IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-711

LEONARD JAMES PHILMORE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Leonard James Philmore, will be referred to as "Philmore" and Appellee, State of Florida, will be referred to as "State". Appellate records will be cited as:

> Direct Appeal case number SC00-1706 - "ROA;"
> Postconviction Relief Appeal case number SC04-1036 "PCR;"
> Successive Postconviction Appeal, instant case number SC17-711 – "2PCR-R" for record documents and "2PCR-T" for transcripts
> Supplemental records will be identified with an "S" all followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

Philmore is in custody and under a sentence of death. He is subject to lawful custody pursuant to a valid judgment of guilt and sentence entered on July 21, 2000. Philmore was convicted and sentenced for one count each of first-degree 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 (ROA-7 1203-39). This Court affirmed. *Philmore v. State*, 820 So.2d 919 (Fla. 2002), *cert. denied*, 537 U.S. 895 (Oct. 7, 2002).

On September 16, 2003, Philmore filed his Florida Rule of Criminal Procedure 3.851 postconviction motion (PCR-6 501-68, 581). An evidentiary hearing was held and on May 12, 2004, relief was denied. (PCR-10 1334-63). This Court affirmed habeas and denied the related petition. *Philmore v. State/Crosby*, 937

So.2d 578 (Fla. 2006).[1] Subsequently, Philmore filed a federal habeas corpus petition which was denied summarily, and that ruling was affirmed. *Philmore v. McNeil*, 575 F.3d 1251 (11th Cir. 2009), *cert. denied*, 559 U.S. 1010 (2009)

On January 12, 2016, *Hurst v. Florida*, 136 S.Ct. 616 (2016) issued and on January 9, 2017, Philmore filed a successive Rule 3.851 motion based on *Hurst v. Florida*. (2PCR-R 28-64) On March 17, 2017, a Case Management Conference was held (2PCR-T 1-25) and the trial court denied postconviction relief. (2PCR-R 142-44). Philmore appealed and the State's brief follows.

On December 16, 1997, Philmore and Anthony A. Spann ("Spann") were indicted for the November 14, 1997 murder of Kazue Perron and related felonies. (ROA-1 1-4). The trials were severed Philmore was convicted. (ROA.4 632-33, 636-37). Following the penalty phase, on January 28, 2000, the ***jury unanimously recommended death***. (ROA-4 767; ROA-28 2581-85). His sentencing was continued until after Spann, was tried.[2] On July

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[1] In his state postconviction litigation, Philmore challenged Florida capital sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). This Court rejected the claim holding: "Ring does not apply retroactively. See Johnson v. State, 904 So.2d 400, 412 (Fla. 2005)." *Philmore*, 937 So.2d at 588.

[2] Spann was convicted as charged. After waiving his penalty phase jury and mitigation, this Court affirmed. See Spann v. State, 857 So.2d 845, 849-50 (Fla. 2003). Following an evidentiary hearing, this Court affirmed the denial of postconviction relief, *Spann v. State*, 985 So.2d 1059 (Fla. 2008) and his later successive postconviction claim of newly discovered evidence.

21, 2000, the trial court entered its judgment and sentencing order, imposing the death sentence for the first-degree murder.

On direct appeal, this Court found the following facts:

> ... Philmore and codefendant Anthony Spann 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.
>
> … 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 … [and] 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.
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> 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

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Spann v. State, 91 So.3d 812 (Fla. 2012). Subsequently, federal habeas relief was denied in an unreported order. *Spann v. McNeil*, case no. 08-14360-JAL (S.D. Fla. Apr. 16, 2013)

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. 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….

Philmore and Spann then drove the two vehicles to Indiantown, where they stopped at a store. Spann pointed out a bank to rob…. 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 concealing the Subaru, Philmore and Spann returned to Palm Beach County ... [where] Philmore spotted an undercover police van sitting at a nearby house, and stated that it “looked like trouble.” … 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 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 … and the jury found Philmore guilty on all counts.
>
> After a penalty phase in which the State and the defense presented both lay and expert witnesses, the jury recommended a sentence of death by a vote of twelve to zero. ... The trial court found the following five aggravators: (1) defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the capital felony was committed for pecuniary gain; and (5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The court found no statutory mitigation, but found the following nonstatutory mitigation: (1) defendant was both the victim and witness of physical and verbal abuse by an alcoholic father (moderate weight); (2) defendant has a history of extensive drug and alcohol abuse (some weight); (3) severe emotional trauma and subsequent posttraumatic stress (moderate weight); (4) defendant was molested or raped, or both, at a young age (some weight); (5) defendant was classified as severely emotionally handicapped (little weight); (6) defendant has exhibited the ability to form close loving relationships (moderate weight); (7) defendant's cooperation with the State (moderate weight); and (8) defendant has expressed remorse for causing the death of Perron (little weight). The trial court rejected the nonstatutory mitigator that the defendant suffered brain damage at an early age. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court agreed with the jury's recommendation and imposed the death penalty.

Philmore, 820 So.2d at 923–26 (footnotes omitted)

SUMMARY OF THE ARGUMENT

Issues I-III - Philmore's case became final on October 7, 2002, with the denial of certiorari. However, relief under *Hurst v.*

Florida and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) should not be granted. See *Jenkins v. Hutton*, 2017 WL 2621321, 582 U.S. --- (June 19, 2017) and *Davis v. State*, 207 So.3d 142 (Fla. 2016). The record in this case establishes harmless error as it was a highly-aggravated case where there were unanimous findings of prior and contemporaneous violent felonies along with a full confession setting forth the cold calculated and premeditated ("CCP") killing and the that the victim was killed for pecuniary gain and to avoid arrest. A rational jury, as defined in *Jenkins*, would have recommended death unanimously. Moreover, even under this Court's focus on Philmore's jury, relief was denied properly. Philmore's jury was instructed properly and his jury unanimously recommended death.

Issue IV – The jury was instructed properly, thus, *Caldwell v. Mississippi*, 472 U.S. 320 (1985) is no basis for relief.

Issue V – *Hurst* does not provide Philmore with a means to relitigate claims raised and rejected by this Court previously.

ARGUMENT

ISSUES -III

PHILMORE IS NOT ENTITLED TO *HURST* RELIEF AS ANY ERROR IS HARMLESS BEYOND A REASONABLE DOUBT

It is Philmore's position he is entitled to a new sentencing as his death sentence violates *Hurst v. Florida* and *Hurst.* He maintains the trial court erred in trial court

finding "beyond a reasonable doubt that any *Hurst* error was harmless" (2PCR 144) as he did not have a constitutional sentencing and the State cannot prove beyond a reasonable doubt that the error is harmless. The State disagrees.

In *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), this Court found *Hurst v. Florida* and *Hurst* retroactive to cases not final before Ring.[3] Philmore's case did not become final until after *Ring* was issued. However, *Hurst*, properly understood, only requires the jury to find the aggravating circumstances; it does not require the jury to find "sufficient" aggravators or mitigation or weighing. Moreover, here, two of five aggravators were either specifically found by the jury or not required to be found by the jury. The jury is not required to find the prior violent felony aggravator under the *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) exception. Philmore's jury convicted him of the contemporaneous robbery and kidnapping, thus establishing the pecuniary gain and during a felony aggravators.

Davis, 207 So.3d at 174, provided that in order to find a *Hurst* error harmless "it must be clear beyond a reasonable doubt

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[3] The State maintains that *Hurst v. Florida* and *Hurst* should not have been found retroactive as Ring is not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (finding *Ring* not retroactive); *Johnson v. State*, 904 So.2d 400, 411-12 (Fla. 2005)(finding *Ring* not retroactive under state analysis). As noted in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) neither the Supreme Court, nor any federal court, found a new procedural rule not retroactive under the watershed exception only later to change its mind after "the law's intervening evolution.

that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." Philmore received both a trial and a penalty phase before a jury in accordance with the law in effect at the time of his trial and the State carried its burden requiring it to prove each aggravating circumstance beyond a reasonable doubt. *Smith v. State*, 170 So. 3d 745, 760 (Fla. 2015). The jury was instructed 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." (ROA-27 2561, 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. (ROA-27 2564-65) While the jury was instructed its recommendation did not have to be unanimous, Philmore's jury was.[4] (ROA-27 2565-66, 2582-85).

[4] The State's position continues to be that the Sixth Amendment requires nothing more than jury fact-finding sufficient to

Significantly, the United States Supreme Court, in *Jenkins v. Hutton*, 2017 WL 2621321, 582 U.S. -- (June 19, 2017) recently confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts.[5] *Jenkins* helps interpret the intent behind *Hurst v. Florida,* which made no mention of weighing aggravators and mitigators, and explains the

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support the resulting sentence. Trial judges were authorized to impose a sentence within the range established by the legislature as supported by either a guilty plea or jury verdict. The *Ring/Hurst* line of cases did not alter this calculus fundamentally. The fault with Florida's statute was a limited one under *Hurst v. Florida*. As the State maintains, once the jury finds an aggravator the Sixth Amendment constitutional requirement is satisfied. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003)(finding murder conviction exposes defendant to life sentence while aggravator(s) increase maximum sentence to death). This rationale is in accordance with this Court's previous *Ring* jurisprudence *See Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) The overwhelming weight of precedent from different jurisdictions has rejected the notion that the weighing process and its result are a "fact" subject to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and have rejected the notion a capital jury must find beyond a reasonable doubt that aggravator outweigh mitigators or that such a "fact" needs to be alleged in an indictment. *See United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013); *United States v. Fields*, 516 F.3d 923 (10th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13 (1st Cir. 2007); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007); United States v. Purkey, 428 F.3d 738 (8th Cir. 2005).

[5] In *Jenkins,* the lower federal court ordered a new sentencing because, in its view, the penalty phase jury failed to make the necessary factual findings supporting death. However, because the necessary aggravating factors were established beyond a reasonable doubt by the guilt phase jury, the Supreme Court reversed and reinstated the death sentence. Like Florida, a single aggravating factor under Ohio law is sufficient to render a capital defendant death eligible. Because the requisite aggravators were established during the guilt phase, Jenkins entered the penalty phase death eligible.

appropriate harmless error standard to be applied. The Supreme Court has held the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Zant v. Stephens*, 426 U.S. 862, 875 (1983); *Tuilaepa v. California*, 512 U.S. 967, 979–80 (1994). In *Zant*, the Court explained "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Id*. at 875 n.13. *See Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (noting it has never held a specific method for balancing mitigators and aggravators is constitutionally required).

In assessing harmless error, the State maintains the proper analysis is the rational juror test of *Neder v. United States*, 527 U.S. 1, 18-19 (1999) supported by *Jenkins* which held:

> Whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances. . . .
>
> The court, in other words, considered whether the alleged error might have affected the jury's verdict, not whether a properly instructed jury could have recommended death. . . . .
>
> Neither Hutton nor the Sixth Circuit has shown by clear and convincing evidence that —if properly instructed— no reasonable juror would have concluded that the aggravating circumstances in Hutton's case outweigh the mitigating circumstances.

Jenkins, at *5.

Here, if this Court applies the correct harmless error test required by *Jenkins*, it would ask whether a properly instructed jury would have determined that the death penalty was the appropriate sentence. The answer, given the extensive aggravation, supported by Philmore's extensive/thorough confession to the motivation and planning of the murder and absence of mitigation is unquestionably in the affirmative. The rational juror test has been used by this Court for decades when it strikes an aggravator and makes an evaluation concerning whether the death penalty is still appropriate. *See, Middleton v. State*, SC12-2469, 2017 WL 930925, at *13 (Fla. Mar. 9, 2017), *reh'g denied*, SC12-2469, 2017 WL 2374697 (Fla. June 1, 2017) (affirming sentence after striking the avoid arrest and CCP aggravators); *Johnston v. Singletary*, 640 So. 2d 1102, 1104–05 (Fla. 1994) (explaining "jury would have found Johnston's brutal stabbing and strangulation of the eighty-four-year-old victim, who undoubtedly suffered great terror and pain before she died, heinous, atrocious, or cruel, even with the limiting instruction."); *Monlyn v. State*, 705 So. 2d 1, 5–6 (Fla. 1997) (upholding CCP aggravator where case facts established killing was CCP "under any definition" even though instruction was unconstitutionally vague). The analysis should not change simply because it is now the sole duty of the jury, as opposed to the judge, to find aggravators. This Court should continue to look

to the circumstances of each case to determine whether a rational factfinder would have imposed a sentence of death.

Here, the jury heard Philmore's 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 to avoid detection, and how the victim was taken to a remote location, shot, and her body hidden in the maiden cane. 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. A rational jury would have found the aggravators affirmed on direct appeal and recommended death.

Even under the harmless error standard this Court appears to be employing for post-*Ring* cases, Philmore is not entitled to relief. See *Davis*, 207 So.3d at 173-76 (holding *Hurst* error harmless and emphasizing "unanimous jury recommendations of death" which allowed Court "to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors"). As noted above, 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 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. Given the instruction and jury unanimity, this Court should affirm under *Davis* and its progeny.[6]

ISSUE IV

***CALDWELL* DOES NOT PROVIDE A BASIS FOR RELIEF**

Philmore points to *Caldwell v. Mississippi*, 472 U.S. 320 (1985) in support of his claim of error. This sub-claim is procedurally barred as a *Caldwell* claim was raised and rejected previously. Moreover, the claim lacks merit.

Besides being procedurally barred,[7] his *Caldwell* claim is without merit, as it is based on pure speculation. There is nothing in the record to support the proposition that the jury's responsibility in rendering the advisory sentence was diminished. The jury was instructed the trail court would give

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[6] *King v. State*, SC14-1949, 2017 WL 372081, *17-*19 (Fla. Jan. 26, 2017) (holding *Hurst* error was harmless in light of unanimous jury recommendation); *Kaczmar v. State*, SC13-2247, 2017 WL 410214, *4-*5 (Fla. Jan. 31, 2017); *Truehill v. State*, SC14-1514, 2017 WL 727167, *18-*20 (Fla. Feb. 23, 2017).

[7] On it initial postconviction appeal, this Court found the claim procedurally barred as Philmore had not raised it on direct appeal. Citing *Dufour v. State*, 905 So.2d 42, 67 (Fla. 2005), this Court reiterated its repeated rejection of a *Caldwell* violation. *Philmore*, 937 So.2d at 589-90.

the recommendation "great weight" and only under "rare circumstances" would the judge impose a sentence other than recommended. Also, the jury was told not to act hastily or "without due regard to the gravity of these proceedings" and to "carefully weigh, sift and consider the evidence" "realizing that a human life is at stake, and bring to bear your best judgment in reaching" the advisory sentence. (ROA-27 2560, 2566) Presumed to follow the law, the jury undertook its great responsibility resulting in a unanimous recommendation.

To the extent, Philmore points to the Eighth Amendment, the United States Supreme Court's decision in *Hurst v. Florida* was decided entirely on Sixth Amendment grounds. While this Court included *dicta* regarding the Eighth Amendment, *Hurst* was at bottom an application of the Sixth Amendment right to jury fact-finding. Because the Florida Constitution requires this Court to interpret the Eighth Amendment in conformity with the decisions of the Supreme Court, plainly any reference to the Eighth Amendment in *Hurst* is limited in effect. It is important to remember the Supreme Court held in *Spaziano v. Florida*, 468 U.S. 447 (1984) that jury sentencing is not required by the Eighth Amendment; this Court cannot overrule the surviving precedent of the Supreme Court. In deciding *Hurst v. Florida*, the Supreme Court analyzed the case exclusively on Sixth Amendment grounds. Thus, the Supreme Court's Eighth Amendment jurisprudence on that

point in *Spaziano* survives *Hurst v. Florida*. *See Asay v. State*, 210 So. 3d 1, 7 (Fla. 2016) (recognizing *Hurst v. Florida* did not address whether Florida's sentencing scheme violated Eighth Amendment). *Spaziano* was overruled "only to the extent that it allows a sentencing judge to find an aggravating circumstance independent of a jury's fact-finding. *Hurst v. Florida*, 136 S.Ct. at 618. It is true this Court included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst*, 202 So.3d at 59 decision, however, respectfully, this Court cannot overrule the Supreme Court's surviving precedent in *Spaziano* without violating the conformity clause of Florida Constitution. Relief must be denied here.

ISSUE V

PHILMORE IS NOT ENTITLED TO RELITIGATED SETTLED CLAIMS

Hurst does not provide Philmore with a basis to relitigate a claim rejected on direct appeal and postconviction review. Philmore asserts his alleged *Hurst* error must be considered in light of his *Batson v. Kentucky*, 476 U.S. 79 (1986) claim raised in prior litigation. *Hurst*, a Sixth Amendment right-to-a-jury-trial case, does not operate to breathe new life into previously denied due process claims.

CONCLUSION

Based upon the foregoing, this Court should affirm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-portal filing system to: Adriana C. Corso, Esq., at corso@ccmr.state.fl.us and Ali A. Shakoor, Esq. at shakoor@ccmr.state.fl.us this 6th day of July, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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