

**IN THE SUPREME COURT OF FLORIDA**

**JOHNNY MACK SKETO CALHOUN**

**Appellant,**

v.

**No. SC18-340**

**STATE OF FLORIDA,**

**Appellee.**

\_\_\_\_\_ /

**APPELLANT’S RESPONSE TO APPELLEE’S MOTION  
TO RECALL MANDATE**

Appellant, JOHNNY MACK SKETO CALHOUN, files this motion to strike Appellee’s motion to recall the mandate in light of *State v. Poole*, and in support thereof states:

1. Mr. Calhoun was convicted of first-degree murder and kidnapping on February 28, 2012.

2. On February 29, 2012, Mr. Calhoun’s advisory jury recommended a death sentence by a vote of 9 to 3. The trial court sentenced Mr. Calhoun to death on May 18, 2012.

3. This Court affirmed Mr. Calhoun’s convictions and sentences on direct appeal. *See Calhoun v. State*, 138 So. 3d 340 (Fla. 2013). The United States Supreme Court denied certiorari review. *Calhoun v. Florida*, 574 U.S. 895 (Fla. 2014).

4. On February 11, 2016, Mr. Calhoun filed an amended Rule 3.851 motion for postconviction relief raising a claim under *Hurst v. Florida*.

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5. This Court issued its opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016).

6. Mr. Calhoun subsequently filed a Motion for Partial Summary Judgment Relief on March 30, 2017, citing to *Hurst v. Florida*, *Hurst v. State*, and *Mosley v. State*.

7. On June 1, 2017, the circuit court held a hearing on Mr. Calhoun's motion for partial summary judgment. The State conceded that under current Florida law, Mr. Calhoun was entitled to a new penalty phase. (PCR. 1809, 1810).

8. In its written closing argument, the State addressed Mr. Calhoun's penalty phase, stating: "Because Calhoun is entitled to a new penalty phase under *Hurst*, even though a hearing was ordered on this claim, the parties agreed that the issue was moot and no longer required a hearing. As such, this claim should be dismissed as moot." (PCR. 2481). The State conceded the *Hurst* issue.

9. On March 1, 2018, Mr. Calhoun appealed the circuit court's order denying the guilt phase issues in his Rule 3.851 motion. (PCR. 3917).

10. The State did not file a cross-appeal in accordance with the Florida Rules of Appellate Procedure.

11. Oral arguments were presented to this Court on February 7, 2019, and a final disposition was rendered on November 21, 2019, whereby this Court affirmed

the circuit court's order granting Mr. Calhoun's *Hurst* claim and his right to a new penalty phase.

12. This Court issued its mandate in Mr. Calhoun's case on February 28, 2020.

13. On February 13, 2020, after this Court issued its opinion but before this Court issued its mandate, the State initiated proceedings in the circuit court to reinstate Mr. Calhoun's death sentence based on this Court's opinion in *Poole v. State*, 2020 WL 370302 (Fla. Jan. 23, 2020) (SC18-245). Mr. Calhoun filed his response in the circuit court on February 19, 2020. On March 5, 2020, Mr. Calhoun filed a motion to enforce this Court's mandate.

14. Rather than file a response to Mr. Calhoun's motion, the State filed a Motion to Recall Mandate on March 9, 2020.

15. It should be noted that *Poole* was decided on January 23, 2020, and this Court issued its mandate in Mr. Calhoun's case over a month later on February 28, 2020. This Court was aware of its own precedent when it issued the mandate in Mr. Calhoun's case.

16. The State's request that this Court allow a belated cross-appeal and supplemental briefing on the *Hurst v. State* issue in light of this Court's new decision in *Poole* is improper, untimely, and procedurally barred. The briefs have been filed, oral arguments have been heard, and the Court has issued its opinion and mandate,

whereby this Court affirmed the trial court's order granting Mr. Calhoun's *Hurst* claim and his right to a new penalty phase proceeding.

17. Since the trial court granted Mr. Calhoun's *Hurst* claim for a new penalty phase, and since no cross-appeal was filed by Appellee regarding this grant of a new penalty phase, the only issues raised in Mr. Calhoun's appeal were related to his guilt phase. No penalty phase issues were argued on appeal. Appellee's motion, which only relates to *Hurst* and *Poole*, are improperly raised because they do not relate to issues argued on appeal.

18. The State attempts to justify not filing a timely cross-appeal because this Court's precedent granted *Hurst* relief in non-unanimous death cases. This excuse is not persuasive and is quite hypocritical in light of the State's well-documented position on the enforcement of procedural bars. For example, the State has whole-heartedly embraced this Court's rulings in intellectual disability claims that the defendant is procedurally barred from raising a *Hall* claim if the defendant failed to raise a meritless *Atkins* claim under Fla. R. Crim. P. 3.203. Unfortunately, this Court requires litigants to raise claims that are meritless at the time, in the hope that one day the law will change and they will receive the benefit of the preserved error. That concept should not just apply to defendants. The State should also be subjected to procedural bars.

19. As stated above in paragraphs 7 and 8, the State conceded that Mr. Calhoun was entitled to a new penalty phase. At no point did the State argue substantively that *Hurst v. State* was wrongly decided, other than to state on the record at the hearing on Mr. Calhoun's motion for partial summary judgment that the State "disagreed" with this Court and this Court "did do a wrong analysis in that case." (PCR. 1810, 1809).

20. Additionally, Appellee's argument that a new penalty phase proceeding would be an "enormous waste of the courts' time, the citizens who are called for jury duty's time, and the taxpayers' money" is without merit because if this Court grants the State's motion, the circuit court will be required to consider the penalty phase claims in Mr. Calhoun's Rule 3.851 motion. Mr. Calhoun would still be entitled to an evidentiary hearing on those claims. All of the experts, lay witnesses, and evidence that would be presented at a new penalty phase proceeding would still have to be presented at an evidentiary hearing in order to support a finding of penalty phase relief.

21. Appellee's motion is a flagrant abuse of the appellate process and clearly violates the Florida Rules of Appellate Procedure. This Court's decision is final and Appellee cannot now resurrect an issue that it never appealed.

WHEREFORE, Mr. Calhoun respectfully requests this Court strike Appellee's motion to recall the mandate in Mr. Calhoun's case.

Respectfully submitted,

/s/ Stacy R. Biggart

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### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been electronically served upon Brandon Young, Assistant State Attorney (brandon.young@sa14.fl.gov, holly.taylor@sa14.fl.gov); Lisa Hopkins, Assistant Attorney General, (lisa.hopkins@myfloridalegal.com) on the 10th day of March, 2020.

Respectfully submitted,

/s/ Stacy Biggart

**STACY BIGGART**