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**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC17-711**

**LENARD JAMES PHILMORE,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# INITIAL BRIEF OF THE APPELLANT

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## 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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## CERTIFICATE OF COMPLIANCE

**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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