CASE NO. 17-9556

IN THE UNITED STATES SUPREME COURT

October 2017, Term

LENARD PHILMORE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether certiorari review should be denied because (1) the state court afforded Petitioner a constitutionally adequate opportunity to show why his death sentence based on a unanimous jury recommendation was harmless beyond a reasonable doubt in light of *Hurst v. Florida* and *Hurst v. State*; (2) Petitioner's capital sentenced comports with *Caldwell v. Mississippi*; and (3) the Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law? (restated)

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The decision of which Petitioner seeks discretionary review is reported as *Philmore v. State*, 234 So.3d 567 (Fla. 2018).

JURISDICTION

Petitioner, Lenard Philmore, ("Philmore"), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of the denial of Philmore's successive postconviction relief motion addressed to *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) upon a finding that any *Hurst* error and claims of due process and Eighth Amendment violations were harmless beyond a reasonable doubt. *Philmore v. State*, 234 So. 3d 567, 568 (Fla. 2018)

On December 16, 1997, Philmore and Anthony A. Spann ("Spann") were indicted for the November 14, 1997 murder, conspiracy to commit robbery with a deadly weapon, carjacking with a firearm or deadly weapon, kidnapping, robbery with a firearm or deadly weapon, and grand theft of Kazue Perron ("Perron"). Following severance of their trials, Philmore was tried by a jury and on January 20, 2000, a guilty verdict was returned. On January 28, 2000, the jury unanimously recommended Philmore be executed for Perron's murder, however, sentencing was continued until after Spann, was tried. On July 21, 2000, the trial court entered its judgment and sentencing order, imposing the death sentence for the first-degree murder,[1] five years for grand theft, 15 years for conspiracy to commit robbery with a

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[1] The court found five aggravators: (1) prior violent felony; (2) felony murder (kidnapping); (3) avoid arrest; (4) pecuniary gain; and (5) cold, calculated, and premeditated ("CCP"), no statutory mitigation and eight nonstatutory mitigators: (1) defendant was victim and witness of physical/verbal abuse by alcoholic father; (2) history of extensive drug/alcohol abuse; (3) severe emotional trauma and posttraumatic stress; (4) molested and/or raped when young; (5) classified as severely emotionally handicapped; (6) able to form close loving relationships; (7) cooperation with State; and (8) remorse. The prior violent felonies included the August 22, 1995 battery of a corrections officer in a detention facility, a 1993

deadly weapon, and life for the remaining non-capital crimes to run consecutive to each other and consecutive to the sentence of death. *See Philmore v. State*, 820 So.2d 919, 926, n.10 (Fla. 2002).

Philmore appealed his convictions and sentences to the Florida Supreme Court and on direct appeal, the Florida Supreme Court found the following facts:

> Philmore, who was twenty-one at the time of the commission of the crimes, was charged and convicted of first-degree murder, conspiracy to commit robbery with a deadly weapon, carjacking with a deadly weapon, kidnapping, robbery with a deadly weapon, and third-degree grand theft based upon the events surrounding the November 14, 1997, abduction and murder of Perron.
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> The evidence presented at trial revealed the following. Philmore and codefendant Anthony Spann1 wanted money so they could go to New York. On November 13, 1997, Philmore, Spann, and Sophia Hutchins, with whom Philmore was sometimes living, were involved in a robbery of a pawn shop in the Palm Beach area. However, the robbery was unsuccessful. Consequently, Philmore and Spann decided to rob a bank the following day.
>
> On the evening of November 13, Philmore and Spann picked up their girlfriends, Ketontra "Kiki" Cooper and Toya Stevenson, respectively, in Spann's Subaru and stayed at a hotel for the evening. The following morning, Spann told Philmore that they needed to steal a car as a getaway vehicle in order to facilitate the robbery. Spann told Philmore that they would have to kill the driver of the vehicle they stole.

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robbery, the November 4, 1997 robbery of a jewelry store and attempted murder of the owner, and the November 13, 1995 armed robbery of a pawn shop. The court rejected the alleged mitigation of: "(1) murder committed under influence of extreme mental/emotional disturbance; (2) acting under extreme duress or substantial domination of another; (3) capacity to appreciate the criminality of conduct or to conform conduct to the requirements of law was substantially impaired; and (4) defendant's age of 21. Philmore v. State, 820 So.2d 919, 926, n.9 (Fla. 2002).

At approximately 11:30 a.m. on November 14, Philmore and Spann dropped their girlfriends off at their houses, and went in search of a car to steal. Philmore and Spann first looked for a car at the Palm Beach Mall, but were unsuccessful. They then followed a woman to another mall, but by the time they reached her car, she was already outside of her car, making it difficult for them to steal the car. They ultimately spotted Perron driving a gold Lexus in a residential community, and the two followed her.

At approximately 1 p.m., Perron entered the driveway of a friend with whom she intended to run errands. Upon entering the driveway, Spann told Philmore to "get her." Philmore approached the driver's side of the vehicle and asked Perron if he could use her phone. Perron stated that she did not live there, and Philmore took out his gun and told Perron to "scoot over." Philmore drove Perron's car, with Spann following in his Subaru. During the drive, Perron was crying and told Philmore that she was scared.

Spann flashed his car lights at Philmore, and the two cars pulled over. Spann told Philmore to "take the bitch to the bank." Philmore asked Perron if she had any money, and Perron responded that she did not have any money in the bank, but that he could have the $40 she had on her. Philmore told her to keep the money. Perron took off her rings, and Philmore placed them inside the armrest of the Lexus.2 Perron asked Philmore if he was going to kill her, and he said "no." She also asked if Spann was going to kill her, and Philmore again said "no."

Philmore and Spann passed a side road in an isolated area in western Martin County, and Spann flashed his lights, indicating that they turn around and head down the road. Philmore chose the place to stop. Philmore ordered Perron out of the vehicle and ordered her to walk towards high vegetation containing maiden cane, which is a tall brush. Perron began "having a fit," and said "no." Philmore then shot her once in the head. Philmore picked up Perron's body and disposed of it in the maiden cane. Spann did not assist in disposing of the body.

Philmore and Spann then drove the two vehicles to Indiantown, where they stopped at a store. Spann pointed out a bank to rob, and Philmore, following Spann, drove to the bank parking lot. Philmore parked the Lexus a short distance from the bank, and got into Spann's Subaru. At approximately 1:58 p.m., Spann drove Philmore to the bank to commit the robbery. Philmore entered the bank while Spann waited in the car. Philmore grabbed approximately $1100 that a teller was counting and ran out of the bank. After robbing the bank, Philmore and Spann returned to the Lexus, and concealed the Subaru. Philmore threw his tank top out of the Lexus by the side of the road after the robbery and wore Spann's tank top. The discarded tank top, which contained Perron's blood, was subsequently recovered by the authorities.

After concealing the Subaru, Philmore and Spann returned to Palm Beach County to pick up Cooper and Stevenson at their houses. They then went to a fast food restaurant to get food and Cooper's paycheck. Afterwards, Philmore wanted to go to Hutchins' house because he left his shoes there. However, as they approached Hutchins' house, Philmore spotted an undercover police van sitting at a nearby house, and stated that it "looked like trouble." An officer of the West Palm Beach Police Department, who happened to be engaged in a stakeout in the area, observed Spann driving the Lexus and recognized him because there was an outstanding warrant for his arrest on an unrelated matter. Spann sped away and a high-speed chase ensued on Interstate 95.

As the high-speed chase proceeded into Martin County, a tire blew out on the Lexus. Philmore and Spann, followed by Cooper and Stevenson, exited the vehicle and hid in an orange grove. While in the orange grove, Philmore and Spann encountered the manager of the grove, John Scarborough, and his assistant. Although Spann first told Scarborough that they were running from the police because of a speeding incident, when Scarborough expressed his disbelief, Spann said that they were running from the police because of drug- related activities. Spann offered Scarborough money to get them out of the grove, and Scarborough refused. Scarborough drove away and informed the police, who were already

> searching the grove, where he saw them. Philmore and Spann were apprehended and charged with armed trespass. The authorities recovered firearms from a creek in the orange grove a few days later.
>
> From November 15 through November 26, Philmore gave several statements to the police in which he ultimately confessed that he robbed the bank and abducted and shot Perron. On November 21, Philmore led the police to Perron's body, which was found in the maiden cane. Philmore was charged in a six-count indictment, and the jury found Philmore guilty on all counts.

Philmore, 820 So. 2d at 923-25 (footnotes omitted).

The trial record reveals that the jury was instructed that its recommendation must be given "great weight" and that the aggravators it found had to be proven beyond a reasonable doubt before it may be considered and the jury need only be "reasonably convinced" that a mitigator exists. Further the jury was asked to provide a recommendation based upon its "determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. And, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (Appendix A; ROA-27 2560-61, 2565) The jury was instructed should it find the aggravators were insufficient to recommend death, then life must be recommended. However, should it find sufficient aggravators, then it must consider whether the mitigation outweighs the aggravation. (Appendix A; ROA-27 2564-65) While the jury was instructed its recommendation did not have to be unanimous, Philmore's jury was unanimous. (Appendix A; ROA-27 2565-66, 2582-85) .

On May 30, 2002, the Florida Supreme Court rejected Philmore's eleven

appellate issues, and the Court affirmed. *Philmore*, 820 So.2d at 940. On June 21, 2002, the mandate issued and on October 7, 2002, this Court denied certiorari review. *Philmore v. Florida*, 537 U.S. 895 (2002) . Philmore, on September 16, 2003, filed his Florida Rule of Criminal Procedure 3.851 postconviction motion. On May 12, 2004, following an evidentiary hearing, relief was denied on all the claims. The Florida Supreme Court affirmed the denial of relief and denied his state habeas petition. *Philmore v. State*, 937 So2d 578 (Fla. 2006). Following his state postconviction litigation, Philmore pursued a writ of habeas corpus in federal court. The district court denied relief, and the circuit court of appeals affirmed. *Philmore v. McNeil*, 575 F.3d 1251, 1255-59 (11th Cir. 2009), *cert. denied*, 559 U.S. 1010 (2009)

On January 12, 2016, *Hurst v. Florida* issued and on January 9, 2017, Philmore filed a successive Rule 3.851 motion based on it. On March 17, 2017, a Case Management Conference was held and the trial court denied postconviction relief. Philmore appealed and the Florida Supreme Court affirmed stating:

> Lenard James Philmore is a prisoner under sentence of death whose sentence became final on October 7, 2002. *See Philmore v. State*, 820 So.2d 919 (Fla.), *cert. denied*, 537 U.S. 895, 123 S.Ct. 179, 154 L.Ed.2d 162 (2002). The facts underlying Philmore's sentence of death, which was imposed after a jury unanimously recommended death, *id.* at 925, were fully explained in this Court's opinion on direct appeal. *Id.* at 923-25. Following the United States Supreme Court's decision in *Hurst v. Florida*, —— U.S. —— —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and this Court's decision on remand in *Hurst v. State (Hurst)*, 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017), Philmore filed a successive motion for postconviction relief pursuant to Florida Rule

of Criminal Procedure 3.851, arguing that these decisions render his death sentence unconstitutional under both the United States and Florida Constitutions.[FN1] This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm the postconviction court's order denying relief.

> [FN1] Specifically, Philmore relied on Hurst v. Florida and Hurst to argue in the court below that his death sentence is unconstitutional under the Fifth, Sixth, and Eighth Amendments to the United States Constitution, as well as the corresponding provisions of the Florida Constitution. Philmore's Eighth Amendment claim also includes the assertion that the jury was improperly instructed as to its sentencing responsibility pursuant to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

As the postconviction court found, *Hurst* applies retroactively to Philmore's sentence of death. *See Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016). In its order below, the postconviction court found "beyond a reasonable doubt that any *Hurst* error was harmless," stating:

> This was a highly aggravated case, the jury was instructed that the aggravators must be established beyond a reasonable doubt, the evidence supporting the aggravators for prior and contemporaneous violent felony convictions was significant and uncontested, there was no statutory mitigation, the nonstatutory mitigation was minimal, the jury was not required to recommend death if the aggravators outweighed the mitigators, and the jury recommendation was unanimous. And to date, the Florida Supreme Court has not found *Hurst* error harmful in any unanimous jury cases.

(Citation omitted.) Based on the jury's unanimous

> recommendation for a sentence of death, coupled with Philmore's confession and the aggravation in this case, we agree with the postconviction court that the *Hurst* error in Philmore's case is harmless beyond a reasonable doubt. *See Davis v. State*, 207 So.3d 142, 173-75 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017).
>
> As to Philmore's other claims alleging due process and Eighth Amendment violations, we conclude that Philmore is not entitled to relief on these claims because the jury's unanimous recommendation renders any *Hurst* error harmless beyond a reasonable doubt.
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> Finally, Philmore is not entitled to relitigate his *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), claim in light of *Hurst*, which does not affect the merits of a *Batson* claim. A *Batson* claim addresses who sits on the jury while *Hurst* affects what the jury must do, once empaneled, in order to constitutionally sentence the defendant to death.
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> Accordingly, we affirm the postconviction court's order denying relief.

Philmore, 234 So. 3d at 568–69. Philmore seeks certiorari review of this decision.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW WHERE (A) THE STATE COURT AFFORDED PETITIONER A CONSTITUTIONALLY ADEQUATE OPPORTUNITY TO SHOW WHY HIS DEATH SENTENCE BASED ON A UNANIMOUS JURY RECOMMENDATION WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*; AND (B) PETITIONER'S CAPITAL SENTENCED COMPORTS WITH *CALDWELL V. MISSISSIPPI*? (RESTATED).

It is Philmore's assertion that he was denied access to the courts in violation of the Eighth Amendment to the United States Constitution as well as the Due Process and Equal Protection clauses when the Florida Supreme Court limited his briefing of his *Hurst* claim. Philmore was afforded twenty-five pages for his brief, but filed a brief of only twenty pages. He did not complain to the Florida Supreme Court about that procedure. Additionally, he maintains the jury was instructed in his case that its role was advisory in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and the Eighth Amendment which must be reviewed in the wake of *Hurst v. Florida*. As will be shown, nothing about the process employed by the Florida Supreme Court rejecting Philmore's *Hurst* and *Caldwell* claims was inconsistent with the Constitution. Philmore does not provide any "compelling" reason for this Court to review his case on procedural or constitutional grounds. U.S. Sup. Ct. R. 10. Indeed, Philmore has failed to cite to any decision from this or

any appellate court that conflicts with the Florida Supreme Court's procedure in limiting the length of the brief to twenty-five pages or its decision in *Philmore v. State*, 234 So.3d 567 (Fla. 2018).

A. The Florida Supreme Court's Briefing Order in Petitioner's Successive Postconviction Appeal Is a Matter of State Court Procedure that Does Not Implicate the Federal Constitution, Due Process or Equal Protection.

Philmore focuses his efforts on complaining about the procedure and page limitations[2] the Florida Supreme Court used to reach its decision that any *Hurst v. Florida*/*Hurst v. State* error in this successive postconviction litigation case was harmless beyond a reasonable doubt in light of the "jury's unanimous recommendation for a sentence of death, coupled with Philmore's confession and the aggravation in this case." *Philmore*, 234 So.3d at 568-69. He does not challenge the

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[2] The Florida Supreme Court's order provided in part:

> The parties in the above case are directed to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Parties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument.
>
> Appellant's initial brief, which is not to exceed ***twenty-five pages***, is to be filed by June 26, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of Appellee's answer brief.

(Appendix B)

merits of that decision,but complains he should be afforded additional pages to brief the issue. This issue was not raised before the Florida Supreme Court and should be denied on that basis alone, as it is unexhausted. Moreover, Petition filed a twenty-page brief even though he could have filed one of twenty-five pages. This fact too undercuts any complaint Petition raises here as to the constitutionality of the procedure or relief to which he asserts he is entitled.

Even so, the Florida Supreme Court's determination of appropriate page limits for a successive postconviction appeal is solely a matter of state court procedural law. Consequently, this determination concerns only state law and is outside the scope of this Court's certiorari jurisdiction. *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1936) (noting "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern" and that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (observing "it is normally within the power of the State to regulate procedures under which its laws are carried out") (internal quotes/citations omitted). Accordingly, the constitutional protestations of Petition before this Court do not support certiorari review.

Philmore's Eighth Amendment, Due Process and Equal Protection claims to invalidate the state court procedure is unavailing. He cannot show that the Florida court's longstanding "tag" procedure violates any federal constitutional right. Here, the Florida Supreme Court merely limited the number of pages for a successive

appeal to twenty-five. There is no constitutional infirmity involved in this procedure and, therefore, no basis for the exercise of this Court's certiorari jurisdiction. In fact, this Court employs a similar procedure when dealing with numerous cases involving the same issue. It decides the lead case, and then vacates and remands the other cases to the lower courts in light of the new decision in the lead case. This "grant, vacate, and remand," or "GVR" procedure has "become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). *See also Wellons v. Hall*, 558 U.S. 220, 225 (2010) (observing "GVR order conserves the scarce resources of this Court"). While some Justices have criticized the GVR practice, those criticisms are on case-specific grounds, not on due process grounds. *See, e.g., Stutson v. United States*, 516 U.S. 163, 180-81 (1996) (Scalia, J., dissenting) (arguing for limitations on GVRs in other situations, but noting that the "largest category" of GVRs arise when a decision of the Supreme Court "has cast doubt on the judgment rendered by a lower federal court or a state court" and using GVR procedure there serves "interests of efficiency"). Petitioner cites no case from this or any appellate court holding that the "tag" or GVR practice for dealing with a mass of cases involving the same issue violates due process or equal protection.

Notably, Philmore was not appealing his conviction and sentence, or even the denial of his initial postconviction motion. Rather, he was appealing from a successive postconviction motion. There is no constitutional violation where the courts place reasonable limitations on pleadings in this context. *See, e.g.,*

Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987) (finding no federal constitutional right to postconviction relief); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (entitlements apply only to first appeal as a matter of right). Indeed, rules of court procedure place limits on briefing in every case. *See, e.g.*, U.S. Sup. Ct. R. 33 (specifying format and limitations on briefs filed in this Court, including word limits). *See also, Jones v. Barnes*, 463 U.S. 745, 753 (1983) (noting that most courts impose page limits on briefs as well as limits on the time given for oral arguments). Carried to its logical conclusion, Philmore's argument suggests that any limitation on briefing would be unconstitutional. Such would lead to the absurd and unworkable result where litigants would have free reign to file hundreds of pages of briefing raising frivolous issues and further burdening the court system.

Furthermore, *Bounds v. Smith*, 430 U.S. 817 (1977) and *Douglas v. People of State of California*, 372 U.S. 353 (1963) do not advance Philmore's plea for certiorari review. In *Douglas*, this Court ruled unconstitutional California's requirement that appellate counsel be appointed for an indigent defendant only if the appellate court determined such appointment would be helpful to the defendant or to the court. *Douglas*, 372 U.S. at 357-58. This Court opined that the California requirement left an indigent defendant, "where the record is unclear or the errors are hidden," with a "meaningless ritual, while the rich man [enjoyed] a meaningful appeal." *Id.* In *Anders v. California*, 386 U.S. 738 (1967), this Court set forth procedures an appointed counsel must follow when representing an indigent defendant on direct appeal when the case is wholly frivolous. *Id.* at 744. Additionally, *Bounds* does not

provide Philmore with a basis for certiorari review. In *Bounds*, 430 U.S. at 830-31, this Court concluded that state agencies further the constitutional right of access to court by assisting inmates in the preparation and filing of legal papers by providing an adequate law library.

Again, this was an appeal from Philmore's successive postconviction motion. It was not an initial appeal as of right, or even an initial postconviction appeal. Philmore had counsel throughout and was provided records and transcripts as well as appeals from his state and federal proceedings. His successive postconviction motion was submitted within the standard 25-page limit under Fla. R. Crim. P. 3.851(e)(2) and he filed his initial brief on appeal well under the 25-paqge limit imposed by the Florida Supreme Court for *Hurst* claims. Philmore has not identified any meritorious issues he was forced to abandon based on the state court's briefing procedure. Indeed, although permitted by Florida's rules of appellate procedure, Philmore never moved the court to allow him to file a longer brief. See Fla. R. App. P. 9.210(a)(5)(E) (setting forth page limitations on briefs in Florida's appellate courts and providing that "[t]he court may permit longer briefs"). *See United States v. McCollom*, 426 U.S. 317, 326 (1976) (opining "basic question is one of adequacy of [defendant's] access to procedures for review of his conviction, . . . and [this question] must be decided in light of avenues which [defendant] chose not to follow as well as those he now seeks to widen"). *See also Jones v. Barnes*, 463 U.S. 745, 749 (1983) (opining right to appellate counsel does not include right to have counsel press every non-frivolous claim).

Furthermore, Philmore's case was given an individual determination by the Florida Supreme Court. He was granted a briefing opportunity after *Hurst v. Florida* and *Hurst v. State* were held by the Florida Supreme Court to be retroactive to this category of case. *See Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016) The Florida Supreme Court also pointed Philmore to its recent case, *Davis v. State*, 207 So. 3d 142 (Fla. 2016), wherein the state court had found any *Hurst* error harmless where a unanimous jury recommendation was rendered in a highly aggravated case even though the jury was instructed its role was advisory. Philmore, filed his brief below the page limitation and raised various attacks on his sentence based on *Hurst*, and *Caldwell* in addition to seeking a reconsideration of a settled *Batson v. Kentucky*, 476 U.S. 79 (1986) claim. (Resp. App. C). The fact that the length of a brief is a state law matter; Philmore never challenged the briefing procedure in state court; and that he did not utilize all of his allotted pages support the denial of certiorari. The state court procedure does not implicate a federal constitutional right and Philmore has not shown that the decision conflicts with a decision of this Court or any other federal circuit court or state supreme court. This Court should deny certiorari.

B. Petitioner's Capital Sentence Comports with *Caldwell*

Philmore points to *Hurst v. Florida*, and *Caldwell* to assert he is entitled to resentencing as his jury was instructed its role was advisory in violation of the Eighth Amendment and the Florida Supreme Court did not address his *Caldwell* claim sufficiently once it determined the jury had unanimously recommended death.

First, there is no underlying Sixth Amendment violation and no conflict between the Florida Supreme Court's decision and this Court's Eighth Amendment jurisprudence set forth in *Caldwell* and its progeny. Likewise, there is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. Finally, there is no underlying constitutional error under the facts of this case.

Hurst v. Florida did not require jury sentencing. Rather, *Hurst v. Florida* was a Sixth Amendment case which applied *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. *Hurst v. Florida*, 136 S. Ct. at 624. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided eight days after this Court issued *Hurst v. Florida*, this Court emphasized:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course, the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must deserve mercy beyond a reasonable doubt, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Carr, 136 S. Ct. at 642.

As set forth above, Philmore's jury heard his confession where he laid out the

reason for seeking to carjack a female in a nice car, the hunt he and Spann conducted to find their victim, and pre-planned intent to murder her to avoid detection, and how the victim was taken to a remote location, shot, and her body hidden in the maiden cane. *Philmore*, 820 So.2d at 923-25. The jury convicted Philmore of the related contemporaneous felonies including kidnapping and armed robbery and knew of his prior violent felony convictions, rendering him death eligible.[3] *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). *See also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court's ruling in *Hurst v. Florida* did not change the recidivism exception articulated in *Apprendi* and *Ring* or the fact that

Moreover, Philmore's jury was instructed that the aggravators had to be proven beyond a reasonable doubt while jury need only be "reasonably convinced" as to existence of mitigators. The jury was also told that if it did not find the aggravators sufficient to support death, then life had to be their recommendation. Conversely, if the aggravation was sufficient, then the jury had to consider whether

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[3] From these fact, a rational jury would have found, as the trial court found, the aggravators of (1) cold calculated and premeditated, (2) pecuniary gain, and (3) avoid arrest. *Philmore v. State*, 820 So. 2d 919, 925 (Fla. 2002)

the mitigation outweighed the aggravation and only after doing a careful non-hasty weighing, should the jury report its recommendation. Following these instructions, the jury recommended death unanimously. Under the rational juror test for a harmless error analysis discussed in *Neder v. United States*, 527 U.S. 1, 18-19 (1999) and *Jenkins v. Hutton*, 137 S.Ct. 1769 (2017) no Sixth Amendment violation has been established. As such, *Hurst v. Flori*da has not opened the door to Philmore's claim of an Eighth Amendment violation based on *Caldwell*.

Even so, there is no *Caldwell* error and Philmore's claim here does not merit review. This Court has recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant certiorari for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same). Also, this Court does not have jurisdiction to review the application of the harmless-error rule where it "involves only errors of state procedure or state law." *Chapman v. California*, 386 U.S. 18, 21 (1967).

In *Caldwell*, error was found based on the prosecutor's argument to the jury

that the appellate court would review that sentence and would decide whether a death sentence was appropriate. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). *See* also *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (determining that to prove a *Caldwell* violation a defendant must show that the prosecutor's comments or jury instructions "improperly described the role assigned to the jury by local law. Entitlement to relief under *Caldwell* requires that the prosecutor, judge, or jury instructions misrepresent the jury's role in sentencing. *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (rejecting a *Caldwell* attack, explaining that "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision")

The standard jury instructions in Florida, used in this case, correctly advised the jury about its role and the weight its recommendation is given based on the law in existence at the time of sentencing. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018) (explaining that under *Romano v. Oklahoma*, the Florida standard jury instructions at issue "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."); *Patrick v. State*, 104 So.3d 1046, 1064 (Fla. 2012) (holding "standard penalty phase jury instructions fully advise the jury of the importance of its role,

correctly state the law, do not denigrate the role of the jury and do not violate *Caldwell*.'")(citations omitted). The instant case would be a uniquely inappropriate vehicle for certiorari because this is a postconviction case and this Court would have to address retroactivity before even reaching the underlying jury instruction issue.[4]

To the extent Philmore suggests that jury sentencing is required under federal law, as a result of *Hurst v. Florida*, that is not the case. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring) (explaining "today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). No case from this Court has mandated jury sentencing in a capital case, and such a holding would require reading a requirement into the Constitution that is simply not there. The Constitution provides a right to ***trial*** by jury, not to ***sentencing*** by jury.[5] Here, *Hurst v. Florida*

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[4] Respondent is cognizant of the Honorable Justice Sotomayor's dissent from the denial of certiorari in *Middleton v. Florida*, 138 S. Ct. 829 (2018), wherein she criticized the Florida Supreme Court for not addressing the *Caldwell* claim in cases where *Hurst* was applicable under state law. The Florida Supreme Court has now, however, explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, ___ So. 3d ___, 2018 WL 1633075 (Fla. April 5, 2018); *Johnson v. State*, ___ So. 3d ___, 2018 WL 1633043 (Fla. April 5, 2018) (citing *Reynolds* in rejecting *Caldwell* claim).

[5] See *State v. Mason*, ___ N.E.3d ___, 2018 WL 1872180, *5-6 (Ohio, April 18, 2018) (noting "[n]early every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007)

was applied to Philmore's death sentence, however, any error was found harmless beyond a reasonable doubt. It follows there is no bases for certiorari review as a Florida jury's decision regarding a death sentence was, and remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 401 (1989). *See also* §921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death")[6] (emphasis added). Thus, there was no violation of *Caldwell* because there were no comments or instructions to the jury that "improperly described the role assigned to the jury by local law." *Romano*, 512 U.S. at 9. Philmore's jury was advised accurately that its decision was an advisory recommendation that would be accorded "great weight" and in light of that, it recommended death unanimously. (App A ROA.27 2560-67, 2582).

(opining "[a]s other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *Waldrop v. Comm'r, Alabama Dept. of Corr.*, 2017 WL 4271115, *20 (11th Cir. Sept. 26, 2017) (unpublished) (rejecting *Hurst* claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); *State v. Gales*, 658 N.W.2d 604, 628-29 (Neb. 2003) (stating "we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review to be undertaken by a jury").

[6] A Florida trial court, while bound by the jury's findings of no aggravation and a recommendation of a life sentence, is not bound by a jury's recommendation of a death sentence. A judge is still free to reject the jury's death recommendation and impose a life sentence.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

Case No.: 17-9556

October 2017, Term

IN THE SUPREME COURT OF THE UNITED STATE

LENARD PHILMORE,
Petitioner,
vs.
STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE I, Leslie T. Campbell, a member of the Bar of this Court, hereby certify that on July 24, 2017, a copy of the Brief for Respondent in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to ALI A. SHAKOOR, ESQ., Office of the Capital Collateral Regional Counsel 12973 N. Telecom Parkway; Temple Terrace, FL 33637, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

Leslie T. Campbell

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CASE NO. 17-9556

IN THE UNITED STATES SUPREME COURT

October 2017, Term

LENARD PHILMORE,
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

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APPENDIX A

(Jury returned to the courtroom at 3:23 p.m)

THE COURT: Ready?

THE JURORS IN UNISON: (Nods heads.)

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first-degree.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court, and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. And, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Under the law, I must give your recommendation great weight. It is only under rare circumstances that the Court could impose a sentence other than that which the jury recommends.

Your advisory sentence should be based upon

the evidence that you have heard while trying the guilt or innocence of the Defendant, and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

1. The Defendant has been previously convicted of another felony involving the use or threat of violence to some person. The crimes of attempted first-degree murder, battery in a detention facility, and robbery are felonies involving the use or threat of violence to another person.

The crime of burglary may or may not be a felony involving the use or threat of violence to another, depending on the circumstances of that offense.

In determining whether burglary is a felony involving the use or threat of violence to another person, you should look to the facts and circumstances surrounding the commission of the burglary, and determine whether the burglary involved the use or threat of violence to some person in the course of its commission.

2. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit the crime of kidnapping.

3. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

4. The crime for which the Defendant is to be sentenced was committed for financial gain.

5. The crime for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

As I have previously defined for you, a killing is premeditated. It occurs after the Defendant consciously decides to kill. The decision must be present in the mind at the time of the killing.

The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The

period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required.

A pretense of moral or legal justification is any claim of justification or excuse that, though, insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder.

You have heard evidence about the impact of this homicide on the family, friend and community of Kazue Perron. This evidence may be considered by you to determine the victim's -- the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. However, the law does not allow you to weigh this evidence as an aggravating circumstance.

Your recommendation to the Court must be based only on the aggravating circumstances and the mitigating circumstances upon which I instruct you. If you find the aggravating

circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstances you may consider, if established by the evidence are:

1. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

2. The Defendant acted under extreme duress or under the substantial domination of another person.

3. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

4. Any of the following circumstances that would mitigate against the imposition of the death penalty: (a) any other aspect of the Defendant's character, record or background; (b)

any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstance, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of

whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determines that Lenard Philmore should be sentenced to death, your advisory sentence will be:

> A majority of the jury, by a vote of, blank to blank -- you insert the numbers -- advise and recommend to the Court to impose the death penalty upon Lenard Philmore.

On the other hand, if by six or more votes, the jury determines that Lenard Philmore should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Lenard Philmore without possibility of parole.

You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the Court.

May I have the recommendations, please, the advisory sentence form?

Once again, they have been prepared for you. And, they read as I have previously indicated.

It is not appropriate to talk to the bailiff during your deliberations. If you have any questions of this Court, please put it in writing, and knock on the door, and the bailiff will then hand me the question.

As previously indicated, the evidence, a copy of these instructions that I have just read to you, as well as the advisory sentence forms will be sent back shortly.

If you were aware, one of you still remains an alternate. That is Mr. Ezza. If you will remain in the courtroom, sir, and if you'll take the other jurors into the jury room.

(Jury retired to jury room).

THE COURT: Have a seat, Mr. Ezza. Did I

APPENDIX B

Filing # 57432069 E-Filed 06/07/2017 01:16:26 PM

Supreme Court of Florida

TUESDAY, JUNE 6, 2017

CASE NO.: SC17-711
Lower Tribunal No(s).:
431997CF001672CFAXMX

LENARD JAMES PHILMORE vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The parties in the above case are directed to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Parties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument.

Appellant's initial brief, which is not to exceed twenty-five pages, is to be filed by June 26, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of Appellee's answer brief.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

ALI ANDREW SHAKOOR
ADRIANA CORSO
LESLIE T. CAMPBELL

APPENDIX C

Filing # 58274909 E-Filed 06/26/2017 05:17:05 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-711

LENARD JAMES PHILMORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, STATE OF FLORIDA

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TABLE OF AUTHORITIES

Cases

Other Authorities

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Philmore lives or dies. This Court has allowed argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Philmore.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. Art. V. § 3(b)(1); *Orange v. Williams*, 702 So. 2d 1245 (Fla. 1997)

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are from the transcript and of the form (R. p. 123). Any references to the supplemental record of the direct appeal are of the form (SR page#). References to the original postconviction record on appeal are in the form, e.g. (Vol. I. PCR. 123). References to the successive record on appeal are in the form (Vol. I SPCR 123). Generally, Lenard Philmore is referred to as Mr. Philmore throughout this brief. The Office of the Capital Collateral Regional Counsel, representing the Appellant, is shortened to "CCRC."

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Mr. Philmore was charged with first degree murder, conspiracy to commit robbery with a deadly weapon, carjacking with a deadly weapon, kidnapping, robbery with a deadly weapon and grand theft. Mr. Philmore's codefendant, Anthony Spann, was charged in the same indictment with the same offenses. Mr. Philmore and Anthony Spann were tried separately.

Mr. Philmore was found guilty on all charges. Jurors, by a vote of twelve to zero, recommended a sentence of death. At sentencing, Mr. Philmore received the death penalty. Mr. Philmore appealed his judgment and sentence, which this Court affirmed in *Philmore v. State*, 820 So.2d 919 (Fla. 2002). Mr. Philmore filed a writ of certiorari, which was denied by the United States Supreme Court on October 7, 2002.

Mr. Philmore filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida. The district court denied habeas relief in an order rendered July 17, 2007. A certificate of appealability was granted and Mr. Philmore appealed to the Eleventh Circuit United States Court of Appeals. The Eleventh Circuit denied Mr. Philmore's appeal on July 23, 2009. A petition for writ of certiorari was denied by the United States Supreme Court on March 22, 2010. Mr. Philmore filed his Successive Motion to Vacate Death Sentence on January 9, 2017. (R. p. 28). The State filed its Corrected Answer to Defendant's

Successive Motion for Postconviction Relief on January 31, 2017. (R. p. 96). The Case Management Conference was held on March 17, 2017, and on that same day, the trial court issued an Order Denying Successive Motion to Vacate Death Sentence. (R. p. 142). This timely appeal follows.

Case Management Conference

On March 17, 2017, the following claims were argued before the Honorable Elizabeth A. Metzger for the 19th Judicial Circuit Court in Martin County, Florida, and were later denied via an order submitted on March 17, 2017.

CLAIM 1

IN LIGHT OF HURST, DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM 2

UNDER HURST V. STATE, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT O FTHE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM 3

IN LIGHT OF HURST, PERRY V. STATE AND HURST V. STATE, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE 1, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT.

CLAIM 4

THE DECISIONS IN HURST V. STATE AND PERRY V. STATE ARE NEW LAW THAT WOULD GOVERN AT A RESENTENCING AND MUST ALSO BE CONSIDERED WITH PREVIOUSLY RAISED POSTCONVICTION CLAIMS. THE NEW LAW, DUE PROCESS PRINCIPLES, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. PHILMORE'S PREVIOUSLY PRESENTED CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM AND ALL THE OTHER ADMISSIBLE EVIDENCE AT A FUTURE RESENTENCING WOULD PROBABLY RESULT IN A LIFE SENTENCE IN LIGHT OF THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING.

CLAIM 5

THIS COURT SHOULD VACATE MR. PHILMORE'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. PHILMORE TO THE DEATH PENALTY WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

SUMMARY OF THE ARGUMENT

Mr. Philmore was sentenced to die under an unconstitutional death penalty scheme. The United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016) declared Florida's death penalty system unconstitutional. Based on *Hurst*, other case law, and the implications arising therefrom, Mr. Philmore's death sentence violates the United States Constitution and the Florida Constitution. Because Mr. Philmore was sentenced without a jury determining beyond a reasonable doubt the essential elements that purportedly justify his death sentence, the Constitution mandates that his sentence be vacated.

Specifically, Mr. Philmore's sentence violates the Sixth, Eighth and Fourteenth Amendments of both the US and Florida Constitutions. The error is not harmless. Mr. Philmore must be resentenced by a properly instructed jury that unanimously finds the aggravating circumstances of Mr. Philmore's crime outweighs his mitigating circumstance beyond a reasonable doubt and sentence him to death with a full understanding of the weight of its responsibility. Any other outcome poses substantial harm to Mr. Philmore.

STANDARD OF REVIEW

This is an appeal from a Successive Motion under Fla. R. Crim. P. 3.851. Motions filed under R. 3.851, Collateral Relief after Death Sentence Has Been Imposed and Affirmed on Direct Appeal, must meet the following criteria:

(e) Contents of Motion.

(2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).

(d) Time Limitation.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

The Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but de novo review of legal conclusions. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Retroactivity

Both parties and the lower court agree that *Hurst* relief is available to Mr. Philmore. (R. p. 4). Mr. Philmore's sentence became final after the Supreme Court issued its decision in *Ring*. Pursuant to *Mosley v. State*, 209 So. 3d 1248, 1275 (Fla. 2016), The Supreme Court's decision in *Hurst v. Florida*, and this Court's decisions following *Hurst*, apply to Mr. Philmore.

ARGUMENT

I. MR. PHILMORE WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE ESSENTIAL ELEMENTS THAT LED TO HIS DEATH SENTENCE IN VIOLATION OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Currently, in Florida, a person can only be sentenced to die if a jury unanimously, and with a full understanding of its role, finds that the aggravating circumstances, weighed against the mitigating circumstances, justifies the death sentence. Only the jury, not the judge, may make this determination.

The United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), found Florida's death penalty sentencing scheme unconstitutional because it "[did] not require the jury to make the critical findings necessary to impose the death penalty," but rather, "require[d] a judge to find these facts." *Id.* at 622.

It has been longstanding precedent in non-capital cases that, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); *see also Blakely v. Washington*, 542 U.S. 296 (2004). However, in Florida, the law constitutionally failed by first requiring an "advisory" jury to render a sentencing recommendation by majority vote, and then allowed the judge to independently conduct the fact finding and ultimately impose the death sentence.

This Court on remand in *Hurst v. State*, 202 So 3d. 40 (2016), held that "*Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury." *Id.* at 44. The death penalty may only be imposed in Florida if the jury finds that each aggravating factor has been proven beyond a reasonable doubt; that the jury finds that the aggravating factors are sufficient and outweigh the mitigating circumstances, and unanimously agrees to sentence the defendant to die. *Id.* Jurors must also understand that they, not the judge, make the ultimate determination to

whether the defendant lives or dies. The death penalty may not be imposed if one juror votes for life. *Id.*

Mr. Philmore was sentenced to die under an unconstitutional scheme where jurors ultimately chose to deprive him of life without conscious regard to the full weight of their responsibility. Mr. Philmore is entitled to a new sentencing proceeding because no error made under the death penalty scheme found unconstitutional by the Supreme Court in *Hurst* is harmless. No express findings of fact were made and there is no way of knowing whether Mr. Philmore's jurors found the existence and sufficiency of the aggravating factors beyond a reasonable doubt. Rather, we know that the final factual determination was made by the judge with an advisory recommendation by the jury.

Without regard to the application of harmless error, Mr. Philmore was denied his right to a jury trial on the essential elements that led to his death sentence in violation of the United States Constitution and the corresponding provisions of the Florida Constitution. This Court should vacate Mr. Philmore's sentence and allow a jury to determine whether the factual circumstances justify a death sentence as constitutionally required.

II. THE UNANIMITY OF MR. PHILMORE'S DEATH SENTENCE IS NOT DISPOSITIVE UNDER *DAVIS V. FLORIDA* AND THE STATE FAILS TO MEET THEIR BURDEN BY SHOWING THE HURST ERROR IN MR. PHILMORE'S CASE WAS HARMLESS BEYOND A REASONABLE DOUBT

The State failed to meet their extremely high burden in showing that the "advisory" verdict given to the judge by a jury did not contribute to Mr. Philmore's death sentence when jurors did not make the necessary factual findings to impose the death penalty and were improperly advised that the responsibility of their ultimate decision would be shared by the judge. The State's argument that the unanimous jury recommendation is dispositive is without merit.

The Florida Supreme Court in *Hurst v. State* held that a *Hurst v. Florida* error is capable of harmless error review. *See Hurst*, 202 So 3d. 40, 68; *see also Davis v. State*, 207 So. 3d 142, 173 (Fla. 2016). Harmless error is "not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simple weighing the evidence. The focus is on the effect of the error on the trier-of-fact." *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986).

The central focus of the *Hurst* harmless error analysis is the error's effect on the fact-finder. "As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt

that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Davis v. State*, 207 So. 3d 142.

The "extremely heavy burden" is on the State to prove that the *Hurst* error in this case is harmless beyond a reasonable doubt. *See Hurst*, 207 So. 3d at 174. "[A]s the beneficiary of the error, [the burden is on the State] to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant's] death sentence." *King v. State*, 211 So. 3d 866, 891. A finding of harmless error is rare. *Id.* at 892-893.

First, Mr. Philmore's unanimous jury recommendation is not dispositive on the issue of harmless error. While a unanimous jury recommendation may create the foundation for the finding of harmless error, "[t]he State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst v. Florida*, at 622. Rather, the court may use the unanimity of the jury verdict as a relevant inquiry into the harmless error determination, but must look at the situation in the aggregate to determine whether in conjunction with the factual circumstances of the case, that the Hurst error did not contribute to Mr. Philmore's sentence beyond a reasonable doubt.

The lower court oversimplified the holding of the *Davis* case during the case management conference held on March 17, 2017. (R. p. 140). Both the court and the

State indicate that the *Davis* case stands for the proposition that the *Hurst* error is harmless where a jury has been given standard jury instructions and there is a unanimous recommendation for death. (R. p. 149). However, this ignores the effect of the *Hurst* error on the jury and the factually intensive inquiry required to determine whether the jury's failure to unanimously find all the facts necessary for imposition of the death penalty contributed to Mr. Philmore's sentence.

The State argued that it met its burden because it showed that the standard jury instructions were used in this particular case and that Mr. Philmore received a unanimous verdict. The State also argued that Mr. Philmore had multiple contemporaneous felonies and a full and complete confession.

However, a contemporaneous and prior felony is a not a relevant issue when it comes to a harmless error analysis. See McGinth v. State 209 So. 3d 1146, 1164 (Fla. 2017). Prior convictions for other violent feloniesdo not insulate a sentence from *Ring* and *Hurst v. Florida* relief. Further, a unanimous jury verdict is not dispositive and the standard jury instructions improperly instructed the jurors to their role and responsibility during Mr. Philmore's trial. Taken in the aggregate, the *Hurst* error contributed to Mr. Philmore's sentence and he isentitled to a new penalty phase proceeding.

III. THE HURST ERROR IN MR. PHILMORE'S CASE IS NOT HARMLESS BECAUSE HIS JURY FAILED TO FIND ANY OF THE CONSTITUIONALLY REQUIRED FACTUAL CIRCUMSTANCES THAT JUSTIFY IMPOSITION OF THE DEATH SENTENCE.

The State failed to meet its burden in showing that the *Hurst* error was harmless beyond a reasonable doubt. Mr. Philmore's penalty phase jury did not return a verdict making any findings of fact, thus, there is no way to know what aggravators, if any, jurors unanimously found proven beyond a reasonable doubt, if the jurors unanimously found aggravators sufficient for death, or if jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Rather, the only document returned by the jury was an advisory recommendation that a death sentence should be imposed.

As Justice Perry noted in his dissent in King, when an aggravating circumstance require a factual finding, *Hurst* requires these findings be considered and weighed by a jury *See King*, 211 So. 3d at 893-894 (Perry, J., concurring in part and dissenting in part). "The majority's reweighing of the evidence to support its conclusion is not an appropriate harmless error review." It is pure speculation to determine harmless error where a factually intensive aggravator is weighed by the court without the jury findings required by *Hurst*. *Id.* Especially when, "whether the jury unanimously found each aggravating factor remains unknown." *See Davis v. State*, 207 So. 3d 142, 175-176 (Fla. 2016) (Perry, J. concurs in part).

Jurors in Mr. Philmore's case were not required to make any express findings of fact as required by *Hurst*, and there is no way of knowing whether the aggravating circumstances were proven beyond a reasonable doubt. Rather, the jury "advised" the judge of their recommendation, and the judge ultimately found the aggravating factors.

Furthermore, there is no way of knowing if jurors believed the aggravating factors outweighed the mitigating circumstances to justify the imposition of death beyond a reasonable doubt. Again, it was the judge who weighed these considerations and made the ultimate determination to impose the death sentence.

Mr. Philmore deserves relief under *Hurst* because he was deprived of his constitutional right to a jury trial. His jury made a mere "advisory recommendation" and the necessary fact-finding was conducted by the judge. Because the judge found facts that should have been constitutionally reserved for the jury and the jury was not properly instructed to its ultimate role, Mr. Philmore received a death sentence. The only remedy that addresses the crux of the constitutional harm is to allow for a resentencing where a properly instructed jurors fulfills the role *Hurst* and the Constitution require.

Additionally it would be the jury, not the judge, to determine whether the mitigating evidence by the defense warranted a life sentence. While in Mr.

Philmore's case, the sentencing judge downplayed the significance of his mitigating circumstances, jurors may have reached a different conclusion.

Mr. Philmore's case was highly mitigated. At the time of the offense, Mr. Philmore was a mere 21 years-of-age. The trial and postconviction evidence showed that he acted under the substantial domination of his codefendant. Mr. Philmore suffered physical and verbal abuse by an alcoholic father, suffered from drug and alcohol abused, and severe emotional trauma and subsequent posttraumatic stress. Mr. Philmore was classified as emotionally handicapped and was molested and raped at a young age. The judge, not the jury, rejected that Mr. Philmore suffered brain damage and acted on the behest of his codefendant. Jurors must be given an actual opportunity, as the constitution requires, to properly weigh these mitigating factors against the aggravating factors.

IV. THE HURST ERROR IN MR. PHILMORE'S CASE IS NOT HARMLESS BECAUSE HIS DEATH SENTENCE IS ARBITARY AND CAPRICIOUS BECAUSE HIS JURY DID NOT FULLY APPRECIATE ITS ROLE IN THE DELIBERATIVE PROCESS

The *Hurst* error in this case is not harmless because the minimization of jurors' roles in determining the fate of Mr. Philmore severely undercuts the reliability of the verdict that the Eighth Amendment requires. Mr. Philmore's jury assumed an advisory role during the sentencing portion of his proceeding and were

not properly instructed to ensure that his death sentence was not determined in an arbitrary and capricious manner.

To comply with the Supreme Court's Eighth Amendment death penalty jurisprudence, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *See Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 2932 (1976).*

The Supreme Court in *Furman* "recognized[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that would be inflicted in an arbitrary and capricious manner." *See*, *Gregg* 153, at 2909 (Holding that the death penalty is permitted under narrow circumstances); *See also*, *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972) (Finding the death penalty violated the Eighth and Fourteenth Amendment's prohibition on cruel and unusual punishment).

The instructions given to jurors on their advisory role in the process fails to meet the Eighth Amendment requirements of *Caldwell*. In Mr. Philmore's case, jurors were instructed that, although the court was required to give great weight to

its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633 (1985). In *Caldwell*, the Supreme Court stated and held that it:

> [h]as always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its tasks and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. 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. The sentence of death must therefore be vacated.
> *Id.* at 341, 2646.

In accordance with *Caldwell*, jurors in Florida must now be correctly instructed as to their sentencing responsibilities. Florida jurors will now understand the magnitude of their role during death penalty deliberations. *See Caldwell*, 472 U.S. at 330. "In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at. 2640

A finding of harmless error because jurors unanimously found death ignores the requirement that the onus of the *Hurst* analysis must be on the effect the error had on the jury. To properly consider what impact the Hurst error had on the jurors

in Mr. Philmore's case, it is necessary to give weight to the juror's sense of responsibility during the process.

In Mr. Philmore's case, jurors were able to shift their sense of responsibility to the judge. Thus, the substantial unreliability of Mr. Philmore's unanimous jury verdict should not be the central component in determining whether the *Hurst* error in his case is harmless.

The court instructed jurors that it made the final determination as to whether Mr. Philmore was sentenced to death. This shifted the onus of responsibility and the gravity of the verdict to the judge. While told their recommendation would hold great weight, jurors were informed that the judge would make the ultimate determination. This diminished sense of responsibility undercuts the reliability of the Eighth Amendment. If jurors believed that their final decision was binding; it is not wholly speculative to believe that, at the least, a shifted sense of responsibility impacted the deliberative process and potentially the outcome of such deliberations.

Because jurors made no findings of fact, there is no way of knowing what, if any, aggravators found by the advisory panel were proven beyond a reasonable doubt. There is also no way of knowing if the advisory panel found the aggravating factors outweighed the mitigating factors. This further undercuts the reliability of the advisory panel's recommendation because no specific findings offer proof of reliability of the verdict in light of the juries diminished sense of responsibility.

Evolving standards of decency are reflected in the consensus that a defendant should only be sentenced to death by a properly instructed penalty phase jury that unanimously voted in favor of death. Mr. Philmore did not receive the benefit of a properly instructed penalty phase verdict. Looking at the case in the aggregate and the effect that improper instructions had on the reliability of the verdict, the error is not harmless. The State failed to meet their burden to support a finding of harmless error because the effect on the jury leaves a high likelihood that at least one juror could vote in favor of a life sentence. Thus, he is entitled to relief in the form of a new sentencing proceeding.

V. TRIAL COUNSEL FAILED TO PROPERLY PRESERVE A BATSON ISSUE AND THIS DEIFICIENT PERFORMANCE MUST BE REEVALUATED IN LIGHT OF THE SIXTH AND EIGHTH AMENDMENT IMPLICATIONS IN THIS CASE.

The *Batson* violation raised by Mr. Philmore in both in his direct appeal and in a later motion for ineffective assistance of counsel precludes a finding of harmless error. This Court first rejected this claim in Mr. Philmore's direct appeal by finding that he waived this claim because counsel failed to renew his objection prior to his jury being empanelled. *Philmore v. State*, 820 So. 2d 919, 930. Mr. Philmore later raised this issue in the context of an ineffective assistance of trial counsel claim.

However, it is imperative that this court consider the impact that an improperly impaneled jury has in the context of the *Hurst* harmless error analysis. This Court in *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla. 2014), explained that

when presented with, the court must consider qualifying newly discovered evidence in addition to all of the evidence presented at trial. This includes, "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford v. State*, 125 So. 3d at 775-776 (Fla.).

While this court made no finding of error, it did so on the grounds that his claim was procedurally barred in both his direct appeal and postconviction claim. *See Philmore v. State*, 937 So. 2d 578, 585 (Fla. 2006). It is important to note that in reviewing this claim in the postconviciton context, this Court recognized the procedural bar but also concluded that Mr. Philmore could not have suffered prejudice because "any alleged deficiency in counsel's performance in challenging the State's strike of juror Hold did not 'so affect the fairness and realiability of the proceedings that confidence in the outcome is undermined.'" *Id.*

However, In light of the *Hurst* context, this claim should be revisited. The State of Florida singled the only black juror's conduct and used the hearsay evidence of a conversation with the juror's mother to preclude her from the case. Trial counsel's failure to preserve this issue by renewing the objection prior to submitting this case to the jury should not preclude relief where Mr. Philmore death sentence is already fraught with several constitutional violations.

CONCLUSION

Because Mr. Philmore was sentenced to death under an unconstitutional system, he is entitled to a new sentence because the error is not harmless. Allowing the onus of the responsibility to fall to the judge allowed jurors to feel a lessened sense of responsibility. Based on the foregoing, Mr. Philmore requests that this court vacate his death sentence and allow for a resentencing proceeding with a properly instructed jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 26, 2017, I electronically filed the forgoing Initial Brief with the Clerk of the Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Leslie T. Campbell, Assistant Attorney General, Leslie.Campbell@myfloridalegal.com, and CapApp@myfloridalegal.com ; I further certify that I mailed the forgoing document to Lenard James Philmore, DOC#550026, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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