No. 17-9556

IN THE SUPREME COURT OF THE UNITED STATES

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LENARD PHILMORE
PETITIONER

VS.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

AND

PAMELA JO BONDI, ATTORNEY GENERAL,
STATE OF FLORIDA

RESPONDENTS.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

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# REPLY TO BRIEF IN OPPOSITION

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## CAPITAL CASE
## QUESTIONS PRESENTED

Mr. Philmore stands by the questions presented in his petition and respectfully asks that this Court decide the following:

1. Whether Florida violated Mr. Philmore's and similarly situated defendants' Eighth Amendment rights, and Equal Protection and Due Process rights as guaranteed by the Fourteenth Amendment, by denying the opportunity for full briefing of relevant, life-or-death, *Hurst* issues?

2. Whether the Eighth and Fourteenth Amendments require that Mr. Philmore and other similarly situated defendants receive *Hurst* relief based on this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) in light of the evolving standards of decency, Equal Protection, and the Eighth Amendment's prohibition against cruel and unusual punishment where the advisory panel at the penalty phase of Mr. Philmore's trial was repeatedly instructed in violation of *Caldwell*?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. Without abandoning or waiving any arguments raised in Petitioner's original petition, Mr. Philmore replies to the respondents' Brief in Opposition (BIO) as follows.

## REPLY ON REASONS FOR GRANTING THE WRIT

1. **Whether Florida violated Mr. Philmore's and similarly situated defendants' Eighth Amendment rights, and Equal Protection and Due Process rights as guaranteed by the Fourteenth Amendment, by denying the opportunity for full briefing of relevant, life-or-death, *Hurst* issues?**

The respondents' BIO failed to fully acknowledge the argument in Mr. Philmore's original petition when it was stated in response that "Philmore was afforded twenty-five pages for his brief, but filed a brief of only twenty pages." Respondent's Brief in Opposition, p. 10. Whether Mr. Philmore used only twenty pages, or two, in his response to the Florida Supreme Court's Order to Show Cause, the harm remains the same: A denial of Mr. Philmore's access to the court system and it prohibits him from being able to fully articulate his argument without limitation on the *specific subject matter* from the Florida Supreme Court. (emphasis added).

The Florida Supreme Court's order directed Mr. Philmore to only address why he was entitled to relief based "on this Court's precedent in *Hurst. v. State*, 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)." *See* Respondent's Appendix B. The Florida Supreme Court itself acknowledged that *the subject matter of Mr. Philmore's brief was limited* when it explained that [p]arties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument." *See Id*.

This directive by the Florida Supreme Court is an affront to Mr. Philmore's right to habeas corpus, due process, and access to courts. As noted in the original petition, State decisions such as these that limit a death row inmate's access to courts and full appellate review should be subject to strict scrutiny. *See Mitchell v. Moore*, 786 So. 2d 521, 525 (Fla. 2001). Florida cannot show that prohibiting Mr. Philmore full opportunity to address any and all arguments related to his successive rule 3.851 motion passes such scrutiny. While the respondent argues that prohibiting limitations on briefing "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[,]"; the reality is that Mr. Philmore simply moves to ensure that he is given a full and thorough opportunity to address the major constitutional implications articulated by the court in *Hurst* and its progeny.

The Florida Supreme Court is engaging in an improper merit-based review of all death row inmates with unanimous jury verdicts on life determinative questions. Therefore, Mr. Philmore moves this Court to grant the writ and mandate that the Florida Supreme Court allow him access to argue for his life.

**2. Whether the Eighth and Fourteenth Amendments require that Mr. Philmore and other similarly situated defendants receive *Hurst* relief based on this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) in light of the evolving standards of decency, Equal Protection, and the Eighth Amendment's prohibition against cruel and unusual punishment where the advisory panel at the penalty phase of Mr. Philmore's trial was repeatedly instructed in violation of *Caldwell*?**

The respondent's assertion that there is no conflict between the Florida Supreme Court's decision and this Court's *Caldwell* jurisprudence is without merit. Further, the assertion that the Florida Supreme Court has fully addressed the *Caldwell* issue in *Reynolds v. State*, __ So. 3d __, n.8 2018 WL 1633075 (Fla. 2018), is incorrect because as Justice Sotomayor in her dissent in *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018), acknowledged, the *Reynolds* opinion was only a plurality and that "the [*Caldwell*] issue remains without definitive resolution by the Florida Supreme Court."

The respondent's argument that the jury instructions used during Mr. Philmore's sentencing was correct based on the law in existence at the time, misses the main point of the argument. The issue is not solely whether there is a stand-alone *Caldwell*

violation, but rather, the question is whether the *Caldwell* violation renders the *Hurst* error harmless.

*Hurst* rendered the jury instruction that the judge would make the final determination regarding whether the death penalty will be imposed, unconstitutional and incorrect in hindsight. Thus, Mr. Philmore steadfastly maintains that the improper instruction, that the judge would in essence "review" the jury's advisory recommendation, minimized his jurors' sense of responsibility. This minimization of their role, coupled with a juror's understanding that post-*Hurst*, one vote could spare Mr. Philmore's life, prohibits a finding of harmless error in Mr. Philmore and other similarly situated defendants' cases.

Now, jurors in Florida must be correctly instructed on its sentencing responsibility and each juror will understand that they alone bear the responsibility for deciding whether a defendant lives or dies. While the respondent argued that "Philmore's jury was advised accurately that its decision was an advisory recommendation that would be [afforded] "great weight," the jury instructions included by respondent in Appendix A states clearly at the forefront: "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge." Mr. Philmore is constitutionally entitled to a determination made by jurors whom appreciate the gravity of their task.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Ali A. Shakoor
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Date: August 6, 2018.