CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY LAMAR JOHNSTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Ray Lamar Johnston was convicted of first degree murder and sentenced to death under an unconstitutional capital punishment system in the State of Florida. Following this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Florida Supreme Court has ruled that if an advisory panel recommended the death penalty by a 12-0 vote, like in the instant case, the denial of the Sixth Amendment right to jury trial was harmless beyond a reasonable doubt (simply because of the unanimous recommendation from the advisory panel).

Following this Court's decision in *Hurst*, Florida is currently operating under the following postconviction framework: someone who committed three separate murders (including an unsuspecting Cab Driver, an unwitting Good Samaritan, and a dispatched Sheriff's Deputy murdered with his own service weapon) would get *Hurst* relief. This would be based on three 11-1 advisory panel recommendations (because the errors were presumably harmful based on the non-unanimous recommendations; *see Johnson (Paul Beasley) v. State*, 205 So 3d 1285, 1290 (Fla. 2016)("we cannot conclude beyond a reasonable doubt that the *Hurst* [] sentencing error would have been harmless beyond a reasonable doubt."). Yet someone who committed just one murder, like Mr. Johnston in the instant case, and received one 12-0 death recommendation would not receive *Hurst* relief (because the errors were presumably harmless based on the unanimous recommendation). *See King v. State*, 211 So. 3d 866, 892 (Fla. 2017)("We reach this conclusion based on in light of the

unanimous jury recommendation.").

Following this Court's decision in *Hurst*, Florida counts advisory panel recommendations rather than facts of the crime or the number of victims to determine who on Florida's death row receives life in prison, and who receives a lethal injection. Florida now also uses the date June 24, 2002 to determine who lives or dies. A defendant with a mere 7-5 death recommendation would still be executed if his case was final on or before June 23, 2002. Acknowledging presumptively harmful errors, Florida still refuses to grant *Hurst* relief in the really old cases.

The instant case is a single murder, post-*Ring* unanimous death recommendation. To assist the state courts in understanding that the errors at trial were harm*ful* rather than harm*less*, Petitioner Johnston enlisted the assistance of trial scientist/sociologist Dr. Harvey Moore. In 2017 Dr. Moore and his associates at Trial Practices, Inc. conducted a content analysis of the trial transcripts in this case to identify violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Due to the unconstitutional nature of Florida's advisory capital punishment scheme that existed at the time of this trial, sound sociological and scientific evidence has documented **sixty five (65) *Caldwell* errors** in the trial transcripts in this case. *See* Dr. Moore's report at Appendix G.

The Florida courts refused to even consider Dr. Harvey Moore's comprehensive, scientifically-based report, and instead unreasonably and steadfastly adhered to a finding that the errors at Mr. Johnston's penalty phase were harmless beyond a reasonable doubt. The Florida courts chose to disregard reliable scientific

evidence confirming that the errors at trial were harmful rather than harmless.

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

1. Does the Florida Supreme Court's holding that a *Hurst* error is *per se* harmless where a jury issues a generalized unanimous recommendation for death – after receiving instructions that the judge would make both the findings of facts necessary for a death sentence and render the final decision on the death penalty—contravene the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?
2. Did the refusal of the Florida courts to consider the proffered scientific and sociological evidence to refute the notion of harmless *Hurst* error in this case result in violations of due process under the Fifth and Fourteenth Amendments to the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

Ray Lamar Johnston 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. Proc. 3.851. The 2017 opinion of the Circuit Court in and for Hillsborough County denying that motion is unreported. It is reproduced at Appendix A. The Florida Supreme Court affirmed the lower court's decision on April 5, 2018. *Johnston v. State*, --So. 3d --, 2018 WL 1633043 (Fla. 2018). That opinion is reproduced at Appendix B. A Motion for Rehearing was filed, and is reproduced at Appendix D. The Florida Supreme Court denied rehearing on April 26, 2018 by an order reproduced at Appendix C. Earlier opinions in the case are set out in Appendix E and Appendix F.

JURISDICTION

The Florida Supreme Court's final judgment was entered on July 3, 2018. This Court has jurisdiction to review it under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property without due process of law."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

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."

STATEMENT OF THE CASE

Ray Lamar Johnston was convicted of premediated first-degree murder in the State of Florida. The advisory panel unanimously recommended a sentence of death to the trial judge. *Johnston v. State*, 841 So. 2d 349, 355 (Fla. 2002). In the direct appeal opinion following the conviction and death sentence, the Florida Supreme Court reported that "**the trial court found four aggravating factors, one statutory mitigator, and numerous nonstatutory mitigators, and followed the jury recommendation**." (footnotes omitted, emphasis added).

This Court found the above-described death penalty scheme unconstitutional nearly three years ago:

> A Florida jury convicted Timothy Lee Hurst of murdering his co-worker, Cynthia Harrison. A penalty-phase jury recommended that Hurst's judge impose a death sentence. Notwithstanding this recommendation, Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. The judge so found and sentenced Hurst to death.
>
> We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.

Hurst v. Florida, 136 S. Ct. 616, 619 (2016). Rather than simply vacate all of the unconstitutionally-imposed death sentences in the State of Florida, the Florida courts decided to deny relief in cases that predated June 24, 2002, and decided to deny relief

in cases such as this one where the advisory panel made a unanimous death recommendation to the trial judge. The Florida Supreme Court held that *Hurst* was applicable to defendants whose sentences became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1274-83 (Fla. 2016). However, the Florida Supreme Court only applied *Hurst* to post-*Ring* defendants with non-unanimous death recommendations, and developed a *per se* harmless error rule for unanimous jury recommendations, such as Mr. Johnston. *See Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016).

The advisory panel in Mr. Johnston's case made no factual findings, including: (1) whether each aggravating circumstance was proven beyond a reasonable doubt; (2) whether the aggravators were sufficient to impose death; and (3) whether the mitigating circumstances were proven by competent substantial evidence. As one dissenting justice understood:

> I cannot agree with the majority's finding that the *Hurst* error was harmless beyond a reasonable doubt. As I have stated previously, "[b]ecause *Hurst* requires a jury, not a judge, to find each fact necessary to impose a sentence of death,' the error cannot be harmless where such a factual determination was not made." *Hall v. State*, 212 So. 3d 1001, 1036-37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (citation omitted) (quoting *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016)); *see also Truehill v. State*, 211 So. 3d 930, 961 (Fla.) (Quince, J., concurring in part and dissenting in part), *cert. denied*, 138 S. Ct. 3 (2017). The jury in this case did not make all the factual findings that *Hurst* requires a jury to make in order to impose all the aggravators at issue in this case. Therefore, I dissent.

Johnston v. State, --So. 3d--, 2018 WL 1633043 at 1 (Fla. 2018)(Quince, J. dissenting).

Furthermore, the advisory panel was instructed 65 times contrary to *Caldwell* that they were not responsible for the ultimate decision of whether Mr. Johnston

should receive life or death.

Despite *Caldwell* informing that these types of errors can never be harmless, the Florida Supreme Court ignores this established precedent and has found these errors to be harmless simply because of the unanimous advisory recommendations. *Caldwell* instructed:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task 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. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

Caldwell at 341. The Florida advisory panels of the past never fully recognized the gravity of their task. The gravity of their task was actually systematically diminished by the unconstitutional standard jury instructions. The advisory panel who unanimously recommended death for Mr. Johnston did so without recognizing their "truly awesome responsibility." Much to the contrary, they were basically informed 65 times that they lacked responsibility in the sentencing proceedings.

Notwithstanding these grave constitutional violations, the lower state court in Florida denied relief. Johnston appealed the denial of his successive motion for post-conviction relief to the Florida Supreme Court. As relevant here, Johnston asserted in his Response to the Florida Supreme Court's Order to Show Cause that denying him the benefits of *Hurst* would violate the Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. The Florida Supreme Court denied Johnston's appeal on April 5, 2018, the same day that it issued an opinion in the case of *Reynolds v. State*, --So. 3d --, 2018 WL 1633075 (Fla. April 5, 2018).

In *Reynolds*, there was a much more substantive analysis of the *Caldwell* challenge, albeit a very misguided analysis. In the April 5, 2018 *Johnston* opinion, the opinion did not address the *Caldwell* challenge in any individual detail at all. The Johnston opinion merely stated: "Additionally, we affirm the denial of Johnston's *Hurst*-induced *Caldwell* claim. *See Reynolds v. State*, No. SC17-793, --So. 3d--, [] slip op. at 26-36, 2018 WL 1633075, at *10-12 (Fla. April 5, 2018)." (footnote omitted). The opinion issued by the Florida Supreme Court regarding the *Caldwell* challenge in *Reynolds* was merely a plurality: "so the issue remains without definitive resolution by the Florida Supreme Court." *Kaczmar v. Florida*, 585 U.S.--, 2018 WL 3013960 (2018) (Sotomayor, J. dissenting). A petition for writ of certiorari was filed in the *Reynolds* case on July 3, 2018, therefore similar matters to the instant case are currently pending before this Court.

REASONS FOR GRANTING THE WRIT

Aside from the issues of the *Caldwell*-violative, responsibility-diminishing instructions provided to the advisory panel, the State of Florida now unreasonably treats unanimous advisory recommendations as a *per se* indication of harmless error. Rather than grant full briefing on the issue, the Florida Supreme Court issued an Order to Show Cause which limited briefing on these serious issues. The Florida Supreme Court's plurality decision in the related *Reynolds* case denying *Caldwell*

challenges violates the federal constitution. This constitutes structural error.

Structural error occurs when, after having been affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility, a jury fails to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty. The Florida Supreme Court's refusal to conclude that such an error is structural, and instead subjecting it to harmless error review, undermines multiple federal constitutional rights. Second, the Florida Supreme Court's holding that a unanimous recommendation is binding - unlike a non-unanimous recommendation - based on the same unconstitutional jury instructions and without any individualized factual findings, violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

EQUAL PROTECTION CONSIDERATIONS

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, Equal Protection Clause (1868).

The Florida courts have overlooked the Equal Protection Clause of the Fourteenth Amendment by strictly adhering to a mere counting of advisory recommendations to find harmless error in capital cases where a human life is at stake. By failing to consider Mr. Johnston's individual circumstances, failing to fairly consider and cure the *Caldwell* errors, and by failing to grant Mr. Johnston *Hurst* relief, the Florida courts enforced a law that denied Mr. Johnston due process of law.

All inmates similarly situated on Florida's death row were all tried and sentenced to death under an unconstitutional capital punishment system. To grant some 200 inmates *Hurst* relief, yet deny the other approximately 200 inmates *Hurst* relief who were sentenced to death under the same unconstitutional system is to violate Equal Protection laws.

Because Death is Different, this Court should not permit the State of Florida to deny Mr. Johnston *Hurst* relief. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) ("[d]eath is a unique punishment"; "[d]eath . . . is in a class by itself"); *id*. at 306 (Stewart, J., concurring) ("penalty of death differs from all other forms of criminal punishment, not in degree but in kind"); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is qualitatively different from a sentence of imprisonment, however long"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("qualitatively different"); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "qualitative difference of the death penalty"); *id*. at 468 (Stevens, J., concurring in part and dissenting in part) ("death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards"); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing "previously unquestioned principle" that unique safeguards necessary because death penalty is "qualitatively different"); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987)

(Brennan, J., dissenting) ("hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death"); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is "pinnacle of . . . death-is-different jurisprudence"); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("no doubt that '[d]eath is different'") (citation omitted); *id.* at 614 (Breyer, J., concurring in the judgment) ("Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.").

FOLLOWING *HURST*, IT IS CLEAR THAT FLORIDA HAS VIOLATED, AND CONTINUES TO VIOLATE *CALDWELL* FOR OVER 33 YEARS

Evolving standards of decency should prohibit the State of Florida from continuing to execute inmates whose Sixth, Eighth and Fourteenth Amendment rights have clearly been violated.

Numerous *Caldwell* Errors

In *Caldwell*, this Court identified and rectified a problem that occurred during closing arguments in a capital case out of Mississippi. Based on comments made to the jury during closing arguments, this Court vacated the death sentence in *Caldwell*, holding in part:

> [I]t is unconstitutionally impermissible to rest a death sentence on a determination made by a sentencer 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 328-29, 330.

Considering the inmates left behind on Florida's death row, the State of Florida continues to have a major problem now, especially when viewed through the lens of the *Hurst v. Florida*, 136 S. Ct. 616 (2016) decision. *Hurst* reminded us of a basic fundamental Sixth Amendment right: capital defendants facing the ultimate penalty of death have the right to a trial by jury. Those capital defendants should also have ***the right to a properly instructed jury***. Without proper jury instructions, without full retroactivity, and without giving relief to all capital defendants sentenced to death under an unconstitutional scheme (even those whose death recommendations were unanimous), the Sixth and Eighth Amendments, *Hurst*, *Ring*, and *Caldwell,* all have no teeth in the State of Florida.

As illustrated in the numerous examples cited in Dr. Moore's report in his *Caldwell*-based content analysis of the Johnston trial transcripts, the case at bar clearly does not meet Eighth Amendment scrutiny (*see* Appendix G). *Caldwell* reversed a death sentence based on a prosecutor's isolated comments during closing arguments. The United States Supreme Court concluded in *Caldwell*:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task 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. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

Caldwell, Id. at 341. By ignoring the established Eighth Amendment mandates of

Caldwell (1985), and unreasonably finding harmless error in cases with unanimous recommendations, the Florida Supreme Court leaves clearly established Eighth Amendment violations unrectified.

Caldwell / Eighth Amendment Violations at the Johnston Trial

The case at bar is distinguishable from *Caldwell* because *Caldwell* only presented **one** instance of the jury's role being diminished. This case, and likely every capital case tried in Florida **presents sixty-five instances of the jury's role being diminished**. For example, early in the jury instructions and continuing through *voir dire*, Mr. Johnston's jury was informed: "Once a jury is sworn in this case to try the defendant, if he is found guilty of the crime of First Degree Murder, after that, the jury will be asked to **give a recommendation to the Court on penalty**." (Transcript pg. 24)(emphasis added). Later the advisory panel was informed: "**As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.**" (Transcript pg. 1806)(emphasis added). Before the advisory panel retired for deliberations at the penalty phase they were informed: "When you have reached an **advisory sentence in conformity with these instructions**, that **form of recommendation** should be signed by your foreperson and returned to the court." (Transcript pg. 1813)(emphasis added). All 65 examples from the trial transcripts clearly illustrating the advisory panel's secondary role are appended to Dr. Moore's report (*see* Appendix G).

Following this Court's decision in *Hurst*, Florida's standards of decency have shown signs of improvement. The State of Florida no longer utilizes this archaic type

of language to describe the jury's secondary role at sentencing. But the standards of decency in Florida still need to evolve further. Sadly, the State of Florida will continue to execute the leftover approximately 200 more inmates who were subjected to these unconstitutional instructions, who were all denied *Hurst* relief. This Court must intervene once again to prevent further unconstitutional executions in Florida.[1]

If one instance of the jury's role being diminished in a capital case warrants that a death sentence be vacated under *Caldwell, Id.*, surely 65 instances of the jury's role being diminished should warrant that the death sentence be vacated. *Hurst* reaffirmed the principle that a capital defendant facing the death penalty has a right for a jury to make factual findings, and to decide his fate, not a judge. *Caldwell* reminds us that the jury must also be properly instructed. All inmates similarly situated and currently housed on Florida's death row arrived there following trials with defective and unconstitutional instructions. If *Caldwell* was applied properly prospectively, Florida would have had to drastically change its capital sentencing scheme after 1985. *See Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Sentencing Statutes That Divide Responsibility Between Judge and Jury*, Michael Mello, 30 Boston College Law Review 283 (1989).

The Florida Supreme Court's Past Treatment of the *Caldwell* Issue

Prior denials were issued operating under the flawed premise that Florida's death penalty system was constitutional. This is not the case anymore. The

[1] Since this Court declared Florida's capital punishment system unconstitutional in *Hurst* on January 12, 2016, Florida has executed four (4) inmates. *See* https://deathpenaltyinfo.org/Hurst_Cases_Reviewed (Appendix J).

constitutional landscape in the State of Florida has changed dramatically since those prior *Caldwell* issues were decided. Florida's death penalty has now been declared unconstitutional by this Court in *Hurst*. The Florida Supreme Court has ruled that its pre-*Hurst* death penalty system violates both the Sixth Amendment and the Eighth Amendment. *Hurst v. State*, 202 So. 3d 40, 59 (Fla. 2016)("we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.")(Fla. 2016). *Hurst* has changed everything.

The Florida Supreme Court's Recent Treatment of *Caldwell*

On March 8, 2018, the Florida Supreme Court was once again confronted with post-*Hurst Caldwell* issues. Even though this Court held in *Caldwell* that such errors are presumptively harmful, the Florida Supreme Court 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, 163-164 (Fla. March 8, 2018).

The Florida Supreme Court finally substantively addressed post-*Hurst Caldwell* arguments in *Reynolds v. State*, -- So. 3d --, 2018 WL 1633075 (Fla. April 5, 2018), but wrongly decided the issue, focusing primarily on the fact that the jury was instructed appropriately according to unconstitutional Florida law that existed at that time. Regarding *Caldwell* issues in the State of Florida following fractured

application of *Hurst* relief, partial retroactivity, and routine unreasonable denials in cases with unanimous death recommendations, three Justices from this Court dissented from the denial of certiorari in *Truehill v. Florida*, 138 S. Ct. 1 (2017), reasoning as follows:

> Justice BREYER, dissenting from denial of certiorari.
>
> In part for the reasons set forth in my opinion in *Hurst v. Florida*, 577 U.S. – [] (2016) (concurring opinion in judgment), I would vacate and remand for the Florida Supreme Court to address the Eighth Amendment issue in these cases. I therefore join the dissenting opinion of Justice SOTOMAYOR in full.
>
> Justice SOTOMAYOR, with whom Justice GINSBERG and Justice BREYER join, dissenting from the denial of certiorari.
>
> At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. "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 v. Mississippi*, 472 U.S. 320, 341 [] (1985).
>
> Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer—not the jury." *Combs v. State*, 525 So. 2d 853, 857 (1988). In *Hurst v. Florida*, 577 U.S. – [] (2016), however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional. With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

> This Court has not in the past hesitated to vacate and remand a case when a court has failed to address an important question that was raised below. See, *e.g., Beer v. United States*, 564 U.S. 1050 [] (2011) (remanding for consideration of unaddressed preclusion claim); *Younblood v. West Virginia*, 547 U.S. 867 [] (2006) (*per curiam*) (remanding for consideration of unaddressed claim under *Brady v. Maryland*, 373 U.S. 83 (1963)). Because petitioners here raised a potentially meritorious Eighth Amendment challenge to their death sentences, and because the stakes in capital cases are too high to ignore such constitutional challenges, I dissent from the Court's refusal to correct that error.

Truehill v. Florida, 138 S. Ct. at 3 (2017). Other *Caldwell*-based dissents have come from this Court since *Truehill*. Given that the standard jury instructions in the State of Florida violate *Caldwell*, the State of Florida is unreasonably wrong to hold *Hurst* retroactive only back to *Ring* (2002) and not to *Caldwell* (1985). Florida is also unreasonably wrong to deny relief in cases with unanimous advisory recommendations. Such decisions have led to Equal Protection violations. Some 200 death sentences were vacated in the State of Florida after *Hurst*. The approximate 200 leftover death sentences that remain in place are clearly based on arbitrary and capricious reasoning. All of the inmates were tried under the same unconstitutional system, yet only half of the inmates have had their death sentences vacated. All of these unconstitutional death sentences should be vacated because they clearly violate *Caldwell* and the Eighth Amendment. *Remarkably*, a nearly unanimous Florida Senate felt that *Hurst* should be made legislatively fully retroactive (*see* SB 870 -- 33 YEAHS to 3 NAYS, March 9, 2018). *See* Appendix H.

Justice Pariente agreed recently in another dissent that *Hurst* relief should be afforded to all Florida death row inmates based on *Caldwell*. Justice Pariente

disagrees with the June 24, 2002 cutoff, and feels that *Hurst* relief is warranted because the State of Florida has been violating *Caldwell* for several decades.

PARIENTE, J., dissenting.

> I dissent because I would grant Hamilton a new penalty phase in light of *Hurst* (footnote omitted). Also, I write to address the majority's discussion and denial of relief based on timeliness, which is both unnecessary and, more importantly, relies on reasoning that is legally unsound. In my previous dissents, I have explained why fundamental fairness dictates that all capital defendants should be provided a new penalty phase pursuant to *Hurst* where there is a nonunanimous jury recommendation for death (footnote omitted).
>
> Hamilton was sentenced to death after the jury recommended a sentence of death by a vote of ten to two (citations omitted). His sentence became final in 1998. *Id.* I would apply *Hurst* retroactively to Hamilton's sentence and, based on the jury's nonunanimous recommendation for death, would vacate the sentence of death and grant a new penalty phase. I note that this Court already denied Hamilton's prior petition for a writ of habeas corpus requesting *Hurst* relief, where I concurred in result based on this Court's precedent in *Asay V* (citations omitted). However, since *Asay V* this Court has further denied the retroactive application of *Hurst* to pre–2002 defendants without properly addressing defendants' Eighth Amendment claims and allowed three executions to proceed; I have dissented from all of those decisions (citation omitted).
>
> Over and over, the United States Supreme Court and this Court have made clear that "the critical linchpin of the constitutionality of the death penalty is that it be imposed in a reliable and not arbitrary manner." *Asay VI*, 224 So. 3d 708 & n. 8 (Pariente, J., dissenting) (citing *Gregg v. Georgia* [] (1976); *Glossip v. Gross* [] (2015)(Breyer, J., dissenting); *accord Hurst*, 202 So. 3d at 59-60; *see generally Furman v. Georgia* [] (1972). As I have expressed several times, the Court's retroactivity cut-off of *Ring* [] results in unconstitutional arbitrariness in the imposition of the death penalty. Likewise, Judge Martin of the United States Court of Appeals for the Eleventh Circuit recently stated that "it is arbitrary in the extreme to [distinguish] between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred." *Hannon v. Sec'y, Fla. Dept. of Corrections*, No. 17-14935, --Fed. Appx.--, -----, 2017 WL 5177614 (11th Cir. Nov. 8, 2017) (Martin, J., concurring).

Comparing Hamilton's case with death row inmate Charles Anderson's, for example, demonstrates this unconstitutional arbitrariness. The crimes for which Charles Anderson was sentenced to death occurred on January 16, 1994, three months before the crimes in Hamilton's case. *Anderson v. State*, 841 So. 2d 390 (Fla. 2003). While Hamilton's sentence became final in 1998, Anderson's sentence did not become final until 2003. Thus, Anderson received *Hurst* relief, whereas Hamilton is not even entitled to review of this claim, as the per curiam opinion concludes. *Anderson v. State,* 220 So. 3d 1133, 1150 (Fla. 2017).

Like most defendants whose death sentences have been reviewed by this Court since *Hurst v. Florida* and *Hurst*, Hamilton also raises a claim for relief pursuant to *Caldwell* [] (1985). In *Caldwell,* the United States Supreme Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29, 105 S. Ct. 2633. The Court explained:

> In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. ... Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, [428 U.S. 280] at 305 [96 S. Ct. 2978 [] (1976) (plurality opinion).
>
> ....
>
> 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.
>
> ....
>
> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task 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.*
>
> *Id.* at 329-41, 105 S. Ct. 2633 (emphasis added). Based on this lack of reliability, the Supreme Court vacated the sentence of death. *Id.* at 341, 105 S. Ct. 2633.
>
> Florida's pre-*Hurst* jury instructions referred to the advisory nature of the jury's recommendation over a dozen times. *See* Fla. Std. Jury Instr. (Crim.) 7.11 (2016). Further, the jury was only required to make a recommendation between life or death to the trial court, which then held the ultimate responsibility of making the requisite factual findings and determining the appropriate sentence. Thus, it was made abundantly clear to the jury that they were not responsible for rendering the final sentencing decision. *Caldwell*, which was decided seventeen years before *Ring,* further supports the conclusion that defendants whose sentences were imposed after a jury nonunanimously recommended a sentence of death should be eligible for *Hurst* relief to avoid unconstitutional arbitrariness and ensure reliability in imposing the death penalty.
> ...
> Hamilton should not be denied relief of the fundamental constitutional right announced in *Hurst v. Florida* and *Hurst* based on untimeliness. Further, to ensure reliability and protect Hamilton's fundamental constitutional rights, I would apply *Hurst* retroactively to his sentence and reverse for a new penalty phase based on the jury's nonunanimous recommendation for death. Accordingly, I dissent.

Hamilton v. State, 236 So. 3d 276, 279-282 (Fla. Feb. 8, 2018).

Just as this Court held that the dictates of *Ring* apply in Florida in the *Hurst* decision, this Court should mandate that the dictates of *Caldwell* apply in Florida as well, and afford Mr. Johnston *Hurst* relief. Although Florida Supreme Court Justice Lewis concurred in *Asay v. State*, 210 So. 3d 1 (Fla. 2016) establishing the June 24, 2002 cutoff date for *Hurst* relief, he recently dissented in a related case involving waiver of postconviction and alleged failure to preserve *Ring* and *Hurst* issues. Justice Lewis revisited the issue of the Florida Supreme Court's chosen June 24, 2002

cutoff date in his dissent.

> LEWIS, J., dissenting.
>
> Today this Court advances for the first time a new excuse, not a valid reason, to push Florida's death penalty jurisprudence into an unconstitutional abyss. This case is a classic example which illustrates application of this Court's retroactivity approach to *Hurst v. Florida* and *Hurst v. State*, to deny relief to defendants who have fully and completely preserved the constitutional challenges to Florida's death sentencing scheme. This new denial approach results in equal protection and due process violations, constitutes cruel and unusual punishment, and the arbitrary and capricious operation of the death penalty. The Court simply turns its eyes from the violation of the Sixth, Eighth, and Fourteenth Amendments under the United States Constitution and the corresponding provisions under our Florida Constitution.

State v. Silvia, 235 So. 3d 349, 352 (Fla. 2018).

> Justice Lewis more recently stated the following:
>
> I have repeatedly expressed my disagreement with this Court's *Hurst* retroactivity determinations. . . .Florida will treat similarly situated defendants differently-—here the difference between life and death—-for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing. . . .I continue to respectfully dissent on the *Hurst* issue.

Taylor v. State, --So. 3d--, 2018 WL 2057452, 9 (Fla. May 3, 2018).

In denying *Hurst* relief to defendants with unanimous advisory panel death recommendations, Florida continues to perpetuate disparate treatment of similarly situated defendants. Since *Hurst v. Florida* (2016), four (4) inmates have been executed in the State of Florida who were sentenced to death under a capital sentencing scheme that this Court has unquestionably ruled to be unconstitutional, at least violating the inmates' Sixth Amendment right to jury trial. Since this Court's decision in *Ring v. Arizona* (2002), 44 inmates have been executed in the State of

Florida who were also deprived of their Sixth Amendment right to jury trial. Since *Caldwell v. Mississippi* (1985), 79 inmates have been executed in the State of Florida under a capital sentencing system that routinely diminishes the jury's sense of responsibility in the Florida standard jury instructions, thus violating their Eighth Amendment rights against cruel and unusual punishment under *Caldwell*. Jose Jimenez was scheduled to be executed August 14, 2018; his execution is currently stayed pending the resolution of his lethal injection, *Brady*, and *Giglio* claims.[2] This Court should prohibit the State of Florida from executing those who remain condemned to death under a clearly antiquated unconstitutional system.

Just hours before Patrick Hannon was executed by the State of Florida on November 8, 2017, Judge Martin from the United States Eleventh Circuit Court of Appeals wrote a separate concurring opinion criticizing the June 24, 2002 cutoff date for *Hurst* relief, and commented on Mr. Hannon's Motion for Stay of Execution.

> MARTIN, Circuit Judge, concurring:
>
> Patrick Hannon's claim is simple. The United States Supreme Court and the Florida Supreme Court have identified a constitutional defect in the process that resulted in his death sentence. *See Hurst v. Florida,* [] 136 S. Ct. [at] 619 [] (2016)(holding Florida's former death penalty sentencing scheme unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death"); *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (holding that "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous"). Of course, this defect is quite serious because it concerns Mr. Hannon and others who will lose their lives at the hand of the State.
>
> Indeed, it is so serious that the Florida legislature passed a new law

[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

intended to fix this problem in capital sentencing. The new Florida statute requires the jury to unanimously find at least one aggravating factor and to unanimously recommend death in order for a defendant to be sentenced to death. *See* Fla. Stat. § 921.141(2)-(3)(2017). And although the Florida Supreme Court has interpreted the law to give relief to some death row inmates who were sentenced before the effective date of this statute, Mr. Hannon is not among those who get retroactive relief. Compare *Asay* [] (holding that *Hurst v. Florida* does not apply retroactively to cases that were final before *Ring v. Arizona* [] (2002), was decided), *with Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) (holding that *Hurst* applies retroactively to cases that became final after *Ring).*

The effect of the new statute, and the Florida Supreme Court's retroactivity decisions, is that going forward, people convicted in Florida of the same crime as Mr. Hannon will now have juries deciding important issues related to their sentences. No jury will decide these issues in Mr. Hannon's case, however, only because of the date his conviction and death sentence became final. And in my view, it is arbitrary in the extreme to make this distinction between people on death row based on nothing other than the date when the constitutional defect in their sentence occurred. Indeed I can't imagine what one could say to Mr. Hannon's loved ones to justify why it is acceptable that he falls on the wrong side of this double set of rules.

Mr. Hannon is set to be executed tonight. No one disputes that he was sentenced to death by a process we now recognize as unconstitutional. Neither does anyone dispute that others who were sentenced to death under those same unconstitutional procedures are eligible for resentencing under Florida's new law. The Florida Supreme Court's retroactivity analysis therefore leaves the difference between life and death to turn on "either fatal or fortuitous accidents of timing." *Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result); *see id.* at 40 (Perry, J., dissenting) ("The majority's application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice.").

I agree with the majority of this panel that this Court's decision in *Lambrix v. Sec'y, DOC*, 872 F. 3d 1170 (11th Cir. 2017)(per curiam) forecloses Mr. Hannon's ability to get a Certificate of Appealability on this issue. Nevertheless, his impending execution is a stark illustration of the problems with Florida's retroactivity rule. In particular, I cannot fathom why the need to "cur[e] individual injustice" compels retroactive application of *Hurst* to cases that became final after, but not before, *Ring*. *Mosley*, 209 So. 3d at 1282 (quotation omitted). To the

> contrary, I say finality should yield to fairness, particularly when the State is taking the life of this man based on a death sentence that was unconstitutionally imposed.

Hannon v. Sec'y, Fla. Dept. of Corrections, 716 Fed. Appx. 843, 847-847 (11th Cir. Nov. 8, 2017) (Martin, J., concurring).

The cutoffs between 11-1 and 12-0 advisory panel recommendations are just as arbitrary and capricious as the June 24, 2002 cutoffs. *All* Florida death row inmates should be afforded *Hurst* relief because they were *all* denied a jury trial. The State of Florida's date and numerical cutoffs are blatantly unconstitutional, arbitrary, capricious, and in direct violation of *Furman*. The difference between life and death should not be decided by the unanimous whims of an unconstitutionally-instructed advisory panel whose role at trial was repeatedly diminished by the trial court and the trial advocates in violation of *Caldwell*.

Sixteen years ago after this Court issued the *Ring* opinion, at least one justice from Florida recognized Florida's capital sentencing scheme was problematic. "[I]n light of the dictates of *Ring v. Arizona*, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis" under *Caldwell*. *Bottoson v. Moore*, 833 So. 2d 693, 731 (Fla. 2002) (Lewis, J., concurring in result only). Justice Lewis opined in 2002:

> [I]n light of the decision in *Ring v. Arizona*, it is necessary to reevaluate both the validity, and, if valid, the wording of [Florida's standard capital] jury instructions. The United States Supreme Court has defined the reach of *Caldwell* by stating that "*Caldwell* is relevant only to certain types of comment – those that misled the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible that it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168 (1986)…. Clearly, under *Ring*, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's

> standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication drawn from *Ring*.
>
> ***
>
> By highlighting the jury's advisory role, and minimizing its duty under *Ring* and to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under [*Caldwell*].

Id., 833 So. 2d at 732 (emphasis added). In spite of this awareness, the Florida Supreme Court failed to correct its capital jury instructions. Now, in the aftermath of *Hurst v. Florida*, the Florida Supreme Court has failed to address why treating an advisory, non-binding jury recommendation as a mandatory jury verdict does not violate *Caldwell,* since Johnston's jury – and every pre-*Hurst* jury in Florida – was repeatedly instructed that the ultimate decision belonged to the judge. In addition to the jury being improperly instructed, there is the separate issue of the State of Florida treating those advisory recommendations as mandatory and binding, when the jury was explicitly instructed otherwise. This Court, in *Hurst v. Florida*, warned against that very thing. This Court cautioned against using what was an advisory recommendation to conclude that the findings necessary to authorize the imposition of a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the as the necessary factual finding that *Ring* requires.

Hurst, 136 S. Ct. at 622.

The Florida Supreme Court advised that the *Caldwell* claims in the instant case were being denied because of the analysis it was making in the *Reynolds* opinion,

issued on the same day, April 5, 2018. In dismissing Michael Reynolds' *Caldwell* claim, the Florida Supreme Court completely misapprehended, and failed to address the argument on this point. The Florida Supreme Court reasoned that Reynolds' "jury was not misled as to its role in sentencing" at the time of his capital trial. *Reynolds*, 2018 WL 1633075, at *12. Thus, the majority concluded that *Caldwell* was not violated because, at the time they rendered their advisory recommendation, the jurors understood "their actual sentencing responsibility" was advisory, and *Caldwell* does not require that jurors "must also be informed of how their responsibilities might hypothetically be different in the future." *Id.* at *10. As this Court held in *Caldwell*, both Reynolds and Johnston argued that the State of Florida cannot treat an advisory recommendation based on unconstitutional jury instructions as the necessary fact-finding that *Ring* requires.

An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation, the juror's inability to be merciful based upon sympathy, and what aggravating factors could be found and weighed in the sentencing calculus) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983) ("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed."). *Caldwell* is clear on this point: "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents

an intolerable danger that the jury will in fact choose to minimize the importance of its role," in contravention of the Eighth Amendment. 472 U.S. at 333. The Florida Supreme Court's steadfast refusal to properly apply this Court's explicit precedent undermines multiple federal constitutional rights, and makes this petition the ideal vehicle to clarify analytical tension in critical areas of this Court's jurisprudence.

As the Florida Supreme Court acknowledged in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. The Court cannot rely upon a legally meaningless recommendation by an advisory jury, *Hurst v. Florida*, 136 S. Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"), as the necessary factual findings *Ring* requires. It is difficult to comprehend how Florida can claim that its standard jury instructions, brought about by an unconstitutional statute, do not create a constitutional error that affected every single death sentence since *Ring*, until the statute was altered due to *Hurst*. It is reflective of Florida's arbitrary and misguided application of this Court's precedent.

The Florida Supreme Court believes that because the jury instructions accurately described Florida's then unconstitutional understanding of the role of the jury, that there is no *Caldwell* error now when it treats this unconstitutional

recommendation as binding. Florida cannot repeatedly instruct the jury that its findings are not final and then treat them as final. Not only did Florida's standard jury instructions explicitly state that the jury was making a recommendation and did not inform them of their factfinding capacity, an error under *Ring* and *Hurst*, but it also informed the jury that the judge was the final authority as to the sentence to be imposed. In other words, their decision was not binding and the jury was aware of that fact. This is a direct violation of *Caldwell* where "it is unconstitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

Further, the Florida Supreme Court places an almost talismanic significance in a jury recommendation that was unanimous. "[W]e emphasize the unanimous jury recommendations of death." *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016). In essence, "because here the jury vote was unanimous, the [Florida Supreme Court] is comfortable substituting its weighing of the evidence to determine which aggravators each of the jurors found. Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown." *Davis v. State*, 207 So. 3d 142, 175-76 (Fla. 2016)(Perry, J. concurring in part and dissenting in part).

Johnston's penalty phase panel recommended death by a vote of 12 to 0, and did not return verdicts making any findings of fact. Although these recommendations were unanimous, they reflect nothing about the jury's findings leading to the final

vote. A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. It simply cannot be said that all the jurors agreed as to each of the necessary findings for the imposition of the death penalty. The unanimous votes could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's recommendations. This also impermissibly relieved jurors of their individual responsibility.

The Errors Were Structural

Whether "a conviction for a crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). In fulfilling its "responsibility to protect" federal constitutionally guaranteed rights "by fashioning the necessary rule[s]," *id.*, this Court has distinguished between two classes of constitutional errors: trial errors and structural errors, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

Trial errors are "simply...error[s] in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such errors occur "during presentation of the case to the jury and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S.

at 307-08).

In contrast, structural errors "are structural defects in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. They affect "the framework within which the trial proceeds." Id. at 310. "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). Put another way, structural "errors require reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. 570, 577 (1986). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). With that in mind, the "precise reason why a particular error is not amenable to [harmless error] analysis – and thus the precise reason why the Court has deemed it structural – varies in a significant way from error to error." *Id.* at 1908.

For instance, "an error has been deemed structural if the error always results in fundamental unfairness," such as where a defendant is denied a reasonable-doubt jury instruction. *Id.* Further, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* Additionally, in deciding whether an error is structural, this Court has repeatedly considered whether the error undermined the reliability of the adjudicative process. *See, e.g., Neder*, 527 U.S. at 8-9 (observing that structural "errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function'" (quoting *Rose*, 478 U.S. at 577-78)). But "[t]hese categories are not rigid," *Weaver*, 137 S. Ct. at 1908, and in "a

particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural," *id.* (citing *Sullivan v. Louisiana,* 508 U.S. 275 at 280-82 (1993)).

In the present case, structural error occurred when: (1) the jury failed to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty, and (2) failed to find elements unanimously. These errors were different in order of magnitude than a simple error occurring in the process of a trial. Instead, the errors amounted to a structural defect in the framework underlying the trial process. It undermined the core foundation on which the process of determining death eligibility depended.

Multiple rationales dictate that conclusion. First, the jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty always results in fundamental unfairness. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). In particular, a jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). "For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." Id. at 572-73 (internal citations omitted). And "every

defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment," *Blakely v. Washington*, 542 U.S. 296, 313 (2004), including "each fact necessary to impose a sentence of death," *Hurst* at 619.

In light of those first constitutional principles, it is always fundamentally unfair for a trial court to direct a verdict for the State as to multiple critical elements necessary to impose the death penalty. Simply put, "the wrong entity judged the defendant," *Rose*, 478 U.S. at 578, to be eligible for a penalty "qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(plurality opinion).

Second, the effects of the jury's failure to return a verdict of guilty beyond a reasonable doubt as to multiple critical elements necessary to impose the death penalty are simply too hard to measure. Again, under Florida's capital sentencing scheme, a jury "'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.'" *Hurst v. Florida*, 136 S. Ct. at 622 (quoting *Walton*, 497 U.S. at 648). And the "advisory recommendation by the jury" falls short of "the necessary factual finding" required by the Sixth Amendment. *Id.*

In addition, "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 (2000). The Florida Supreme Court has determined that three such facts are: (1) the existence of the aggravating factors proven beyond a reasonable doubt; (2) that the aggravating

factors are sufficient to impose death; and (3) that the aggravating factors outweigh the mitigating circumstances. *Hurst v. State*, 202 So.3d at 53. These facts must be found unanimously. *Id.* at 44. But under Florida's capital sentencing scheme, Johnston's jury was repeatedly told its verdict was a "recommendation" and / or "advisory" only.

Subsequent to both *Hurst* decisions, the Florida Supreme Court altered Florida's standard jury instructions in an attempt to satisfy the Sixth and Eighth Amendments. As a result, "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made" by a reviewing court. *Sullivan* at 281 (1993).

Third, the error undermined the reliability of the process for determining eligibility for the death penalty. Again, "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson*, 428 U.S. at 305 (plurality opinion). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* Simply put, the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)). As a result, the Florida Supreme Court concluded "that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment." *Hurst v. State*, 202 So. 3d at 59.

Additionally, a capital jury "must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (citing *Caldwell*,

472 U.S. at 336 (plurality opinion)). More specifically, a capital jury must not be "affirmatively misled ... regarding its role in the sentencing process so as to diminish its sense of responsibility." *Id.* at 10. But under Florida's capital sentencing scheme, a capital jury is affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility.

Florida jury instructions diminished the jury's sense of responsibility throughout the sentencing process, including during any jury determination of whether Johnston was eligible for the death penalty. The instructions indicated that the jury's input – including its "findings" – into the sentencing process was not binding or controlling. In particular, those instructions conveyed that the jury's input was not binding on the trial court. Instead, the judge made "the final decision." The fact finding, which was not done by a jury, was fundamentally flawed and simply rubber stamped by Florida.

In Johnston's case, the jury was able to agree unanimously to a death sentence, but the record holds no clues as to what - if any - findings the jury may have made. Further, their recommendation was admittedly flawed because the jury was unable to fulfill its statutory role – even under the unconstitutional scheme Florida had in place - because they were unable to determine if sufficient mitigating circumstances exist which outweigh the aggravating circumstances. Johnston's death sentence should not stand.

SOCIAL SCIENCE CONFIRMS THAT THE ERRORS WERE HARMFUL

The courts of the State of Florida refused to consider sound, scientific,

sociological evidence confirming that the errors in the Johnston trial were harm*ful* rather than harm*less*. Dr. Moore concluded on page 4 of his report that "Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable degree of sociological certainty the jury which recommended a sentence of death for Mr. Johnston *in Johnston v. State* was persuaded against the requisite level of attention to its responsibility through comments made by the court and prosecutor." (*see* Appendix G).

On one front, the lower state court ruled that Dr. Moore's report was barred under *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). (See Appendix I: 2017 Hillsborough County Circuit Court pleadings and testimony related to Dr. Moore's evidence). The lower court's striking of Dr. Moore resulted in due process violations and denial of access to the courts. The Florida Supreme Court failed to cure this error on appeal; the opinion did not even mention the specific claim on appeal that the lower court improperly *Frye*-barred Dr. Moore's evidence. The Florida Supreme Court stated simply on appeal: "Johnston received a unanimous jury recommendation of death and, therefore, the *Hurst* error in this case is harmless beyond a reasonable doubt. *See Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016. Additionally, we affirm the denial of Johnston's *Hurst*-induced *Caldwell* claim. *See Reynolds v. State*, No. SC 17-793, -- So. 3d --, [] slip op. at 26-26, 2018 WL 1633075, at *10-12 (Fla. Apr. 5, 2018)." *Johnston v. State*, --So. 3d--, 2018 WL 1633043 at 1 (Fla. 2018).

The state courts should have considered the following evidence:

TRIAL PRACTICES, INC. April 11, 2017

Dear Mr. Hendry:

You have asked me to evaluate the trial transcript of the sentencing phase in *Johnston v. State*, 841 So.2d 349 (2002) from a social science perspective based on guidance derived from *Caldwell* (footnote omitted). A simple method of applying a non-legal perspective to this transcript is to conduct a content analysis of the text in terms of two principles in *Caldwell* which frame the inquiry you seek:

"It is constitutionally impermissible to rest death a sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere." (footnote omitted).

> "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." (footnote omitted).
>
> The results of this analysis are summarized in Table I, attached at Tab A.

Method. "Content Analysis" is a methodology common to many disciplines in the social and behavioral sciences including Sociology, Psychology, Social Psychology, Information and Library Sciences. Typically, it is used for the evaluation of text, video, audio and other observational data and may include both qualitative, quantitative and mixed modes of research frameworks. (footnote omitted). At its most fundamental level, the technique provides a systematic means of codifying and counting references based on explicit coding standards executed by multiple coders. "Basic content analysis relies mainly on frequency counts of low-inference events that are manifest or literal and that do not require the researcher to make extensive interpretive judgements." (footnote omitted).

A panel of four coders read the trial transcript and recorded observations which fit any of the following categories derived from *Caldwell*:

* Any suggestion the jurors might make with respect to the ultimate recommendation for punishment can be corrected on appeal by the sitting judge, appellate court or executive decision-making; or,

* Any suggestion that only a death sentence and not a life sentence will subsequently be reviewed; or,

* Any *uncorrected* suggestions the jury's responsibility for any ultimate determination of death will rest with others, *e.g.* an alternative decision maker such as the judge or a higher state court.

The unit of analysis chosen for this review was the sentence. Reviewers were asked to count any comment uttered before the jury which either directly, or, implicitly fell into the categories above in the judgment of the four coders. (footnote omitted). Disagreements were adjudicated in a review by the full panel. Inter-coder reliability was established by identifying *miscodes* reflecting judgments that could not be corrected by review of the panel due to a fundamental disagreement over the meaning of the comment and *mistakes* or *errors* (*e.g.*, accidental oversights or misreads which were identified by a vote on review). The inter-coder reliability rate for miscodes was 96% with 65 comments (three discrepancies) out of a total of 68 observations. (See Table I at Tab A.) Coding mistakes which were resolved upon review and did not reflect disagreement on content included 11% (29) of the 260 judgments.

The resumes of these coders are attached at Tab B. Two of the coders (Ms. Deery and Mr. Ali) respectively are graduate and undergraduate Psychology majors at the University of South Florida, Tampa, Florida. Mr. Brennan, the fourth coder, is a journalist who actually covered the *Caldwell* case for *The Meridian Star* before the Mississippi Supreme Court.

Results. Table I identifies 65 sentence-long statements by Judge Diana M. Allen, the State Prosecutor, Jay Pruner, or, by jurors who directly or implicitly repeated questions posed by the State during *voir dire* which the coders found to fit the categories described above. On their face, these sentences appear to diminish the role of jurors or the jury as the final arbiter of the punishment in accord with existing Florida law. A total of 61 sentences or 94% ***directly*** reflected the juror's inferior position in setting punishment while 4 or 6% ***implicitly*** asserted sentencing would actually be determined by some other party. Finally, 43% (28) of these statements were made to the jury before the trial began and 57% (37) were made after the presentation of evidence concluded. (See Table I at Tab A.)

Analysis. These results are not surprising given that Florida law directly tasked the sitting judge in the trial with the actual sentencing decision in death penalty cases. However, inasmuch as *Caldwell* was decided on the basis of a single assertion the U.S. Supreme Court held was sufficient to establish a constitutional flaw, the sheer number of such statements in this case provides support for the conclusion jurors

might well apply themselves to the awesome responsibility of addressing the question of life or death for the defendant with either more or less intensity for reasons unrelated to either evidence or testimony. Two concepts common to the social sciences and education accelerate the impact of any statements which suggest the jury, or jurors, hold a responsibility for sentencing inferior to that of other actors. These include (1) the role of repetition in learning and (2) the concept of primacy-recency.

The value of repetition in learning and education is apparent to all readers who have mastered the multiplication tables in arithmetic. Repetition is common to all disciplines of learning whether manual or intellectual in nature. The mechanism of repetition in learning is addressed frequently in both education and social psychology. (footnote omitted). Repetition as used in this review merely reflects a count of the number of sentences identified by the four coders in comparison to the standard set by the United States Supreme Court in *Caldwell*—a single statement by the prosecutor. In light of this standard, the more frequent repetition of sentences underscoring the fact juror decision-making will not determine the punishment in Mr. Johnston's trial is far more than in Mr. Caldwell's trial and works against the sense of responsibility for process outcome in the jury.

A second concept in social psychology concerns the primacy-recency effect in learning. (footnote omitted). In short, respondents are most likely to retain those statements made early in the learning process and those heard late in the experience. As noted above, 43% (28) of the sentences identified were found at the beginning of the trial during the court's opening remarks and *voir dire* by the prosecution before the presentation of evidence and testimony. Based on this view, both the placement and repetition of the sentences counted in Table I further accelerated the impact of those sentences in reducing the jury's attention to its responsibility in recommending life or death for a defendant.

A standard jury instruction at the start of Florida jury trials and given in this case holds that statements made by the attorneys during opening of counsel are not evidence and should not be considered by the jury in reaching its decision. Here, the judge herself announced the fact the jury's decision would only be a recommendation rather than an affirmation of its responsibility for the actual sentence of life or death as opposed to its previous verdict concerning guilt. The "story model" of juror decision-making now dominant among trial scientists and attorneys underscores the seriousness of such framing effects in

> determining trial outcomes (footnote omitted). Statements by the court and prosecution frame the jury's orientation to the tasks in its subsequent performance. In short, a jury which is told its work will not determine the outcome of sentencing necessarily is less likely to take its role as seriously as would be the case if it actually bore more direct responsibility for execution of sentence.
>
> **Conclusion.** Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable degree of sociological certainty the jury which recommended a sentence of death for Mr. Johnston in *Johnston v. State* was persuaded against the requisite level of attention to its responsibility through comments made by the court and prosecutor.
>
> Harvey A. Moore, Ph.D.

Appendix G: 4/11/17 Trial Practices, Inc. Report -- *Caldwell* Content Analysis of the Johnston Trial Transcripts (Dr. Harvey Moore).

THE FLORIDA COURTS SHOULD HAVE CONSIDERED THE EVIDENCE

The instant case is a post-*Ring* unanimous death recommendation that should have been afforded *Hurst* relief because the sixty-plus errors that occurred at trial were harmful, not harmless. The Petitioner hoped to have the Florida courts consider the testimony of Dr. Harvey Moore because death is different. Mr. Johnston should have had the full opportunity to present any and all relevant evidence tending to show the Florida courts that the errors that occurred at his trial were harmful.

At page 2 of 7 of the 6-15-17 amended order granting the state's motion to strike, the court stated that "In response, Defendant argues that Dr. Moore's report is 'full of facts necessary for this court to consider.'" Mr. Johnston stated much more than that in the response. Specifically, he stated that "Dr. Harvey Moore's report is full of facts necessary for this Court to consider **and analyze if it is to conduct a robust analysis of Mr. Johnston's Eighth Amendment claims, one that**

comports with due process." (emphasis added). Mr. Johnston submits that the failure to consider the evidence resulted in violations of his due process rights. There was no robust analysis conducted of Mr. Johnston's Eighth Amendment claims.

Also at page 2 of 7 of that order (located in Appendix I), the court stated that "In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle." Dr. Moore's content analysis did not employ novel scientific methods in this case. Content analysis of legal authority is a not a new or novel scientific principle. It has been around since at least 1948. *See CONTENT ANALYSIS—A NEW EVIDENTIARY TECHNIQUE*, University of Chicago Law Review, Vol. 15 No. 4, pp. 910-925 (Summer of 1948); *see also SYSTEMATIC CONTENT ANALYSIS OF JUDICIAL OPINIONS,* 96 Cal. L. Rev. 63 (2008).

At page 4 of 7 of the order, the court stated, "After reviewing the State's motion, Defendant's response, and the evidence and argument presented at the May 18, 2017, hearing, the Court finds that Dr. Moore's testimony is not needed to resolve the outstanding issues in Defendant's Rule 3.851 motion." If the court was inclined to grant relief from the death sentence, the Petitioner would have agreed with that. But since the court was inclined to find the *Hurst* and *Caldwell* errors harmless in this case, Dr. Moore's testimony was in fact needed. Mr. Johnston had a right to access to the courts to present evidence in support of his claims. *See IN RE: AMENDMENTS TO the FLORIDA EVIDENCE CODE,* 210 So. 3d 1231, 1239 (2017)(The Florida Supreme Court, citing "concerns includ[ing] undermining the right to a jury trial and

denying access to the courts," opted to "decline to adopt the Daubert Amendment [] due to the constitutional concerns raised.").

At page 5 of 7 of the order, the court stated, "The Court does not take issue with the use of content analysis as a means of researching and collecting data. However, there was little to no evidence presented to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue influence." In making this finding, the court overlooked the article entitled *TAKING CALDWELL V. MISSISSIPPI SERIOUSLY: THE UNCONSTITUTIONALITY OF CAPITAL STATUTES THAT DIVIDE SENTENCING BETWEEN JUDGE AND JURY,* 30 B.C. L. Rev. 283 (1989)(Assistant Professor at Vermont Law School, concluding after reviewing extensive studies and research, including mock trial studies: "The *Caldwell* Court set out a strict test for determining whether diminished sentencer responsibility so inheres in a sentencing procedure so as to render it constitutionally invalid: 'Because we can not 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.' [*Caldwell* at 341]. There is, simply no way, that one can confidently conclude that the [] statutes of Alabama, Florida, and Indiana do not yield such a result. Such a degree of unreliability in a capital sentencing scheme is constitutionally unacceptable.").

This article was acknowledged and mentioned by Dr. Moore in his 5-15-17 testimony at transcript pages 20-21 (located in Appendix I). In the law review article, illustratively as far back as 1989, Michael Mello used content analysis to investigate

trials in Alabama, Indiana, and Florida for biased language and undue influence in light of a comparison of the selected trials to the *Caldwell* decision.

The previously-referenced article, *SYSTEMATIC CONTENT ANALYSIS OF JUDICIAL OPINIONS,* 96 Cal. L. Rev. 63 (2008), confirms that content analysis of legal authority continues to be both widely accepted and used to analyze legal authority and legal cases. *Hurst v. Florida* was released January 12, 2016, nearly 3 years ago. *Hurst* and its progeny will surely be the topics of continued research and continued content analysis. The Florida courts should not have overlooked Dr. Moore's report and the *Caldwell* errors that occurred in this case, especially considering the holdings of *Hurst v. Florida* (2016). The record before the Florida courts was full of evidentiary support for the admission Dr. Moore's evidence. All prongs of *Frye* for admissibility of Dr. Moore's evidence were met by Mr. Johnston.

At page 5 of 7 of the order, the court found "that even if Dr. Moore's testimony and methods could meet the required standards, his testimony is still inadmissible as it enters into the purview of the Court's decision making authority." Just because the trier of fact has the ability to make a decision on a factual and legal question does not mean that expert evidence is inadmissible just because it might "invade" the purview of the factfinder. The parties have the right to present evidence, especially in a death penalty case. To deny the parties the opportunity to present their case is denial of access to the courts. Because death is different, the Florida courts should have at least afforded Mr. Johnston an opportunity to present evidence in support of his harmful error arguments.

The Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property without due process of law." At a minimum, the State of Florida clearly violated Mr. Johnston's Fifth Amendment due process rights after this Court issued *Hurst v. Florida* (2016). It is simply unfair for the courts of the State of Florida to mandate that errors are *per se* harmless in cases with 12-0 advisory recommendations, while refusing to even consider sound, scientific, generally accepted sociological evidence to the contrary based on a content analysis of *Caldwell*. The scientific evidence and treatises presented in the state courts proving harmful errors at this trial are reliable; in contrast, the unanimous advisory recommendation from an inadequately and unconstitutionally instructed advisory panel is not a reliable indicator of harmless error.

CONCLUSION

This death sentence is clearly arbitrary and capricious. These *Hurst* errors were not harmless beyond a reasonable doubt. Florida denied Mr. Johnston Equal Protection and due process of law. This Court should grant this Writ of Certiorari.

Respectfully submitted,

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