No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JOSPEH PITTMAN,

***Petitioner*,**

vs.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

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PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
WEDNESDAY SEPTEMBER 17, 2025, AT 6:00 P.M.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court's decision in *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), denying some capital defendants the retroactive effect of *Hall v. Florida*, 572 U.S. 701 (2014), while having given retroactive effect of Hall to other similarly situated capital defendants, create an unacceptably disparate and unequal death penalty system in violation of the Eighth Amendment?

2. Does the Florida Supreme Court's decision in *Phillips* violate the ex post facto clause of the United States Constitution?

LIST OF PARTIES

All parties appear on the caption to the case on the cover page. Pittman was the Appellant below. The State of Florida was the Appellee below.

RELATED CASES

TRIAL AND SENTENCING

Circuit Court of the Tenth Judicial Circuit, Polk County, Florida
Docket Number: 1990-CF-2242
Case Caption: State of Florida v. David Pittman
Date of Entry of Judgment: Convicted, April 19, 1991; Sentence of Death, April 25, 1991.
Unreported.

DIRECT APPEAL

Florida Supreme Court
Docket Number: 1960-78605
Case Caption: David Joseph Pittman v. State of Florida
Date of Entry of Judgment: Order entered, September 29, 1994; Rehearing Denied, December 19, 1994; Mandate issued, January 23, 1995.
Pittman v. State, 646 So.2d 167 (Fla. 1994).

PETITION FOR WRIT OF CERTIORARI

United States Supreme Court
Docket Number: 94-8589
Case Caption: David Joseph Pittman v. Florida
Date of Entry of Judgment: May 15, 1995.
Pittman v. Florida, 115 S.Ct. 1982 (1995).

POSTCONVICTION MOTION TO VACATE JUDGMENT AND SENTENCE

Circuit Court of the Tenth Judicial Circuit, Polk County, Florida
Docket Number: 1990-CF-2242
Case Caption: State of Florida v. David Pittman
Date of Entry of Judgment: November 5, 2007; Rehearing Denied December 17, 2007.
Unreported

APPEAL FROM DENIAL OF POSTCONVICTION MOTION TO VACATE JUDGEMENT AND SENTENCE AND CONSOLIDATED STATE HABEAS PETITION

Florida Supreme Court
Docket Number: SC2008-0146 and SC08-2486
Case Caption: David Joseph Pittman v. State of Florida
Date of Entry of Judgment: June 30, 2011; Rehearing Denied June 7,

2012; Mandate Issued, June 25, 2012.

Pittman v. State, 90 So.3d 794 (Fla. 2011).

FEDERAL HABEAS CORPUS PETITION

United States District Court, Middle District of Florida, Tampa Division

Docket Number: 8:12-cv-1600-T- 17EAJ

Case Caption: David Joseph Pittman v. Kenneth s. Tucker, Secretary, Fl. Dept. of Corrections and Pamela Jo Bondi, Attorney General.

Date of Entry of Judgment: February 20, 2015.

Unreported in Fed. Supp. *Pittman v. Secretary, Dept. of Corrections*, 2015 WL 736417 (U.S. M.D. 2015).

APPEAL FROM DENIAL OF PETITION OF FEDERAL HABEAS CORPUS

United States Court of Appeals, Eleventh Circuit.

Docket Number: 15-11807

Case Caption: David Joseph Pittman v. Kenneth s. Tucker, Secretary, Fl. Dept. of Corrections and Pamela Jo Bondi, Attorney General

Date of Entry of Judgment: September 22, 2017.

Pittman v. Secretary, Fl. Dept. of Corrections and Attorney General, State of Florida, 871 F.3d 1231 (11th Cir. 2017).

PETITION FOR WRIT OF CERTIORARI

United States Supreme Court

Docket Number: 17–9015

Case Caption: David Joseph Pittman v. Julie L. Jones, Secretary, Florida Department of Corrections, et al.

Date of Entry of Judgment: October 1, 2018.

Pittman v. Julie L. Jones, Secretary, Florida Department of Corrections, et al, 586 U.S. 839 (2018).

SUCCESSIVE MOTION TO VACATE DEATH SENTENCES AND CONSOLIDATED RULE 3.800 MOTION

Circuit Court of the Tenth Judicial Circuit, Polk County, Florida

Docket Number: 1990-CF-2242

Case Caption: State of Florida v. David Pittman

Date of Entry of Judgment: May 28, 2021; Rehearing Denied June 14, 2021.

Unreported

APPEAL FROM SUMMARY DENIAL OF PITTMAN'S SUCCESSIVE POSTCONVICTION MOTION

Florida Supreme Court

Docket Number: SC21-1185

Case Caption: David Joseph Pittman v. State of Florida

Date of Entry of Judgment: April 28, 2022; Mandate Issued, May 19, 2022.

Pittman v. State, 337 So.3d 776 (Fla. 2022).

DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED AND DEFENDANT'S MOTION FOR STAY OF EXECUTION CONSOLIDATED.

Circuit Court of the Tenth Judicial Circuit, Polk County, Florida

Docket Number: 1990-CF-2242

Case Caption: State of Florida v. David Pittman

Date of Entry of Judgment: August 27, 2025.

Unreported

APPEAL FROM SUMMARY DENIAL OF PITTMAN'S SUCCESSIVE POSTCONVICTION MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED AND DEFENDANT'S MOTION FOR STAY OF EXECUTION CONSOLIDATED

Florida Supreme Court

Docket Number: SC2025-1320

Case Caption: David Joseph Pittman v. State of Florida

Date of Entry of Judgment: September 10, 2025

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases ..... **PAGE(S)**

Statutes

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner, David Joseph Pittman, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court and address the important questions of federal constitutional law presented. This case presents a fundamental question concerning the Due Process Clause requirement of proof beyond a reasonable doubt, and the Eighth Amendment need for a reliable capital sentencing determination.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *Pittman v. State*, SC2025-1320, 2025 WL_____ (Fla. September 10, 2025) and reproduced at Appendix. The trial court's order denying Pittman's successive motion for post-conviction relief is reproduced at Appendix F.

JURISDICTION

The opinion of the Florida Supreme Court was entered on September 10, 2025. (Appendix E). This petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Article I, sec. 10, cl. 1. Provides in pertinent part: No State shall pass [ ] any [ ] ex post facto Law.

STATEMENT OF THE CASE

In *Hall v. Florida*, 572 U.S. 701 (2014), this Court found the Florida Supreme Court's application of its Intellectual Disability statute unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Walls v. State*, 213 So. 3d 340 (2016) (*per curiam*), the Florida Supreme Court agreed that its prior statutory interpretation had unconstitutionally restricted *Atkins* claims to a smaller subgroup of individuals than recognized by the medical community and determined *Hall* to be retroactive. As a result, capital defendants who were denied under the unconstitutional pre-*Hall* framework were entitled to receive a new, "holistic" review of their *Atkins* claims. However, the Florida Supreme Court sua sponte reversed its decision in *Walls* and determined that *Hall* announced a new non-watershed rule for Eighth Amendment purposes and thus was not retroactive. *See Phillips v. State*, 299 So.3d 1013 (Fla. 2020).

The Petitioner, David Pittman, was sentenced to death before this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The trial court summarily denied

Mr. Pittman's claims, even though there is evidence of intellectual disability, due, in part, to the reversal of *Walls*.

Procedural History:

On May 15, 1990, an information was filed charging David Pittman with one count of grand theft and one count of arson. On July 12, 1990, Mr. Pittman was indicted on three counts of first-degree murder, two counts of arson, and one count each of burglary and grand theft. Trial commenced on March 18, 1991. Subsequently, on April 19, 1991, the jury returned a guilty verdict, finding Mr. Pittman guilty of three counts of first-degree murder, two counts of arson, and one count of grand theft. The jury also found Mr. Pittman not guilty of the burglary charged in Count 5 of the Indictment. At the conclusion of a penalty phase proceeding, the jury returned a death recommendation by a nine to three vote. On April 25, 1991, Mr. Pittman was sentenced to death. He also received fifteen-year sentences on each arson count, and a five-year sentence on the grand theft count. The sentences were ordered to be served concurrently.

On direct appeal, Mr. Pittman raised various issues. The Florida Supreme Court rejected Mr. Pittman's arguments and affirmed his death sentence. *Pittman v. State*, 646 So.2d 167 (Fla. 1994).

Thereafter, Mr. Pittman filed a rule 3.850 motion in 1997 and filed an amended one in 2001 and 2005. Various claims of ineffective assistance of trial counsel were raised, specifically focusing on trial counsel's failure to present additional evidence of mental health issues. *See Pittman v. State*, 90 So.3d 794 (Fla. 2011). Amongst the

evidence presented in that hearing was testimony that Pittman was in a class for emotionally handicapped students and functioned at a lower level than his age. PC3687-88.[1] Further, there was evidence that Mr. Pittman, during the sixth, seventh and eighth grades was in special education classes and classified as "educable mentally handicapped" and that he functioned on a low elementary level. PC3573-74. In 1967, a Stanford-Binet test was administered to Mr. Pittman and obtained 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. R248. Furthermore, there is evidence in the record of this case that Mr. Pittman suffered from mental difficulties, previously described as brain damage, which appeared to be "some congenital problem." PC4438. At the time of the hearing, much of this was presented as evidence of brain damage. Following an evidentiary hearing, Rule 3.851 relief was denied. The Florida Supreme Court affirmed the denial of Rule 3.851 relief on these initial claims. *Pittman v. State*, 90 So.3d 794 (Fla. 2011).

On May 27, 2015, Mr. Pittman's counsel filed a successive Rule 3.851 motion, setting forth the results of a WAIS-IV[2] administered by Dr. Gordon Taub on May 18, 2015, that showed Mr. Pittman had an IQ score of 70. R154-63. Counsel for Mr. Pittman at the time, Martin McClain, stated he was first alerted to Mr. Pittman's intellectual disability claim under *Hall v. Florida*[3]. The trial court struck Mr.

[1] Citations to the specific record on appeal for these proceedings are designated a "R" and followed only by a page number (R page). Any references to the trial record on appeal are designated by "TR" and followed by a page number (TR page). Any citation to the initial postconviction record on appeal is designated by "PC" and followed by a page number (PC page).
[2] The Wechsler Adult Intelligence Scale, 4th Edition.
[3] *Hall v. Florida*, 572 U.S. 701 (2014).

Pittman's motion due to facial insufficiencies in an order dated July 9, 2015 (R164-166), which counsel did not learn about until November 2015. The trial court, after granting the defendant's motion requiring service of the order, gave Mr. Pittman sixty days from December 14, 2015, to file a facially sufficient amended successive motion. R174-78. Mr. Pittman filed his amended successive motion on February 9, 2016, as well as a Rule 3.800(a) motion. R179-245. Mr. Pittman later filed a second amended successive motion and Rule 3.800(a) motion, October 14, 2016. R341-429. This motion was amended again on April 17, 2017[4]. R753-56.

The trial court held a case management conference on November 9, 2017. Based upon the then applicable law, the trial court ruled that an evidentiary hearing was appropriate for Claims 1 and 1A of Mr. Pittman's third successive motion. R805. The trial court summarily denied the rest of the claims. Id.

On October 4, 2019, the state filed a Motion to Dismiss Claims 1 and 1A of Third Amended Successive Motion for Post-Conviction Relief on October 4, 2019. R1199-1201. Shortly afterwards, on October 22, 2019, Mr. Pittman filed a separate Rule 3.800(a) motion, along with a response to the state's motion to dismiss. R1215-21.

While Mr. Pittman's case was pending in the trial court, the Florida Supreme Court sua sponte reversed its decision in *Walls* and determined that *Hall* announced

[4] Although this motion is entitled Second Amended Successive Motion to Vacate Judgments of Conviction and Sentences, and Alternatively Motion to Correct Illegal Sentences, this is the third amended successive motion and will be referred to as such throughout the brief.

a new non-watershed rule for Eighth Amendment purposes and thus was not retroactive. *See Phillips v. State*, 299 So.3d 1013 (Fla. 2020).

On March 19, 2021, the trial court held a hearing on the State's Motion to Dismiss Claim 1 and 1(A) and Mr. Pittman's Rule 3.800(a) motion. During the hearing, the trial court chose to address its prior granting of an evidentiary hearing without first providing defense counsel with notice that Mr. Pittman's Third Amended Successive Motion was to be heard at that time. See R2323-25.

On May 28, 2021, the trial court issued its Final Order Denying Defendant's Third Amended Successive Motion for Postconviction Relief and Defendant's Motion Under Rule 3.800(a) Challenging His Death Sentence as Illegal. R1866-1903. The trial court reversed its earlier order granting Mr. Pittman an evidentiary hearing on Claims 1 and 1A. Mr. Pittman filed a motion for rehearing on June 14, 2021. R1944-50. This motion was denied on July 13, 2021. R1951-52. A timely notice of appeal was filed on August 12, 2021, to the Florida Supreme Court. The Florida Supreme Court denied Mr. Pittman's appeal on April 28, 2022.

Governor DeSantis signed a death warrant for the execution of Mr. Pittman on August 15, 2025, setting the execution of Mr. Pittman for September 17, 2025, at 6:00 P.M. Mr. Pittman's Successive 3.851 under warrant was timely filed on August 24, 2025. In his Successive 3.851, Mr. Pittman raised that his sentence of death is unconstitutional due to his intellectual disability. The trial court held a *Huff*[5] hearing on August 26, 2025. The trial court expressed concern that indeed an intellectually

[5] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

disabled individual would be executed, nonetheless, based on existing precedent, denied the successive motion. Mr. Pittman, an intellectually disabled person, was once again denied the opportunity to present evidence of his intellectual disability. Pittman appealed that decision to the Florida Supreme Court on August 29, 2025. The Florida Supreme Court denied the appeal and this petition followed.

REASONS FOR GRANTING THE WRIT

This case presents questions of great importance for this Court regarding the analysis of a State court's duty to give retroactive effect to a federal constitutional holding. This area of the law remains complicated and unclear to many lower courts and practitioners. Further, this Court has repeatedly held that a death sentence "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887 n.24 (1983)). The Florida Supreme Court's sua sponte reversal of *Walls* in *Phillips* undermines the integrity of the judicial system and results in arbitrary eligibility determinations.

Additionally, the Florida Supreme Court violated Pittman's rights under the *ex post facto* clause. This Court should clarify the application of the clause to judicial holdings such as the one at issue here.

1. Intellectual Disability Should Not Be Subject to Procedural Bars.

"The Eighth Amendment prohibits certain punishments as a categorical matter." *Hall v. Florida,*572 U.S. 701, 708 (2014). Categorical bans exist to protect both the individual as well as the interests of society. *See e.g. Ford v. Wainwright*,

477 U.S. 399, 409-10 (1986) (finding Eighth Amendment based categorical exemption not only protects the death-exempt individual but also protects "the dignity of society itself from the barbarity of exacting mindless vengeance[.]". 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. Just as it would be illegal to execute a person who was convicted of committing a murder as a fifteen-year-old and who failed to raise an Eighth Amendment challenge at the appropriate time, *see Roper*, 543 U.S. at 568-69, 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 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.").

The categorical bans that are recognized under the Eighth Amendment recognize the Amendment's "protection of dignity" that reflects "the Nation we have been, the Nation we are, and the Nation we aspire to." *Hall v. Florida*, 572 U.S. 701, 708 (2014). "A claim that a punishment is excessive", such as the execution of an intellectually disabled individual, "is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). A State rule that "will frequently and predictably cause a factfinder to determine that an individual who in fact is intellectually disabled is not" manifestly does not meet the command of the Eighth Amendment.

No state-law waiver provision 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. Just as it would unquestionably be unconstitutional for the State to invoke timeliness or res judicate as justification to execute individuals subject to other categorical exemptions or exclusions, *see e.g., Roper v. Simmons,*543 U.S. 551 (2005) (juveniles); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (individuals without murder conviction), so too would it be unconstitutional to execute Mr. Pittman on the grounds that he

failed to raise his claim at the "appropriate" procedural time or was "right too soon" by attempting to litigate before the consensus was reached. *See Sawyer v. Whitley*, 505 U.S. 333 (1992) (courts may hear otherwise defaulted claims where petitioner can show "by clear and convincing evidence that, but for a constitutional error," he would not be eligible for the death penalty).

"Once a State has granted prisoners a liberty interest, this Court [has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). Determining who benefits from a substantive right must not offend the Due Process Clause. In this matter, this court had originally granted Mr. Pittman a hearing on his intellectual disability claim.

Due to the Florida courts erroneous interpretation of federal law, and its insistence on placing a time bar on intellectual disability claims, the State of Florida **will** execute an intellectually disabled defendant, in violation of the United States Constitution. This Court should reconsider any previous precedent that would violate Mr. Pittman's rights to due process and would create an unacceptable risk under the Eighth Amendment of executing an individual that falls within one of the acknowledged categorical bars to the death penalty.

The record in Mr. Pittman's case already includes evidence that Mr. Pittman's mental difficulties, previously described as brain damage, appear to be "some congenital problem" (R. 4438). In 1967, a Stanford-Binet was administered to Mr. Pittman and obtained 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. Furthermore, there is evidence in the record of this case that Mr. Pittman suffered from mental difficulties, previously described as brain damage, which appeared to be "some congenital problem." PC4438. This shows that the onset was before the age of 18. There is also evidence in the record of this case of Mr. Pittman's documented issues with adaptive functioning. Mr. Pittman's IQ score of 70 obtained on or about May 18, 2015, and Dr. Gordon Taub's subsequent medical report interpreting the score according to current medical standards.

Hall recognizes that intellectual disability "is a condition, not a number." *Hall*, 572 U.S. at 723 (2014). The Florida Supreme Court found that *Hall* requires courts to consider all three prongs of intellectual disability in tandem and that no single factor should be dispositive of the outcome. *See Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015). Thus, an intellectual disability claim may not be legally insufficient or positively refuted by the record even if the defendant's IQ scores are higher than 70. Mr. Pittman was denied his opportunity to demonstrate his intellectual disability and now the State of Florida will perform an unlawful execution.

Mr. Pittman is in a class of persons that are ineligible to be executed. At the time of Mr. Pittman's initial conviction, no such categorical exemption existed. Later, when there was such an exemption, the State of Florida misapplied the law and was so focused on a singular number to exclude an entire sect of the population of intellectually disabled persons, including Mr. Pittman. Thereafter, *Hall* was decided, giving Mr. Pittman hope that he would be able to show the court proof of his intellectual disability. Due to the cruelty of time and this Court reversing its decision in *Walls,* Mr. Pittman was once again locked out of the courtroom and unable to put on evidence of his intellectual disability. It is an injustice to once again deny Mr. Pittman access to the courts, when his unlawful execution is looming.

2. The Florida Supreme Court's Sua Sponte Determination That *Hall* Was Not a New, Non-Watershed Rule of Law for Eighth Amendment Purposes Conflicts with This Court's Retroactivity Doctrines.

The conclusion of *Phillips* that *Hall* announced a new non-watershed rule of federal Eighth Amendment law for purposes of *Teague v. Lane*, 489 U.S. 288 (1989) was in error. In *Walls*, the court clearly articulated that its rationale stemmed from the analysis conducted in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (rejecting the State's argument that *Miller v. Alabama*, 567 U.S. 460 (2012) only invalidated the statute as applied to a subgroup of people and thus constituted a procedural refinement that did not warrant retroactive application). Guided by *Miller*, the *Walls* court concluded that *Hall* similarly identified and prohibited a penalty (a death sentence) for an exempt class of offenders (individuals with IQ scores ranging above 70). The court recognized that while *Atkins* gives States the discretion to craft the procedures to determine intellectual disability, courts cannot ignore the medical community's diagnostic framework. Thus, at bare minimum, a court must not "view a single factor as dispositive of the conjunctive and interrelated assessment." *Hall*, 572 U.S 701 at 2001.

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court explained that its opinion did not categorically bar a particular penalty for a class of offenders or type of crime, rather it only mandated that the sentencer follow a certain process before imposing a particular penalty. Following this ruling, a Louisiana petitioner filed a motion for postconviction relief asserting *Miller* was substantive law. The Louisiana court disagreed and held *Miller* was not retroactive. In addressing the retroactive

implications of *Miller* in *Montgomery v. Louisiana*[6], this Court acknowledged the procedural component of *Miller* but found that Louisiana's argument labeling *Miller* as a procedural rule "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the manner of determining the defendant's culpability.'" 136 S. Ct. at 734-35. This Court concluded *Miller* was inherently substantive as it implicated a line of precedent concerned with the proportionality of certain punishments. In light of *Miller* recognizing the grave risks of exposing a defendant to a "punishment that the law cannot impose," this Court held retroactive application was warranted. *See id*. at 735 ("There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show he falls within the category of persons whom the law may no longer punish... [] *See, e.g., Atkins*… Those procedural requirements do not, of course, transform substantive rules into procedural ones.") (internal citation omitted).

As illustrated by *Miller* and *Montgomery*, the "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and *goes far beyond the manner of determining a defendant's sentence*." *Id*. at 733. (emphasis added); *Contra Phillips v. State*, 299 So 3d at 1021 ("[*Hall*] *merely clarified* the manner in which courts are to determine whether a capital defendant is intellectually disabled…") (emphasis added). Under this Court's jurisprudence, it follows that the same logic applies to intellectual disability claims. Given that *Hall*, like *Miller*, contains a procedural component, and is ultimately

[6] 136 S. Ct. 718 (2016).

rooted in the Eighth Amendment's prohibition against imposing a particular sentence on a class of offenders, the procedures imposed by Florida courts cannot impede the enforcement of the substantive constitutional rule announced in *Atkins*. Thus, the procedures used to determine intellectual disability must allow for the consideration of other evidence, beyond IQ scores, to enable a court to resolve the question of whether an offender is, or is not, a member of the eligible class. *See e.g., Moore v. Texas,* 137 S.Ct. 1039, 1051 (2017). ("Mild levels of intellectual disability…nevertheless remain intellectual disabilities").

Hall v. Florida undeniably mandated the expansion of *Atkins* claims under Florida law to reduce the risk of executing an intellectually disabled defendant. While *Atkins* announced a categorical rule forcing the sentencer to consider intellectual disability before determining the permissibility of a death sentence, *Hall* built upon *Atkins* framework and forced Florida to broaden the class of qualifying intellectually disabled individuals. Consequently, retroactivity is necessarily invoked as the Constitution deprives States of the power to impose a death sentence when a rule has altered the class of persons that the law may punish. Despite the *Walls* court identifying and understanding this principle, because of the decision in *Phillips*, it was determined that Mr. Pittman would not receive the same "benefits" from *Hall v. Florida* as other similarly situated capital defendants on collateral review received.

"Once a State has granted prisoners a liberty interest, this Court [has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). Determining

who benefits from a substantive right must not offend the Due Process Clause. In this matter, the trial court had originally granted Mr. Pittman a hearing on his intellectual disability claim. However, due to the Florida Supreme Court's ruling in *Phillips*, this was reversed because "*Hall* does not apply retroactively." *Pittman v. State*, 337 So. 3d 776 (Fla. 2022). In effect, Florida is not abiding by this Court's precedent in *Hall*. In order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *The Federalist No.* 78 (Alexander Hamilton). As a result, Mr. Pittman was denied a fair opportunity to show that the Constitution prohibits his execution under the Eighth Amendment.

3. This Court Should Find That The Arbitrary Reversal of *Walls* Creates An Unacceptable Risk That Intellectually Disabled Individuals Will Be Executed In Violation Of The Eighth and Fourteenth Amendments.

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *see also id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . .there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). The death penalty may not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint

opinion of Stewart, Powell, and Stevens, JJ.); see also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

Other Florida inmates, challenging their sentences on collateral review, have been resentenced to life imprisonment based on *Hall* and *Walls*.[7] Further, other Florida inmates have been given the opportunity in the courts of Florida to present the evidence of their intellectual disability claims. *See for example Oats v. State*, 181 So.3d 457 (Fla. 2021); *Foster v. State*, 260 So.3d 174 (Fla. 2018); *Nixon v. State*, 2017 WL 462148 (Fla. Feb. 3, 2017). Accordingly, there is no rational basis that justifies Mr. Pittman being denied the same benefit. The trial court had originally granted Mr. Pittman a hearing on his intellectual disability claim (R805), only to deny the claim later summarily as a result of the Florida Supreme Court's reversal of *Walls*. Mr. Pittman should have had the opportunity to present his evidence of intellectual disability. Although throughout his various postconviction hearings, there have been signs of Mr. Pittman's lifelong adaptive deficits and low intellectual functioning, but it was never the focus of previous litigation, due to the fact that most of the evidence was presented prior *Atkins*. Further, due to errors made by the neuropsychologist in Mr. Pittman's initial postconviction in this matter, the opportunity to raise intellectual disability was almost lost.[8] However, despite these issues, the prior

[7] See Appendix D, as an example.

[8] 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. In Dr. Taub's report, which was filed with the trial court (R246-257), he sets forth his discovery that Dr. Dee's testing of Mr. Pittman's IQ in 1991 was invalid because Dr. Dee used the wrong test instrument. As a result of using the wrong instrument, Mr. Pittman's IQ score was significantly inflated and at odds with testing conducted when Mr. Pittman was a child. Initial postconviction counsel detrimentally relied on the opinion of his expert, Dr. Dee, unaware that he had used the wrong test instrument, until Dr. Taub's assessment of Mr. Pittman in 2015.

record contains compelling evidence indicating that Mr. Pittman is intellectually disabled.

Early on in school, it was evidence that Mr. Pittman had intellectual difficulties. Mr. Pittman was in a class for emotionally handicapped students and functioned at a lower level than his age in elementary school. PC3687-88. Further, during the sixth, seventh and eighth grades, Mr. Pittman was in special education classes and classified as "educable mentally handicapped" and that he functioned on a low elementary level. PC3573-74. In 1967, a Stanford-Binet test was administered to Mr. Pittman and obtained an IQ score of 70. R248. In 1975, a Weschler Intelligence Scale for Children- Revised (WISC-R) was administered and Mr. Pittman obtained a score of 71. Id. Both scores were obtained prior to the age of 18. Finally, on May 18, 2015, Dr. Gordon Taub conducted a neuropsychological examination of Mr. Pittman and obtained an IQ score of 70. R254. Further, "[r]esults from the evaluation of adaptive functioning on the ABAS-3 found that Mr. Pittman has deficits in adaptive functioning". Dr. Taub opined that "Mr. Pittman meets the diagnostic criteria for an Intellectual Disability". R257.

Mr. Pittman should have had the opportunity to present a full and complete picture of his intellectual disability, just as others in the state of Florida have been allowed to do.[9]

[9] Even though the Florida Supreme Court reversed and receded their decision in *Walls v. State,* 213 So.3d 340 (Fla. 2016), Mr. Walls himself was still allowed by a circuit court in Florida to present and develop his evidence of intellectual disability after the advent of *Phillips*. See Appendix C.

4. The Florida Supreme Court's Denial to Apply the Constitutionally Valid Statute to Pittman Violates the *Ex Post Facto* Clause.

The Florida Supreme Court's decision to deny Mr. Pittman the retroactive effect of a constitutionally valid statute is impermissibly retroactive in violation of *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977). *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-92 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). Just as he was entitled to the pre-*Cherry*[10] reading of the statute then, he is entitled to it now. It is a commonplace of ex post facto history that the prohibition was a response to punishments exacted in England when one warring faction succeeded another and proceeded to despoil the losers. *See Calder v. Bull*, 3 U.S. 386, 390 (1798) (opinion of Chase, J.). Protection against retroactive punishment resulting from regime change was very much in the mind of the Framers when they included two ex post facto clauses in the federal Constitution. *See Cummings v. Missouri*, 71 U.S. 277, 322 (1866). To deprive Mr. Pittman of the benefits of a rule that as recently as 2017 was squarely applicable to his case violates Article I, §10 of the federal Constitution. *See State v. Ramseur*, 843 S.E.2d 106, 113-19 (N.C. 2020).

As this Court has pointed out in finding that a change in State evidentiary standards violated the ex post facto clause, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it

[10] *Cherry v. State*, 959 So.2d 702 (Fla. 2007).

can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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