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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 2025-1320

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

EXECUTION SCHEDULED FOR SEPTEMBER 17, 2025 AT 6:00 PM

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ARGUMENT I:

INTELLECTUALLY DISABILITY SHOULD NOT BE SUBJECT TO A PROCEDURAL BAR. THE STATE OF FLORIDA IS SET TO EXECUTE AN INTELLECTUALLY DISABLED MAN IN CONTRAVENTION TO THE UNITED STATES SUPREME COURT'S PRECEDENT IN *ATKINS V. VIRGINIA* AND *HALL V. FLORIDA* AND IN VIOLATION OF MR. PITTMAN'S EIGHTH AMENDMENT RIGHTS

Atkins v. Virginia, 536 U.S. 304 (2002), established an absolute prohibition against the execution of those with "mental retardations[1]" due to the Court's view that the execution of those with such intellectual disabilities violated the Eighth Amendment's ban on "cruel and unusual punishment." While the *Atkins* Court left it to the States to find their own way to implement this categorical ban, the Court was silent as to any bars, procedural or otherwise when establishing this absolute bar to the death penalty. *Id*.

Following *Atkins*, the United States Supreme Court rendered the *Hall*[2] decision. The *Hall* Court restated "[t]he Eighth Amendment prohibits certain punishment as a categorical matter…[a]nd, as relevant for this case, persons with intellectual disability may not be executed" *Hall 572* U.S. at 708. The United States Supreme Court has *never* suggested that the Eighth

[1] The term "mental retardation" is outdated and is now referred to as "Intellectual Disability."
[2] *Hall v. Florida*, 572 U.S. 701 (2014).

Amendment prohibition on executing an intellectually disabled person is subject to any sort of waiver or procedural bar or default. Just as it would be illegal to execute a person who was convicted of committing a murder as a fifteen-year-old and who failed to raise an Eighth Amendment challenge at the appropriated time, *see Roper v. Simmons*, 543 U.S. 551, 568-69 (2005). *Atkins,* 536 U.S. at 309, or to execute a person who was convicted of rape but not murder and failed to raise a challenge at the appropriate time, *see Kennedy v. Louisiana*¸554 U.S. 407 (2008), so too it would be illegal to execute an intellectually disabled person who failed to raise a 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 trail 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.").[3] Notwithstanding any waiver or

[3] The State appears to authorize the execution of minors in cases where age is not raised in a timely manner:

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.").

The record is rich with evidence of Mr. Pittman's intellectual disability. Along with qualifying IQ scores, there is evidence of his subaverage functioning and issues with adaptive functioning. Mr. Pittman has a long history of mental difficulties and cognitive deficits. Family members reported

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> The Court: What if the same thing happened, one of these situations with a foreign adoption when we are talking about someone being a juvenile? What if no one realized until the death warrant was signed? What would the State's view be at that point?
>
> Mr. Freeland: There is still the requirement that you make the claim within a certain period of time when you could reasonable , with due diligence, have discovered it.

DS 390.

that Mr. Pittman was a slow learner with a short attention span. In school, as early as age six, Mr. Pittman was placed in special education classes. Further, there was evidence that Mr. Pittman, during sixth, seventh, and eighth grade was in special education classes and classified as "educable mentally handicapped" and that he functioned on a low elementary level.

In 1967, a Stanford-Binet was administered to Mr. Pittman and yielded an IQ score of 70. In 1975, a Weschler Intelligence Scale for Children-Revised (WISC-R) was administered and Mr. Pittman obtained a score of 71. Both of these tests were administered prior to the age of eighteen. During post-conviction proceedings, Dr. Gordon Taub evaluated Mr. Pittman and once again administered an IQ test. The score of that test was 70[4]. More recently, Dr. Barry Crown evaluated Mr. Pittman. Dr. Crown administered the Test of General Reasoning Ability (TOGRA). The TOGRA test assessed a major area of IQ measurement – reasoning and judgement. Mr. Pittman score a 62 (with a 95% confidence interval between 58 and 72). Dr. Crown found that

[4] During trial, Mr. Pittman was tested again via a test administered by Dr. Dee. That score was a 95. It was later learned that this test was administered incorrectly and that score of 95 is an outlier. During warrant proceedings, the court agreed with the score of 95 as an outlier. "I think it's a stretch to say there is enough evidence in this record to be confident to the extend required by law that his IQ was a 95." DS 394.

this score was consistent with Mr. Pittman's prior IQ scores of 70 and 71. Dr. Crown also opined that Mr. Pittman has significant neurological impairment (brain damage) and significant problems dealing with language-based critical thinking. Dr. Crown's recent assessment of Mr. Pittman corroborates the earlier IQ scores equating to 70 to 71. The false test administered by Dr. Dee should not be considered when evaluating Mr. Pittman.

Despite unequivocal language from the United States Supreme Court that the executions of intellectually disabled persons are categorically exempted via the Eighth Amendment, the State of Florida is set to execute Mr. Pittman, who has an intellectual disability. There is no indication in the United States Supreme Court Jurisprudence regarding intellectual disability that Mr. Pittman should be subject to any type of procedural bar and, by extension, execution. No state-law waiver can stand in the way of this important constitutional function. Death-sentenced individuals "must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724. Mr. Pittman has been denied his right to be heard and present evidence as to his intellectual disability. The State of Florida is standing in the way of Mr. Pittman's Constitutional rights, which will result in irreparable harm to him: his death.

ARGUMENT II

THE COURT'S HOLDING IN *PHILLIPS* IS ERRONEOUS AND ITS APPLICATION WILL RESULT IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

It was error on the part of this Court to reverse the decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), that *Hall v. Florida*, 572 U.S. 701 (2014) must be applied retroactively. As a result, the State of Florida is set to execute David Pittman, who has an intellectual disability. However, due to errors on the part of this court, Mr. Pittman has been barred from presenting evidence of his intellectual disability to the court.

"The Eighth Amendment prohibits certain punishments as a categorical matter…persons with intellectual disability may not be executed." *Hall*, 572 U.S. at 705. The United States Supreme Court in *Hall* ruled that Florida's strict cut-ff of a 70 or below IQ in determining whether an individual is intellectually disabled "creates an unacceptable risk that persons with intellectual disability will be executed and thus is unconstitutional." *Id.* at 704. Despite the United States Supreme Court's warnings over a decade ago, this Court made this "unacceptable risk" more likely when ruling that *Hall* does not apply retroactively.

CERTIFICATE OF SERVICE

WE 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 the Clerk of the Circuit Court, the **Honorable J. Kevin Abdoney**, Judge of the Circuit Court, Administrative Judge of the Polk Felony Division, Tenth Judicial Circuit of Florida, P.O. Box 9000, Drawer J-165, Bartow, Florida 33831, (kabdoney@jud10.flcourts.org, cstevens@jud10flcourts.org, jreublin@jud10.flcourts.org, nsudzina@jud10.flcourts.org); **Assistant Attorney General, Timothy A. Freeland,** (timothy.freeland@myfloridalegal.com), **Assistant Attorney General, Michael W. Mervine** (Michael.mervine@myfloridalegal.com, capapp@myfloridalegal.com, stephanie.tesoro@myfloridalegal.com, paula.montlary@myfloridalegal.com, and Nanette.pelehach@myflorida.com); **Assistant State Attorney, Jacob Orr**, and **Assistant State Attorney, Mark Levine**, 10th Judicial Circuit, 255 N. Broadway Ave., Bartow, Florida 33880, (jorr@sao10.com, felonypolk@sao10.com, mlevine@sao10.com, cnorris@sao10.com); **Executive Senior Attorney, Kristen J. Lonergan**, (Kristen.lonergan@fdc.myflorida.com, courtfilings@fdc.myflorida.com,

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WE HEREBY FURTHER CERTIFY that a copy has also been furnished via U.S mail to **David J. Pittman**, DC#355971, Florida State

Prison, P.O. Box 800, Raiford, Florida 32083, on this 3rd day of September 2025.

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CERTIFICATE OF COMPLIANCE AND FONT

WE 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. Counsel further certifies that this entire Brief contains 1981 words.