CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LENARD PHILMORE,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

Ali A. Shakoor
Florida Bar No. 0669830
Law Office of the Capital Collateral Regional Counsel
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 643
Fax No. (813) 558-1601
Attorney of Record for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

Lenard Philmore was unconstitutionally sentenced to death in the State of Florida following a unanimous recommendation from a mere advisory panel who was instructed numerous times that the trial judge would be making the ultimate determination on the sentence to be imposed.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down Florida's longstanding capital-sentencing procedures because they authorized a judge, rather than a jury, to make certain factual findings that are necessary preconditions for a death sentence. This court utilized the reasoning in *Ring v. Arizona*, 536 U.S. 584 (2002), to find Florida's death penalty system was unconstitutional, but made no mention of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and how that decision would affect reviewing courts' decisions.

Following *Hurst v. Florida*, the Florida Supreme Court has decided that *Hurst* errors are subject to harmless error review and that a unanimous jury verdict supports a virtually per-se finding of harmlessness.

Mr. Philmore requests that certiorari be granted to address the following two substantial questions:

1. Whether Florida violated Mr. Philmore's and similarly situated defendants' Eighth Amendment rights, and Equal

Protection and Due Process rights as guarantee by the Fourteenth Amendment, by denying the opportunity for full briefing of relevant, life-or-death, *Hurst v. Florida,* 136 S.Ct. 616 (2016), issues?

2. Whether the Eighth and Fourteenth Amendment requires 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 on the cover page.

Index to Appendix

TABLE OF CONTENTS

CONTENTS **PAGE(S)**

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

Petition for Writ of Certiorari

Lenard Philmore respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

Opinions and Orders Below

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. Pro. 3.851. The opinion of the Circuit Court in and for Martin County, FL denying that motion is unreported. It is reproduced in Appendix C. The Florida Supreme Court affirmed on January 25, 2018, reproduced in Appendix A.

Jurisdiction

The Florida Supreme Court's final judgment was entered on January 25, 2018. This Court has jurisdiction to review it under 28 U.S.C. § 1257 (a).

Constitutional Provisions Involved

The Eighth Amendment provides in relevant part: "[C]ruel and unusual punishments [shall not be] inflicted."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." "[N]or shall any State deprive any person of life, liberty, or property, without due process of law…"

STATEMENT OF THE CASE

1. Introduction

The lives of similarly situated condemned inmates on Florida's death row hinge upon resolution of the issues presented by this petition.

2. Mr. Philmore's conviction and sentence; pre-*Hurst* proceedings

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.

3. Hurst related proceedings and rulings below

Mr. Philmore filed a successive rule 3.851 motion to vacate his death sentence based on *Hurst* I and *Hurst* II. The circuit court denied this motion on March 17, 2017. Philmore filed a timely appeal of that denial.

In response, the Florida Supreme Court denied briefing and instead tasked Mr. Philmore to "file briefs addressing why the lower court's order should not be affirmed in light of 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)."

The Florida Supreme Court denied Mr. Philmore *Hurst* relief "[b]ased 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 (citations omitted)." In a footnote, the Florida Supreme Court noted that "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 (1985).” However, the Court engaged in no explanation or analysis regarding this claim.

4. *The context of the Hurst rulings*

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court invalidated Florida’s capital sentencing procedure 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.

On remand, in *Hurst v.State*, 202 So. 3d 40 (2016), the Florida Supreme Court held that the existence of aggravating factors necessary for the death penalty must be found by a jury, and further, under Eighth Amendment principles, those jury findings must be unanimous and beyond a reasonable doubt.

The jury instructions in Mr. Philmore’s case diminished the juror’s sense of responsibility as to who makes the ultimate decision of death in violation of *Caldwell*[1].

Mr. Philmore’s petition requests that this court grant the writ so the Florida Supreme Court can adequately address the issue of *Caldwell’s* impact on the *Hurst* analysis.

[1] *Caldwell v. Mississippi*, 472 U.S. 320 (1985)

REASONS FOR GRANTING THE WRIT

Denial of Briefing

The Constitution requires Mr. Philmore be permitted full briefing regarding why he is entitled to relief under *Hurst v. Florida* and its progeny. The State of Florida denied Mr. Philmore the opportunity for full briefing by limiting an actual appeal of the postconviction court's denial of his successive 3.851 motion to a twenty-page response to an order to show cause that directed Mr. Philmore to only address why the trial court's order should not be affirmed in light of this Court's decision in *Davis v. State,* 207 So. 3d 142 (Fla. 2016).

The Florida Supreme Court's denial of full appellate briefing and an opportunity for meaningful review of Mr. Philmore's claims denies him the right to habeas corpus, due process, and access to courts.

Access to courts is guaranteed by both the Florida and United States Constitutions. The Florida Constitution expressly guarantees a citizen's access to courts. Art. I, § 21, Fla. Const. The United States Constitution does not contain a specific access to courts provision, but the right has been recognized by this Court to arise from several constitutional provisions including the First Amendment, the Due Process Clause, and the Equal Protection Clause. *See Mitchell v. Moore*, 786 So. 2d 521, 525 (Fla. 2001); *see generally Bounds v. Smith*,

430 U.S. 817, 825, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1997) (finding that prisoners have a constitutional right to "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to courts.")

While postconviction appeal may not be required as a matter of federal constitutional right, see *Evitts v. Lucey*, 469 U.S. 387, 408, 105 S. Ct. 830, 842 (1985), the Florida Constitution, statutes and rules of criminal procedure establish it as a matter of right. This is a matter of due process and equal protection under the law.

State decisions that limit a death row inmates' access to courts and full appellate review should be subject to strict scrutiny. In Florida, limitations on that right are already subject to strict scrutiny. *See Mitchell*, 786 So.2d at 515 *citing Lloyd v. Farkash*, 476 So. 2d 305, 307 (Fla. 1st DCA 1985). Thus, it must be shown that any restriction of this right furthers a compelling government interest and that the act in furtherance of that compelling interest be narrowly tailored. *See Washington v. Glucksberg*, 521 U.S. 702, 766, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Thus, Florida must show that their right to prohibit Mr. Philmore and other similarly situated death row inmates from full opportunity to argue significant constitutional issues in Florida death penalty jurisprudence that has life or death consequence, is the least

restrictive way for the Florida Supreme Court to further an unidentified compelling government interest.

This Court in *Douglas v. People of State of Cal.*, 372 U.S. 353, 83 S. Ct. 814 (1962) vacated the judgment that denied the defendant's indigent request for counsel after the appellate court had "'gone through' the record and had come to the conclusion that 'no good whatever could be served by appointment of counsel.'" *Id*. at 354-55, 814, 815. "When an indigent is forced to run this preliminary showing of merit, the right to appeal does not comport with fair procedure." Id. at 358, 817. The court noted that "[w]e are not here concerned with problems that might arise from the denial of counsel . . . [w]e are dealing only with the first appeal, granted as a matter of right to rich and poor alike . . . from a criminal conviction." *Id*. at 356, 816.

The Florida Supreme Court engaged in the behavior this court took issue with in *Douglas*: an impermissible record review of the issues and requiring that Mr. Philmore make a preliminary showing of merit before being granted full access to a meaningful appeal. In *Douglas*, this Court took issue with the State court's determination of who may file an appeal by discrimination of prisoners between rich and poor, and in a similar fashion the Florida Supreme Court is denying similarly situated Florida death row inmates the right to a full appeal on

all issues raised in a successive 3.851 motion based on their unanimous jury verdict alone. Mr. Philmore does not have the same opportunity as other similarly situated defendants to convince this Court of the merits of the issues raised below, regarding why he is entitled to relief under *Hurst*.

The Florida Supreme Court routinely provides for extensive briefing in cases in which a death sentenced individual wishes to waive all postconviction. On direct appeal, someone may have no meritorious issues or not wish to pursue the appeal, yet Florida requires briefing. Mr. Philmore waives no claims and seeks to fully address issues of fundamental constitutional significance. *See Bounds*, 430 U.S. at 825. Mr. Philmore is under a sentence of death and the Florida Supreme Court's order to show cause restricts his access by denying his right to a full appeal on life-determinative questions. Any procedure that screens out cases from full briefing usurps Mr. Philmore's right to appeal his death sentence. Art. I, § 3(b)(1), Fla. Const. He moves this Court to grant the writ and mandate that the Florida Supreme Court allow him access to argue for his life.

Caldwell

The Florida Supreme Court has failed to adequately address another major problem in Florida death penalty jurisprudence that has been ongoing since June 11, 1985.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court identified and rectified a problem that occurred during closing arguments in a capital case out of Mississippi.

> "ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they ...
>
> "COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.
> "ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, **2638 they said this panel was going to kill this man. I think that's terribly unfair.
>
> "THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
>
> "ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically *326 reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so." Id., at 21–22.

Caldwell, *Id*. at 325-26.

Based on the above comments to the jury, this Court vacated the death sentence in *Caldwell*, holding in part:

> It is unconstitutionally impermissible to rest a death sentence on a determination made by a sentence who has been

> led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere . . . . there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.

Caldwell, *Id*. at 328, 330.

The main premise behind *Hurst* was that capital defendants have the basic fundamental Sixth Amendment right to a trial by jury, especially those facing the ultimate punishment. The Eighth Amendment requires that these capital defendants should also have the right to a properly instructed jury.

Mr. Philmore's jury was repeatedly advised that their roles were advisory. Again, a capital defendant has a right for a jury to make factual findings and decide his or her fate, not a judge. A jury must *fully know and understand their role* in a process designed to determine whether someone deserves to live or die.

While there is a long line of cases from the Florida Supreme Court denying *Caldwell* relief, most of the decisions were made operating under the flawed premise that Florida's death penalty system was constitutional. This is no longer the case. The constitutional landscape in the State of Florida has changed dramatically since prior *Caldwell* issues were decided. Now that Florida's death penalty scheme is well understood to be constitutionally defective, the issue must be revisited.

Even though this Court held in *Caldwell* that such errors are presumptively harmful, the Florida Supreme Court has ruled as follows:

> Further, we have considered and rejected Guardado's claim that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), affect this Court's harmless error analysis in Hurst. See *Franklin v. State*, 43 Fla. L. Weekly S86 (Fla. Feb. 15, 2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla. [2017]), cert. denied 138 S. Ct. 513 (2017). Because Guardado's claims have been previously rejected, we affirm the circuit court's summary denial of Guardado's successive motion for postconviction relief.

Guardado v. State, 238 So. 3d 162 (Fla. March 8, 2018). Thus, the Florida Supreme Court has sidestepped the analysis by deciding that the *Caldwell* issue can be decided, without comment, under a harmless error analysis. [2]

Though certiorari was denied in *U.S. v. Truehill*, 138 S. Ct. 3 (2017), three Justices from this Court dissented to

[2]The Florida Supreme Court only decision that substantively addressed post-*Hurst Caldwell* arguments is in *Reynolds v. State*, __ So. 3d __, n.8 2018 WL 1633075. However, this decision focused primarily on the fact that the jury was instructed appropriately according to unconstitutional Florida law that existed at the time the instructions were given. It does not adequately address the issue regarding juror's mistaken belief of the finality of their role in any given defendant's death sentence and the Eighth Amendment implications arising therein. Additionally, as recently noted by Justice Sotomayor in her dissent in *Kaczmar v. Florida*, No. 17-8148, the *Reynolds* opinion, "gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court." Id.

acknowledge that capital defendants in Florida have "raised [] important Eighth Amendment challenges to their death sentences that the Florida Supreme Court has failed to address." *See Truehill*.

Justices from this Court were particularly concerned about these *Caldwell*, 472 U.S. at 341, violations. The dissent noted that the *Caldwell* challenges prior to *Hurst* were rejected based on rationale undermined by this court in *Hurst*. "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and we have thus found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341.

In the wake of *Hurst v. Florida* and the resulting new Florida law, the jury, pursuant to *Caldwell*, must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst*, the individual jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution, since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation.

As explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately

executed after no juror exercised his or her power to preclude a death sentence. Otherwise, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

Mr. Philmore's death recommendation was submitted by a mere advisory panel who did not fully appreciate their role in the process of whether Mr. Philmore would live or die. This scheme was found by this Court to be patently unconstitutional and has since been remedied with substantive changes, both statutorily and through *Hurst's* progeny. Denying Mr. Philmore the full benefit of his constitutional protections in such an unequal and arbitrary manner is fundamentally unacceptable. This issue must be remedied as the lives of similarly situated individuals are at stake.

CONCLUSION

Respectfully, certiorari should be granted for this case.

Respectfully submitted,

Ali A. Shakoor
Florida Bar No. 0669830
Office of the Capital Collateral
Regional Counsel
12973 N. Telecom Parkway
Temple Terrace, Florida 33637

Phone No. (813) 558-1600 ext. 608
Attorney of Record for Petitioner