.203(f) Are Not Persuasive

Mr. Bowles argued, in the alternative, that two separate reasons support that good cause under Fla. R. Crim. P. 3.203(f) exists in his case. As Mr. Bowles explained, courts cannot have it both ways—either Mr. Bowles could not have known to file his intellectual disability claim in the wake of R. 3.203 in 2004, as he did not have an IQ score that is below 70, or he should have known to do so, and his counsel was negligent for failing to file such a claim as well as failing to even investigate his intellectual disability. *See* IB at 35-43.

Likewise, the State cannot have it both ways. The State affirmatively argues that Mr. Bowles's counsel was not negligent or neglectful in failing to file an *Atkins*-based claim after the promulgation of R. 3.203 in 2004 because Florida law was clear that only individuals with IQ scores of 70 or below qualified for relief. *See* AB at 27, *id*. at 27 n. 15, *id*. at 28. Thus, the State concedes that Mr. Bowles's eligibility

for relief was not foreseeable—which can and should form the basis for good cause. Good cause is intended to be fact-dependent, and need only establish facts constituting "excusable neglect." *Parker v. State*, 907 So. 2d 694, 695 (Fla. Dist. Ct. App. 2005) (internal citation omitted). Mr. Bowles and the State are in agreement that in 2004, Mr. Bowles could not have known to file an intellectual disability claim. His neglect is excusable and supports a finding of good cause.

With respect to his second basis for good cause, the State argues that attorney misconduct or neglect cannot form the basis for good cause, *see* AB at 26, and that even if it could, Mr. Bowles's postconviction attorney was not neglectful in failing to file an intellectual disability claim because the state of the law precluded it, *see id.* at 26-27. But the State's argument about what can form the basis for good cause is not supported by Florida law—attorney misadvice or negligence has been held to establish good cause for other provisions of the Florida Rules of Criminal Procedure. *See, e.g.*, *Johnson v. State*, 971 So. 2d 212, 215 (Fla. Dist. Ct. App. 2008) (finding that an attorney's "mistaken advice can be a valid basis for finding good cause."); *Nicol v. State*, 892 So. 2d 1169, 1171 (Fla. Dist. Ct. App. 2005) (finding attorney's neglect in failing to advise client of potential suppression motion sufficient to establish good cause); *Graham v. State*, 779 So. 2d 604, 605 (Fla. Dist. Ct. App. 2001) (finding that even where counsel's advice is not required, if it is given and is "measurably deficient" it can form the basis for good cause).

The State—and the circuit court's—assessment that attorney neglect cannot form the basis of good cause is refuted by Florida courts' interpretation of good cause in analogous parts of the Florida Rules of Criminal Procedure. *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).[2]

II. The State's Arguments that Mr. Bowles is Not Entitled to an Evidentiary Hearing are Legally and Factually Inaccurate

A. Contrary to the State's Mischaracterization, Mr. Bowles's Factual Proffer Establishes that He Can Meet All Three Prongs of Intellectual Disability at an Evidentiary Hearing

Importantly, the circuit court's order in this case did not discuss or make any findings of fact concerning the merits of Mr. Bowles's intellectual disability claim. However, because the State has devoted substantial space in their brief to the merits

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[2] The State's argument that the "tipsy coachman" doctrine—otherwise known as the right-for-the-wrong-reason doctrine—applies to this case is misplaced. First, proper application of the tipsy coachman doctrine requires that the alternative basis for the "correct" ruling be found, uncontested, in the record before the trial court—not the arguments of opposing counsel in an appellate brief. *See Robertson v. State*, 829 So. 2d 901, 906-907 (Fla. 2002) ("The key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law *in the record before the trial court*.") (emphasis added). Second, the application of the tipsy coachman doctrine in this case would be constitutionally impermissible because it would violate the Eighth Amendment's proscription that states may not create rules that unconstitutionally risk the execution of the intellectually disabled, *see Hall*, 572 U.S. at 720, and because capital cases require "heightened reliability," *see, e.g., Arbelaez v. Butterworth*, 738 So. 2d 326, 331 n. 11 (Fla. 1999) ("The United States Supreme Court has stated repeatedly that the Eighth Amendment requires a heightened degree of reliability in capital cases.").

of this claim, Mr. Bowles responds to clarify both the merits of his intellectual disability claim as well as the relevant legal standard for an evidentiary hearing, which the State's arguments muddle.

To be clear, Mr. Bowles's challenge to the circuit court's procedural bar ruling is not academic: he has a strong intellectual disability claim that, if heard on the merits, would establish his entitlement to relief. Mr. Bowles proffered to the circuit court strong evidence of his intellectual disability on each of the three prongs required for such a diagnosis.

Regarding significantly subaverage intellectual functioning, Mr. Bowles presented evidence that every mental health professional who is known to have evaluated Mr. Bowles's intellectual functioning—including Dr. McMahon (1995, pretrial); Dr. Krop (2003, initial state postconviction); Dr. Toomer (2017); Dr. Crown (2018); and Dr. Kessel (2018-2019)—admits either that they did not assess Mr. Bowles for intellectual disability (Dr. McMahon, *see* PCR-ID at 835, and Dr. Krop, *id*. at 789-790), or that Mr. Bowles is intellectually disabled or has intellectual functioning consistent with an intellectually disabled person (Dr. Toomer, *id*. at 778-83; 786-88, Dr. Crown, *id*. at 784-85, Dr. Kessel, *id*. at 791-801).

Mr. Bowles has only two full scale IQ scores: a score of 80 on the WAIS-R as given by Dr. McMahon in 1995, and a score of 74 on the WAIS-IV as given by

Dr. Toomer in 2017.[3] When the WAIS-R score of 80 is corrected for norm obsolescence, it falls within the SEM for an intellectual disability diagnosis (between 70-75). Mr. Bowles's most recent score of 74 on the WAIS-IV is plainly within the SEM, and is a qualifying score for such a diagnosis. *See, e.g.*, *Brumfield*, 135 S. Ct. at 2278 (finding that an IQ score of 75 is "squarely in the range of potential intellectual disability."). Mr. Bowles also has neuropsychological testing results that indicate he has brain damage consistent with an intellectual disability. *See* PCR-ID at 784-85 (Dr. Crown's report).

Regarding adaptive deficits, Mr. Bowles proffered sworn statements from a dozen individuals establishing that Mr. Bowles had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains. *See* PCR-ID at 802-34 (sworn statements of lay witnesses); *id*. at 741-45 (discussing how sworn lay witness observations establish significant adaptive deficits in each domain).

Mr. Bowles has also proffered evidence that his intellectual disability manifested before the age of 18—nearly half of the lay witnesses knew Mr. Bowles in his childhood or teenaged years, and neuropsychological testing revealed that Mr.

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[3] The State's contention that Mr. Bowles has three IQ scores relevant to his intellectual disability diagnosis is not accurate—he has only two full scale IQ scores from appropriate tests for the assessment of intellectual disability. This point is expanded on in *infra* section (II)(A)(ii).

Bowles's brain damage was consistent with an "earlier origin, including a possibly perinatal origin." PCR-ID at 785 (Dr. Crown's report).

No mental health professional who has conducted an evaluation on Mr. Bowles currently disputes Mr. Bowles's intellectual disability diagnosis. The State's bare assertion that Mr. Bowles's intellectual disability is conclusively refuted by the record —a record which has never had the benefit of testimony from any expert who has evaluated Mr. Bowles for intellectual disability—is not supported by the reality of this case. Further, State's arguments against the merits of Mr. Bowles's claim, and the necessity of an evidentiary hearing, should be rejected because they are not supported by the scientific or medical community, and because they misconstrue the relevant legal standard.

i. The State's Arguments Disputing the Merits of Mr. Bowles's Intellectual Disability Diagnosis Are Not Supported by the Record or the Medical Community

The State's arguments regarding the merits of Mr. Bowles's intellectual disability claim are speculative and premature, as Mr. Bowles has never had the opportunity to fully and fairly present evidence of his intellectual disability. The State has consistently opposed any hearing in this case, and the circuit court refused to hold a hearing, under a state timeliness theory. Nevertheless, the State attempts to argue the merits of a claim that Mr. Bowles has never been allowed to present before

any court. These premature arguments are worth only brief discussion here to correct several inaccuracies in the State's brief.

The State argues that Mr. Bowles's intellectual disability is conclusively refuted by the record because: (1) Mr. Bowles's IQ scores, "considered collectively" reflect that his "IQ is between 78 and 79," AB at 34; (2) records indicate that Mr. Bowles obtained an GED while incarcerated, AB at 35; (3) Mr. Bowles obtained a fake identification card, AB at 36; (4) Mr. Bowles had driven long distances and ridden in greyhound buses, AB at 37; (5) Mr. Bowles can read and write, AB at 37; and (6) Mr. Bowles has had jobs including "working on an oil rig," "as a machinist and a roofer," AB at 38. The State's arguments are inaccurate, misleading, and refuted by Mr. Bowles's factual proffers and the medical community.

First, the State makes a number of inaccurate representations in the interpretation of IQ scores. The State conflates Mr. Bowles's full scale IQ scores on the WAIS-R and the WAIS-IV with his score of 83 on the WASI (Wechsler Abbreviated Scale of Intelligence). As Mr. Bowles's experts would have testified had they been given the chance, the WASI is not a full scale IQ test, it is a short form, screening test of intellectual functioning, and the score resulting from it should not be considered in the assessment of intellectual disability (and particularly not for disqualification for the diagnosis). *See, e.g.*, American Association on Intellectual and Developmental Disabilities Manual (11th ed. 2010) (AAIDD-11), p. 41 ("Short

forms of screening tests are not recommended, and it is critically important to use tests with relatively recent norms."); User's Guide to the AAIDD-11, p. 17 ("Short forms or screening tests are not recommended or professionally accepted for diagnostic purposes."). The WASI also has been observed to overestimate an individual's intellectual functioning when compared with full-scale intelligence tests, and is discouraged from even general use in the medical community. *See, e.g.*, Bradley N. Axelrod, *Validity of the Weschler Abbreviated Scale of Intelligence and Other Very Short Forms of Estimating Intellectual Functioning*, 9 Assessment 1 at 22 (2002) (noting that the WASI produced a higher full scale IQ score estimate than the WAIS-III, and finding that "if the clinician's goal is to obtain an accurate estimation of general intellectual functioning, the current results suggest that the WASI should not be used in the assessment of individual patients.").

The State's suggestion that Mr. Bowles's IQ scores should be averaged, or alternatively, considered in "median," is a creation not found in resources by the medical or psychological community. The State's creative formula for the consideration of IQ scores has been previously rejected on at least one occasion by a psychologist and a Florida circuit court. *See* Order, *State v. Freeman*, No. 16-1986-CF-11599 (Duval County Cir. Ct. April 6, 2018) ("Neither of the State's assertions—that the most recent IQ score should be ignored as 'slant[ed]' or that the mean, median and 'center of the band[]' figured are the correct way to analyze

Defendant's intellectual functioning—is supported by competent, substantial evidence.").[4]

The State's suggestion that Mr. Bowles does not have adaptive deficits because he obtained a GED, obtained a fake identification card, had driven long distances and ridden in greyhound buses, can read and write, and has had jobs including "working on an oil rig," "as a machinist and a roofer," are likewise baseless. Principally, it is critical to understand that these specific potential strengths—even if true, which Mr. Bowles's factual proffer disputes—do not themselves negate an intellectual disability diagnosis, which focuses on deficits, not strengths, and does not pit strengths against weaknesses in adaptive functioning. *See* AAIDD-11, p. 7 (noting a fundamental assumption in defining intellectual disability is that "[w]ithin an individual, limitations often coexist with strengths."); *Moore*, 137 S. Ct. at 1050 ("In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. . . . But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.") (emphasis in original). Even where a crime itself seems sophisticated, this does not disqualify an individual from an intellectual disability diagnosis. *See, e.g.*, *Brumfield*, 135 S. Ct. at 2281 (noting that while the crime suggested that Brumfield

[4] While the circuit court later amended this order, which originally granted an evidentiary hearing, due to application of a time bar, it did not rescind its rejection of the State's dubious IQ score formula.

possessed some adaptive skills including "advanced planning and acquisition of a car and guns" it did not conclusively dispute an intellectual disability diagnosis).

The State's arguments against adaptive deficits are also wrong because they ignore Mr. Bowles's factual proffer, the record in this case, and the guidance of the medical community. For example, that Mr. Bowles could read and write, and drive a car or hold a driver's license, does not dispute his adaptive limitations in other areas and does not bear on his intellectual disability diagnosis. In fact, the AAIDD specifically warns against these improper stereotypes. *See* AAIDD-11, p. 162 (noting that intellectually disabled individuals can, with support, obtain skills such as "academic skills" or "survival skills," such as learning to use a bus system); User's Guide to the AAIDD-11, p. 26 (noting it is an "incorrect stereotype" that "[p]ersons with ID cannot get driver's licenses, buy cars, or drive cars"). The State's argument also ignores Mr. Bowles's factual proffer, in which he provided sworn statements that into his adulthood he struggled with using bus systems without help, *see* PCR-ID at 822, could not have navigated air travel without significant help, *id*. at 833, and that his GED is suspect because another individual present at the time of the testing recalled that the administrator of the exam gave the test takers the answers to the questions, *id*. at 818.

Moreover, the State's argument that Mr. Bowles worked as a "machinist," and thus does not have adaptive deficits, is intentionally misleading. The State's citation

for this proposition (PCR-ID at 796) is one of Mr. Bowles's expert reports, which refers to a sworn statement that Mr. Bowles provided from his previous employer at a temporary labor position at a manufacturing company. This report and corresponding sworn statement is evidence of Mr. Bowles's *deficits*, not strengths—his previous employer describes him as "slow intellectually," "childlike," noted he had to be moved from a four-step machine to a one-step machine because they "were not able to train Gary," and that although he "tr[ied] very hard" he "continually made mistakes," *id*. at 810-11. Likewise, the State's argument that Mr. Bowles worked on an oil rig for two years and that he worked as a roofer, were from Mr. Bowles's self-reports, and do not at all bear on how successful he was at these jobs. Additionally, the medical community cautions against self-reported information in the assessment of intellectual disability. *See, e.g.*, AAIDD-11, p. 52 (noting that due to several factors, including the stigma associated with intellectual disability, "strong acquiesce bias," and masking behaviors, "the authors of this *Manual* caution against relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for the purpose of establishing a diagnosis" of intellectual disability.) (emphasis in original).

Mr. Bowles also proffered information suggesting that Mr. Bowles was not particularly successful at his manual labor position working for a roofing company. *See* PCR-ID at 824 (sworn statement of Minor Kendall White, noting that he helped

Mr. Bowles get the roofing job, and that Mr. Bowles was never promoted while he worked there). Even if he were successful at this manual labor job, however, it still would not be dispositive of the presence of sufficient adaptive deficits for a diagnosis of intellectual disability. *See* User's Guide to the AAIDD-11, p. 26 (noting that it is an "incorrect stereotype" that individuals with intellectual disability "cannot acquire vocational and social skills necessary for independent living."); AAIDD-11, p. 157 (noting that "commonly held jobs" for individuals with intellectual disability "include maintenance, food service, and retail positions" and that they can also obtain jobs in "trade" positions like "plumbing and carpentry."). Because the State's arguments against the presence of Mr. Bowles's adaptive deficits are refuted by Mr. Bowles's factual proffer, the record, and the guidance of the medical community, these arguments should be disregarded.

ii. The State Misstates the Legal Standard for Evidentiary Hearings on the Merits

Mr. Bowles is entitled to an evidentiary hearing on the merits of his intellectual disability claim, and the State's arguments to the contrary apply the wrong legal standard. "Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." *Franqui v. State*, 59 So. 3d 82, 95-96 (Fla.

2011) (citation omitted). In determining whether a postconviction motion may be summarily denied, courts 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, 1081 (Fla. 2008) (citing *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)).

The State mischaracterizes this standard by failing to accept Mr. Bowles's factual proffers as true, which refute the State's arguments. Further, those arguments that ignore Mr. Bowles's factual proffer and the guidance of the medical community that Mr. Bowles has pleaded are not record evidence, and are not conclusive. The State also argues that Mr. Bowles's claim does not warrant an evidentiary hearing because he does not meet the criteria for intellectual disability "certainly not by clear and convincing evidence." AB at 33. But contrary to the State's suggestion, Mr. Bowles need not conclusively prove he is intellectually disabled to warrant an evidentiary hearing, he only needs to plead sufficient facts to obtain an evidentiary hearing where he may then prove his intellectual disability. Mr. Bowles has proffered sufficient facts to be entitled to an evidentiary hearing on the merits of his intellectual disability claim, notwithstanding any procedural concerns, and the State's legally inaccurate arguments should be disregarded.

B. The State Has Waived Any Arguments Concerning the Necessity of an Evidentiary Hearing on Timeliness

Even aside from the issue of whether Mr. Bowles is entitled to an evidentiary hearing on the merits of his intellectual disability claim, *see supra* section (III)(A), he has explained that he is also separately entitled to an evidentiary hearing on the timeliness of his postconviction motion, but did not receive one. *See* PCR-ID at 754-55; IB at 44-45. Mr. Bowles has alternatively argued that his postconviction attorney should have known to file an intellectual disability claim, and that his failure to do so was neglect sufficient for good cause under Fla. R. Crim. P. 3.203(f). The State has affirmatively argued that he could not have known to file such a claim, *see* AB at 27-28, and thus a factual dispute exists related to timeliness. A factual dispute, including one related to timeliness, is properly resolved through an evidentiary hearing. *See, e.g., State v. Boyd*, 846 So. 2d 458, 460 (Fla. 2003) (remanding to the trial court for proceedings which "may include an inquiry into whether the facts [related to timeliness] alleged in the motion for extension are true."); *Peede v. State*, 748 So. 2d 253, 259 (Fla. 1999) ("Because there is a factual dispute as to whether defense counsel was ineffective . . . we find that an evidentiary hearing is required on this claim."). The State, by failing to address this argument, has waived any response. *See Simmons*, 934 So. 2d at 1117 n.14.

III. The State Incorrectly Argues that Mr. Bowles was Not Entitled to Public Records under Fla. R. Crim. P. 3.852

A. The State's Arguments that Mr. Bowles was Not Entitled to Department of Correction Records Under *Muhammad* are Wrong

Contrary to the State's arguments, Mr. Bowles is entitled to records from the Florida Department of Corrections (DOC) under Fla. R. Crim. P. 3.852 and *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013), and these records were plainly relevant to his intellectual disability claim. The requested were narrowly tailored to "records pertaining to any disciplinary proceedings, movement and housing logs, and visitation logs for attorneys and visitors including friends, family and clergy designated by Mr. Bowles from 2002 to the present." PCR-ID at 246. The State concedes that the demanded records, like in *Muhammad*, are an update as many of these records had been provided in 2002. Additionally, like in *Muhammed*, Mr. Bowles sought these records to raise a claim that would bar his execution: his intellectual disability. The circuit court's order wrongly distinguished this case from *Muhammad*, and improperly concluded that the demand in this case was not an update of already disclosed records to which Mr. Bowles was entitled.

B. The Department of Corrections Records are Relevant Both to the Claim of Intellectual Disability and to Establishing Good Cause Under Fla. R. Crim. P. 3.203

The State incorrectly argues that the requested DOC records would not have led to a colorable claim. AB at 51-52. But this is not entirely supported by guidance from the medical community, which maintains that observations of an incarcerated

individual can provide evidence of deficits in functioning. *See* Edward Polloway, *The Death Penalty and Intellectual Disability*, p. 195-96 (2015). Such records can, for example, contain information about performance of prison jobs, and observations from corrections officers can "substantiate impaired functioning." *Id*. at 196. Florida courts have also found information contained in prison records relevant to the assessment of intellectual disability. *See Oats v. State*, 187 So. 3d 457, 459 (Fla. 2015) (noting that records from prison supported defendant's claim of intellectual disability). The demand also included visitation logs for attorneys, which are relevant as to Mr. Bowles's argument that good cause under Fla. R. Crim. P. 3.203(f) exists due to his postconviction attorney's neglect to overcome the untimely filing of his intellectual disability claim. PCR-ID at 751. Thus, the demanded records are relevant both to developing further evidence to support a claim of intellectual disability and to establishing good cause for an untimely filing under 3.203.

C. Appellant's Use of *Bucklew* is Meant to Illustrate the Due Process Considerations Surrounding Discovery Related to Lethal Injection Materials

In addressing the argument for sustaining multiple agencies' objections to produce records relating to lethal injection, the State takes issue with Mr. Bowles's use of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). While the State accurately notes that *Bucklew* does not deal with public records, it is relevant to the question of the due process owed to litigants facing execution by lethal injection. Though the State

points out that Bucklew's claim was unsuccessful, access to public records in this case is not reliant on a *meritorious* claim, but simply a relation to a *colorable* claim. Whether or not Mr. Bowles could ultimately develop a meritorious claim is immaterial; due process calls for access to the documents necessary to fully develop the claim.

It is impossible for Mr. Bowles to do in eighteen days (and with none of the demanded lethal injection records) what Mr. Bucklew failed to do in five years with "extensive discovery." *Id* at 1118, 1129.[5] Florida's use of Rule 3.852 to foreclose any discovery on materials relating to lethal injection in this case preempts any kind of meaningful litigation relating to lethal injection, and thus violated Mr. Bowles's rights under the Eighth and Fourteenth Amendments.

D. Equal Protection Considerations Call for Public Records Not to be Denied Based Upon Impermissible Factors

The State also wrongly argues that not providing these records to death sentenced individuals when the general public would be able to access them does not violate the equal protection clause. Death sentenced individuals, required to utilize the procedure specified under Fla. R. Crim. P. 3.852, are inevitably denied access to these materials. The State argues that death sentenced individuals are not similarly situated to the general public. This is undeniably true, but if anything,

[5] Florida's most current lethal injection protocol was filed on June 13, 2019 and Mr. Bowles' motion to the circuit court was due on July 1, 2019.

efforts to curtail their rights should be more thoroughly scrutinized than the rights of the general public because death sentenced individuals have much more at stake. *See Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); *see also Doe v. District of Columbia*, 701 F. 2d 948, 960 (D.C. Cir. 1983) (noting of prisoners that "[f]ew minorities are so 'discrete and insular,' so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority.") (citation omitted).

IV. 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 6th day of August, 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