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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 21-1185

DAVID JOSEPH PITTMAN

Appellant

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENTS

The Appellant, David Pittman, relies on the arguments presented in the Initial Brief of the Appellant ("Initial Brief"), and offers the following reply to the State's Answer Brief of Appellee (Answer Brief or AB) dated December 6, 2021. While Mr. Pittman will not reply to every issue and argument raised by the State, he expressly does not abandon the issues not specifically replied to herein and incorporates them by reference.

I. Intellectual Disability is a categorical bar to execution and cannot be waived.

The State has implied that intellectual disability is not a categorical bar to execution. Answer Brief (AB) at 21. This is incorrect and flies directly in the face of what the United States Supreme Court has held. "The Eighth Amendment prohibits certain punishments as *a categorical matter*… And, as relevant for this case, persons with intellectual disability may not be executed." *Hall v. Florida*, 572 U.S. 701, 708 (2014), citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Further, The Florida Supreme Court has, at times, 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 v. Texas,* 137 S. Ct. 1039, 1048 (2017); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *see also* § 921.137(2), Fla. Stat.

(2017)." *Wright v. State*, 256 So. 3d 766, 770 (Fla. 2018) (internal citation omitted).

The United States Supreme Court has never suggested that the Eighth Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver or procedural bar or default. Quite the contrary, the United States Supreme Court has in the past stated. "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." *Hall v. Florida*, at 724. 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."). 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*, 134 S. Ct. at 2001; *see also Walls v. State*, 213 So. 3d 340, 348 (Fla. 2016) (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.").

This Court should reconsider any previous precedent that would violate Mr. Pittman's rights to due process and would create an unacceptable risk of violating the Eighth Amendment because it forecloses any opportunity for Mr. Pittman to receive a hearing on the merits of his intellectual disability claim.

II. The State Incorrectly Asserts that Mr. Pittman's Intellectual Disability Claims are Untimely and Procedurally Barred.

The State in its Answer asserts that Mr. Pittman's successive motion is untimely. AB at 14. This is incorrect.

The IQ test administered to Mr. Pittman by Dr. Taub on May 15, 2015, resulted in a score of 70. Until this point, and supported by testimony before the trial court, prior postconviction counsel had no reason to doubt, question, or review the prior expert's test results, showing an IQ score of 95, which

prior postconviction counsel had relied upon. That reliance caused prior postconviction counsel to not raise an intellectual disability claim on Mr. Pittman's behalf. Mr. Pittman was originally tested by Dr. Henry Dee in 1991. Until Dr. Taub evaluated Mr. Pittman and the prior testing that was done, it was unknown that Dr. Dee's testing of Mr. Pittman was flawed.[1] The evidence that Dr. Dee's initial testing was defective could not have come to light until the new testing by Dr. Taub was done on or about May 15, 2015.

Recent medical studies, reports, and articles—not available at the time of trial—have been held to constitute newly discovered evidence. *See Vega v. State*, 288 So. 3d 1252, 1275 (2020) (citing *Clark v. State*, 995 So. 2d 1112, 1113 (Fla. 2d DCA 2008)). Similarly, case specific studies that cast doubt on critical state evidence can also constitute newly discovered evidence, *Id*., (*citing Wyatt v. State*, 71 So. 3d 86, 99-100 (Fla. 2011)).

In this matter, the newly discovered evidence was Mr. Pittman's IQ score of 70 obtained on or about May 18, 2015, and Dr. Taub's subsequent medical report interpreting the score according to current medical standards. This information was new and not available prior to the administration of the WAIS-IV on May 18, 2015. *See Jones v. State*, 591 So. 2d 911 (1991). Mr.

[1] This is more fully expounded upon in Mr. Pittman's Initial Brief at 9-15.

Pittman's motion was filed within one year of when the facts supporting the claim became available. Fla. R. Crim. P. 3.851(d)(1)(2) and *Clark v. State*, 35 So. 3d 880, 892 (Fla. 2010) (applying Rule 3.851(d)(2)(A) to hold that "[c]laims of newly discovered evidence must be raised within one year of the time of discovery". This is measured from the date of when the information was or could have been first discovered, and not at some later date when a subsequent document containing the same information is created. *See Long v. State*, 183 So. 3d 342 (Fla. 2016). In this matter, the IQ score was not known until it was obtained. Further, at the time of filing the motion, pursuant to *Walls v. State*[2], *Hall v. Florida* had retroactive effect, and this was the controlling law at the time of filing.

The fact the Mr. Pittman's intellectual disability claim was not filed previously is used by the State to attempt to prevent Mr. Pittman from presenting his newly discovered evidence. *See* AB 15. Had Mr. Pittman brought this claim during his initial postconviction, as the State claims he should have, with the evidence that prior postconviction counsel had available at the time of *Atkins*, it would have been dismissed based on the 95 IQ score alone. Based on the law at the time and in conjunction with the

[2] *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

available evidence from his expert, Mr. McClain was correct to not have brought forth the intellectual disability claim at that time, as he did not have at that time a good faith basis for raising this claim. The State's suggestion that Mr. Pittman should have raised a claim with no good faith basis is absurd and disingenuous. Further, it is clear from the face of this record, that Mr. McClain came to the decision to not raise the claim based on his reliance on Dr. Dee's findings from 1991.

The Florida Supreme Court "has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *See Darling v. State*, 966 So. 2d 366 (Fla. 2007) (*citing State v. Sireci*, 502 So. 2d 1221,1223 (Fla.1987)); *see also Crain v. State*, 78 So. 3d 1025 (Fla. 2011) (the Court found counsel was not ineffective for relying on a mitigation expert who used older versions of the WAIS and MMPI in his examination of the defendant).

The facts of this case, and postconviction counsel's reliance on Dr. Dee match the facts of *Darling v. State*:

> Darling argues that trial counsel was ineffective in failing to order a neuropsychological assessment when there was a clear indication in the records relating to Darling's life and from interviews with various witnesses that Darling may suffer from brain damage. During the

> evidentiary hearing, Marjorie Hammock stated that although she was admittedly not qualified to diagnose brain damage, the multiple head injuries, severe beatings, nosebleeds, headaches, and stuttering experienced by Darling as a child might give some indication of neurological damage. Dr. Henry Dee was of the view that Darling did suffer from frontal lobe damage. However, in preparing for the penalty phase, trial counsel relied on the evaluation of psychiatric expert Dr. Michael Hercov. Darling's trial counsel confirmed that he relied on the evaluation performed by his expert, Dr. Hercov, and would not have ordered a neuropsychological evaluation absent a recommendation by Dr. Hercov. Also, Dr. David Frank established during the evidentiary hearing that Darling's irritability and changed behavior was the result of being abused rather than organic brain damage. Dr. Frank added that stuttering after being abused is a normal response produced by fear and anxiety. Dr. Frank also added that Darling's impulsivity, frequent fights, and poor planning were all indicative of the diagnosis that Darling had antisocial personality disorder.
>
> This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. *See State v. Sireci*, 502 So.2d 1221, 1223 (Fla.1987). Even if the evaluation by Dr. Hercov, which found no indication of brain damage to warrant a neuropsychological workup, was somehow incomplete or deficient in the opinion of others, trial counsel would not be rendered ineffective for relying on Dr. Hercov's qualified expert evaluation. *See id*. Therefore, trial counsel was not ineffective for failing to order a neuropsychological evaluation.

966 So. 2d at 377.

Both the State, in its Answer (AB 16), and the trial court make much of the fact that Mr. McClain, after Dr. Taub’s evaluation, noted the copyright of the IQ test and realized the incorrect one was used in the original evaluation and that he should have caught this error at the time of the original

evaluation. Both claim that the flaws in the IQ testing were discoverable within one year of finality. AB 16. First, focusing on this statement ignores the evidence that Mr. McClain only caught the issue *after* Dr. Taub's evaluation in 2015. Until 2015, there was no reason to second guess the testing procedures used or Dr. Dee's opinion.

Second, the trial court's conclusions in this case run directly counter to the established case law of this Court. Mr. McClain, like many attorneys who represent death row inmates, may be familiar with neuropsychology and rudiments of testing, but he is not a neuropsychologist. Mr. McClain, and many other practitioners in this legal field, do not have the training or experience of an actual neuropsychologist. An attorney cannot be expected to detect, without the assistance of an expert, issues with his expert's work or comprehend fully the implications of an old test having been used in an evaluation. That is something for an expert to evaluate and fully explain for the lawyer. Further, this position held by the State and the trial court begs postconviction counsel (and trial counsel for that matter) to constantly doubt their experts and re-evaluate their expert's work, which is contrary to established precedent. The conclusions made by the trial court should be disregarded, as they are not supported by the facts or the law.

Mr. Pittman's successive 3.851 motion is therefore timely, both under the law at the time and because it was filed within one year of Dr. Taub's results. *See Duckett v. State*, 148 So. 3d 1163, 1168 (Fla. 2014) (finding Duckett's motion timely "[b]ecause the review of Malone's work in the instant case was written during these successive post-conviction proceedings, the 2011 Report could not previously have been discovered by due diligence because it did not exist.").

The new evidence of Mr. Pittman's intellectual disability was presented at the first opportunity, and in compliance with Florida court rules, within one year of discovering the newly discovered evidence. Finally, at the time the motion was filed, which is when the timeliness is to be determined, the law recognized the retroactive effect of *Hall*. Therefore, Mr. Pittman is entitled to an evidentiary hearing on his new evidence claim.

III. Good Cause Was Demonstrated

Prior postconviction counsel did demonstrate good cause. First, based upon counsel's reasonable reliance on his previous expert, Dr. Dee, he believed that he did not have a cognizable claim for intellectual disability at the time of the initial 3.851 motion. Second, prior to and until the records were re-reviewed by another expert, there was no reason to believe the prior

testing or conclusions were flawed. In fact, based upon prior counsel's actions and his belief that he lacked good faith to file a successive motion until this point, it is evident he had no reason to doubt the work that had gone before. We have evidence in this case that until new testing revealed that Mr. Pittman had an adult score in the range of intellectual disability, Mr. McClain felt there was no reason to revisit Dr. Dee's prior assessment.

Dr. Dee testified at Mr. Pittman's penalty phase in 1991. Dr. Dee, based upon his testing, concluded that Mr. Pittman was not "mentally retarded" and diagnosed him with organic personality disorder. TR4449. The trial court's order at sentencing reflected the following: "The expert [Dr. Dee] has offered an opinion as a mitigating circumstance that the Defendant suffers brain damage." *See Pittman v. State*, 90 So. 3d 794, 816 (Fla. 2011).

Dr. Dee also testified at the 2006 evidentiary hearing conducted on Mr. Pittman's 3.851 claims. He testified at that hearing that Mr. Pittman had an IQ of 95. PC291. The current trial court, in its final order, noted that Dr. Dee testified at the initial postconviction hearing that he believed the discrepancy between Mr. Pittman's IQ during the IQ test he administered, and the deficiencies noted in school records were explained by brain damage. R1887.

At the time of Mr. Pittman's 2006 evidentiary hearing, *Atkins v. Virginia* had already been decided, however, as Mr. McClain testified to, "I didn't have an IQ score that qualified as intellectually disabled." R2268. Mr. McClain felt that with an IQ score of 95, as obtained by Dr. Dee, he "had no basis to raise the claim." Id. "[I]f I know of a 95 IQ score that's valid and I'm trying to raise an intellectual disability claim, that's not good faith." R2288. At that time, Mr. McClain did not have a cognizable claim for intellectual disability. Until Dr. Taub reported his results, postconviction counsel did not have any reason to question the work done by his prior expert.

It should be noted that the trial court, prior to the hearing on March 19, 2021, found that counsel had demonstrated good cause, because it granted an evidentiary hearing on the claims regarding intellectual disability. Had good cause not been evident then, the trial court would have summarily denied it at the time. Further, the trial court clearly, at the time, found that the defendant had pled a facially sufficient claim which required factual determination. *See Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012) (quoting *Parker v. State*, 89 So. 3d 844, 855 (Fla. 2011)). The evidence between the case management conference, held over two years prior, and

the March 19, 2021 hearing did not change and the State presented nothing to contradict this finding of a facially sufficient claim. At the case management conference, counsel for the state did not argue or contest that issue and instead, suggested to the trial court that if it felt inclined to do so, that an evidentiary hearing would be the wisest course. R2772. The trial court should have held the evidentiary hearing that it ordered. Nothing has factually changed between the trial court's original decision and the final order dated May 28, 2021.

IV. The trial court's re-addressing of issues previously decided at the case management conference at the March 19, 2021 hearing was a violation of due process.

State claims that the trial court correctly identified their motion to dismiss as a motion for rehearing and that that the trial court correctly revisited its prior ruling. AB at 25-27. Mr. Pittman agrees that the motion to dismiss was a motion for rehearing, however, the State and the trial court are incorrect in their conclusions.

Fla. R. Crim. P. 3.851(f)(7) provides that motions for rehearing "shall be filed within 15 days of the rendition of the trial court's order". The trial court does not have the authority to extend that time and should not have entertained the State's motion. *See Catsicas v. Catsicas*, 669 So. 2d 1126

(Fla 5th DCA 1996). The trial court should have not only acknowledged the true nature of the State's motion but should have denied it and allowed Mr. Pittman's evidentiary hearing to go forward.

"An intervening decision by a higher court is one of the exceptional situations in which a court will entertain a request to modify the law of the case." *State v. Okafor*, 306 So. 3d 930, 934 (Fla. 2020). The above statement, however, must be read in the context of the immediately preceding sentence in which the court said: "[N]o party is entitled as a matter of right to have the law of the case reconsidered, and a change in the law of the case should only be made in those situations where strict adherence to the rule would result in 'manifest injustice.'" *Brunner Enters. v. Dept. of Revenue*, 452 So. 2d 550, 552–53 (Fla. 1984). "We consider that the supreme courts reference to an intervening decision of a higher court, as constituting an exceptional circumstance for modifying the law of the case, means simply that the occurrence of such circumstance may be a ground for deciding whether adherence to the law of the case might result in manifest injustice to one of the parties in the case." *Dep't of Health & Rehab. Servs. v. Shatto*, 538 So. 2d 938, 939 (Fla. 1st DCA1989).

A manifest injustice – "an exception to procedural bars to postconviction claims in only the rarest and most exceptional of situations ...." *Cuffy v. State*, 190 So. 3d 86, 87 (Fla. 4th DCA 2015). To establish manifest injustice, the reviewing court must be "left with the definite and firm conviction that a mistake has been committed." *Vega v. State*, 288 So. 3d 1252, 1258 (Fla. 2020), citing *Smith v. Clark City Sch. Distr.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The error must also affect the defendant's substantial rights. *See United States v. Keppler*, 2 F.3d 21, 24 (2d Cir. 1993). "To show that an error affected one's substantial rights, the defendant must show that there is a reasonable probability of a different result in the outcome of [the] case." *United States v. Rozier*, 685 F. App'x 847, 851 (11th Cir. 2017).

It would be a manifest injustice for Mr. Pittman to not have the opportunity to fully demonstrate his intellectual disability claim, especially as there is evidence in the current record that Mr. Pittman does have a valid claim. See R246-257. Further, barring Mr. Pittman from presenting this evidence would lead to the unjust and unconstitutional result of executing an intellectually disabled person. Finally, denying him the opportunity that was previously granted to him violates his due process rights.

To deprive a defendant of the opportunity to be heard that he was granted back in 2017 would be a manifest injustice in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. *See e.g. Walls*, 213 So. 3d at 348 (Pariente, J., concurring); *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016) ("Because Thompson's eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence, this case is a prime example of preventing a manifest injustice if we did not apply *Hall* to Thompson.").

Where the state postconviction rules are abruptly changed with the retroactive effect of denying a litigant a hearing in a pending case, as is the case here, such a change deprives him of due process of law in its primary sense – an opportunity to be heard. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930)). This "transgression of the due process clause" is just as clear regardless of the supervening change in procedural rules is done by the legislature or, as here, "accomplished by the state judiciary[.]" *Id*. at 355. The transgression of the due process clause is even clearer when a litigant had reasonably relied on the stable existence of legal authority that was in

his or her favor.[3] *Jones v. Bd. of Governors of Univ. of N.C.*, 704 F.2d 713, 717 (4th Cir. 1983) (internal citations omitted).

It is clear the summary dismissal of Mr. Pittman's intellectual disability claim would violate his due process rights as he reasonably relied on the prior ruling and designed his litigation strategy around the expectation of presenting his claim at an evidentiary hearing. The only thing that changed in the duration of this litigation since the evidentiary hearing was ordered in 2017 was when this Court *sua sponte* overruled its *Hall* retroactivity holding that was established in *Walls*. Even if *Hall* is no longer deemed retroactive as *Phillips*[4] held, the new retroactivity decision cannot be used to upset cases where defendants won the right to new hearings under the then-current legal standards. The transgression of the due process clause is even clearer when a litigant had reasonably relied on the stable existence of legal authority that was in his or her favor.[5] *Jones v. Bd. of Governors of Univ. of*

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[3]Reliance on the court's order of November 15, 2017 is evident in this record, especially taking into consideration that discovery was ordered and scheduled for in preparation for the evidentiary hearing. See R1159, Discovery Schedule. Also, the various depositions that were noticed and taken. R1247, R1386-90.

[4] *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020).

[5] In this matter, Mr. Pittman relied on the grant of the evidentiary hearing by going forward with discovery and depositions in this case to prepare for the

N.C., 704 F.2d 713, 717 (4th Cir. 1983) (due process is violated where a litigant's claim is denied after "significant departures from [prior favorable] procedures … which have induced reasonable and detrimental reliance").

The death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887 n.24 (1983)). To deny Mr. Pittman the benefit of *Hall* would violate his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). The unevenness that would flow from applying *Phillips* to Mr. Pittman would flout the fundamental fairness interests enshrined in the Fourteenth Amendment's concept of due process. *See Carmell v. Texas*, 529 U.S. 513, 533 (2000) (holding "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice,

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same. There was, as the record on the appeal in this matter attests, much litigation surrounding what would be presented, what the experts could testify to, etc. All of this was done in explicit reliance on the trial court's order granting an evidentiary hearing. The fact the trial court granted Mr. Pittman the ability to depose witnesses in this matter also demonstrates that the trial court itself felt these measures were necessary in this case.

in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."). At the barest minimum, due process requires that Mr. Pittman be afforded the opportunity to present all of his evidence of intellectual disability, which he was unable, prior to 2015, to present, as it did not exist at that time.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the trial court improperly summarily denied Mr. Pittman's successive motion. This Court should, at a minimum, remand and order the trial court to hold a full evidentiary hearing on Mr. Pittman's claims of intellectual disability and allow him the full opportunity to put forth his evidence in support of his claim. Mr. Pittman 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. Pittman's constitutional and due process rights. This Court should remand to the circuit court to allow Mr. Pittman to present his evidence at an evidentiary hearing.

The categorical bar described in *Atkins* and *Hall* was clear. Under the Eighth Amendment, "persons with intellectual disability may not be executed." *Hall*, 134 S.Ct. at 1992 (citing *Atkins*, 536 U.S. at 321, 122 S.Ct.

2242)(emphasis added). It should not matter when one is deemed disabled in this way. To follow the United States Supreme Court's ruling as quoted in *Atkins*, courts must offer a fair opportunity to present evidence as to whether a defendant is intellectually disabled. This Court could eliminate the unconstitutional risk of executing an intellectually disabled man by remanding for an evidentiary hearing and factual finding of whether he is intellectually disabled. The risk of harm to not do so outweighs any benefit of "finality" in his sentence. After the evidentiary hearing, the Court will have the facts needed to make a just determination of Mr. Pittman's mental status for execution and it will withhold scrutiny if his death sentence is carried out.

As Justice Labarga so eloquently explained in his dissent in *Phillips*:

> No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. This is not to say that under current law persons with intellectual disability who 'meet the law's requirements for criminal responsibility' may not be tried and punished. They may not, however, receive the law's most severe sentence.

299 So. 3d at 1026 (internal quotation marks and citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Assistant Attorney General Timothy Freeland (Timothy.Freeland@myfloridalegal.com, capapp@myfloridalegal.com) on December 22, 2021.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was generated in Arial 14-point font and otherwise formatted in compliance with Florida Rules of Appellate Procedure 9.045 and 9.210, and the Florida Supreme Court's Scheduling Order.

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