DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

HARRY FRANKLIN PHILLIPS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Does the Florida Supreme Court's determination that the jury findings required by *Hurst v. Florida* and *Hurst v. State* enhance the reliability of decisions to impose death, but can only be retroactively applied to cases in which a death sentence was final after June 24, 2002 violate Due Process, the Eighth Amendment, and the Equal Protection Clause of the Fourteenth Amendment?

2. Does the Florida Supreme Court's partial retroactivity analysis concerning *Hurst* violations violate the Supremacy Clause of the United States Constitution in light of this Court's holdings in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

CITATION TO OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. P. 3.851. The Florida Supreme Court affirmed the lower court's summary denial on January 22, 2018 in *Phillips v. State*, 234 So. 3d 547 (Fla. 2018), which is attached to this petition as Appendix A. The April 21, 2017 order of the Circuit Court in and for Miami-Dade County denying Mr. Phillips' successive motion is unreported. It is reproduced in Appendix B. The Florida Supreme Court Order to Show Cause issued on September 27, 2017 is Appendix C. The Appellant's Response to the Order to Show Cause is attached as Appendix D. The State's Reply to Appellant's order to Show Cause is attached as Appendix E. The Reply to the State's Reply to Response is attached as Appendix F.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying collateral relief on January 22, 2018, and indicated that any motion for rehearing containing reargument would be stricken.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

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

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . 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.

STATEMENT OF THE CASE

I. Introduction

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down Florida's capital sentencing procedures because those procedures authorized a judge, rather than a jury, to make the factual findings necessary for a death sentence. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida Supreme Court held that in order for a capital penalty phase jury to return a death recommendation that gives the sentencing judge the power and authority to impose a death sentence, the jurors must have unanimously found all facts necessary to impose a sentence of death and unanimously agreed to the recommendation. "In requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, [the Florida Supreme Court was] cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. Following *Hurst v. State*, the Florida Supreme Court issued a series of cases holding that while the unanimity requirement in *Hurst v. State* was retroactively applicable to cases in which death sentences were not final on June 24, 2002, when *Ring v. Arizona*, 536 U.S. 584 (2002) issued, it was not retroactively applicable to cases in which death sentences were final prior to June 24, 2002.

II. Factual and Procedural Background

On December 16, 1983, Harry Franklin Phillips was convicted of one count of first-degree murder in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Despite protest from Phillips' counsel, the penalty

phase began thirty minutes later (R-1984. 1212).[1] The Honorable Arthur Snyder instructed the jury that their role was merely advisory, and that they would only be giving a "recommendation" as the "[f]inal decision as to what punishment shall be imposed rests solely with me." (R-1984. 1227).The court instructed the jury that it could consider and weigh five aggravating factors: (1) under sentence of imprisonment; (2) prior violent felony; (3) committed to disrupt/hinder law enforcement; (4) heinous, atrocious or cruel (HAC); and (5) cold, calculated and premediated (CCP). The court also instructed, "[w]hen seven or more are in agreement as to what sentence should be recommended to the Court that form of recommendation should be signed by your foreman and returned to the Court" (R-1984. 1261). The jury retired to deliberate at 4:50 p.m. and returned a recommendation at 5:38 p.m. The jury "advise[d] and recommend[ed]" a sentence of death by a vote of 7 to 5 (R-1984. 1269). The jury made no factual findings and did not have special verdict forms. Thereafter the trial court sentenced Phillips to death, finding four of the five aggravating circumstances that the jury had been instructed on. The sentencing court specifically rejected the disrupt/hinder aggravator finding, "the fact that the only connection between the victim and the defendant was their status as parole officer and parolee, the Court is <u>not</u> satisfied beyond a reasonable doubt that this killing hindered or disrupted any governmental function and [the Court] is of the belief that the killing may have been for purpose of revenge only . . ."

[1] References to the record on appeal transmitted to the Florida Supreme Court from the original 1984 sentencing will be designated "R-1984. ___" and references to the 1994 resentencing proceeding will be designated "R. ___".

(R-1984. 1508). The Florida Supreme Court affirmed the conviction and sentence on direct appeal. *Phillips v. State,* 476 So. 2d 194 (Fla. 1985). Phillips filed an initial Fla. R. Crim. P. 3.850 motion on November 4, 1987. A state habeas corpus petition was docketed the same day, but the Florida Supreme Court denied relief. *Phillips v. Dugger,* 515 So. 2d 227 (Fla. 1987). After a limited evidentiary hearing, the trial court denied relief on February 13, 1989. On appeal, the Florida Supreme Court reversed and remanded for resentencing, due to ineffective assistance of counsel at the sentencing phase of the trial. *Phillips v. State,* 608 So. 2d 778 (Fla. 1992).

On April 4, 1994, a resentencing proceeding was held in the Circuit Court for the Eleventh Judicial Circuit, again before the Honorable Judge Arthur Snyder. During *voir dire*, the judge explained to the jury:

> This is a little unusual case in that we are on the penalty phase of a First Degree Murder case, that means that the defendant has already been found guilty of First Degree Murder by a different jury and **for legal technicalities we have to retry the penalty phase**. That means that you people would be given testimony during the week . . .

(R. 82-83) (emphasis added).

At the close of the second penalty phase, the court told the jury, "**[i]t's not your duty** to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you were told **I will decide what punishment shall be imposed**. It's the responsibility of the Judge" (R. 787) (emphasis added). The court instructed the jury it could consider four aggravating circumstances: (1) under sentence of imprisonment; (2) prior violent felony; (3) committed to disrupt/hinder law enforcement; and (4) CCP; and two statutory mitigating circumstances: (1) under

the influence of extreme mental or emotional disturbance; and (2) capacity to appreciate criminality or conform conduct was substantially impaired (R. 787-790). The court also instructed the jury, "[f]eelings of prejudice, bias or mere sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way" (R. 795).

The court then explained in detail the difference between a "regular trial" and a "death penalty" trial:

> There is nothing wrong with getting into a heated discussion until you finally vote. The vote must be unanimous in a regular trial. In this case in a death penalty it's not the case. You can only take one vote and that vote is the vote. You don't after the vote argue with the people. You don't say stupid, why did you vote that way and argue with the people. The vote has been taken and that's it.

(R. 798).

The jury retired to deliberate at 12:40 p.m. and returned at 3:30 p.m. with questions. Although the questions posed by the jury had nothing to do with the vote, Judge Snyder agreed that his instructions had been confusing and improper, and reinstructed the jury about voting procedures (R. 803). The jury again left to deliberate. At 4:40 p.m. the jury returned:

> [JURY FOREPERSON]: We would like another 30 minutes.
>
> THE COURT: Do you think you can come to a decision?
>
> [JURY FOREPERSON]: It's entirely possible.
>
> THE COURT: How do the rest of you feel about it? Do you think it's not possible in 30 minutes?
>
> [JURY FOREPERSON]: We're not sure.

> (Thereupon the jury left the courtroom to continue to deliberate).
>
> THE COURT: Fine, we'll meet at 5:30 p.m.(Thereupon the jury returned to the courtroom at 5:30 p.m.)
>
> Ladies and gentlemen, let me ask you one question. I have no problem. I already arranged for everything to lapse over until tomorrow. Do you believe that the decision has to be unanimous?
>
> [JURY FOREPERSON]: No.
>
> THE COURT: Fine. Okay, I'll see you all in the morning at 9:00 a.m.

(R. 803-06).

The next day, the jurors returned to continue their deliberations. They sent a note to the judge indicating that two jurors were declining to vote, i.e., that a verdict could not be reached (R. 810). The judge brought the jury in and told them to take a vote, even if from only ten of the jurors, and to "[p]ut on the vote as it stands" (R. 811). Six minutes later, the jury returned with a recommendation, by a vote of 7 to 5, to impose death (R. 812). Again, the jury made no factual findings and did not have special verdict forms. At the *Spencer*[2] hearing on April 20, 1994, the judge showed up with a sentencing order prepared in hand. *See* R. 826-46. Prior to reading the sentencing order, Judge Snyder commented:

> It's interesting in this case that the jury verdict was 7-5 in both cases. I don't know why that is. I don't know. I guess sympathy is not supposed to enter in to the deliberations. I guess they do. And I guess that's the benefit of out jury system. I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment. I really don't. I

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

> had a fellow by the name of famous Stacy Weinstein case. Bosco. Jury voted 12 nothing give him life imprisonment, and I gave him the death penalty. It was reversed. Not on the case, but that he was given life. There are certain crimes that you must send a message to the community.

(R. 825).

The trial court found the four aggravating circumstances[3] that the jury was instructed on but found neither of the two instructed statutory mitigating circumstances applied[4] (R. 826-46). The Florida Supreme Court affirmed the sentence on direct appeal. *Phillips v. State*, 705 So. 2d 1320 (Fla. 1997), *cert. denied*, *Phillips v. Florida*, 525 U.S. 880 (1998).

Phillips filed an initial Fla. R. Crim. P. 3.850 motion, raising twenty-four claims. The circuit court summarily denied relief. Phillips appealed the denial and petitioned for a writ of habeas corpus. While the appeal was pending, this Court issued its rulings in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) and *Ring v. Arizona*, 536 U.S. 584 (2002).

On August 1, 2002, Phillips filed a "Notice of Supplemental Authority and Motion for Permission to Submit Supplemental Briefing" requesting to address the

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[3] The court acknowledged that although "[t]his Court previously found [the disrupt/hinder] factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits that although revenge may have been one motive, it was part of the overall motive of killing a parole officer . . . Mr. Svenson's only connection with the defendant was as parole officer and parolee" (R. 831). However, Mr. Svenson was not Phillips' parole officer.

[4] The court found three non-statutory mitigating circumstances: (1) Phillips had low intelligence; (2) comes from a poor family background; and (3) had an abusive childhood including a lack of proper guidance by his father (R. 839-42).

implications of both *Atkins* and *Ring*. The Florida Supreme Court issued an order on January 24, 2003, granting supplemental briefing only on *Atkins*. Nevertheless, Phillips briefly addressed *Ring* in his Supplemental Brief:

> Under *Ring* and *Atkins*, the State is required to prove beyond a reasonable doubt to a unanimous jury that Mr. Phillips is not mentally retarded.... Although supplemental briefing was not ordered in this case on the applicability of *Ring* to this case or to the *Atkins* procedures which are in play, Mr. Phillips submits that in his case a jury trial is necessary pursuant to *Ring supra* . . . In other words, all factual matters which are condition precedent to the imposition of the death penalty must be decided by a jury.

Supplemental Brief at 20-21. Phillips continued, "As *Ring* made clear, the relevant inquiry is not one of form but of effect." *Id.* The Florida Supreme Court affirmed the denial of relief and simultaneously denied the petition for writ of habeas corpus. *Phillips v. State*, 894 So. 2d 28 (Fla. 2005). Phillips subsequently filed a motion for a mental retardation determination pursuant to Fla. R. Crim. P. 3.203.[5] After an evidentiary hearing the trial court determined that Phillips did not meet any of the three prongs of the definition of mental retardation. Phillips appealed to the Florida Supreme Court which affirmed the denial of relief on March 20, 2008. *Phillips v. State*, 984 So. 2d 503 (Fla. 2008).

Phillips timely sought federal review on December 10, 2008. *Phillips v. Sec. Fla. DOC*, Case No. 08-23420 (S.D. Fla). The federal district court denied relief on

[5] Since that time the term mental retardation has been replaced by the term intellectual disability in the professional nomenclature of the medical community of psychology and psychiatry.

November 19, 2015 and denied a certificate of appealability except as to a *Brady/Giglio* issue. With the appeal pending in *Phillips v. Secretary Fla. DOC*, Case No. 15-15714 (11th Cir.) and a motion for expansion of COA to ID issues also pending, on March 2, 2016 the United States Court of Appeals for the Eleventh Circuit granted Phillips' motion to stay proceedings based on *Hurst v. Florida*, 136 S. Ct. 616 (2016). No briefing has been ordered to date and the stay remains in place as of today's date.

III. Hurst Litigation and the Decision of the Florida Supreme Court

On March 7, 2017, Mr. Phillips' filed an amended state Fla. R. Crim. P. 3.851 motion for postconviction relief, raising four separate claims.[6] Claim I rested on the Sixth Amendment and this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II rested on the Eighth Amendment, the Florida Constitution, and the Florida Supreme Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that before a death sentence could be authorized the jury must first return a unanimous death recommendation. Claim III was premised upon the arbitrariness of the distinction that the Florida Supreme Court made in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Asay v. State*, 210 So. 3d 1 (Fla. 2016), between death sentences final before June 24, 2002, and those that became final after the date this Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). The arbitrariness of the distinction meant that his death sentence stood in violation of *Furman v. Georgia*, 408 U.S. 238 (1972). Claim IV asserted that the rejection of Mr. Phillips' previously presented *Brady/Giglio*,

[6] Mr. Phillips filed a Rule 3.851 motion on February 23, 2016 following *Hurst v. Florida*. The motion was amended March 7, 2017, and March 31, 2017 to include briefing on subsequent developments in the law.

Strickland, and *Atkins*/*Hall* claims could not stand because *Hurst v. State* and *Perry v. State*, 210 So. 3d 610 (Fla. 2016), gave him a retrospective right to a life sentence unless a jury returns a unanimous death recommendation.[7]The state circuit court summarily denied the motion on April 21, 2017. Mr. Phillips appealed the summary denial of his successive Rule 3.851 motion to the Florida Supreme Court, which entered a show cause order predicated on its holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). That Court thereafter affirmed the summary denial below:

> After reviewing Phillips' response to the order to show cause, as well as the State's arguments in reply, we conclude that Phillips is not entitled to relief. Phillips was sentenced to death following a jury's recommendation for death by a vote of seven to five. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997). Phillips' sentence of death became final in 1998. *Phillips v. Florida*, 525 U.S. 880 (1998). Thus, *Hurst* does not apply retroactively to Phillips' sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Phillips' motion.

See Phillips v. State, 234 So. 3d at 548. No motion for rehearing was filed.

REASONS FOR GRANTING THE WRIT

I. Arbitrary reliability and partial retroactivity

The Florida Supreme Court created an arbitrary bright line cutoff, set at June 24, 2002, in its *Mosley* and *Asay* decisions. This cutoff is so arbitrary as to violate the Eighth Amendment principles enunciated in *Furman v. Georgia*. In *Furman*, this

[7] On March 31, 2017, Mr. Phillips also filed an amendment premised upon the substantive change in law resulting from the enactment of Chapter 2017-1 by the Florida Legislature. Subsequently, after allowing the amendment during the case management conference, the circuit court summarily denied it.

Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not based on the Sixth Amendment decision in *Ring v. Arizona,* the line drawn operates much the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*, 134 S. Ct. 1986 (2014).[8]

In *Hurst v. Florida* this Court declared that the Sixth Amendment right to a jury trial applied to those statutorily defined facts that were necessary to authorize a death sentence. As a result, the Florida Supreme Court had to reassess Florida's capital sentencing scheme, not just what findings had been statutorily mandated as necessary to authorize a death sentence, but what was required of the jury for a reliable sentencing determination after *Hurst v. Florida* struck Florida's capital sentencing scheme as unconstitutional. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.").On remand, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the Florida

[8] Mr. Phillips is continuing to litigate in state court that he is a death sentenced individual who is intellectually disabled and erroneously under sentence of death who previously was found to be on the wrong side of the 70 IQ score cutoff. By analogy, there are also individuals, like Mr. Phillips, with pre-*Ring* death sentences that rest on proceedings so layered in error and/or outdated science and/or discredited forensic evidence such that the cumulative unreliability rises up to trump the State's interest in finality.

Supreme Court ruled that in a Florida capital case, the jury's sentencing recommendation at the penalty phase had to be returned unanimously. Recognizing that the role the jury had previously played was inadequate to insure a reliable, non-arbitrary result, the Florida Supreme Court identified each of the necessary components of a jury's unanimous death recommendation:

> We hold that in addition to **unanimously finding the existence of any aggravating factor**, the jury must also **unanimously find that the aggravating factors are sufficient for the imposition of death** and **unanimously find that the aggravating factors outweigh the mitigation** before a sentence of death may be considered by the judge. * * * As we explain, we also find that in order for a death sentence to be imposed, **the jury's recommendation for death must be unanimous.** This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and **under explicit Florida law, jury verdicts are required to be unanimous.**

Hurst v. State, 202 So. 3d at 54.The Florida Supreme Court also specifically detailed why the administration of justice warranted the unanimity requirement:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice.

Hurst v. State, 202 So. 3d at 58. Reliance was placed on decisions from other courts regarding the value of unanimity to the deliberative process, which allowed society to have confidence in the jury's fact-finding and research studies regarding the positive effect the unanimity requirement had on a jury's deliberations. According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. The Eighth Amendment

requires that a death sentence carry extra reliability in order to insure that it is not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*, 408 U.S. 238 (1972). The need for enhanced reliability in capital sentencing procedures has long been established as a requirement under the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

Implicit in the Florida Supreme Court's recognition that requiring juror unanimity enhances the reliability of a decision imposing death is an acknowledgment that death sentences imposed without such a requirement are less reliable, and thus, do not carry the heightened reliability required under the Eighth Amendment. While the Florida Supreme Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. For example, in holding that requiring unanimity would produce more reliable death sentences, the Florida Supreme Court acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability:

> After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined that a reliable penalty phase proceeding requires that "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed," 202 So.

> 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make "a critical difference." *Phillips*, 608 So. 2d at 783.

Bevel v. State, 221 So. 3d 1168, 1182 (Fla. 2017). By citing in *Bevel* to its own 1992 opinion finding Mr. Phillips' penalty phase counsel ineffective and granting Mr. Phillips a re-sentencing where there was a 7 to 5 recommendation, the Florida Supreme Court's 2017 recognition that "a reliable penalty phase requires" a unanimous jury death recommendation by a properly-instructed jury certainly calls into question the reliability of the 7 to 5 death recommendation provided by Mr. Phillips' jury at his re-sentencing. Both circumstances fail to pass a reliability test.

In *Mosley v. State*, the Florida Supreme Court noted that the unanimity requirement in *Hurst v. State* carried with it "heightened protection" for a capital defendant. *Id.*, 209 So. 3d at 1278. The Florida Supreme Court also stated in *Mosley* that *Hurst v. State* had "emphasized the critical importance of a unanimous verdict." *Id.* The Court added:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur[ing] **individual injustice**" compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Mosley v. State, 209 So. 3d at 1282 (emphasis added). *Hurst v. State* recognized that a non-unanimous recommendation, like the one that occurred in Mr. Phillips' re-sentencing, lacks the heightened reliability demanded by the Eighth Amendment. *See Hurst v. State*, 202 So. 3d at 59 ("the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a

defendant who stands to lose his life as a penalty.")

Throughout his appellate and collateral proceedings, Mr. Phillips has pointed to numerous ways in which the State withheld evidence and used false testimony, all which have been denied on the basis that no prejudice has been shown. A Certificate of Appealability (COA) was granted by the District Court on a *Brady/Giglio* claim that is pending at the Eleventh Circuit. Mr. Phillips also alleged that re-sentencing counsel rendered ineffective assistance of counsel at the penalty phase for, among other reasons, failing to present mitigation, including evidence of intellectual disability. The previous rejection of his *Strickland* claims or *Brady*/*Giglio* claims on the basis failure to show prejudice (the reasonable likelihood that six jurors would vote for a life sentence) no longer comports with the law since Florida law now provides that if only one juror votes for a life sentence, a life sentence must be imposed. *Strickland* and *Brady* prejudice analysis requires a determination of whether confidence in the reliability of the outcome –the imposition of a death sentence – is undermined by the evidence the jury did not hear due to the *Strickland* and/or *Brady* violations. The new Florida law should be part of the evaluation of whether confidence in the reliability of the outcome is undermined without reference to an arbitrary cut-off date based on *Ring v. Arizona*.

Given that Mr. Phillips' re-sentencing jury recommended death by a bare 7 to 5 majority, it is probable that in light of the evidence developed in collateral proceedings that will be admissible, Mr. Phillips will receive a sentence of less than death. Due to the arbitrary line the Florida Supreme Court has drawn in the course

of deciding *Mosley* and *Asay*, Mr. Phillips' death sentence is inherently more unreliable. Individuals in Mr. Phillips' shoes, those with pre-*Ring* death sentences, are more likely to have had proceedings layered in error to the extent that the cumulative unreliability overcomes the interests the State may have in finality. Although the State's interest in finality increases the older the case is, older cases will often have greater unreliability due to advances in science (such as the recognition of the materiality of intellectual disability) and improvements in the quality of representation in capital cases over time. Mr. Phillips' belongs to a class of inmates who are most likely to be deserving of relief from their unconstitutional non-unanimous "death recommendation" death sentences.

Death sentences imposed after a jury did not return unanimous findings on all facts necessary to impose a sentence of death before June 24, 2002, are just as unreliable as similar death sentences imposed after June 24, 2002. The older the death sentence, the more likely it is to be unreliable. The Florida Supreme Court made a substantive change when it required unanimity in *Hurst v. State* because of the special need for reliability in a capital case and to insure that death sentences are not imposed in an arbitrary fashion. But the manner in which this change has been extended retroactively to some death sentenced individuals but not others arbitrarily leaves intact death sentences recognized as lacking reliability.

It is constitutionally impermissible to execute a person whose death sentence was imposed in proceedings now recognized as producing constitutionally unreliable results. As explained in *Hurst v. State,* the benefit of the new substantive rules is

enhanced reliability. Enhancement of reliability warrants retroactive application of new substantive rules. *See Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied"). The changes mandated by *Hurst v. State* were specifically found to improve accuracy. The difference between an advisory death recommendation by a bare 7 to 5 majority vote, as in Mr. Phillips' case, to the necessity of a unanimous death recommendation before a death sentence is authorized is analogous to the difference between requiring proof by a preponderance of the evidence and requiring proof beyond a reasonable doubt. Mr. Phillips' jury made no findings at all regarding the elements necessary to allow for the imposition of a death sentence. The jury failed to find unanimously and expressly that all the aggravating factors were proven beyond a reasonable doubt, to unanimously find that the aggravators were sufficient to impose death, and unanimously find that the aggravators outweighed the mitigators. *Hurst v. State* made just this point:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69.

Mr. Phillips jury was also repeatedly misinformed as to its responsibility in the sentencing process. Under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), even a

unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. Numerous errors occurred at Mr. Phillips' capital penalty phase which, in light of the shift in the law due to *Hurst*, establish that his death sentence is incurably unreliable. At Mr. Phillips' resentencing, the trial court informed the jury:

> This is a little unusual case in that we are on the penalty phase of a First Degree Murder case, that means that the defendant has already been found guilty of First Degree Murder by a different jury and **for legal technicalities we have to retry the penalty phase.**

(R. 82-83) (emphasis added). The mishandling of the jury, however, did not stop there, the trial judge also instructed:

> "**[i]t's not your duty** to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you were told **I will decide what punishment shall be imposed**. It's the responsibility of the Judge"

(R. 787) (emphasis added).[9] In *Caldwell v. Mississippi*, this Court held it is constitutionally impermissible to rest a death sentence on a determination made by a jury that was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.[10]

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[9] In addition, the trial court explicitly instructed the jury that "[f]eelings of prejudice, bias or mere sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way" (R. 795).

[10] The Florida Supreme Court has previously rejected *Caldwell* challenges (including Mr. Phillips') in the context of the pre-*Hurst* sentencing scheme. Recently a dissent to the denial of certiorari by three justices of this Court in *Truehill v. Florida*, 138 S. Ct. 3 (2017) noted that "capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address." (Sotomayor, J., dissenting, joined by Breyer

Here, not only did the trial court diminish the jury's role by explicitly informing the jury that the final decision rested solely with the judge, but the deliberative process was further undermined by the judge's improper commentary. After retiring to deliberate, the jury returned with several questions, and the court agreed that the instructions had been confusing and improper, and reinstructed the jury about voting procedures (R. 803). The jury once again retired to deliberate and returned without reaching a decision. The following day, the jury returned to deliberate and sent a note to the judge indicating that two jurors were declining to vote, i.e., that a verdict could not be reached (R. 810). The judge brought the jury in and told them to take a vote, even if from only ten of the jurors, and to "[p]ut on the vote as it stands" (R. 811). **Six minutes later**, the jury returned with a recommendation, by a vote of 7 to 5, to impose death (R. 812).

The unreliability of the proceedings giving rise to Mr. Phillips' death sentence is clear on the face of the record. At the judge sentencing hearing, the judge showed up with his sentencing order prepared in hand. *See* R. 826-46. The order indicated

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and Ginsburg, JJ.) In response the Florida Supreme Court rejected any review through the lens of *Hurst* litigation. *See Reynolds v. State*, ---So. 3d---, 2018 WL 1633075 at *9 (Fla. April 5, 2018) ("[T]here cannot be a pre–*Ring*, *Hurst*–induced *Caldwell* challenge to Standard Jury Instruction 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law; therefore, there was no *Caldwell* violation. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The Standard Jury Instruction cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts.") *but see Reynolds v. State*, 2018 WL 1633075, at *15-*17 (Pariente, J. dissenting).

the trial court found the four aggravating[11] factors that the jury was instructed on but found neither of the two statutory mitigators applied. On appeal, the Florida Supreme Court found the sentencing order claim procedurally barred because of trial counsel's failure to properly object at trial[12], but nonetheless acknowledged the trial judge's error in "adopt[ing] almost verbatim the State's earlier-filed sentencing memorandum as his sentencing order." *Phillips v. State*, 705 So. 2d 1320 (Fla. 1997) (Anstead, J. concurring).

Given the Florida Supreme Court's acknowledgment of error and the fact that the jury did not return any written findings, it cannot be said that the judge's sentencing order reflects the jury's fact-finding.[13] As this Court explained in *Caldwell*, "there are specific reasons to fear substantial unreliability as well as bias in favor of

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[11]The court acknowledged that although "[t]his Court previously found [the disrupt/hinder] factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits that although revenge may have been one motive, it was part of the overall motive of killing a parole officer . . . Mr. Svenson's only connection with the defendant was as parole officer and parolee" (R. 831). However, Mr. Svenson was not Phillips' parole officer, rather he was the supervisor of Mr. Phillips' parole officer.

[12] While the Florida Supreme Court found Mr. Phillips' claim procedurally barred because of trial counsel's failure to object and preserve the issue, the Court did not attribute any error to trial counsel.

[13] Judge Snyder's commentary prior to reading the sentencing order provides further support for this contention. *See* R. 825 ("It's interesting in this case that the jury verdict was 7-5 in both cases . . . I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment. I really don't. I had a fellow by the name of famous Stacy Weinstein case. Bosco. Jury voted 12 nothing give him life imprisonment, and I gave him the death penalty. It was reversed. Not on the case, but that he was given life. There are certain crimes that you must send a message to the community").

death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at 330. Here, the trial court's failure to follow sentencing procedures, coupled with its improper commentary, further compounds the prejudice to Mr. Phillips and demonstrates specific reasons why the jury's 7-5 recommendation for death is incurably unreliable.

If a bias in favor of a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that additional jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instructions as to each juror's power and authority to dispense mercy and preclude a death sentence.

Because the jury's sense of responsibility was improperly diminished in *Caldwell*, this Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

Mr. Phillips case exemplifies the presumption of *Caldwell* error where his jury received inaccurate instructions as to their ultimate responsibility during sentencing and as to their power to dispense mercy and preclude a death sentence. The jury in Mr. Phillips' case was precluded from exercising mercy ("[f]eelings of prejudice, bias or mere sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way" (R. 795)) and was also instructed that its recommendation

was advisory and could be returned on the basis of a simple majority vote, ("[i]t's not your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you were told I will decide what punishment shall be imposed. It's the responsibility of the Judge" (R. 787)). Thus, the weight of the sentencing decision was taken off the jury's shoulders and the proceeding all but insured an unreliable result. This Court should consider whether the death sentence imposed on Mr. Phillips constitutes cruel and unusual punishment in violation of the Eighth Amendment where Florida law no longer permits a death sentence to be imposed unless the jury unanimously consents, where Mr. Phillips' jury did not unanimously find the required facts to impose a death sentence, and where the jury instructions improperly diminished the jury's sense of responsibility. This Court should consider whether denying Mr. Phillips the benefit of *Hurst v. State* demonstrates a level of capriciousness and inequality so as to violate the Equal Protection Clause.

This Court should consider whether allowing Mr. Phillips' death penalty sentence to stand in spite of the recognized risk of unreliability constitutes the arbitrary exercise of governmental power that violates the Due Process Clause.

II. Other retroactivity issues and the Supremacy Clause

In his state circuit court pleading below, Mr. Phillips pled that as a matter of federal law in light of this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Florida courts should reject the notion of "partial retroactivity," which violates the United States and Florida Constitutions. The circuit court order denying relief failed to mention *Montgomery*, and relied on the Florida Supreme Court's

opinion in *Asay v. State* for the denial of retroactive application of *Hurst v. State* in Mr. Phillips' case. On appeal, the Florida Supreme Court issued an order on September 27, 2017 requiring that "Appellant shall show cause on or before Tuesday, October 17, 2017, why the trial court's order should not be affirmed in light of this Court's decision *Hitchcock v. State*, SC17-445. The response shall be limited to no more than 20 pages." The *Hitchcock* opinion made no mention of *Montgomery*, and due to the limited scope of the ordered response Mr. Phillips did not brief the *Montgomery* aspect of federal retroactivity in the Florida Supreme Court.

In *Montgomery*, 136 S. Ct. at 731-32, this Court held that the Supremacy Clause of the United States Constitution requires the state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In that case, a Louisiana state prisoner filed a claim in state court seeking the retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment.) The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

Montgomery v. Louisiana clarified that the Supremacy Clause requires state courts to apply substantive rules retroactively notwithstanding the result under a

state-law analysis. *Montgomery*, 136 S. Ct. at 728-29 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, *the Constitution* requires state collateral review courts to give retroactive effect to that rule.") (emphasis added). Thus, *Montgomery* held, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

Importantly for purposes of *Hurst* retroactivity analysis, this Court found the *Miller* rule substantive in *Montgomery* even though the rule had "a procedural component." *Id.* at 734. *Miller* did "not categorically bar a penalty for a class of offenders or type of crime – as, for example, [the Court] did in *Roper* or *Graham*." *Miller*, 567 U.S. at 483. Instead, "it mandate[d] only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty." *Id.* Despite *Miller's* "procedural" requirements, the Court in *Montgomery* warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (first alteration added). The Court explained, "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that the necessary procedures do not "transform substantive rules into procedural ones," *id.*

In *Miller*, the decision "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734.

Hurst v. Florida explained that under Florida law, the factual predicates necessary for the imposition of a death sentences were: (1) the existences of particular aggravating circumstances; (2) that those particular aggravating circumstances were "sufficient" to justify the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst* held that those determinations must be made by juries. Those decisions are as substantive as whether a juvenile is incorrigible. *See Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). Thus, in *Montgomery*, these requirements amounted to an "instance [ ] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

After remand, the Florida Supreme Court described substantive provisions it found to be required by the Eighth Amendment. *Hurst v. State*, 202 So. 3d at 48-69. Those provisions represent the Florida Supreme Court's view on the substantive requirements of the United States Constitution when it adjudicated Mr. Phillips' case in the proceedings below.

Hurst v. State held not only that the requisite jury findings must be made beyond a reasonable doubt, but also that juror unanimity is necessary for compliance

with the constitutional requirement that the death penalty be applied narrowly to the worst offenders and that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to insure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* As a matter of federal retroactivity law, this is also substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"). And it remains substantive even though the subject concerns the method by which the jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine the method of enforcing constitutional rule does not convert a rule from substantive to procedural).

In *Welch*, the Court addressed the retroactivity of the constitutional rule articulated in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that a federal statute that allowed sentencing enhancement was unconstitutional. *Id.* at 2556. *Welch* held that *Johnson's* ruling was substantive because it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied" – therefore it must be applied retroactively. *Welch*, 136 S. Ct. at 1265. The Court emphasized that its determination whether a constitutional rule is substantive or procedural "does not depend on

whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used to obtain the conviction, or alters instead the class of persons the law punishes. *Id.* at 1266.

The same reasoning applies in the *Hurst* context. The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt and that the Eighth Amendment requirement of jury unanimity in fact-finding are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on "the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the very purpose of the rules is to place certain individuals beyond the state's power to punish by death. Such rules are substantive, *see Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."). and *Montgomery* requires the states to impose them retroactively.

Hurst retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where this Court held that *Ring* was not retroactive in a federal habeas case. In *Ring*, the

Arizona statute permitted a death sentence to be imposed upon a finding of fact that at least one aggravating factor existed. *Summerlin* did not review a statute, like Florida's, that required the jury not only to conduct the fact-finding regarding the aggravators, but also fact-finding on whether the aggravators were sufficient to impose death and whether the death penalty was an appropriate sentence. *Summerlin* acknowledged that if the Court itself "[made] a certain fact essential to the death penalty . . . [the change] would be substantive." 542 U.S. at 354. Such a change occurred in *Hurst* where this Court held that it was unconstitutional for a judge alone to find that "sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal citation omitted) .

Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a reasonable-doubt standard in addition to the jury trial right, and this Court has always regarded proof-beyond-a reasonable-doubt decisions as substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (explaining that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in [*In re Winship*, 397 U.S. 358 (1970)] was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the

applicable burden of proof").

"Under the Supremacy Clause of the Constitution . . . . [w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Montgomery*, 136 S. Ct. at 731-32. Because the outcome-determinative rights articulated in *Hurst v. Florida* and *Hurst v. State* are substantive, the Florida Supreme Court was not at liberty to foreclose the retroactive application to Mr. Phillips' case.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this case.

Respectfully submitted,

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