DOCKET NO. 17-9520

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

HARRY FRANKLIN PHILLIPS
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

CAPITAL CASE

Petitioner herein presents a limited response to representations made in the Respondent's Brief in Opposition to the pending Petition for Writ of Certiorari.[1]

Despite the Respondent's position to the contrary, Mr. Phillips did not raise a previously litigated intellectual disability (ID) claim in his pending petition. The reference to *Hall v. Florida,* 134 S. Ct. 1986 (2014), in his petition was simply in making an analogy as to the arbitrariness of the Florida Supreme Court's *Hurst*

[1] Pursuant to Rule 34(g)(2) of this Court, no Table of Contents or Table of Authorities is included in the instant Response due to its length of five (5) pages or less.

retroactivity analysis in *Asay v. State*, where the retroactivity cutoff that Court announced was based on this Court's issuance date of *Ring v. Arizona* (and not *Apprendi*) as a line of demarcation. The language of the petition made this quite clear:

> 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 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).
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> [footnote 8 in petition: 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 Phillips, with pre-*Ring* death sentences that rest on proceedings so layered in error and/or outdated science and/or discredited forensic evidence such that the cumulative unreliability rises up to trump the State's interest in finality.]

Petition at 10. The Appendices to the Brief in Opposition, A & B, that were provided by the Respondent, the recent state circuit court order on the intellectual disability claim still being litigated below in state court and the subsequent Notice of Appeal to the Florida Supreme Court, are irrelevant to the current questions presented in the pending petition and should be stricken. BIO at 9.

The issue that the Respondent says that Petitioner is attempting to raise is nowhere articulated in the pending petition. The Notice of Appeal to the Florida

Supreme Court included as Appendix B by the Respondent was docketed on July 13, 2018 and accepted as Florida Supreme Court Case No. SC18-1149. The Court issued a scheduling Order on July 17, 2018. Thus the intellectual disability issue will be litigated at the Florida Supreme Court before any review by this Court would be timely or appropriate.

In addition to the concern noted *supra*, Petitioner also disagrees with the materiality and relevance of Respondent's statement in the Brief in Opposition concerning judge sentencing in Florida. Respondent states that "[T]he language of the [Florida death penalty] statute does not remove the judge as the ultimate decider of whether the death penalty is imposed. In fact, it is wholly possible that a judge could give a defendant life in prison even though a jury unanimously voted for the death penalty." BIO at 11.

This convoluted position turns reason on its head and is wholly beside the relevant point, as to both retroactivity and the necessity to revisit *Caldwell* claims. If Mr. Phillips was being sentenced today in 2018 instead of on April 20, 1994, the jury's 7 to 5 death recommendation standing alone would mandate a life sentence. After *Hurst v. State* and the subsequent change to the Florida death penalty statute, if a capital jury in Florida is non-unanimous in a life or death recommendation, the judge **must** enter a life sentence. The only opportunity to override a decision by a jury by "the ultimate decider" in this new post-*Hurst* era in Florida jurisprudence is a judicial override for life and mercy if a jury unanimously recommends death. That

is a vastly different position for the sentencing judge in a Florida death penalty case than before.

Respectfully submitted,

/s/ William M. Hennis III
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PROOF OF SERVICE

I, William M. Hennis III, counsel for petitioner and a member of the Bar of this Court, hereby certify that a true copy of the foregoing Response to Respondent's Brief in Opposition has been electronically served with appropriate hard copies provided by Federal Express Delivery to the Court and furnished by United States Mail, first class postage prepaid to Assistant Attorney General Melissa Roca Shaw at the Office of the Attorney General, SunTrust International Center, One S.E Third Avenue, Suite 900, Miami, FL 33131, on August 10, 2018. I further certify that all parties required to be served have been served.

/s/ William M. Hennis III
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