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In the

Supreme Court of Florida

GARY RAY BOWLES,
Petitioner,

v.

MARK S. INCH,
Secretary, Florida Department of Corrections,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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

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JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.100(a). Article I, Section 13 of the Florida Constitution provides "[t]he writ of habeas corpus shall be grantable of right, freely, and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Petitioner Gary Ray Bowles was sentenced to death, and the instant petition accompanies his Initial Brief from the lower tribunal's order summarily denying his Rule 3.851 Motion for Postconviction Relief. Fla. R. App. P. 9.142(b).

Where a trial has resulted in "incongruous and manifestly unfair results" a court of appeal has the "inherent authority to grant a writ of habeas corpus." *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). The ends of justice call on this Court to grant the relief sought in this case. Mr. Bowles's petition raises claims involving fundamental state and federal constitutional error. This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional error is warranted in this action. As this petition shows, habeas corpus relief is proper.

REQUEST FOR ORAL ARGUMENT

Mr. Bowles has been sentenced to death and is scheduled to be executed on August 22, 2019. Resolution of these issues will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. Mr.

Bowles respectfully requests oral argument because a full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. In accordance with Fla. R. App. P. 9.320, Mr. Bowles has filed separately a motion for oral argument on both the appeal of his summarily denied R. 3851 motion as well as this petition.

GROUNDS FOR HABEAS CORPUS RELIEF

Mr. Bowles's death sentence violates the Eighth and Fourteenth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution because capital punishment as administered in Florida, and as applied in this case, is contrary to the evolving standards of decency that mark the progress of a maturing society.

PROCEDURAL HISTORY[1]

Mr. Bowles pleaded guilty to first-degree murder in Duval County, Florida in 1996. *See Bowles v. State*, 716 So. 2d 769, 770 (Fla. 1998). Pursuant to Florida's pre-*Hurst*[2] sentencing scheme, the judge imposed a death sentence. *Id*. 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,

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[1] A more detailed procedural history of Mr. Bowles's case is available in his simultaneously filed Initial Brief, in the appeal of the summary denial of his Fla. R. Crim. P. 3.851 motion, found in *State v. Bowles*, No. SC19-1184 (Fla. 2019).

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

and thus vacated Mr. Bowles's death sentence and remanded for a new sentencing. *Id.* at 773. Following a second penalty phase proceeding, the state court again imposed the death sentence, which was affirmed by the Florida Supreme Court on direct appeal in 1999. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), *cert denied*, *Bowles v. Florida*, 536 U.S. 930 (2002).

Mr. Bowles was denied state postconviction relief. *Bowles v. State*, 979 So. 2d 182 (Fla. 2008). In 2008, Mr. Bowles filed a petition for federal habeas corpus relief under 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 Corr*., No. 3:08-cv-791, ECF No. 1 (M.D. Fla.). The District Court denied the petition, *id*. at ECF No. 18, and the Eleventh Circuit affirmed. *Bowles v. Sec'y, Fla. Dep't of Corr*., 608 F.3d 1313, 1317 (11th Cir. 2010), *cert denied*, 562 U.S. 1068 (2010). In June 2017, Mr. Bowles filed a successive motion for postconviction relief pursuant to *Hurst v. Florida*, the circuit court's summary denial of which was affirmed by this Court. *Bowles v. State*, 235 So. 2d 292 (Fla. 2018), *cert denied*, 139 S. Ct. 157 (2018).

In October 2017, Mr. Bowles filed a successive motion for postconviction relief raising a claim of intellectual disability pursuant to *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 572 U.S. 701 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002), the appeal of which is pending before this Court. *See State v. Bowles*, No. SC19-1184 (Fla. 2019).

ARGUMENT

I. FLORIDA'S DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The increasing number of death row exonerations has highlighted the extraordinary dangers of capital punishment, especially in Florida where twenty-nine innocent people have been exonerated after being sentenced to death.[3] Mr. Bowles was sentenced in the Florida county with the highest per capita rate for inmates on death row of any county in the United States,[4] in the state that most frequently puts the wrong person on death row,[5] and in the state that leads the nation

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[3] *See* Death Penalty Information Center (DPIC), *Facts about the Death Penalty* (2019), https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1562867044.pdf. Florida has had twenty-nine exonerations from death row since 1973, including two exonerations within the last year, accounting for almost eighteen percent of death row exonerations nationally. During that same time, Florida has executed ninety-eight inmates, meaning the proportion exonerated is nearly thirty percent of the number executed. In addition to its troubling record of sentencing the innocent to death, Florida's capital sentencing scheme under which Mr. Bowles was sentenced was held unconstitutional by the United States Supreme Court in 2016 in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[4] *See* DPIC, *Duval County, Florida, Leader in Death Sentences* (Dec. 1, 2014), https://deathpenaltyinfo.org/news/duval-county-florida-leader-in-death-sentences.

[5] *See* DPIC, *Facts about the Death Penalty* (2019), *supra*, n. 1.

in missed federal habeas corpus deadlines.[6] Meanwhile, across the country, bipartisan coalitions in state legislatures have been repealing the death penalty, as society gains better understanding of how coerced confessions, snitch testimony, eyewitness misidentification, and imprecise forensic disciplines lead the innocent to death row.[7]

States are recognizing capital punishment's high personal and economic costs. Today, Mr. Bowles would be safe from execution in twenty-five states and the District of Columbia. In the past four years alone, three new states have outlawed the death penalty[8] and two have imposed moratoria on executions.[9] In 2018, thirty-six states did not impose any new death sentences, and only eight states conducted

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[6] *See Lugo v. Sec'y, Dep't. of Corr.*, 750 F. 3d 1198, 1216-1218 (11th Cir. 2014) (Martin, J., concurring) (explaining that at least thirty-four death row inmates in Florida have missed their one-year filing deadlines under the Anti-Terrorism and Effective Death Penalty Act of 1996.) At least three Florida death row inmates, Juan Chavez, Paul Howell, and Chadwick Banks, have been executed after their postconviction lawyers missed their federal habeas corpus filing deadlines. *Lugo*, 750 F. 3d. at 1216; and Ken Armstrong, *The Marshall Project, Death by Deadline, Part One* 8 (2014). The Marshall Project report tallied thirty-seven missed filing deadlines in federal habeas proceedings for Florida death row prisoners. *Id.*

[7] *See, e.g.*, *Death Penalty Repeal Sweeping Across States As Both Parties Get on Board*, NBC News (Apr. 7, 2019), *available at* https://www.nbcnews.com/politics/politics-news/death-penalty-repeal-sweeping-across-states-both-parties-get-board-n988321.

[8] Delaware (2016); Washington (2018); and New Hampshire (2019).

[9] Pennsylvania (2015); and California (2019).

executions.[10] Despite the clear and consistent national trend against capital punishment, Florida continues to march forward in pursuit of death, despite its appalling title of national leader in death row exonerations. Given the national trends, executing Mr. Bowles would violate the Eighth and Fourteenth Amendments to the United States Constitution and Articles Two, Nine, and Seventeen of the Florida Constitution, because capital punishment as administered in Florida is contrary to the evolving standards of decency that mark the progress of a maturing society.

Eighth Amendment excessive punishment claims are judged by currently prevailing standards, not those that existed when the Bill of Rights was adopted. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))

In *Kennedy v. Louisiana*, the Court expounded upon *Trop* saying, "the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." 554 U.S. 407, 419 (2008) (quoting

[10] DPIC, *The Death Penalty in 2018: Year End Report*, *available at* https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2018-year-end-report (last accessed 6/21/2019).

Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)) (internal quotation marks omitted). "Objective factors," including legislation and state practice with regard to executions, inform the evolving standards of decency. *See Roper v. Simmons*, 543 U.S. 551, 563 (2005). Importantly, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 315.

Legislation is "the clearest and most reliable objective evidence of contemporary values." *Atkins*, 536 U.S. at 322-23. Legislatures "are constituted to respond to the will and consequently the moral values of the people." *Id.* at 323. On May 23, 2019, the very date of Florida's most recent execution, the New Hampshire legislature abolished capital punishment with a bipartisan supermajority in both houses, becoming the 21st state without capital punishment. In addition to New Hampshire, five other states have legislatively abolished the death penalty in the past fifteen years: Maryland, Connecticut, Illinois, New Mexico, and New Jersey. [11] Moreover, in states where the courts have stricken death penalty statutes, legislatures have either formally removed the death penalty from the books or declined or failed to reauthorize capital punishment, including in New York. For example, after the Washington Supreme Court held that state's application of the death penalty to be

[11] DPIC, *State by State* (last accessed June 21, 2019), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

unconstitutional in October 2018, the Washington Senate this year passed a bill to repeal the statute.[12] Similarly, in Oregon, which has a governor-imposed moratorium, the state legislature voted in June 2019 to reserve the death penalty for only four specific types of aggravated murder,[13] none of which applies to Mr. Bowles and all of which drastically narrow the death penalty's application. In Wyoming this year, an abolition bill passed in at least one state house.[14] *See Atkins*, 536 U.S. at 314-15 (noting "bills have passed at least one house in other States" as an indicator of the evolving standards of decency). "Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime," the large number of States now prohibiting the death

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[12] In addition, it appears that a bipartisan list of fifty-four members of the Washington State House are prepared to pass the bill; however, because the death penalty statute is currently unconstitutional in Washington, the legislation has not been a priority in the House since no one is in danger of execution. *See Abolition of Death Penalty Won't Happen in 2019. House Democrats Cite Other Priorities*, *News Tribune* (Apr. 18, 2019), *available at* https://www-1.thenewstribune.com/latest-news/article229414449.html.

[13] Premeditated murder of a child, murder of another inmate by someone already incarcerated on aggravated murder charges, terroristic acts where two or more people are killed, and premeditated murder of a police officer, parole or probation officer are the four death-eligible crimes under the new legislation.

[14] Death-Penalty Repeal Efforts Across U.S. Spurred by Growing Conservative Support, DPIC (Feb. 19, 2019), https://deathpenaltyinfo.org/news/death-penalty-repeal-efforts-across-u-s-spurred-by-growing-conservative-support.

penalty—and the unilateral direction of legislative change—supports abolition. *See Atkins*, 536 U.S. at 315-316.

Courts also look to "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, such as "actual sentencing practices [that] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010) ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."). *Id.* The year 2018 was a record low for new death sentences nationally.[15] It marked the fourth consecutive year with fewer than fifty death sentences, and no county imposed more than two death sentences for the first time in the modern death penalty era—even the capital-friendly Duval County. Indeed, in thirty-six states, no new death sentences were imposed, even in states like Virginia that conducted capital trials.[16] Sentencing practices thus illustrate that the use of the death penalty nationally has become "most infrequent" so as to make the practice cruel and unusual. *See Graham*, 560 U.S. at 62-63.

In addition to sentencing practices, "[s]tatistics about the number of executions may inform the consideration whether capital punishment . . . is regarded

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[15] *See* DPIC, *The Death Penalty in 2018: Year End Report* (2018). https://files.deathpenaltyinfo.org/reports/year-end/2018YrEnd.f1560295940.pdf.

[16] *Id.*

as unacceptable in our society." *See Kennedy*, 554 U.S. at 433. In 2018, executions were geographically isolated, with only twenty-five executions in eight states. No year since 1992 has had so few executions. In 2019, California Governor Gavin Newsome instituted a moratorium on executions in California, and governors in Oregon and Pennsylvania who had imposed or extended moratoria were reelected. These statistics and the moratoria "confirm [the] determination from . . . review of state statutes that there is a social consensus against the death penalty." . *Id.*

While the death penalty has become extraordinarily rare, when it is imposed it is done so freakishly and wantonly, rendering it constitutionally unreliable. Alarmingly, fifty-seven percent of the few death sentences imposed in 2018 came from merely four states, including Florida. *Id.* Even more troubling, Duval County, the county where Mr. Bowles was sentenced, "is among the two percent of counties in the United States responsible for a majority of all inmates on death row."[17] Roughly twenty-five percent of Florida's death sentences come from Duval County, even though it only holds about five percent of the state's population.[18] Bernie De

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[17] Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DPIC (Oct. 2013), *available at* https://files.deathpenaltyinfo.org/documents/pdf/TwoPercentReport.f1560295690.pdf.

[18] *See, e.g.*, Robert J. Smith, *America's Deadliest Prosecutors*, Slate (May 14, 2015), https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html

La Rionda, the Assistant State Attorney who prosecuted Mr. Bowles, has put more people on death row than just about any other prosecutor in Florida, putting ten people on death row since 2008.[19] This is particularly disturbing in light of the national trend moving away from capital punishment. It is clear that whether a death sentence is imposed depends not on the crime or societal mores, but rather on the specific state, county, and prosecutor where an individual is sentenced—the height of an arbitrary and capricious system.

Furthermore, the justifications cited for the death penalty no longer support the existence of capital punishment, because "capital punishment is excessive when . . . it does not fulfill two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *See, e.g.*, *Kennedy*, 554 U.S. at 441 (noting decision was consistent with justifications); *Gregg v. Georgia*, 428 U.S. 153, 173, 183, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). There is no meaningful evidence that the death penalty deters violent crime when compared with life imprisonment without parole, and states without the death penalty actually

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[19] *See, e.g.*, *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, Fair Punishment Project (June 2016), *available at* http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf; *see also* Robert J. Smith, *America's Deadliest Prosecutors*, Slate (May 14, 2015), *available at* https://slate.com/news-and-politics/2015/05/americas-deadliest-prosecutors-death-penalty-sentences-in-louisiana-florida-oklahoma.html.

have lower murder rates.[20] Indeed, according to one study, eighty-eight percent of the nation's leading criminologists do not believe the death penalty is an effective deterrent to crime.[21] "In considering whether retribution is served," the Supreme Court has looked "to whether capital punishment has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the ultimate penalty must be sought and imposed," including whether the surviving victims' "hurt is lessened when the law permits the death of the perpetrator." *See Kennedy*, 554 U.S. at 442-43. Again, research now shows that seeking capital punishment can actually bring more harm to victims, does not bring closure, and additionally creates new social harms to the families of those executed.[22]

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[20] *See, e.g.*, Steven Durlauf, et al., *Assumptions Matter: Model Uncertainty and the Deterrent Effect of Capital Punishment*, Am. Econ. Rev. 102(3): 487-492 (2012), *available at* https://www.ssc.wisc.edu/~cfu/aer_PP.pdf; and John Lamperti, *Does Capital Punishment Deter Murder? available at* https://www.dartmouth.edu/~chance/teaching_aids/books_articles/JLpaper.pdf.

[21] Michael Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. of Crim. Law & Criminology 2 (2009), *available at* https://files.deathpenaltyinfo.org/legacy/files/DeterrenceStudy2009.pdf.

[22] *See, e.*g., Linda Lewis Griffith, *Does the Death Penalty Give Victims Closure? Science Says No*, San Luis Obispo Tribune (June 5, 2019), available at https://www.sanluisobispo.com/living/family/linda-lewis-griffith/article230010544.html (summarizing studies); R. Muller, "Death Penalty May Not Bring Peace to Victims' Families," Psychology Today (Oct. 19, 2016);

When the Supreme Court decided *Atkins* in 2002, there were only twelve noncapital states plus the District of Columbia. Since then, nine states—New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), Washington (2018), and New Hampshire (2019)—all have outlawed the death penalty. In addition, the governors of four states have imposed (and continue to impose) moratoria on executions: Oregon (2011), Colorado (2013), Pennsylvania (2015), and California (2019).[23] Thus, in half the states and the District of Columbia, Mr. Bowles would be ineligible for immediate execution. This is similar to the consistency of change that was dispositive in *Atkins*. In addition, as a practical matter, it would also be unlikely that Mr. Bowles would be executed if he were convicted almost anywhere else in the country, because in 2018, forty-two states, plus the District of Columbia, the Federal Government, and the United States Military did not carry out executions. Indeed, the majority of capital sentences come from two percent of counties in the United States—including Duval County, where Mr. Bowles was convicted. Accordingly, executing Mr. Bowles would violate the Eighth Amendment protection against cruel and unusual punishment based on the evolving standards of decency.

Michael Radelet, *The Incremental Retributive Impact of a Death Sentence Over Life Without Parole*, 49 Univ. of Mich. J. of L. Reform 4 (2016).

[23] DPIC, *State by State* (last accessed 6/21/2019), *available at* https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

CONCLUSION AND RELIEF SOUGHT

Based on the evolving standards of decency Mr. Bowles respectfully urges this Court to commute his death sentence into a life sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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